Law, Biopolitics, and the Problem of Historical Specificity

An Analysis of the Juridical Paradigm of Aesthetic Genre between 1750 and 1850

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Abstract

Within the conceptual framework of biopolitics and political theology, the author draws from the work of Foucault, Agamben, Derrida, Benjamin, and Schmitt to discuss the historical and theoretical conditions for an aesthetic theory structured according to a legal logic. The thesis discusses the two contrary positions of Foucault and Derrida on the historical specificity of madness, in order to argue that the same theoretical and methodological impasse emerges in subsequent discussions of biopolitics and the ontology of law. Agamben’s third position, in which Derrida’s deconstruction of law and Foucault’s historical analysis of the biopolitical law are given equal truth value, is then seen as a possible solution to the perceived incompatibility of an ontological and historical understanding of law – and of order in general, be it literary, aesthetic or juridical. In two essays the thesis then examines, in the first essay, an early text by Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime* from 1764 and, in the second, the novel *Spader Dame* from 1824 by the Swedish Romantic writer Clas Livijn. The author argues that these two texts articulate two different ways of classifying aesthetic phenomena – such as the sublime, beauty, poetry, etc. – in order to demonstrate the emergence of a juridical paradigm of aesthetic genre. In the *Observations*, Kant is shown to anticipate Lessing’s ontological system of historically conditioned aesthetic distinctions as based on the distinction between the two primary ontological qualities of the beautiful and sublime. Kant’s text is then contrasted with the juridical paradigm present in his critical writings and the writings of Friedrich Schlegel. In Livijn’s Romantic novel, on the other hand, a contingent system of norms is shown at work in the articulation of a concept of poetry as distinct from, but fundamentally dependent on, a juridical discourse. This paradigmatic shift between the two systems of aesthetic genre – one based on ontology and the other on contingent norms – is tied to the biopolitical shift in the juridical discourse which Foucault traces to the second half of the eighteenth century, in which the juridical subject is replaced by the subject of political economy. These two readings are aimed at illustrating the possibility of understanding order – in this case aesthetic orders – as both possessing historically distinctive traits, as claimed by Foucault, and as adhering to the logical structures, which in the thesis are referred to as ontological, described by Derrida.
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Introduction

The hypothesis of this thesis is that the classification of aesthetic genre undergoes a paradigm shift between 1750 and 1850, from being a taxonomical classification with an instable correlation between ontology and sematics – between what a thing is and the sign for it – to become grounded on a “positivist” notion of norms, only verifiable by their historical facticity.¹ The purpose is to outline this shift in two sample texts, Immanuel Kant’s *Observations on the Feeling of the Beautiful and Sublime* from 1764 and the Swedish Romantic writer Clas Livijn’s novel *Spader Dame* from 1824, and to provide a twofold analysis of both the theoretical and the historical conditions for these two paradigms of classification, with a particular theoretical emphasis on the modern paradigm of normative classification against the backdrop of contemporary theories of law.

Genre will thus be discussed primarily as the aesthetic genre as such. In other words, the issue at stake is how the aesthetical in the studied texts seems to only become conceivable as filtered through a certain classificatory grid – a certain system of difference. The tentative outline of these two systems that I will present shows the first one to make ontological status, such as temporal or spatial, and classificatory name, such as poetry or painting, coincide in reference to the manifest appearance of phenomena. This however becomes increasingly difficult to maintain in the second, modern system, which is shown to rely on the new classificatory means made available by modern science, such as hidden functions and causal relations. Hence, the Romantic system abandons the taxonomical system and adjusts aesthetics to a juridical discourse – and thus to the theoretical problems intrinsic to the concept of law. In other words, it adopts for aesthetics a paradigm of classification – or, as it is now significantly called, judgment – in which distinctions, differentiations, and characterizations take place as judgments in relation to norms.

This shift towards law – and to a particular concept of law – evokes a theoretical debate on political theology and biopolitics, which has not been connected to the history of aesthetic theory. This debate, which serves as the theoretical background to this thesis, can for the present purposes be summarized as allowing two positions: One (the biopolitical) according to which legal orders (and this would include the normative order of aesthetic genre) is historically specific, and one (the political-theological) according to which the logic of law amounts to an

¹ It should be noted that legal positivism is a construct of the early nineteenth century, developed by Jeremy Bentham and John Austin. For a general discussion of legal positivism, see Raymond Wacks, *Philosophy of Law, A*
ontology of linguistic structure, of which the order of law would be just one instance. Hence, my own analysis of the legal paradigm of aesthetics is also an attempt to elaborate on the problems of combining the historical and ontological models of law – or of structure, system, and order in general. In my reading of Livijn’s text, then, I hold to the position of Giorgio Agamben, in which, as I will argue in the first chapter, these two models to some extent are reconciled.

It is thus not the purpose of the present study to give a historical account of the particular distinctions of genre – between drama, the novel, poetry, painting, sculpture, song, comedy, tragedy, etc. – as they may appear in the studied texts. Rather, the focal point of this study is the shift itself, between the discourse of genre as sustained by an ontological taxonomy caught between a classical Linnaean and a modern Darwinian model of classification (Kant’s Observations) and the discourse of genre as founded on a realist concept of law (the Romantics).

This means that the three chapters of this thesis to some extent can be read as independent essays. The first gives a theoretical background while also contrasting the idea of law as a linguistic order found in thinkers like Carl Schmitt, Walter Benjamin, Jacques Derrida, and Agamben with Michel Foucault’s analysis of the historically specific paradigms of law; the second demonstrates the non-juridical paradigm of aesthetic genre-distinction at work in Kant’s Observations and the third gives an example of how, for the Romantics in general and for Clas Livijn in particular, the juridical discourse provides the decisive grid for distinguishing between different modalities of language. Consequently, there is no causal or teleological claim attached to the implied comparison of Kant and Livijn, and there is no claim that the discussed theories of law, language and biopolitics correlate perfectly with the features of any of the studied texts. Instead, the principal purpose of this thesis is to open a field in which some discursive practices, and the possible connections between them, can be exposed.

Theoretical and Methodological Demarcations

The methodological premises of this thesis are those of discourse analysis. This means that the primary sources are read as procedures in which utterances are made possible only in accordance with the rules of a certain discursive practice. The concepts and enunciations of the texts will thus be understood as made possible through specific discursive formations, and as such, the
texts will be seen as formations of the enunciating subject.\textsuperscript{2} However, the purpose of the investigation is also theoretical, and the two chapters dealing with historical texts can to some extent be seen as an experiment testing the theoretical positions discussed in the first chapter.

In this I draw from contemporary discussions on law in the context of biopolitics and political theology. I thus rely on Foucault’s analysis of the emergence of a bio-power in the end of the eighteenth century, in the shape of the juridical subject’s transformation into the economical subject of political economy; the juridical becoming the spectacle of the economical; government the administration not of legal subjects but of life as such.\textsuperscript{3} However, I also rely on Agamben’s consolidation of Foucault’s historical analysis of the biopolitical form of government with Schmitt and Benjamin’s theories of the juridical exception as the outside of law – or any order – that sustains the force of law from within law through a sovereign’s decision on a state of exception.\textsuperscript{4}

The first chapter thus aims to clarify the intricacies of these discussions and to resolve the issue of history that haunts the concept of biopolitics. In this I try to show that the dismissal of Agamben’s diachronic approach to biopolitics, by among others Derrida, may prove misguided. In Agamben’s adherence to a history of the subject in the vein of Foucault and his search for the crossed-over origins of a “différance” in the manner of deconstruction, Derrida sees an absurd conciliatory gesture of the diachronic and synchronic. My own take on these theories – biopolitical history, political theology, and deconstruction – instead aims at separating them in the purpose of clarifying them through each other.

The theoretical issues of historicity in the discussions on biopolitics in chapter 1 and the readings of Kant and Livijn in chapter 2 and 3, thus form an intersection of theory and methodology. The question of a historicity of the ahistorical “presuppositional” order of the exception, in which the outside must be presupposed from within the order in order to sustain it, meet with the historical difference between the systems of ordering the aesthetical in Kant and

\textsuperscript{2} In a strict sense, this is a question of how something can be said. Michel Foucault describes his own discourse analytical project as an attempt to “show with precise examples that in analysing discourses themselves, one sees the loosening of the embrace, apparently so tight, of words and things, and the emergence of a group of rules proper to discursive practice.” See Michel Foucault, \textit{Archaeology of Knowledge}, trans. A. M. Sheridan Smith (London & New York, 2002 [1969]), pp. 34 ff., 45 ff.; see also Michel Foucault, Preface to \textit{The Order of Things, An Archaeology of the Human Sciences} (New York 1970 [1966]) p. xx.


Livijn: Whereas the idea of a possible non-presuppositional order is at the center of the Romantics’ juridically conceived genre theory, it is absent in the pre-critical Kant. Hence, the purpose of this thesis is as much to present a discourse analytical claim about Kant’s Observations and Livijn’s Spader Dame, as it is to illuminate the blind spot of historicity in the contemporary discussions on law and its exceptions.

Literature Review

In comparison to the literature on Kant’s critical work, the literature on Kant’s early writings – especially in their capacity as writings rather than as philosophy – is somewhat limited. Nevertheless, most of the features of the Observations that I bring to attention have to some extent already been discussed. However, the knowledge interest of these readings is significantly different from my own. Most often these readings can be placed in one of two categories. In the first one, the purpose is to trace the emergence of the critical Kant in the pre-critical works. In order to trace the arrival of Kant’s practical turn, Jonathan Luftig thus comments on the ambiguities of the concept of ethical feeling in the Observations as a “shudder,” the absolute particularity of which requires fiction to be expressed. Paul Guyer similarly reads the Observations in an attempt to trace the development of Kant’s mature position on the categorical and hypothetical imperative, seeing that it already makes clear that “simple feelings,” rather than principles, can found morality. However valuable these readings are, the understanding of the text is limited to a historicist, causally grounded anticipation of what is already known to follow.

5 The seminal work on Kant as a writer is Willi Goetschel’s Constituting Critique: Kant’s Writing as Critical Praxis. More recently the Observations has, along with Kant’s anthropological writings, however attracted an increased attention from scholars. Willi Goetschel, Constituting Critique: Kant’s Writing as Critical Praxis, trans. Eric Schwab (Durham and London, 1994 [1990]); the most important of recent comments on the Observations are found in the collection of essays in Kant’s Observations and Remarks: A Critical Guide, ed. Susan Meld Shell, Richard Velkley (Cambridge 2012).
In the second category of comments, the text is read against the backdrop of biographical and historical information in order to expose the literary and private Kant—most often showing the influence of Jean-Jacques Rousseau—absent in the critical works.8

The Observations is thus rarely read as part of the tradition of German aesthetics. My own reading of Kant’s text should not be seen in this context of Kant scholarship, but rather as an analysis of a sample text, selected in its capacity of example, of a certain aesthetic paradigm.

In this I have been guided by Robert A. Clewis’ account of Kant’s superimposition of the ethical and the aesthetical. Clewis’ argument is that the distinction between true (sublime) and false (beautiful) virtues in Kant’s text exposes an intrinsic connection between aesthetics and morality. However, whereas Clewis, in line with the first category of comments, sees this as evidence of the genealogy of Kant’s critical turn, I see this connection between the ethical-political and the aesthetical as an effect of the classificatory paradigm at work in the text.9

However, most important for my own reading is W.J.T. Mitchell’s analysis of a politics of genre in Gottfried Ephraim Lessing’s Laokoon oder Über die Grenzen der Malerei und Poesie. In this less historically focused reading of the contemporaneous text by Lessing, Mitchell shows how the ontologically founded distinctions (Grenzen) of aesthetics for Lessing correspond to historically conditioned political qualities, the most evident example of which is how temporal (poetic) art corresponds to the masculine and the spatial (visual) art to the feminine.10 Although my reading of Kant’s Observations adopts Mitchell’s approach to Lessing, it does not share its

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9 Robert A. Clewis, “Kant’s Distinction Between True and False Sublimity,” in Kant’s Observations and Remarks: A Critical Guide, ed. Susan Meld Shell, Richard Velkley (Cambridge 2012), p. 117 ff.; the most pertinent discussion of Kant’s aesthetic theory as a political theory is however given by Hannah Arendt in the Lectures on Kant’s Political Philosophy. In these she contrasts the Observations with the Critique of Judgment in order to demonstrate how the Critique of Judgment deals with a residue of an “unwritten political philosophy” from the distinction between the beautiful and sublime made in the Observations. Hannah Arendt, Lectures on Kant’s Political Philosophy, ed. Ronald Beiner (Chicago 1989 [1970]), p. 18 ff.

pursposes. Whereas Mitchell reads Lessing in order to criticize the foundations of a modernist understanding of art history, the purpose of my reading of Kant is merely to point out the characteristics of Kant’s discourse and to abstract from it what I see as a particular paradigm of articulating the aesthetical.

Clas Livijn’s Romantic novel *Spader Dame* has not attracted the attention of scholars to the same extent as his more famous contemporaries in Swedish Romanticism; Erik Johan Stagnelius, P.D.A. Atterbom and C.J.L Almqvist. The few dissertations on Livijn’s work have either had a general scope of investigation or subordinated the novel to an excessive degree to thematic comparison. The former is the case with Johan Mortensen’s comprehensive *Clas Livijn: Ett nyromantiskt diktarfragment* and the latter with the dissertation by Jonas Asklund, *Humor i romantisk text: om Jean Pauls estetik i svensk romantik: C.F. Dahlgrens Mollbergs epistlar (1820), C.J. L. Almqvists Amorina (1822) och C. Livijns Spader Dame (1825)*. More relevant to my own study have been comments focusing on the semiotic character of Livijn’s writings, as well as on its position in relation to the political discourse of his time. Otto Fischer’s reading of Livijn as a fundamentally semiotic, simulacral text has thus been instrumental to my own understanding of the text.

However, in the following addition to this bibliography, *Spader Dame* is read as a text in which connections between different discourses around 1800 are exposed. My methodological premises, in other words, presupposes that the discursive connections at work in Clas Livijn’s novel can function as an extrapolation of discursive conditions which are not limited to this particular text. Thus I am greatly indebted to the analyses of the subject in writings from around the end of the eighteenth century provided by Friedrich A. Kittler in *Aufschreibesysteme 1800/1900* and of Jochen Hörisch in *Die Andere Goethezeit; poetische Mobilmachung des Subjekts um 1800*. Kittler’s analysis has provided the methodological blueprint for what kind of

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12 Otto Fischer, ”Clas Livijn. Tecken och öfentlicht, en förstudie”, *TFL*, 2:1997, p. 9; this “semiotic” understanding of Livijn is elaborated by Miočević, who views the denotation of the “signs” of the novel as contextually fluctuating. Miočević, p. 86 ff.

questions could be asked when reading a historical text – it has in other words warranted the specific knowledge interest of my reading. Instead of asking for the meaning of a particular text in relation to other texts, the aim of the reading is the wider set of relations that structures the possibility of a historically specific meaning. More specifically, Hörisch has in his book on the Romantics provided a connection between the motif of law in Heinrich von Kleist and the political theology of Carl Schmitt, with an implied reference to the biopolitical shift around 1800 as described by Foucault. Hörisch’s analysis of sovereignty, exception and law in Kleist is however only made in passing, as one symptom among many of a biopolitically conditioned component in German literature at the turn of the century. Nonetheless, this note on Kleist has served as a starting point and a methodological reference point to my own reading of Livijn, as well as to my understanding of the political theological and biopolitical component in Romanticism in general. Hörisch’s note on the legal motif in Kleist is however only scraping the surface of the theoretical issues involved in political theology, biopolitics, and the deconstructive take on law upon which his reading relies. In following the clue given by Hörisch, I have attempted to bring the theoretical background of his reading of Kleist – biopolitics, political theology, and deconstruction – into the foreground of my own reading of Livijn.¹⁴

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1. Foucault, Agamben, Derrida: Law, Biopolitics, and the Problem of Historical Specificity

Introduction

The first section of this chapter presents a discussion of the notion of biopolitics as it appears in the work of Foucault and Agamben, as well as the latter’s reliance on the writings of Benjamin and Schmitt. As a methodological memorandum, the second section of this chapter presents and examines the debate between Derrida and Foucault resulting from Derrida’s critique of the historical specificity in Foucault’s *History of Madness*. In order to connect this methodological debate to my own investigation, I finally turn to Derrida’s much later critique of Agamben in order to measure the extent of the shift between Agamben and Foucault. The purpose of this triadic encounter of the three thinkers is to illustrate how the problems of methodology for my own study here are intrinsic to the problems of philosophy.

Foucault’s Analysis of Biopolitics

In his lectures on the emergence of biopolitics, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, Foucault historically identifies a political paradigm shift in the second half of the eighteenth century; an economical system replaces a juridical. The power of the state transforms from governing juridical subjects to controlling man as a biological species. The norm of law is thus replaced by a liberal principle of equivalence, accumulation, and growth. Whereas the concept of biopolitics itself is more or less absent from these lectures, a concise definition of the concept is offered in an earlier series of lectures.

By this [biopolitics] I mean a number of phenomena that seem to me to be quite significant, namely, the set of mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power, or, in other words, how,
starting from the eighteenth century, modern Western societies took on board the fundamental biological fact that human beings are a species. This is roughly what I have called bio-power.¹⁵

Foucault’s specific claim is that in the later half of the eighteenth century, the law goes from being an external regulation of the limits of the state’s power to become integrated into the state’s power as an internal regulation. This means, according to Foucault, that the power of the state no longer is grounded on a juridical norm and hence no longer can be accused of transgressing the law. Instead, the state produces its juridical norm in its very force or violence – a force that is not sanctioned by a norm. This self-generating juridical norm becomes, in lack of other references to life – such as pre-existing juridical norms – synonymous with utility: As long as the state governs according to utilitarian and economic principles of growth, it will be deemed a lawful government.

It is in this transition from law to economics that the juridical subject disappears – this juridical subject being one that is both juridically subjected and free from juridical subjection, but never the one or the other exclusively. The juridical subject is disintegrated in the new rationality of the state, which no longer asks for what is lawful in relation to the natural rights of the subject, but rather when its governing is justifiable as a means to its utilitarian ends. Legitimate government is thus equated with successful government – and the logic of this success made impervious to critique by the naturalizing discourse of political economics. Hence, the new criteria of government become indistinguishable from those of political economics and the juridical norm is henceforth produced through the logic of the experiment – in its success or failure measured against the naturalized end that is growth. The juridical law is thus replaced by the natural law of economics. “Man” no longer stands in front of the state and its violence as a subject of right but as a statistical data in a calculus of economical effects.

For Foucault, examples of this regime of truth are the emergences of phenomena that, by becoming fields of disciplinary techniques, are simultaneously existent and non-existent – such as madness, sexuality, and punishment. In the lectures on biopolitics, Foucault elaborates on the connection between the new “governmentality,” and his analysis of the transformation of institutional practices in the shift between the classical and the modern: “[y]ou can see that all these cases – whether it is the market, the confessional, the psychiatric institution, or the prison –

involve taking up a history of truth under different angles, or rather, taking up a history of truth that is coupled, from the start, with a history of law.” However, in contrast to the disciplining of the body, which according to Foucault emerges already in the seventeenth century, a biopolitical power does not only aim at controlling the individual body, but to rule over man as biological mass: The potency of governance no longer manifests itself as the control over a certain territory, but as the control of a population. When the juridical norm thus is replaced with an experimental truth validation, the juridical subject disappears as political medium and in its place enters the human species and the nameless body – as human capital.

When political economy replaces political law, a new problematic emerges: How a law regulating the limits of state governance can be stipulated when this law must permit its own violation (according to the paradigm of the experiment). Foucault here makes a distinction between two techniques operative in the eighteenth century for managing the relation of the law to state power. On the one hand there is the reactionary technique, which coincides with that of Rousseau and the French revolution; on the other hand there is the utilitarian technique of political economics. Whereas the former identifies natural rights in order to constitute a sovereignty of the state along the limits set by these fundamental rights, the utilitarian assumes a state governance that is only limited to the extent that it is not useful for the ends of the state. However, it is not the emergence of a utilitarian technique of governance which alone shifts the meaning of the words “right” and “law” – this shift is instead to be found at the point of coexistence between these two systems; at the point where their contradictory premises are eclipsed; “The state rediscovers its law, its juridical law, and its real foundation in the existence and practice of economic freedom.” Thus, the traditionally juridical problems have been incorporated into those of utilitarian and liberal political economics – and hence the law has lost its force.

If Foucault’s historical analysis were to be accepted, the transition from “classical” to “modern” would then not only have its common denominator in the dissolution of the juridical norm; it would also have consequences in fields not usually seen as juridical. For example, the notion of law seems to loose its link to the notion of an interpretable writing – which would then seem to occur at the very moment when hermeneutics becomes an institution; notably, the Code

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17 Ibid., p. 86.
Napoléon makes it illegal for the judge not to judge, not to interpret the written law. This means, first of all, that history looses its normative function in relation to the law, the foundation of which now is deferred to a future, requiring the sort of risk and experimentation that the classical law would have deemed unlawful. Secondly, it means that the law as a system of hermeneutically determined norms in itself has become an instrument without potency, subordinated to a principle of validation with radically opposed premises to those manifested, or rather represented, by the juridical institution – i.e. the experiment of political economics and the natural sciences.

At the end of the eighteenth century, law, the mechanism of the law, was adopted as the economic principle of penal power, in both the widest and most exact sense of the word economic. Homo penalis, the man who can legally be punished, the man exposed to the law and who can be punished by the law is strictly speaking a homo oeconomicus. And it is precisely the law which enables the problem of penal practice to be connected to the problem of economy.\(^\text{18}\)

However, the juridical subject – the core of which is its acceptance of a juridical contract that precedes and constitutes its subjectivity – is maintained, but only in capacity of being grounded on an economic interest. Foucault thus shows how during the eighteenth century the social contract merges rhetorically with the notion of being in the interest of the individual, whose rights according to this rhetoric are limited by the natural law of political economics. Hence, the subject of interest is made dominant to the subject of rights and the law looses its objective correlate – the juridical subject.\(^\text{19}\) The result of this transformation, then, is that the traditional juridical sovereignty becomes ineffective when faced with a sphere consisting of subjects who are both economical (and thus cannot be governed by means of a juridical logic) and juridical (and thus cannot be governed without law). This paradox of the non-juridical subject effectively opens up the new sphere of power, namely that of life.

In the first volume of his *The History of Sexuality*, Foucault summarily delineates this notion of a biopolitical law that he later develops in the lectures at the Collège de France, here however with less emphasis on its genealogy than on its theoretical grounds; “If genocide is indeed the dream of modern powers, this is not because of a recent return of the ancient right to kill; it is because power is situated and exercised at the level of life, the species, the race, and the

\(^{18}\)Ibid., p. 249.

\(^{19}\) Ibid., p. 273 ff.
large-scale phenomena of population.”

Rather than a power over death, then, we are since the end of the eighteenth century faced with a power over life as such. Reproduction, health and life expectancy all become the fields of a biopolitical control: “One might say that the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death.”

However, even when this shift is thought only within the limits of “governmentalities,” ways of controlling behavior, the juridical sphere seems to be the matrix through which biopolitical, disciplinary techniques can be seen as manifestations of one and the same shift. When power no longer regulates death but life, it can no longer legitimate itself through a juridically sanctioned violence but only through regulatory and correctional mechanisms. As a corollary, the juridical norm looses its force to normative techniques. Sovereignty is then no longer constituted through a distribution of death by the law but through how a population is distributed around a normality. This however does not mean that the law has become obsolete, but only that it operates as a norm for behavior instead of with a violence sanctioned by the interpretation of a legal norm; “that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.”

The juridical system becomes the spectacle that simultaneously hides and implements the actual power over life, the interest of which is not to prevent transgressions of the law but on the contrary to control their distributions and consequences.

We have entered a phase of juridical regression in comparison with the pre-seventeenth-century societies we are acquainted with; we should not be deceived by all the Constitutions framed throughout the world since the French Revolution, the Codes written and revised, a whole continual and clamorous legislative activity: these were the forms that made an essentially normalizing power acceptable.

21 Ibid., 138.
22 Michel Senellart gives a gloss of this term as from the lectures on biopolitics and onwards designating the conduct of conducts: "Governmentality is thus the rationality immanent to the micro-powers, whatever the level of analysis being considered (parent-child relation, individual-public power, population-medicine, and so on).” Michel Senellart, afterword to Security, Territory, Population. Lectures at the Collège de France 1977-1978, trans. Graham Burchell (New York, 2007), p. 389.
24 Ibid.
Foucault’s analysis thus points to an actual transformation of the juridical discourse taking place around the end of the eighteenth century; a shift that undermines the objective legal norm upon which the force of law has relied. However, it also shows how the concept of law intrinsically carries with it the concept of the lawless, something which cannot be put in a legal relation – in other words a bare life.

Law as Language; Agamben’s analysis of the Exception

Agamben has synthesized Foucault’s historical analysis with an ontology of law in which law is understood as an order where outside and inside become indiscernible. Although criticized for lacking support for many of his historical and etymological assertions, Agamben’s conceptualization of biopolitics as intrinsically connected to the notion of law has become highly influential in subsequent discussions on the relation between life and law. In any case, Agamben’s main contribution to the discussion on biopolitics consists in combining Walter Benjamin and Carl Schmitt’s notion of sovereignty as that which suspends and restores the law in a state of exception, with Foucault’s historical analysis of a biopolitical governmentality.

In his essay Critique of Violence, Benjamin distinguishes between on the one hand mythical lawmaking violence and lawpreserving violence and on the other hand these two forms of violence and the divine violence in which law itself is destroyed. In two short passages, important for Agamben’s project, Benjamin touches upon the divine lawlessness of mere life. After having identified divine violence with a bloodless annihilation that is also an expiation from law, Benjamin continues,

For blood is the symbol of mere life. The dissolution of legal violence stems, as cannot be shown in detail here, from the guilt of mere life – and doubtless also purifies the guilty, not of guilt, however, but of law. For with mere life the rule of law over the living ceases.

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25 James Gordon Finlayson thus shows how Agamben’s understanding of the distinction between political life, bios, and bare life, zoē is completely absent in the text he invokes to support it with, Aristotle’s Politics. James Gordon Finlayson, “Bare Life’ and Politics in Agamben’s Reading of Aristotle,” The Review of Politics 2010:72, pp. 107-115.
Mythical violence is bloody power over mere life for its own sake, divine violence pure power over all life for the sake of the living.\(^{26}\)

This divine violence, which expiates life not from guilt but from law itself, is a violence that is no longer tied to either preserving or conserving a law. Whereas mythical lawmaking here is understood as the conservation of power, Derrida has pointed out against Benjamin’s strong distinction between lawmaking and lawpreserving violence that a founding of law always also is a preservation of it, and that every lawpreserving in fact is a refounding of the law; “Conservation in its turn refounds, so that it can conserve what it claims to found.”\(^{27}\) Here however, most important to note is that Benjamin is intrinsically connecting this concept of a conservation of “power” (Gewalt) in lawmaking, to that of a “mere life,” (bloßes Leben) belonging to divine violence. In contrast to what both Derrida and Agamben make of Benjamin’s text – the differences between their readings of Benjamin aside, both in fact associate the divine violence with the Holocaust\(^{28}\) – there is for Benjamin a clear messianic element to the notion of a divine lawdestroying violence; “[…] if the existence of violence outside the law, as a pure immediate violence, is assured, this furnishes the proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible […].”\(^{29}\)

Agamben’s reading of Benjamin is somewhat ambiguous, both dismissing Derrida’s critique of Benjamin and drawing seemingly similar conclusions when he sees the paradigmatic example of a divine violence over bare life in the concentration camp. He does however keep


\(^{27}\) Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority’” in Deconstruction and the Possibility of Justice, ed. Drucilla Cornell et al. (New York, 1992), p. 38 f.

\(^{28}\) Derrida emphasizes the troubling image of a bloodless annihilation; “The interpretation of this thought of blood is as troubling, despite certain dissonances, in Benjamin as it is in Rosenzweig (especially if we thin of the "final solution").” Derrida, Deconstruction and the Possibility of Justice, p. 52; Agamben characterizes this as a "peculiar misunderstanding" but nonetheless uses Benjamin’s figure to understand the nomos of the concentration camp. Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life, trans. Daniel Heller-Roazen (Stanford, 1998 [1995]), p. 65.

\(^{29}\) In the German original; “Ist aber der Gewalt auch jen- seits des Rechtes ihr Bestand als reine unmittelbare gesichert, so ist damit erwiesen, daß und wie auch die revolutionäre Gewalt möglich ist, mit welchem Namen die höchste Manifestation reiner Gewalt durch den Menschen zu belegen ist.” Benjamin, 1991, p. 202; Benjamin, 1978, p. 300.
from Benjamin the messianic idea that this sovereign violence must be considered in order for a rethinking of politics as such to be possible.

In the second text important for Agamben in this matter, Carl Schmitt’s *Political Theology: Four Chapters on the Concept on Sovereignty*, sovereignty is defined as the decision on an exception from the law. This decision is not deducible from any norm, but radically exceeds it in establishing it. This means that the sovereign, or in other words the exception to the rule, exists outside of the law but is at the same time not in opposition to the juridical system; “Although he [the sovereign] stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.”

Hence, it is the decision that is the theological constant, which according to Schmitt must be the basis upon which a legal order, i.e. a normative system, is founded. All orders, then, are grounded on a decision and not on a succession or evolution of norms. The existence of such a decision on the exception, however, is not a question that can be answered juridically – hence a political theology. The decision on the exception, then, is not to be understood as intrinsically connected to the norm. Rather, the exception that is decided upon is that which “cannot be subsumed,” what “defies general codification” and destroys the norm in proving that “to produce law it need not be based on law.” However, whereas the exception itself exceeds the juridical, it can still be understood within the framework of jurisprudence, as the two elements together, the decision on the exception and the norm, do belong within the juridical.

This conflation of the outside and inside of the law evokes the question of how to distinguish between anarchy and a constitutive decision. Schmitt’s answer is that anarchy in the end is a decision on non-decisiveness, and since the decision thus permeates both order and chaos, the only remaining option is to affirm – and not to cover it up behind the historical schemas of political economy – the decision on the exception as the confirmation “not only [of] the rule but also its existence, which derives only from the exception.” For Schmitt there is thus an ontology of law as grounded on the decision which is simultaneously external and internal to

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32 Ibid., pp. 15, 66.
law, on an exception from the law. This ontology of law is by Schmitt presented against the attempts to explain the political of both materialist-historical and liberal economics – in other words against every form of de-politizicing of what, according to Schmitt, is intrinsically political, i.e. that which is based on the decision on the exception. There can, in other words, be no historically specific instance of biopolitical governance, since all politics adhere to the logic of the exception.

Agamben’s achievement is to have connected this theory of sovereignty with the historical specificity of the discourse of political economy. In fact, Agamben locates the sovereign exception at the core of the paradigm of biopolitics. This is explicitly stated at the outset of *Homo Sacer: Sovereign Power and Bare Life*, where Agamben summarizes his project as the explication of the “hidden point of intersection between the juridico-institutional and the biopolitical models of power.”33 This hidden intersection between the Schmittian-Benjaminian and Foucauldian models, also seems to be implied in his emphasis on the two ostensibly contradictory manifestations of power identified in Foucault’s late work; that of the techniques of subjective individualization and of an objective totalization of power. Agamben’s project is thus presented as seeking the unthought of Foucault’s work; to locate the point where the techniques of individualization converge with the totalizing procedures of “objective power,” in other words the analysis of governmentality and the biopolitical power of the sovereign exception. For Agamben, sovereign power is, in a Schmittian formulation, identical to the “inclusion of bare life in the political realm.”34 Political power and law are in other words seen as constituted in the original exclusion of bare life, which through this exclusion simultaneously includes it within the political order. In making biological life the object of its calculations, then, the modern form of power that Foucault analyzes, is shown in fact to be the result of a sovereign decision on the exception in Schmitt’s sense, in which bare life is simultaneously excluded and included within the law. Hence, two not clearly compatible analyses of power – on the one hand a discursive analysis of historical practices and on the other an ontological model of sovereignty – are conflated. One of the main difficulties with Agamben’s work seems to be how to interpret

33 Agamben, 1998, p. 6 f.
34 Ibid.
this conflation – to decide whether Agamben actually integrates these two analyses, or merely diminishes their individual achievements by confusing them with each other.\textsuperscript{35}

Agamben’s matrix for understanding this intersection between biopolitical discourses and the juridical model of the exception is the distinction in Greek antiquity between the two terms for “life” – \textit{bios} and \textit{zoē} – which Agamben claims to find in Aristotle. Agamben here follows Hannah Arendt’s reading of Aristotle’s \textit{Politics} in \textit{The Human Condition}, where she identifies the dissociation of political life from private life – for Agamben \textit{bios} and \textit{zoē} – with the emergence of the Greek city-state. The exclusion of \textit{zoē} is in other words seen as the founding event of politics.\textsuperscript{36} Whereas \textit{zoē} denotes an unspecified life that does not distinguish between species or attributes, \textit{bios} designates life with the additional capacities of a specific form of life. With biopolitics however, it is precisely the former, \textit{zoē}, which enters “into the sphere of the \textit{polis}.”\textsuperscript{37} In other words, Agamben makes two, if not contradictory then at least peculiarly separate, claims which are then used in support of each other; a) that \textit{zoē}, bare life, becomes included as excluded in the polis by the very operation of all law – the sovereign decision on the exception and b) that this inclusion-exclusion of \textit{zoē} in the political domain has a particular pertinence to the politics of modernity – and in fact culminates in the global totalization of the paradigm of the camp as a permanent state of exception.\textsuperscript{38} While it is not the purpose here to engage in a refutation of Agamben’s analysis, it could be noted in passing that the historicization here presumes an ahistorical logic of sovereign power as its a priori condition. This conflict between ontology and history – or rather this historicization of ontology – can be demonstrated in how Agamben first claims that, “[t]here is politics because man is the living being who, in language, separates and opposes himself to his own bare life and, at the same time, maintains himself in relation to that bare life in an inclusive exclusion,” only to invoke, a couple of pages later, history as the only field in which biopolitics can be thought; “[y]et this idea must nevertheless be strongly maintained on a historico-philosophical level, since it alone will allow us to orient ourselves in relation to the new realities and unforeseen convergences of the end of

\textsuperscript{35} Ibid.
\textsuperscript{37} Ibid., p. 4.
\textsuperscript{38} A quote from \textit{Homo Sacer} illuminates this second, historical and Foucauldian strain in Agamben’s project; “[…] the decisive fact is that, together with the process by which the exception everywhere becomes the rule, the realm of bare life – which is originally situated at the margins of the political order – gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, \textit{bios} and \textit{zoē}, right and fact, enter into a zone of irreducible indistinction.” Ibid., pp. 9, 168 ff.
the millennium.” Hence, as not to be reduced to the simple contradiction between historical specificity and ahistorical structure, this historico-philosophical level seems to require an understanding of “Western politics” as the repetition in history of the original ahistorical and philosophical split between *bios* and *zoē*. This is also the basis for Derrida’s critique.

The conflation of specificity and structure, of history and ontology, is further illuminated in how Agamben understands law as a linguistic system, implying its ahistorical nature within an argument about its historically specific consequences. The constitution of law through its own exception – that it “maintains itself in relation to an exteriority” – is seen as analogous to language in that the reference of law to life only remains in force by simultaneously suspending its reference as a virtual instant in a lexical system of potential reference; the law, in order to have reference, must in other words have a relation to what is outside of its relations. Language as *parole* requires, for its denotation to have reference, *langue* as a virtual potentiality to denote – in other words, reference requires a suspended reference. This point zero of signification is precisely what is achieved in the sovereign decision on the exception,

as language presupposes the nonlinguistic as that with which it must maintain itself in a virtual relation (in the form of a *langue* or, more precisely, a grammatical game, that is, in the form of a discourse whose actual denotation is maintained in infinite suspension) so that it may later denote it in actual speech, so the law presupposes the nonjuridical (for example, mere violence in the form of the state of nature) as that with which it maintains itself in a potential relation in the state of exception. *The sovereign exception (as zone of indistinction between nature and right) is the presupposition of the juridical reference in the form of its suspension.*

This analogy between the distinction between *langue* and *parole* and nature and right is not completely obvious. It is not clear whether *langue* really is the non-linguistic in the sense used here, i.e. as that which is outside of the relations of language and by means of this exclusion becomes included in it, thus giving it its actual reference. A little further on Agamben goes on to characterize language as itself precisely a form of sovereignty, a state of exception in which it is declared that language simultaneously has nothing external to it and that it is always in a relation to this exteriority. Hence, the logic of sovereignty is, as language, a logic of presupposition in which the juridical reference is presupposed by being suspended before it exists; in other words, the reference is only affirmed through its negation. In this suspension that precedes the actuality

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39 Ibid., p. 8 ff.
40 Ibid., p. 18.
41 Ibid., p. 20.
of what is suspended, the juridical reference becomes presupposed through its negation as actual. It is in other words a creation ex nihilo in the most pertinent sense. By presupposing, in the sovereign exception, the non-juridical prior to the actuality of the juridical, the law presupposes itself. Only through this sovereign decision on the inclusive exclusion of the non-juridical, can a sphere of reference to life be established. This means, moreover, that life only is put in relation to law by being included through exclusion as the non-juridical in the state of exception, and that life and law become indistinguishable at the constitutive moment of law only in order for an ensuing distinction between them to become possible.

Hence, the ontological conclusion to be drawn from this potentiality of the exception in which the actuality is established, is that it is in fact the possibility not to be which is shown to secure Being; by negating itself it establishes itself. For Agamben, then, the biopolitical indistinction between life and law, which takes place in the state of exception, can only be prevented from becoming the normal state through a thinking of the potentiality and actuality of Being “beyond every figure of relation.”

In the figure of the homo sacer, the sacred man, in Roman law and the Muselmann of the concentration camps, Agamben finds the historical evidence for this “Western politics” of the inclusive exclusion of bare life – of the “inhuman” as becoming indistinguishable from the “human.” In these figures, a complete coinciding of bare life and political life is realized. In his book on the Holocaust, Remnants of Auschwitz: The Witness and the Archive, Agamben describes the Muselmann in the camp as “a kind of absolute biopolitical substance that, in its isolation, allows for the attribution of demographic, ethnic, national, and political identity.” When the extra-juridical coincides with the juridical as in the paradigm of the camp, the inclusive exclusion dissolves the distinction between life and law. Hence, bare life becomes available as a “substance,” without any given “additional capacities,” at the disposal of an apparatus of taxonomy; “the citizen passes into the Staatsangehörige of non-Aryan descent, the non-Aryan into the Jew, the Jew into the deportee and finally, the deported Jew beyond himself into the Muselmann, that is, into a bare, unassignable and unwitnessable life.” Here we see,

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42 Ibid. p. 46 f.
44 Ibid., p. 156.
then, the transition in Agamben’s discourse from the ontological model of law as founded in the decision on the exception to the historically specific governmentality of biopolitics.

An illuminating variation on this theme of the “threshold between the human and the inhuman” as located at a specific point in history and as such connecting the ontological model with the historical, can be found in the discussion in *Homo Sacer* on the natural rights of man as formulated in the *La déclaration des droits de l’homme et du citoyen* of 1789. Agamben here points out the ambiguity of the terms man and citizen as both independent of each other and as presupposing one another. The natural rights of man, of *zoë*, in other words merge with those of the citizen, of *bios* – the natural becomes contingent upon the political. In the second article of the declaration of rights, the function of the juridico-political is thus defined as the preservation of the natural rights in the rights of the citizen – to use Agamben’s terminology, the becoming *bios* of *zoë*. Through the juxtaposition of the idea of natural rights and the rights of the citizen – who is a citizen of the nation only by birthright – then, life and law coincide. 46

Agamben’s argument thus oscillates between a historical and ontological model. As seen in the discussion on law and language, Agamben adopts from deconstruction a notion of language as operating through an excess of signification in relation to denotation. In fact, in *State of Exception*, he identifies such a “floating signifier” with the state of exception “in which the norm is in force without being applied.”47 However, already in *Homo Sacer* Agamben points out that it is regarding the notion of being in force without signification, of a “force of law” that his position differs from that of deconstruction. In other words, it is a question of reaching beyond deconstruction’s interminable negotiations with the floating signifier, towards the above-discussed ontological model of the exception, the understanding of which ultimately would allow for a new, non-relational politics.

However, Agamben also explicitly distances himself from a strictly Foucauldian analysis. He does so with the claim that the biopower seen to operate in the paradigm of the camp in fact reflects the “originary structure of the *nomos*”48 as it is understood in line with Schmitt, i.e. as grounded on the decision on an exception as an inclusive excluding of the non-juridical, and thus not only as a contingent discursive network of practices. What remains then, is the question of whether Derrida’s critique of Agamben takes aim at his Foucauldian historicism, or if it in fact

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48 Ibid., p. 20.
reveals something about this second trajectory of his though, which seems to aim at the vanishing point of the Benjaminian-Schmittian and the Foucauldian analyses of law. In Derrida’s critique of Foucault, the former argument is developed at length and is thus an important reference point for understanding what is at stake in both Derrida’s reading of Agamben and in Agamben’s relation to Foucault.

Derrida’s Critique of Foucault

In the short passage in Foucault’s *History of Madness* against which Derrida directs his critique, Foucault shows the exclusion of madness from philosophical knowledge in Descartes’ *Meditations*. Derrida presents his argument, which is profoundly philosophical, in the form of a simple correction of an unjustified interpretation. His question is whether the sign – of Descartes’ *Meditations* – in itself and in its manifest intentions, actually does convey the historical structure that Foucault seems to be able to inductively reconstruct from it. Added to this care for cautious reading – which in the end is a hermeneutical question of whether the part refers to the whole – is, however, a wider critique of Foucault’s attempt to write a history of what is excluded and silenced by, according to Derrida, the very logic of this history. The order of history, in other words, is also that of exclusion. Both history and exclusion are, in the same instant, made possible by “différance” as differing-deferment, and the only justice one could do to the repressed term of any opposition would be to excavate the traces of this possibility from the text. Hence, if the language of history is that of classical reason, to write the history of the silent and excluded of this reason would be nothing less than absurd: “Order is then denounced within order.” Furthermore, it would produce yet another exclusion; a repetition and restoration of a logic concealed by the pretense to speak the silent. Here Derrida’s argument is double; on the one hand he sees a complicity between an “archaeology of silence” and the logic that produces silence – “to exculpate one’s own language” – and on the other hand an insufficiency in impugning only the delegates of an order, i.e. psychiatry, and not the order itself. The two straits

of the argument then seem to take place at different levels. Whereas historicizing what is in fact a repetition of an origin amounts to a radical impossibility at the level of ontology, the critique against the historically particular proxies of the logic that makes this very critique possible, would be a mere miscarriage of justice on the level of epistemology. The latter of Derrida’s two arguments thus seems superfluous, as it can only be carried out in an ethical register deemed impossible by the former argument, having proven the hope of redemption through a differentiating logic futile.

The radical attitude – radical since it must refer to an origin, even if as a repetition of the origin, to make its claim – of Derrida’s objections is densely summarized; “Nothing within this language [of Western reason], and no one among those who speak it, can escape the historical guilt – if there is one, and if it is historical in a classical sense – which Foucault apparently wishes to put on trial.” (Author’s italics)50 This radicalism of Derrida’s critique becomes even clearer when he asserts that the only possible escape from “the historical language responsible for the exile of madness”51 would be to either refuse to give a name to any specific excluded (since this would just reiterate the exclusion, as Foucault allegedly does) or align oneself with the excluded, in other words to become mad. The arche-historical “différance” as structuring all historical particulars, instead necessitates a withdrawal from all particularity to the moment of an origination that would not be an origin.

The argument that Foucault must remain within the order that he is analyzing, is also an accusation against Foucault’s implied Hegelianism; that the negation operates within the order it negates and that it subsequently transforms into a new instance of this order. Hence, the positing of an exteriority guarantees the totality of interiority. Since all articulation of the excluded, whether in the form of appraisal or deprecation, is supported by the same logic, the only circumvention of falling into a rhetoric of negative theology is to posit a “practice” against “formulation” and to understand the opposition neither on the side of one term nor on its other: “One could perhaps say that the resolution of this difficulty is practiced rather than formulated.”52 In other words, the difference – in this case between reason and madness and in

50 Ibid.
51 Ibid., p. 36.
52 Ibid., p. 37.
another between *bios* and *zoē* (or between law and poetry) – must be thought more originally, as “interior to meaning in general.”\(^{53}\)

The issue here, then, is both one of epistemology and ontology. On the one hand it is impossible to formulate the exclusion since exclusion only takes place by means of this language of formulating exclusion. The formulation thus leads to yet another repetition of the exclusion. On the other hand there is a question of epistemological inconsistency; Foucault operates with an opposition belonging to the whole of “Western metaphysics,” yet assigns it a historical specificity; “Foucault cannot simultaneously save the affirmation of a reassuring dialectic of Socrates and his postulation of a specificity of the classical age,”\(^{54}\) which translates to that the same thing cannot happen twice and still be specific. To some extent, then, this is merely an epistemological or methodological objection against Foucault. It seems possible to reconstruct it as follows: If 1) language is taken as the evidence for the possibility of a practice and 2) this possibility is inherent in all of language on the basis of an ontology of difference as temporal deferment and spatial difference, then there cannot be, on the basis of language, any historical determination of the possibility of a certain practice. Foucault is thus accused of producing an unproductive hermeneutical circle, positing an oppositional binary in language as allowing a certain practice, the historical particularity of which can then be determined on the basis of the evidence of this practice. The specificity of the practices – the disciplinary techniques – is a historical fact, but they do not necessarily determine the historical specificity of the language that enabled them. The evidential relation between practices and “discursive” documents are in other words the source of Derrida’s suspicion. Thus, Derrida’s argument moves imperceptibly between its ontological foundation in “différance” (and the adjoining concept of “Western metaphysics”) and a very concrete criticism of how Foucault carries out this project, which again seems superfluous, as it in any case must be absurd on the basis of the ontological argument.\(^{55}\)

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\(^{53}\) Ibid., p. 38.

\(^{54}\) Ibid., p. 40.

\(^{55}\) While it could be said that this inconsistency in Derrida’s own discourse belongs to the requirements of the genre, that a critique must be total in order to be valid, it remains a troubling conflict in Derrida’s text that the critique he delivers on the level of methodology is incompatible with the one at the level of ontology. As an example of such a sliding into a debate over methodology: “Finally, whatever the place reserved for philosophy in this total historical structure may be, why the sole choice of the Cartesian example? What is the exemplarity of Descartes, while so many other philosophers of the same era were interested or – no less significantly – not interested in madness in various ways?” Ibid., p. 44.
The question would then be why history in one instance, as the history of “Western metaphysics,” is possible and in the other, as the history of discursive variables enabling specific practices, is not possible. Derrida’s implied answer seems to be that history’s only object can be philosophy itself, as it is philosophy – if only in its impasses – which shows the condition of “history” as that of “différance.” A history can thus only be a history of history itself, presenting its un-thought origin as a repetition of origin. A “historicity of philosophy” is also what Derrida provides as a positive alternative to Foucault’s alleged rationalist unveiling of its own rationalist logic. This historicity, rather than dealing with specific structures of events, identities, and situations, would be located “between that which exceeds the totality and the closed totality, in the difference between history and historicity.”

Madness, then, would be only one case of the prohibitions or oppositions that enable speech to begin with – along with others, such as those manifested in the legal system. To give this singular, derivative case a historical determination is thus to conceal the “Western metaphysics;” it “risks missing the essential, risks dulling the point itself […] and [doing] a violence of a totalitarian and historicist style which eludes meaning and the origin of meaning.”

Thus, instead of the analysis of a particular instance, a more “original” thinking of exclusion is favored. This means that to engage with a particular discourse only can result in acknowledging one’s own failure to speak.

Foucault’s Critique of Grammatology

Foucault’s response to Derrida’s critique of a history of the excluded, is particularly revealing as it is organized around notions that seem excluded by Derrida in advance; the subject, the discourse and the practice. Consequently, when Foucault talks about the prohibitions of enunciation in language, he does not mean an invariable logic as Derrida does, but a discourse whose transformations are intertwined with that of subjectivity. 

56 Ibid., p. 60.
57 Ibid., p. 57.
For Derrida, Foucault says, the risk presented by a history of the exclusion of madness, is that madness might be exterior to philosophical discourse, i.e. something that does not inherently adhere to the logic of “Western metaphysics” and something that would collapse the totalizing scope of “différance.”

In his response to Derrida’s counter-reading of Descartes – of which it is here enough to say that madness is deprived of its exemplary status of madness to instead be seen as a variation of dreaming – Foucault mobilizes the illocutions of language as an inherent variability of discourse and subject, as opposed to the stasis of the decipherable rhetoric analyzed by Derrida.59

Foucault can thus criticize Derrida’s inattentiveness to the illocution of discourse, the movement in discourse which requires of the reader what seems to be a fundamentally non-structuralist reading, as it brackets synchronic structure in order to account for the unfolding of particular discursive moments, the responses to these moments, and the subject that is constituted in this movement. Characterizing Derrida’s reading, Foucault says that it effaces differences that belong to the specifically procedural character of Descartes’s text, in which the concepts transform as the meditations proceed. Derrida thus reduces the text to a paradoxically spatial structure of temporal, differing-deferring signs,

[…] discursive practices to textual traces; the elision of events that are produced there, leaving only marks for a reading; the invention of voices behind the text, so as not to have to examine the modes of implication of the subject in discourses; the assignation of the originary as said and not-said in the text in order to avoid situating discursive practices in the field of transformation where they are carried out.”60

In sum this is a critique of the “historicity of philosophy,” in which all particular situations are “already anticipated or enveloped” by this historicity. With the risk of reducing Foucault’s argument, what is at stake here seems to be a thinking of the particular as not relating to any universal.

The claim, then, is that Derrida makes philosophy into a constant. This enables a radical skepticism, which effectively makes all knowledge of specific oppositional structures redundant – since they are all the same: “For Derrida, what happened in the seventeenth century could only ever be a ‘sample’ (i.e. a repetition of the identical) or a ‘model’ (i.e. the inexhaustible excess of

59 Ibid., p. 556.
60 Ibid. p. 573.
Foucault reverses these premises; it is not a fallacy to treat philosophy externally or to reduce its characteristics to non-philosophical, contingent discursive moments. Rather, this is precisely the methodological foundation of an archaeology of knowledge; to consider philosophy extra-philosophically. It is tempting to invoke Derrida’s own term “dissemination” to describe this stratification of epistemes without recourse to any original “excess of origin” – which in its crossing out of “origin” becomes similar to the place of Being. This pursuit of thinking outside of philosophy is in one sense to appropriate the logic of Derrida’s own maximalist epistemology, according to which only the knowledge that transgresses its own constraints has truth-value. Foucault’s supposed Hegelianism would then apply to Derrida himself, in the necessity present in his work of positing a system of differences which is total, so as to give ontological value to the notion of “différance.”

Derrida’s critique of Agamben

Whereas Derrida’s critique of Foucault seems to apply to a reading of Agamben as a continuation of Foucault’s project, the latter’s response to the former does not seem to successfully vindicate Agamben from this critique – not the least since Agamben explicitly marks a distance to Foucault. This imbalance seems to show Derrida’s critique of Agamben as somewhat misguided, since it identifies the respective positions of Foucault and Agamben, and since it neglects Agamben’s attempt to determine the specificity of modernity as a political realization of an ontological model of order.

In any case, there seems to be two main arguments in Derrida’s critique of Agamben as it appears in the late seminar *The Beast and the Sovereign*: One is directed against Agamben’s rhetoric in which the original becomes more original through repetition. The other has to do with the Foucauldian conflation of the “arche-ancient” and the specifically “modern” status of biopolitics.

In line with the first theme and in response to Agamben’s assertion that Hegel was the first to “truly understand the presuppositional structure thanks to which language is at once

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61 Ibid., p. 577.
inside and outside itself,” Derrida objects that there has been no philosopher who did not understand this – and indeed Derrida’s whole oeuvre could be seen as an attempt to demonstrate this. It is not completely clear whether this side of Derrida’s critique actually goes beyond an objection to the style of the Italian philosopher, or if it merely reiterates Agamben’s assertions in a more careful manner. Against Agamben’s assertion that Pindar was the first thinker of sovereignty, Derrida similarly counters that every Greek using the words *nomos* and *basileus* in the same sentence was a thinker of sovereignty. In other words, Derrida here says something that it is unlikely that Agamben is not aware of, namely that enunciations are not determined by the isolated subjective position of utterance, but are always filtered through the grids of the apparatuses which govern speech. It is also difficult to judge whether Derrida here exaggerates the importance of this rhetoric of the first (along the lines of “I am the first to understand the first”) in Agamben’s project or not; whether it is precisely a style or in fact intrinsically connected to the conflation of historical specificity and the ontological “arche” which, however, cannot go unnoticed in Agamben’s writings on biopolitics.\(^{62}\)

The main discussion on Agamben in Derrida’s seminar concentrates on precisely this Foucauldian problematic. In this more substantiated critique, the emphasis is on the distinction between *bios* and *zoē*. To some extent this is a dispute over the historical evidence for this distinction in Greek thought. As in his critique of Foucault, Derrida here engages in the very historicism he refutes at the outset.\(^{63}\) More important however, is Derrida’s problematizing of how the instability of the distinction between *bios* and *zoē* – and this instability of *bios* and *zoē* is for Agamben intrinsically tied to the ontology of the exception – can enter at a precise historical point, i.e. in modernity,

> [w]hat is difficult to sustain, in this thesis, is the idea of an entry (a modern entry, then) into a zone of irreducible indifferentiation, when the differentiation has never been secure; […] and, above all, what remains even more difficult to sustain is the idea that there is in this something modern or new; for Agamben himself, as you are about to hear, taking the Foucauldian idea of a specifically modern biopolitics seriously, is keen to recall that it is as ancient as can be, immemorial and archaic.\(^{64}\)


\(^{63}\) Derrida thus points out the insufficiency of Agamben’s philological evidence for his *bios*/*zoē*-distinction; “[…]said philologist must repeatedly recognize that not only did Aristotle, many centuries ago, talk of *zoon politikon* and that (and that the ‘plus’: *zoon + politikon* is, as we shall see in a moment, a very fragile threshold), but that sometimes […]*zoē* designates a life that is qualified, and not ‘bare’” Ibid., p. 316 f.
Derrida thus points out the problem in Agamben’s writings on biopolitics as intrinsically connected to his reliance on Foucault – his adherence to Foucault’s analysis of a “specifically modern biopolitics.”

Derrida does however remain ambiguous on the matter of historical specificity, although he explicitly maintains that biopolitics belongs to the “arche-ancient.” Instead Derrida turns to a logical claim: In order to avoid the possibility that already Aristotle understood that zoē could be politicized and that the example of the politikon zōon in Aristotle’s Politics is nothing more than an aberration, Agamben would have to demonstrate the difference he claims to exist between “political” as an attribute – bios – and a “specific difference” determining an instance of zōon as politikon zōon. According to Derrida, this distinction is in fact impossible to make. Thus, the distinction between bios and zoē is shown to lack validity both on historical and logical grounds.65 The core of this argument is however the same as in the critique of Foucault; that there is a linear understanding of history. The issue then, is not so much the problem of a conflation of two incompatible ways of thinking the biopolitical – on the one hand as an original event of biopolitics and on the other as located in history – but the problematic privileging of the latter. This amounts to nothing less than a refutation of the important idea of the decision which informs Agamben’s thinking: “To give up the idea of a decisive and founding event is anything but to ignore the eventness that marks and signs, in my view, what happens, precisely without any foundation or decision coming along to make it certain.”66

However, this emphasis on the historicity of the bios/zoē-distinction in Agamben’s thinking, seems to neglect that this distinction for Agamben is a figure in which two models of power are thought together without a split between law and life; the constitution of an order through its exception and the relation between this order and the life which it orders. Derrida thus takes for granted that Agamben’s theory of the relation of law to life is contingent on the historical evidence he provides for it; the distinction in Greek thought between politically attributed life and bare life. This seems however to overemphasize the Foucauldian side of Agamben’s project. In doing so, this critique repeats the above-discussed debate with Foucault. If this is true, Derrida may be accused of neglecting another side of Agamben’s work; that of

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65 Ibid., p. 329 f.
66 Ibid., p. 333.
mobilizing an ontological model of law, according to which every order presupposes its outside as its inside, in order to understand a historically specific political reality in which the law is discursively sanctioned to function as its own negation.

Conclusion

The question of biopolitics was shown to appear at the vanishing point of two positions – expressed somewhat schematically as that of history and of ontology. These two positions interchangeably appear as oppositional and complimentary to each other in Agamben’s discussion of biopolitics. At stake was the perhaps trivial question whether Agamben provides a synthesis and conciliation between Foucault and Derrida, or if he merely confuses their positions without philosophical grounding. If Agamben were to be judged by his intentions, it is clear that his conflation of two ostensibly contradictory positions is an attempt to break a “deadlock” of deconstruction without limiting himself to an analysis of historical contingencies. Thus, I have attempted to outline, in the incongruity shown between two incongruities that were supposed to be identical – the one between Foucault and Agamben and the one between Agamben and Derrida – Agamben’s project could be seen as the coming thinking of politics that he never ceases to announce, in which the relational, presuppositional ontology of “différence” and logic of “Western metaphysics” is seen as a historically specific practice instrumental to the biopolitical paradigm, without reducing the explanatory validity of this ontological model to an absurdity. Perhaps it could be argued that Agamben should be read as attempting to fulfill the promise implied in Foucault’s critique of Derrida’s critique; the promise of a further transgression of one’s own epistemological constraints than that provided by Derrida’s “historicity of philosophy,” a thinking in which formulation – “exculpation of one’s own language” – can give way for a practice of thinking that is not the interminably repeated pointing out of a differing-deferment, but one in which both positive knowledge and radical uncertainty can appear without contradiction.
In what follows, I will provisionally adhere to this standpoint, according to which it is possible to understand order – literary and legal – simultaneously as a necessary, ontological structure of language and as results of historically specific discursive practices.
2. Evolutionary Feelings and the Unity of Difference in Kant’s *Observations on the Feeling of the Beautiful and Sublime*

**Introduction**

Along with the notions of sublimity and beauty, the favored matrix of the aesthetic theory of the later half of the 18th century is the notion of genres. In one of its most important texts, Gotthold Ephraim Lessing’s *Laokoon oder Über die Grenzen der Malerei und Poesie*, the idea of a generic distinction of art (*Gattung*) is not derived from principles of praxis, but from a primary ontological distinction between painting as spatial and poetry as temporal.\(^{67}\) This constitutes a paradigm shift from classicism in so far as Aristotle, by associating genre distinctions to a social hierarchy as the distinctions corresponding to characters “better” or “worse” than ourselves, until now had made sure that genre distinctions were restricted to a pragmatic sphere.\(^{68}\) However, with the new ontological distinction as foundation for a series of derivative genre distinctions, Lessing’s “natural” distinctions effectively come to inform political and normative distinctions of gender and nationality under the guise of the ontologically grounded aesthetic genres.\(^{69}\)

The same analytical movement and the same complicity between aesthetic and political distinctions are at work in Immanuel Kant’s early essay *Observations on the Feeling of the Beautiful and Sublime* (*Beobachtungen über das Gefühl des Schönen und Erhabenen*) from 1764, published twenty-six years prior to his *Critique of Judgment* and preceding Lessing’s more

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\(^{69}\) As Mitchell points out, this complicity is anticipated even in Lessing’s choice of words; it is the “borders” between artistic media that are to be decided, and the border will be pushed by the stronger part to the disadvantage of the weaker much as it did in 18\(^{\text{th}}\) century politics. Mitchell writes that “the argument from necessity tends to slip unobtrusively into an argument from desire: painting should not be temporal because time is not proper to its essential nature. The argument from desire has to be underplayed, of course, because it only makes sense when it is clear that the argument from necessity has failed. There would be no need to say that the genres should not be mixed if they could not be mixed.” Mitchell, p. 108 ff.
famous text by two years. While Kant’s text now is regarded as somewhat of a philosophical curiosity, Lessing’s text remains an implied authority for modernist theorists of aesthetics.

As is the case with Lessing’s famous text, the “natural” distinction between the sublime and the beautiful in Kant’s essay is entangled with an insistence on the objective truth of distinctions between gender, nationality, race, and character. The first kind of distinction – that between the beautiful and the sublime – I will henceforth call ontological and assume to be fictional. Fictional because it carries with it an element of “as if”, often becoming difficult to distinguish from a pragmatic method of classification; ontological since the authority it lends to Kant’s subsequent differentiating spree is dependent on that it belongs to some other epistemic level than the merely political and thus possesses a higher truth-value. The derivative differentiations of particulars that are in this way subordinated to the primary ontological one – in Lessing’s case between time and space, in Kant’s between beauty and sublimity – I consequently call political, since they always aim at a morally coherent constitution of a community.

In this I am staying close to what Mitchell has argued about Lessing’s Laocoon; that one fundamental and “neutral” distinction gives way to an array of normative distinctions. The most obvious illustration of this in Kant’s text would be how the sublime is seen as corresponding to the male and the beautiful to the female. The first distinction naturalizes and is invoked as support of the second one between the sexes. As Mitchell shows in Lessing’s Laocoon, I will argue that these two modes of argument, the ontological and the political, in Kant’s text similarly are part of a rhetoric that seems to necessitate confusion between the two in order to achieve the intended normative results. In addition to this analysis, I am however adding the question of how the ontological fiction in Kant’s essay gives way not only to political distinctions, but also to a system of distinction in which unity and difference presuppose and contain one another.


This analysis of the rhetoric of the *Observations* is however connected to the central question of the thesis; how “poetry,” or in Kant’s vocabulary “beauty,” measures itself against what it is not and how systems of distinction are made possible on the pretexts given by aesthetics. The kind of differentiation shown in Kant’s text is thus further on contrasted with the paradigm of Romanticism, here illustrated with a text by Friedrich Schlegel, as well as with Kant’s *Critique of Judgment*.

After a presentation of the text with some preliminary comments, the text will be examined in three sections: In the first I discuss the semiotic system of Kant’s taxonomy of “feeling human beings;” in the second I ask how this “pre-critical” conflation of ontological fiction with political distinction relates to aesthetic judgment; and finally I turn to the structural functions of unity and difference in the text.

The Classificatory System of the *Observations*

Kant’s text is systematic in so far as the conclusions made in one section are dependent on the premises attained in the previous. The considerations move from the most general to the most particular, placing the particular instances into the categories established in the preceding, more general descriptions. In another sense the *Observations* remains an unsystematic text. The reach of the categories, starting with beauty and sublimity, expand without constraint into subcategories that come to overlap in an ever-increasing catalogue. This movement changes the position of the speaking subject of the text; it allows for new classifications and conclusions to be made that were not possible from the outset. It is thus necessary to follow this movement from the first to the last of the four sections of the essay.72

Since the first section presents the major motifs of the text, a detailed reading of it reveals many of the epistemes underlying Kant’s following argument. Kant here starts out by declaring the method to be observation rather than philosophical deduction. He then goes on to determine

72 “Yet tenderness and deep esteem give the latter a certain dignity and sublimity; on the other and, gay jest and familiarity heighten the hue of the beautiful in this emotion”, Kant, 2003, p. 52; “Doch geben Zärtlichkeit und tiefe Hochachtung der letzteren eine gewisse Würde und Erhabenheit, dagegen gaukelhafter Scherz und Vertraulichkeit das Colorit des Schönen in dieser Empfindung erhöhen.” Kant, 1905, p. 212.
the fundamental premise of his Observations to be that sensations (“Empfindungen”) depend on
the feelings (“Gefühle”) of a person rather than on the objective attributes of the external cause
of the feeling. This circular use of “Empfindungen” and “Gefühle” in the very first sentence of
the text is important since Kant also uses the latter term to categorize what the sublime and the
beautiful are, namely “Gefühle.” In other words, already from the outset and before any
observations possibly can have been made, it is made clear that it is precisely the distinct
feelings, “Gefühle”, of beauty and of sublimity that are the real causes of sensations of either
enjoyment or displeasure.

Kant then introduces a scale of capacity of feeling. This scale ranges from those feelings
that require no talents or intellectual capacities to the more delicate feelings, which are not
exhausted as quickly and which require the kind of sensitivity the former can do without.
However, the most delicate feelings are omitted from the inquiry. Kant states that it will only
deal with those that are 1) sensuous and 2) those that the largest group of people are capable of
having. Hence, on the very first pages, the two important premises are established that feelings of
the beautiful and the sublime are sensuous and that they, as such, also are to be understood as the
common denominator of individuals.

Kant continues with a series of general distinctions between the beautiful and the
sublime. However, both the beautiful and the sublime are said to stem from a common root; they
are subcategories of pleasure. From this point on, these two categories – beauty and sublimity –
can encompass all the particular subcategories of feelings of pleasure and displeasure. Already
here however, general distinctions are made: Beauty relates to the joyful pleasure and the
sublime to the melancholic; beauty charms and the sublime moves. Furthermore, by associating
this pair of terms – beauty and sublimity – with metonymic oppositional pairs such as day and
night, tall and low, gradual and sudden, Kant is rhetorically presenting them as opposites.
However, at a literal level they are also presented as supplementary to each other; “In order that
the former impression could occur to us in due strength, we must have a feeling of the sublime,
and, in order to enjoy the latter well, a feeling of the beautiful” (“Damit jener Eindruck auf uns in

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73 Kant, 2003, p. 51 f.; Kant, 1905, p. 211 f.
74 Kant, 2003, p. 46; Kant, 1905, p. 207.
75 Kant, 2003, p. 46; Kant, 1905, p. 207.
gehöriger Stärke geschehen könne, so müssen wir ein Gefühl das Erhabenen und, um die letztere recht zu genießen, ein Gefühl für das Schöne haben.”).

The sublime is then divided into three subdivisions: The terrifying, the noble and the splendid (“das Schreckhaft-Erhabene,” “das Edle,” “das Prächtige”). On the one hand this is a scale of purity, on the other it is a scale of the prevalence of one or the other of two components of sublimity: either Melancholy and dread or wonder and esteem. Thus, while the terrifying relates to the melancholic and the noble to the wondering, the splendid is instead a hybrid of beauty and sublimity. A taxonomy of interbred feelings is thus starting to take shape.

It is only after these categories of the beautiful and sublime have been presupposed that examples are invoked to support them. Kant’s discourse thus moves from presupposed category to examples confirming the category. The categories are in other words not simply induced from experience, but hypothetical until tested with examples from experience. The categories are, at least on the manifest level of the exposition, thus always apriori there before they are verified by empirical examples.

Kant’s aims with this classification of the two fundamental feelings – beauty and sublimity – on which our sensations depend, are however already anticipated in the beginning of the text, in the literary example of a sublime feeling, appearing in a footnote where a certain literary character called Carazan, from a story published in the *Bremen Magazin*, is quoted as saying

‘And now I have been taught to esteem mankind; for in that terrifying solitude I would have preferred even the least of those whom in the pride of my fortune I had turned from my door to all the treasures of Golconda.’

‘Und nun bin ich belehrt worden, Menschen hochzuschätzen; denn auch der Geringste von denjenigen, die ich im Stolze meines Glücks von meiner Thüre gewiesen hatte,würde in jener erschrecklichen Einöde von mir allen Schätzen von Golconda weit sein vorgezogen worden."

In this rare example in the text of how the actual affect of sublimity is experienced by others than Kant’s anonymous subject, the derivation of all feelings to the two fundamental categories beauty and sublimity is seen to relate to an idea of a possible unity or communality; a

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76 Kant, 2003, p. 47 ff.; Kant, 1905, p. 208.
77 Kant, 2003, p. 48; Kant, 1905, p. 209.
transgression and encompassing of difference through a common ground of feeling and sensation.

A step towards particularity is taken in the second section of the text, as the perspective shifts from feelings in general to the relations between people in a society expressed by these feelings. The initial categories of beauty and sublimity are, to match the variety of characters, aesthetic genres, and relations observed in society, developed into offshoot categories and hybrid-categories. For example, tragedy is sublime; comedy is beautiful. These categories of feelings can then be used to identify differences between men “in general,” (“Menschen überhaupt”) i.e. between all those who have the feeling of the beautiful and sublime.78

This move towards particulars leads to a less stable distinction between beauty and sublimity. In the case of virtue, a subspecies of the sublime feeling, the oppositional relation between beauty and sublimity thus becomes undermined, since virtue requires both beauty and sublimity. True virtue is first distinguished from the superficial virtuous feelings emanating from beauty, which are described as mere inclinations to amiability that easily fool one into moral assumptions that are absurd to reason. A distinction is thus made between the sublime as the principle of conduct and the beautiful as the principle of a conduct, which is morally right but on false grounds.79 At this point however, the ambiguous opposition between the beautiful and the sublime is fully exposed.

Accordingly, true virtue can be grafted only upon principles such that the more general they are, the more sublime and noble it becomes. These principles are not speculative rules, but the consciousness of a feeling that lives in every human breast and extends itself much further than over the particular grounds of compassion and complaisance. I believe that I sum it all up when I say that it is the feeling of the beauty and the dignity of human nature.

Demnach kann wahre Tugend nur auf Grundsätze gepropft werden, welche, je allgemeiner sie sind, desto erhabener und edler wird sie. Diese Grundsätze sind nicht speculativische Regeln, sondern das Bewußtsein eines Gefühls, das in jedem menschlichen Busen lebt und sich viel

78 An example of this structure is where a list of the visionary, the crank, the trifling, the fop and the dandy/old dandy follows upon the definition of a subdivision of the unnatural terrifying sublime as adventurous and of the unnatural sublime as the grotesque. Kant, 2003, p. 55; Kant, 1905, p. 213 f.

79 On the very first page of the book however, Kant declares all pleasures to be the response to a gratified inclination: “Because a person finds himself happy only so far as he gratifies an inclination, the feeling that makes him capable of enjoying great pleasures, without needing exceptional talents to do so, is certainly no trifle”. Kant, 2003, p. 45; “Weil ein Mensch sich nur in so fern glücklich findet, als er eine Neigung befriedigt, so ist das Gefühl, welches ihn fähig macht große Vergnügen zu genießen, ohne dazu ausnehmende Talente zu bedürfen, gewiß nicht eine Kleinigkeit.” Kant, 1905, p. 208.
weiter als auf die besondere Gründe des Mitleidens und der Gefälligkeit erstreckt. Ich glaube, ich fasse alles zusammen, wenn ich sage, es sei das Gefühl von der Schönheit und der Würde der menschlichen Natur.\textsuperscript{80}

Clearly, the objective here is to rid morality of the social contingency caused by individual inclinations. The sublime virtue must therefore consist in its general nature. The general principles of a sublime virtue must thus be understood as closer to a \textit{sensus communis} than to any stipulated rule, which as inherently contingent would be closer to the merely beautiful. However, true virtue is only achieved through a combination of the beautiful and sublime; it is achieved when the sublime, universal esteem is the cause of a beautiful action. Kant however remain doubtful about the prospect of realizing this virtuous life, as he finds it necessary to add the existence of drives that are supplementary to true virtues; “adoptive” (“adoptierte”), or as they are called further on, “beautiful” (“schöne”) virtues. In fact, there are only “but few who behave according to principles” (“die nach Grundsätzen verfahren, sind nur sehr weinige”) and virtue thus seems to run the risk of almost becoming superfluous when compared to the beautiful virtues. To add further to this confusion, these beautiful virtues also have “a great similarity to the true virtues” (“Diese adoptierte Tugenden haben gleichwohl mit den wahren Tugenden große Ähnlichkeit[…]”)\textsuperscript{81} and again threaten to make the essential virtues redundant. However, the beautiful is always dependent on the sublime; “In order that the former impression [beauty] could occur to us in due strength, we must have a feeling of the sublime, and, in order to enjoy the latter well, a feeling of the beautiful.” (“Damit jener Eindruck auf uns in gehöriger Stärke geschehen könne, so müssen wir ein Gefühl des Erhabenen und, um die letztere recht zu genießen, ein Gefühl für das Schöne haben.”)\textsuperscript{82} The terms \textit{sublime} and \textit{beauty} are thus used as supplementary and oppositional, easily confused yet dependent on each other.

The sublime, then, is not a moral feeling; instead, the moral feeling is sublime. From the ontological generality of the aesthetic categories beauty and sublimity, and through linking them to moral feelings, Kant is able to assert the generality of an ethics. Nevertheless, the section ends with a precautionary gesture in case an ethics based on the universality of the two fundamental feelings would not hold: The beautiful virtues, even if they are not by themselves virtuous, still

\textsuperscript{80} Kant, 2003, p. 60; Kant, 1905, p. 217.

\textsuperscript{81} Kant, 2003, p. 61; Kant, 1905, p. 218.

\textsuperscript{82} Kant, 2003, p. 47; Kant, 1905, p. 208.
reveal how “the whole of moral nature exhibits beauty and dignity.” (“das Ganze der moralischen Natur Schönheit und Würde an sich zeigt.”)\textsuperscript{83}

The last two sections of Kant’s Observations relate to the two previous as the experiment to its methodology. Here the categories and subcategories of beauty and sublimity are used to describe the differences within the generality that these feelings constitute and sustain. The supposed generality of the feelings of the beautiful and sublime are tested against an increasing level of particularity; first against differences between the sexes and then, as a final test, against differences between different kinds of human beings.

Thus, the binary of the sexes – derivative of the binary of beauty and sublimity – is found to be fundamentally unstable because of the instability of the primary binary of beauty and sublimity.

It is not to be understood by this that woman lacks noble qualities, or that the male sex must do without beauty completely. On the contrary, one expects that a person of either sex brings both together, in such a way that all the other merits of a woman should unite solely to enhance the character of the beautiful, which is the proper reference point; and on the other hand, among the masculine qualities the sublime clearly stands out as the criterion of his kind. All judgments of the two sexes must refer to these criteria […].

Hiedurch wird nun nicht verstanden: daß das Frauenzimmer edeler Eigenschaften emangelte, oder das männliche Geschlecht der Schönheiten gänzlich entbehren müßte, vielmehr erwartet man, daß ein jedes Geschlecht beide vereinbare, doch so, daß von einem Frauenzimmer alle andere Vorzüge sich nur dazu vereinigen sollen, um den Charakter des Schönen zu erhöhen, welcher der eigentliche Beziehungspunkt ist, und dagegen unter den männlichen Eigenschaften das Erhabene als das Kennzeichen seiner Art deutlich hervorsteche. Hierauf müssen alle Urtheile von diesen zwei Gattungen […] sich beziehen […].\textsuperscript{84}

However, when turning to the differences between groups of people, Kant can henceforth make continual reference to the now established general attributes of human feeling as relating back to either beauty or sublimity, in order to illustrate a gradual variance: The grotesque, the adventurous, vanity, haughtiness, pride, pomp, conceit – all these attributes can be mapped in a beauty/sublime diagram.\textsuperscript{85} Kant does not execute this classification. Instead he provides the

\textsuperscript{83} Kant, 2003, p. 75; Kant, 1905, p. 227.
\textsuperscript{84} Kant, 2003, p. 77; Kant, 1905, p. 228.
\textsuperscript{85} Robert B. Louden sees this as an indication that the Observations is in fact a work of anthropology, and not of aesthetics. This seems however to neglect the specific analytic maneuver of the text, departing from a commonality pertaining to the senses and the affect – in other words aesthetical – and arriving at anthropological classifications.
blueprint, both ontological and epistemic, with which his readers can structure both their own sensations and those of others; sensations with feelings of artworks, men, women, Africans, Germans, the melancholic, the sanguine, and so forth.86

An Evolution of Distinctions

A conflation of the ontological distinction between beauty and sublimity and the political distinctions that follow it, appears already in the contradiction that the feeling of the beautiful and the sublime are presupposed as given a priori, while at the same time they are presented as empirical. As already noted, it is however only after the primary distinction between beauty and sublimity has been made that experiences are invoked to support it. There is thus a conflict between the manifest intentions of the text, to observe, and how the text is actually structured: It provides meaning to its observations through a fundamental distinction that is never authorized by any other evidence than that which is contingent on this distinction. For example: The experience of the attribute “adventurous” reinforces “sublime” as a cause by being a derivative example of it.

Furthermore, the trajectory in Kant’s text from the most general to the most particular is crucial. From the highest possible generality of feeling in the sublime and the beautiful, distinctions derivative of the original one can be defined ad infinitum: Between men and men, women and men, and between different groups and races of men. Kant thus establishes the two categories beauty and sublimity as a starting point of an evolutionary taxonomy that is both Darwinian and Linnaean; modern and classical.87

86 This is explicitly stated: “The mental characters of peoples are most discernible by whatever in them is moral, on which account we will yet take under consideration their different feelings in respect to the sublime and beautiful from this point of view.” (“Die Gemütscharaktere der Völkerschaften sind am kenntlichsten bei demjenigen, was an ihnen moralisch ist; um deswillen wollen wir noch das verschiedene Gefühl derselben in Ansehung des Erhabenen und Schönen aus diesem Gesichtspunkte in Erwägung ziehen.”) Kant, 2003, p. 100; Kant, 1905, p. 245.
87 In this discussion of Kant’s system of difference, I rely heavily on Foucault’s analysis of classical and modern paradigms of natural history in The Order of Things, in which the modern paradigm is characterized by historical modes of explanation and as a separation of semantics and ontology. A summary of this analysis and a clear distinction between the two paradigms is given in the following passage: “The essential problem of Classical
The central idea of Charles Darwin’s *The Origin of Species* is the mutability of every species through the laws of natural selection: “From the strong principle of inheritance, any selected variety will tend to propagate its new and modified form.”\(^8^8\) Thus, the present relations between species can only be explained by the history of these relations; the species is its accumulated inheritance. Furthermore, in natural selection the “less divergent, the less improved, and preceding forms” are eliminated by the new mutations that differentiate themselves the most from other species.\(^8^9\) In Kant’s own system of species, “the Native American” is by the same logic inferior to, say, “the German,” in that he is only one mutation away from the feeling of the sublime, whereas the descent of “the German” runs through a number of divergent mutations – derivative categories – of both sublimity and beauty. For Kant, sublimity and beauty are, what Darwin would call the “ancient but unseen parent”\(^9^0\) which all the feelings that enable sensations – and as such aesthetical – can be deduced from. Instead of “resemblance” as in the Linnaean natural system, the principle of verification here is “the propinquity of descent […] [which] is the bond, hidden as it is by various degrees of modification, which is partially revealed to us by our classifications.”\(^9^1\) The classifications Kant are making – a century earlier than Darwin – move in a circle from induction from resemblances and differences, towards deductions from the ontological fiction of “the feelings of the beautiful and sublime.”

The infinite multiplication of species of feelings that could be produced out of the primary distinction between the sublime and the beautiful, must in Kant’s taxonomy, as in Darwin’s, be derived from an investigation of causes, which are all inferred from the common root of the sublime and the beautiful as the two finer feelings of sensational pleasure shared by the largest quantity of mankind. Kant’s taxonomy, then, is structured according to a fictional temporality in which a combination of different, preceding causes gives a certain genealogical composition of “sublime” attributes and “beautiful” attributes. This means that anything – to mention a few of Kant’s observed examples; a woman, a cliff, a choleric man, or a Native


\(^{8^9}\) Ibid., p. 398 f.

\(^{9^0}\) Ibid.

\(^{9^1}\) Ibid.
American female child – can be more purely sublime or beautiful by the combination of a certain attribute in which one of the two causes is predominant and another attribute, although genealogically different, in which the same cause is predominant, although not necessarily exclusively so. This means that the system is dynamic; its “signifiers” can change by a coupling of attributes that may very well be contradictory. The system allows these contradictions, since the inductive movement proves a common root and the deductive movement presupposes this common root.92

Since this scale of sublimity and beauty determines the lineage of attributes – and not the attributes of a divine plan – it allows for a temporal and causal gradation of qualities in which differences can both increase and decrease. Hence, there are no stable oppositional binaries in Kant’s taxonomy of feeling human beings. Since it operates by means of causality, the signifiers of this system – i.e. all the derivatives of sublimity and beauty – imply a dynamic of change. Feeling x combined with feeling z gives quality y. This change can however only be progressive or regressive; it is bound up in time only in so far as it is an evolution of the categories of sublimity and beauty. Thus, this system of classification has a Darwinian component, however different the aims and premises:

[...] the characters which naturalists consider as showing true affinity between any two or more species, are those which have been inherited from a common parent, and in so far, all true classification is genealogical; that community of descent is the hidden bond which naturalists have been unconsciously seeking, and not some unknown plan of creation, or the enunciation of general propositions, and the mere putting together and separating objects more or less alike.93

Likewise, Kant’s classifications are not only based on inductive observation of differences – of “objects more or less alike” – it also moves deductively from a law of evolutionary signifiers, in which these are determined by their genealogy of signification. This is however not the clear-cut modern paradigm of historicity that Foucault exemplifies in philology, economics and natural history. In Kant’s text a modern premise of temporality and genealogy for verifications of

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92 This can be compared with Foucault’s characterizations of the classical and modern paradigms of classification: “This taxonomy [the classical] was constructed entirely upon the basis of the four variables of description (forms, number, arrangement, magnitude), which could be scanned, as it were in one and the same movement, by language and by the eye; and in this development of the visible, life appeared as the effect of a patterning process – a mere classifying boundary. From Cuvier onward, it is life in its non-perceptible, purely functional aspect that provides the basis for the exterior possibility of classification.” Foucault, 1994, p. 268.

93 Darwin, p. 404.
identity and value is coupled with a classical absence of the historical trope. Kant’s text does not discuss the history of peoples, nations or art in order to classify them. Rather, the *Observations* presumes the immediacy and atemporal autonomy of the phenomena and things it classifies, but to do so it opens up two spheres of distinction; one of temporal signs and one of observed phenomena. The paradigm of historical verification is thus transposed to a semiotic system of evolutionary signs in which ontological distinctions are made based on the genealogy of these signs. The observation of resemblance – of original differences – remains however the manifest premise for the political distinctions between the observed ethnicities, nations and characters. The analytical movement of the text thus consists in conflating these two spheres of distinction, ontological distinctions of signifiers (beauty, sublimity, etc.) and political distinctions of empirical phenomena, in order for them to support each other.

A comparison with Edmund Burke’s contemporaneous *A Philosophical Enquiry into the Origin of our Ideas of the Sublime and Beautiful* and its radical skepticism of the mimetic quality of language can elucidate the intricate logic of Kant’s aesthetic-classificatory system. Whereas Burke’s proto-Romantic denial of a natural connection between signifier and signified has the implication that language is a system open to manipulation by any poet wishing to produce sublime affects, Kant’s system of aesthetic difference is only manipulable according to its genetic temporal scheme; it allows a deferral of meaning that, by the initial ontological fiction of sublimity and beauty, remains bound to a kind of eugenic process of subtraction or addition. It is a system that provides a logic where the differentiation of anyone with “finer feelings” of sublimity or beauty, produces categories which both allow and demand mutations of these categories, but only according to a “law of evolution” stipulated by the ontological fiction of sublimity and beauty. Thus, the taxonomy maps the inhabitants of the world according to a distance or closeness to the two primary feelings. This map becomes an indicator of genetic complexity and as such it determines a possibility to progress or regress. For example, while “the African” is only one step away from the primary distinction (African = trifling, i.e. lack of sublimity and beauty), the “Indian” is a sign with a longer genetic history of other signs (Indian
= “grotesque” with traces of “adventurous”, which is derived from “visionary”/“crank” and the latter from “terrifying sublime”, which in turn is derived from “sublime”).

Indicators of this conflation of ontological origin and semiotic differentiation are also demonstrable at the level of the sentence in Kant’s text. In the passage that has already been quoted, the aporia of this method of distinction that is its own evidence, becomes particularly clear.

It is not to be understood by this that woman lacks noble qualities, or that the male sex must do without beauty completely. On the contrary, one expects that a person of either sex brings both together, in such a way that all the other merits of a woman should unite solely to enhance the character of the beautiful, which is the proper reference point; and on the other hand, among the masculine qualities the sublime clearly stands out as the criterion of his kind. All judgments of the two sexes must refer to these criteria […]

Hiedurch wird nun nicht verstanden: daß das Frauenzimmer edeler Eigenschaften ermgangelte, oder das männliche Geschlecht der Schönheiten gänzlich entbehren müßte, vielmehr erwartet man, daß ein jedes Geschlecht beide vereinbare, doch so, daß von einem Frauenzimmer alle andere Vorzüge sich nur dazu vereinigen sollen, um den Charakter des Schönen zu erhöhen, welcher der eigentliche Beziehungspunkt ist, und dagegen unter den männlichen Eigenschaften das Erhabene als das Kennzeichen seiner Art deutlich hervorstechen. Hierauf müssen alle Urtheile von diesen zwei Gattungen […] sich beziehen […]

First Kant points out that the particular subdivision of beauty and sublimity here investigated, woman and man, is not identical with the primary division, and that it hence is a question of gradation. The classifications thus depend on how much of each category has been handed down to the particular instance.

In the last sentence of this quote, the crucial remark is made that there are no criteria for judging the subdivision other than those provided by the primary division between sublimity and beauty. At the same time as the methodological character of the political distinctions is acknowledged, it is also defended as necessary and as belonging to an epistemic dimension that is exempted from scrutiny. Hence, the circular ambiguity of the ontological and political distinction appears as one in which the two reinforces one another: Since the sublime and the beautiful are ontologically given, the methodological utility of the distinctions derived from them is exempted from criticism.

95 Kant, 2003, p. 77; Kant, 1905, p. 228.
While the deductive level of ontological distinctions is stable, there thus appears an ambiguity at the inductive level of political distinctions; qualities overlap and the possibilities for hybrids seem infinite. Thus, without the parallel ontological distinction between sublimity and beauty, the political distinctions would lose their validity. By relying on the modern premise of genealogy and the classical premise of resemblance interchangeably, all distinctions stemming from the distinction between the beautiful and the sublime can be verified in either one of the two modes of argument.

Judgment without Law; the Juridical and the Non-Juridical Paradigm of Distinction

If Kant’s text performs a form of naturalization of aesthetic categories as corresponding to ontological qualities, the Romantics instead mobilize a new set of discursive devices against precisely generic distinctions on ontological grounds. When celebrating the “heterogenic mixture” of the moderns, Friedrich Schlegel and his generation revolted both against the Aristotelian confinement of aesthetic distinctions to a pragmatic sphere and to the idea seen in Kant’s text of a primary “natural” distinction that enables pragmatic ones. With the Romantics, I will argue, generic distinctions are instead licensed by support of a juridical discourse: It is by a “law,” contingent on history, rather than by any eternal attribute of nature, that aesthetic qualities are to be judged.

This seems to be what animates a text such as Schlegel’s Über das Studium der griechischen Poesie published in 1797, in which Schlegel says that the missing ground for judgment only is to be found in a history of particulars. Paradoxically however, it is still against the classical that a modern “lawfulness” according to Schlegel must be measured, while at the same time the classical cannot allow the moderns to imitate any of its particulars. The classical, then, does not achieve an ontological truth, but only a historical truth. This historical basis for judgment is contingent on circumstances, and never on inherent qualities with ontological rank such as painting, poetry, beauty or sublimity. Here, at the turn of the century, the question of genre is thus posed as a critique and reevaluation of the method of categorization established by
a previous generation. The advantages and disadvantages of classification are thus by the Romantics tested against a new experience of groundlessness. This absence of a secure ontological ground, such as time and space, on which to build a system of aesthetic genres necessitates an adaptation to a juridical topos that is absent in Schlegel’s predecessor Kant anno 1764. For Schlegel, only an interpretation of the particular instances of history can establish a norm for the future. Importantly, this is a norm that is not identical with the interpreted particulars. A modern work of art is thus judged by norms established in ancient art, but the historical difference between them prevents them from converging in either true identity or the false identity of mannerism. About “philosophical poetry” Schlegel thus says that it is

[only by means of an arrangement that is ideal does the characteristic of an individual become a philosophical work of art. As a result of being organized in such a manner, the law of the whole must clearly emerge from the sum total and effortlessly offer itself to inspection; the meaning, spirit, and inner coherence of the represented essence must come forth out of it.

(Nur durch eine ideale Stellung wird die Charakteristik eines Individuums zum philosophischen Kunstwerk. Durch diese Anordnung muß das Gesetz des Ganzen aus der Masse klar hervortreten, und sich dem Auge leicht darbieten; der Sinn, Geist, innre Zusammenhang des dargestellten Wesens muß aus ihm selbst hervorleuchten. [author’s italics])

It is this interpretation of a law that makes possible a “new mythology”, connecting the past with the present without any mannerist imitation. It aims at an exhaustive particularization of history that succeeds in construing its “law”, its “Gesetz.” For Schlegel, this becomes a sort of constitutional law of taste: “Only when the lawgovernedness of aesthetic vitality is secured by an objective basis and style, can aesthetic development [Bildung] – by means of the freedom of art and the communality of taste – become thoroughly far-reaching and public [author’s italics].”

Schlegel’s descriptive distinction between ancient poetry and modern poetry thus becomes similar to one between lawfulness and lawlessness. Modern poetry escapes its own categories; drama becomes lyrical, the lyrical becomes drama, poetry becomes philosophy and so


forth in an “endless flux” in which the “anarchy is not confined to the outer limits; instead it spans the entire realm of taste and art.”

The state of modern poetry and of its theory is however also described pejoratively in these terms as an infinite stipulation and transgression of the law of taste, without any theory with a “fixed point” (“festen Punkt”). The contemporary theory of poetry and aesthetics is described as based on any of a number of norms, such as imitation, originality, theorems, myths, the anarchy of the genius or other “obviously foolish laws” (“offenbar törichten Gesetze”). The theory thus lacks the capacity to enforce its laws: “How can it [theory] demand reverence for its pronouncements and obedience for its laws when it has not even succeeded in rendering a proper explanation of the nature of the poetic arts and a satisfactory classification of its types?” The history of modern poetry is thus described as lawless, where the new – the transgression of the law of taste – is the only verification of aesthetic taste. Schlegel’s objective is to find the “principle of its development” (“das Prinzipium ihrer Bildung [author’s italics]”), which could turn the anarchy of taste into a revolution and the stipulation of a new law. The principle of the modern is thus only found in tracing its historical development; its Bildung.

The anticipated aesthetic revolution requires two things according to Schlegel, on the one hand an “aesthetic vitality” (“ästhetische Kraft”), i.e. a capacity to enforce aesthetic ideals, and on the other hand “morality” (“Moralität”). Correct aesthetic taste is thus the willful and moral expression of a mind that has passed through this aesthetic development (Bildung). This Bildung is described as either a progression of skills or as an “absolute legislation that organizes force” (absolute Gesetzgebung, welche die Kraft ordnet [author’s italics]). The former principle of Bildung achieves aesthetic “objectivity.” The will is however not enough to guarantee objectivity. It requires “legislation” (“Gesetzgebung”) and a “perfect aesthetic legislation would be the first organ of an aesthetic revolution.” (“Eine vollkommne ästhetische Gesetzgebung würde das erste Organ der ästhetischen Revolution sein.”). This constitutional law of

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99 Ibid.
aesthetics that would “organize the lawless into harmony” (“das Gesetzigse zur Harmonie zu ordnen”) and provide “a legitimate mood to aesthetic development” (“der ästhetischen Bildung […] eine gesetzmäßige Stimmung zu erteilen”), is however already established (“konstituiert”) in the Romantic theory of poetry. The function of this theory, i.e. Schlegel’s own, is to be a guide to Bildung and to productively release the aesthetic vitality (Kraft).

Furthermore, these “laws of the aesthetic theory” (“Gesetze der ästhetischen Theorie”) are democratic; they only have authority in so far as they are supported by a “major portion of public opinion” (“der Majorität der öffentlichen Meinung”). The aesthetic project is thus closely related to that of the French revolution.\(^\text{103}\) It aspires to transpose the legislative function from a sovereign to the masses; “In perfect and free agreement with itself, theory can then provide its laws the most well-grounded reputation, and elevate itself to a true public force.” (“Dann kann die Theorie nur durch vollkommne und freie Übereinstimmung mit sich selbst ihren Gesetzen das vollgültigste Ansehn verschaffen, und sich zu einer wirklichen öffentlichen Macht erheben.”)\(^\text{104}\) This is the difference, according to Schlegel, between the preceding stage of the history of modern poetry and his own; that the laws with Romantic theory have acquired objectivity; “objectivity is truly attained – at least in individual aspects of the entire mass” (wenigstens in einzelnen Punkten der ganzen Masse das Objektive wirklich erreicht”).\(^\text{105}\)

This objectivity is credited to critical philosophy in general and Kant’s *Critique of Judgment* in particular. The objective aesthetic laws of the masses are thus parallel with the laws governing the principles of perception and cognition: The ultimate aim of this legislative process becomes the “objective system of a practical and theoretical science of aesthetics.” (“objektiven Systems der praktischen und theoretischen ästhetischen Wissenschaften”) (author’s italics). For

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\(^{103}\) This seems to correspond to what Jacques Rancière calls the “aesthetic regime” of art, in which art becomes the possibility for anyone to appropriate sensations outside of their social condition; an emancipation of the masses by means of appropriating the disinterested gaze: “In the aesthetic regime, artistic phenomena are identified by their adherence to a specific regime of the sensible, which is extricated from its ordinary connections and is inhabited by a heterogeneous power, the power of a form of thought that has become foreign to itself […].” This primacy of the sensible is what will govern the idea of the Kantian genius, who produces an aesthetic law he himself is unaware of. For Rancière, then, this aesthetic revolution of the nineteenth century meant an overthrowing of the classical “representational regime” of the Aristotelian representative hierarchies of low and high subjects and characters, its priority of action over life and its scheme of causality and effects, which to some extent still characterize a text like Kant’s *Observations*. Jacques Ranciere, “The Distribution of the Sensible” in *The Politics of Aesthetics*, trans. Gabriel Rockhill (London 2004 [2000]) p. 21 ff.; See also the chapter “Divided Beauty” in Jacques Rancière, *Aisthesis: Scenes from the Aesthetic Regime of Art*, trans. Zakir Paul (London/New York 2013 [Paris 2011]).


\(^{105}\) Schlegel, 2001, p. 89; Schlegel, 1979, p. 355.
Schlegel, then, aesthetic distinctions have manifestly aligned themselves with a juridical-political discourse.\textsuperscript{106}

A comparison with Kant’s third critique from 1790 is similarly instructive, although it cannot do justice to its philosophical significance. In the \textit{Critique of Judgment} judgment is seen as an \textit{a priori} legislative (“gesetzgebenden”) faculty. Whereas the determining power of judgment operates according to universal laws, the reflective power of judgment of particulars requires a law that is not empirical, since its purpose is to systematize the empirical laws of these particulars; “[t]he reflecting power of judgment, therefore, can only give itself such a transcendental principle as a law, and cannot derive it from anywhere else […]”.\textsuperscript{107} The power of judgment thus prescribes its own law for a reflection on nature. Hence, to make a universally valid judgment of taste requires a law, which is prescribed individually but in each case identically. Aesthetic judgment thus measures the suitability of the purposiveness of nature to our own cognitive faculties; in it, purposiveness is perceived without a conception of the purpose. The unique capacity of aesthetic judgment thus is to judge “in accordance with a rule but not in accordance with concepts.”\textsuperscript{108} In it, no access is given to the qualities of the object that is being judged, but only to the representations that make it available to the subject; it is “a faculty for judging an object in relation to the free lawfulness of the imagination.”\textsuperscript{109} The law of the common sense of taste, the \textit{sensus communis}, is in other words not conceptual, but depends upon a presupposed communality of feeling. This freedom of the imagination’s lawfulness is a necessity, as a prescribed law would rely on concepts and hence not account for the beautiful, which depends upon taste and not concepts. What the judgment of taste thus needs is a “lawfulness without law” (“eine Gesetzmäßigheit ohne Gesetz”), which remains subjective and singular. Thus, the logical “peculiarities” (“Eigenthümlichkeiten”) of the judgment of taste is that it has a universal validity \textit{a priori}, which however is valid only in accordance with the individual

\textsuperscript{106} Schlegel, 2001, p. 90; Schlegel, 1979, p. 358.
\textsuperscript{108} “Die ästhetische Urtheilskraft ist also ein besonderes Vermögen, Dinge nach einer Regel, aber nicht nach Begriffen zu beurtheilen.” Kant, 2000, p. 80; Kant, 1908, p. 194.
\textsuperscript{109} “[…] ein Beurtheilungsvermögen eines Gegenstandes in Beziehung auf die freie Gesetzmäßigkeiten der Einbildungskraft sei.” Kant, 2000, p. 124; Kant, 1908, p. 240.
judgment and not in accordance with concepts, and that it is necessary without there being any means of proving it.\(^{110}\)

Kant’s dependence on the juridical trope becomes even clearer in the discussion on the genius, who is the one who creates the laws of art out of his own artistic actions, without any preconception of preceding laws; “the rule must be abstracted from the deed, i.e. from the product” ([…] die Regel muß von der That, d. i. vom Product, abstrahirt werden […]).\(^{111}\)

If one brackets the epistemological theory that allows Kant to define the judgment of taste as lawfulness without law, it appears to be the facticity of the law that determines its validity. The idea of a \textit{sensus communis} of taste thus has a structural similarity with the idea of law as social construct: The norms of taste are individual to each subject, yet by being enforced in the particular instance they presuppose a validation of the norm by the community. As a discursive practice, this is analogous to legal positivism. For Kant it departs from the fact that “there is no empirical ground of proof for forcing the judgment on anyone” and reaches the conclusion that this – that its basis lies not in a reference to life but in a free lawfulness of imagination which is the same for every subject – becomes the reason why it “nevertheless makes a claim on all subjects of a kind that could only be made if it were an objective judgment resting on cognitive grounds and capable of being compelled by means of a proof.”\(^{112}\)

The analyses may be entirely different – they both however constitute a movement from the discovery of a law that lacks an “objective principle” to nonetheless safeguarding its validity by means of a presupposed, fictional consensus,

By “\textit{sensus communis}” however, must be understood the idea of a \textit{communal} sense, i.e., a faculty for judging that in its reflection takes account (\textit{a priori}) of everyone else’s way of representing in thought, in order \textit{as it were} to hold its judgment up to human reason as a whole and thereby avoid the illusion which, from subjective private conditions that could easily be held to be objective, would have a detrimental influence on the judgment.

Unter dem \textit{sensus communis} aber muß man die Idee eines gemeinschaftlichen Sinnes, d. i. eines Beurteilungsvermögens verstehen, welches in seiner Reflexion auf die Vorstellungsart jedes andern in Gedanken (\textit{a priori}) Rücksicht nimmt, um gleichsam an die gesamte Menschenvernunft sein Urtheil zu halten und dadurch der Illusion zu entgehen, die aus

\(^{110}\) Kant, 2000, p. 162; Kant, 1908, p. 281.
\(^{111}\) Kant, 2000, p. 188; Kant, 1908, p. 309.
\(^{112}\) “[…] ob es gleich bloß subjective Gültigkeit hat, es dennoch alle Subjecte so in Anspruch nimmt, als es nur immer geschehen könnte, wenn es ein objectives Urtheil wäre, das auf Erkenntnissgründen beruht und durch einen Beweis könnte erzwungen werden.” Kant, 2000, p. 165 f.; Kant, 1908, p. 285.
subjectiven Privatbedingungen, welche leicht für objectiv gehalten werden könnten, auf das Urtheil nachtheiligen Einfluß haben würde. (author’s italics)

For Kant this validity of the law without objective principle is achieved by means of an “as if” of a consensus, an “as if” which depends on the interplay of cognitive faculties; the reciprocity between the freedom of imagination with the lawfulness of understanding. In other words, it is not a law that refers to something that is not law, i.e. life, but rather “is itself, subjectively, both object as well as law.” ([… sie sich selbst subjectiv Gegenstand sowohl als Gesetz ist.”)

As later Schlegel, Kant here relates this communality of the judgment of taste (for the beautiful) – as the freedom of imagination in its lawfulness – to a model of democracy in which communication between the higher and lower strata of humanity allows a legislation which unites the freedoms and limitations according to the will of the whole of society. It is thus with aesthetic taste, which “declares to be valid for mankind in general, not merely for the private feeling of each” that a common ground for morality can be found.

If there is a juridical paradigm at work in these two texts, it only seems to allow a norm to be decided from praxis and never praxis from an “apriori” norm such as concepts of beauty or sublimity. This difference between the texts from 1797 and 1790, and the text from 1764, can be detected already at the level of the sentence in the latter: Kant consistently prefers the word “principle” (“Grundsätzen”) when describing a normative system and never mentions “law” in any form.

According to Kant, these principles remain however mostly unrealized, since they belong to the form of sublimity called “true virtue”, which is exceptionally uncommon and in any case may not be very desirable, since the morality of beauty, “beautiful virtue,” as a feeling of the masses, is much more useful for practical ends. Nonetheless, the “principle” in Kant’s text is also the subject of a positive critique: “Among men there are but few who behave according to principles – which is extremely good as it can so easily happen that one errs in these principles, and then the resulting disadvantage extends all the further, the more universal the principle.”

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113 Kant, 2000, p. 173 f.; Kant, 1908, p. 293.
114 Kant, 2000, p. 168; Kant, 1908, p. 288.
115 “[…] welche der Geschmack als für die Menschheit überhaupt, nicht bloß für eines jeden Privatgefühl gültig erklärt […]” Kant, 2000, p. 230; Kant, 1908, p. 356.
116a Derjenigen unter den Menschen, die nach Grundsätzen verfahren, sind nur sehr wenige, welches auch überaus gut ist, daßes so leicht geschehen kann, da man in diesen Grundsätzen irre und alsdann der Nachtheil, der daraus
This surprising critique of normative principles acknowledges the contingency of every law on an interpretation of previous actions, actions that may be wrong even if guided by the truest of virtue.

The beautiful virtues give on the other hand, as stemming from the ontologically necessary truth of “beauty,” license to a lawless judgment, not in the sense of a negation of law that creates law, as the trope reappears in Kant’s discussion of the genius in *Critique of Judgment*, but as a non-juridical judgment, i.e. without any relation to a system of norms. Instead it is a principle that comes forth naturally as a mere consequence of the ontologically given quality of beauty, which precedes any normative system and refuses to lend itself to establishing one. Since law relates to sublimity in Kant’s scheme, this critique of law is also a privileging of beauty. This latent primacy of beauty is further clarified later on in the section on the sexes, where Kant says about the education of women, that one “will seek to broaden their total moral feeling and not their memory, and that of course not by universal rules but by some judgment upon the conduct that they see about them” and further on that women “will avoid the wicked not because it is unright, but because it is ugly; and virtuous actions mean to them such as are morally beautiful” after which he announces the happiness this results in; “[n]othing of duty, nothing of compulsion, nothing of obligation!”

This seems to say that the risk of every stipulated and formalized principle will be that it inevitably causes conflict. Hence, it is only at the distinctly beautiful, pre-conceptual level that the effects of a sublime, true virtue becomes realizable. Only through this accumulation of “inclinations,” in a manifestation of what in Kant’s text appears to function as the masses in relation to the individual moral subject, can morality thus attain the rank of reality. Hence, it is both despite the distinctions and as a corollary of them that the notion of a beautiful virtue, in contrast to the concept of true virtue, allows that “different groups unite into a picture of splendid expression, where amidst great multiplicity unity shines forth, and the whole of moral nature...

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erwächst, sich um desto weiter erstreckt, je allgemeiner der Grundsatz und je standhafter die Person ist, die ihn sich vorgesetzt hat.” Kant 2003, p. 74; Kant, 1905, p. 227.
117 Kant, 2000, p.186 ff.; Kant, 1908, p. 307 ff.
118 “Man wird ihr gesammtes moralisches Gefühl und nicht ihr Gedächtniß zu erweitern suchen und zwar nicht durch allgemeine Regeln, sondern durch einiges Urtheil über das Betragen, welches sie um sich sehen.” Kant, 2003, p. 80; Kant, 1905, p 230.
exhibits beauty and dignity.” In reversing the initial order of the argument, the political distinctions thus become indistinguishable from the ontological: Natural beauty creates a moral community by means of its politically construed contrast to the sublime. A schematization of the different steps of conflation of the two modes of argument could help to clarify this: 1) From the ontological presupposition a (sublime and beauty are given attributes) to 2) political distinction a (sublime and beauty corresponds to certain moral qualities) to 3) ontological presupposition b (beauty as a certain moral quality is given) to 4) political distinction b (sublime feelings relate to different moral qualities than those of beauty). As the distinctions and conclusions become more numerous, the conflation between the two modes of argument grows increasingly complex.

Latent in the beautiful judgment without law, then, is a suppression of the sublime, which is also the strengthening of its binary relation to beauty. Throughout the text, the sublime has to struggle not to slip away from the initial premise that both the sublime and the beautiful are finer feelings of pleasure and that everyone who has one of the two also needs to have the other. However, to experience a sublime pleasure in the terrifying does not seem to be a pleasure shared by everyone. This causes a need to associate these obscure sublime pleasures, such as that of the terrifying, with the beautiful pleasures of joy and happiness at the level of ontology. At the same time however, beauty needs the contingency of the principle – of law and of terrifying pleasures – since a purely “beautiful” world without sublimity would be one without difference, which in turn would suspend the force of beautiful virtue, since it is precisely when “the different groups unite into a picture of splendid expression [my italics]” that the “whole of moral nature exhibits beauty and dignity.” In Kant’s system, then, difference serves as the cause of overcoming difference, and it is achieved through the rhetoric of conflating ontological with political distinctions.

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121 For the German original see preceding note. Kant, 2003, p. 75; Kant, 1905, p. 227

122 Alix Cohen sees this interdependency of beautiful and sublime virtues as an ethical contradiction, between individual (sublime) morality and the amorality of the human species, or the masses, (beauty), which in a Rousseaun spirit is resolved in privileging the beautiful amorality of humankind as a whole. On a similar note Patrick R. Frierson sees the privileging of beautiful virtues as a proto-utilitarian strain in Kant’s text. It is not my intention to refute these readings. My own analysis of the text brackets its philosophical truth value in order to detect its discursive movement, in which contradictions aren’t to be resolved but seen as components in the specific meaning production of the text. See Alix Cohen, “Kant’s ‘curious catalogue of Human Frailties,’ and the Great Portrait of Nature,” in Kant’s Observations and Remarks: A Critical Guide, ed. Susan Meld Shell, Richard Velkley (Cambridge 2012), p. 143 ff.; Patrick R. Frierson, “Two Concepts of Universality in Kant’s Moral Theory,” in
A Unity of Feeling as a Unity of Difference

Kant’s distinction between the feelings of the beautiful and sublime does not claim to be universal. The pair is instead presented as the common denominator among the “finer feelings” ("feinere Gefühle") of men. There is both something lower and higher than these finer feelings, something that is not covered by either sublimity or beauty. Both of these lower and higher categories of feelings are however excluded from Kant’s investigation. The lower since it has no relation to thought and the higher since it is not available to the “more ordinary souls.” ("gemeinere Seelen") This exclusion is aristocratic against its own principle of aristocracy, and democratic as far as it privileges what belongs to the majority and excludes what is quantitatively less but qualitatively more.

I shall moreover exclude from it that inclination that is fixed upon high intellectual insights, and the thrill that was possible to a Kepler, who, as Bayle reports, would not have sold one of his discoveries for a principedom. The latter sensation is quite too delicate to belong in the present sketch, which will concern only the sensuous feeling of which also more ordinary souls are capable.

Doch schließe ich hiervon die Neigung aus, welche auf hohe Verstandes-Einsichten geheftet ist, und den Reiz, dessen ein Kepler fähig war, wenn er, wie Bayle berichtet, eine seiner Erfindungen nicht um ein Fürstenthum würde verkauft haben. Diese Empfindung ist gar zu fein, als daß sie in gegenwärtigen Entwurf gehören sollte, welcher nur das sinnliche Gefühl berühren wird, dessen auch gemeinere Seelen fähig sind.123

The sensuous, aesthetic feelings provide a common denominator for the human species. The mind cannot be, Kant says, “completely without a univocal finer feeling.” However, “the degrees of its sensitivity are still very different.”124 In any case, a few sentences earlier Kant has excluded the “phlegmatic” disposition from his investigation, since in it “no ingredients of the

123 Kant, 2003, p. 46; Kant, 1905, p. 208.
124 “Auch selbst wenn das Gemüt nicht gänzlich ohne ein einstimmiges feineres Gefühl ist, sind doch die Grade der Reizbarkeit desselben sehr verschieden […]” Kant, 2003, p. 71; Kant, 1905, p. 224.
sublime or beautiful usually enter in any noticeable degree.” While the finer feelings perhaps do not require universality to be of importance, they are still throughout the essay characterized by their aspiration towards universality. This seems to be implied already in the democratic valuation of what is important to study; that which pertains to the majority. Still, Kant remains ambiguous on this point, sometimes discarding from his system of difference a certain disposition, nationality or race completely, and sometimes contending that there is “virtually no one [who] is so gross as not to sense that a moral action, at least when done to another person, moves all the more the further it is from self-interest, and the more those nobler impulsions stand out in it.” According to Kant’s own scheme, where “nobility” is a derivative quality of sublimity, this has to mean that virtually everyone has a sense of the sublime.

The generality of sublimity and beauty, although perhaps not universal, enables a scale with coordinates corresponding to these two primary feelings of the beautiful and sublime, in which the degrees of both subsequently can be mapped out. This project of gradation of particulars according to a standard of generals, reaches its culmination in the section on the differences between nationalities. The apologia in the extensive footnote in the beginning of this concluding section on races is instructive. Kant here assures the reader that he is only going to investigate the differences between nationalities as long as they depend on the distinct feelings of the beautiful and sublime. Hence, the causal episteme of Kant’s taxonomy again becomes apparent. Everything except the genetic code of signifiers within the taxonomy of the species sublimity and beauty becomes useless to the argument; “[w]hether these national differences are contingent and depend upon the times and the type of government, or are bound by a certain necessity to the climate, I do not here inquire.” Kant here asserts that he does not claim to characterize nationalities, since such an attempt must result in “that its prototypes stand out only in the great multitude of those who lay claim to a finer feeling, and that no nation lacks

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125 “Da in der phlegmatischen Mischung keine Ingredienzien vom Erhabenen oder Schönen in sonderlich merklichem Grade hineinzukommen pflegen […]” Kant, 2003, p. 70; Kant, 1905, p. 224.
126 “Imgleichen ist wohl niemand so grob, daß er nicht empfinde, daß eine sittliche Handlung wenigstens an einem andern um desto mehr rühre, je weiter sie vom Eigennutze ist, und je mehr jene edlere Antriebe in ihr hervorstechen.” Kant, 2003, p. 73; Kant, 1905, p. 226.
dispositions that combine the most excellent qualities of this sort.”

Observation has once again been turned inside out to become the deduction of ontological, naturalized qualities, and the observing of particulars only the epistemic disguise for a search for qualities with ontological rank. Classification is made not based on appearances – such as given climatological effects – but on the internal functions of feelings, which remain hidden to the observing eye. The political distinctions that then follow – between nations and races – are thus, as ontologically given, exempted from any need to correspond to observed particulars, while at the same time they are meaningful to the essay only as distinctions of precisely observed particular instances of the derivations of the primary qualities of the sublime and the beautiful.

The observational mode, the emphasis on a movement towards the most particular distinctions, reveals itself to be the vehicle of the conflation of ontological fiction with political distinction. By depriving the mode of description of its epistemic primacy, Kant’s apologetic footnote thus illustrates how the political distinctions serve the purpose of reinforcing the ontological distinction, which in turn reinforces the political distinctions.

This correspondence between the “natural” feelings on which sensations depend with the “contingent” (“zufällig,”) political reality, enables a sort of system of peoples that can insist upon the unity of “mankind” as much as upon difference between “races.” Since all the contingent differences only are possible if they are related back to the necessary, natural, ontological and thus uniting difference between the feeling of the beautiful and sublime, and since this necessary difference only is possible by means of an exemplification of particular instances of the contingent kind of political difference, unity becomes dependent upon difference and difference upon unity.

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Conclusion

The system of difference in Kant’s *Observations*, emanating from the distinction between the beautiful and sublime and consisting of the subdivisions of these two categories, departs from an aesthetic theory of sensations and feelings, and moves towards a political theory of difference between higher and lower subject, genre, character and so forth, in an Aristotelian fashion.

This politically invested system of distinctions between aesthetic experiences was first seen as structured as a simultaneously evolutionary and synchronic taxonomy; Kant makes sense of a category such as “grotesque” or “adventurous” by understanding it as a particular mutation of sublimity and/or beauty. The temporality of these categories was seen as structured as an evolutionary causality by which variation only is allowed through regression or progression in relation to the fundamental feelings of pleasure – the beautiful and sublime. The signifiers of this system were thus seen as characterized by a restrained instability, which does not allow the arbitrary signification that appears in Burke’s text on the same topic of the sublime and beautiful. Hence, the instability intrinsic to a method of distinction dependent on a structure of binaries, could in Kant’s text be mobilized for further distinctions within the constraints provided by the primary ontological fiction.

Secondly I discussed how Kant’s ontological fiction expresses a repression, or at least absence, of the juridical topos, as shown in the comparison to Schlegel and Kant’s third critique. The circumvention of the juridical was shown to occur by Kant’s recourse to the “beautiful virtue” as preceding “principle.” The interdependency of the two forms of virtue, beautiful and sublime, illustrated how the two modes of argument – ontological and political distinctions – were structurally dependent on each other. The example invoked showed how the presupposition of “the beautiful morality of the whole” in order to be ontological rather than pragmatic, was contingent on that the distinction between sublimity and beauty here functioned as political-pragmatic rather than as ontological. The purpose of this discussion was to suggest how Kant’s rhetoric makes the two modes of argument interchangeable in one and the same analytical move. Hence, the paradox of Kant’s text is that in its causal (stable) and semiotic (unstable) system, distinctions can only be made with reference to a primary unity, and this unity in turn can only exist if it produces instable differences: It formulates the paradox of a unity that necessitates difference within it.
Aesthetic theory here seems to have come to encompass epistemology. The question of the artwork and its possible affects is replaced with categorizations of morally conditioned differences and similarities between human beings. The aesthetic categories which are enabling this system, the sublime and beautiful, remain however the same. As the principle for assessing taste, the distinction between the two aspects of the general feeling of pleasure becomes transposable to all moral attributes. Within the *sensus communis* of taste, then, distinctions can be made. These distinctions, of conduct, gender, race, character, nationality and so forth, amount to a systematic foundation of a virtuous community; of human relationships that are not contingent on private interests. But out of a systematically founded aesthetic generality inherent to man, distinctions can also be made which divide humanity by insisting on an essential unity; in order to unite mankind, it requires differences.
3. Exchangeable Signs and the Order of Law; Law, Economy, and Poetry in Clas Livijn’s Novel *Spader Dame: en berättelse i brev, funne på Danviken*

Introduction

Like many Romantic prose stories, the Swedish Romantic author Livijn’s novel *Spader Dame: en berättelse i brev, funne på Danviken*, published in 1824, consists of a collection of letters. In this case, an editor who accidentally has found the letters at the mental hospital Danviken presents them with an appendix consisting of a protocol in which the writer of the letters is explained and described by that same institution. The letters are fragmentary, addressed to a dead friend and elliptically documenting the doting tutor and letter writer Zachäus Schenander’s increasingly instable perception of reality. In contrast to the nonsensical letters that take up the larger part of the novel, the protocol at the end retrospectively gives meaning and sense to the letters and thus presupposes a stable reference in language to reality. In the letters and in the relation between the letters and the enclosing proto-psychiatric protocol, a notion of “poetry” emerges that is closely related in the novel to two other discourses frequently referred to in the novel, that of economy and that of law. Rather than a mere thematic curiosity of the novel, these relations between poetry, economy and law will be at the center of this analysis.

In what follows, the significance of these relations in the text between law, economy and poetry remains presupposed, regardless of what hidden but possible meaning could be hermeneutically extracted from them. The purpose of this is to expose a self-understanding of the author and his own discursive activity; a self-understanding in which the triangular formula poetry-economy-law is presupposed in order to give meaning to the discursive activity of the writer and of the hero of the novel – to write poetry – and thus raise the question of what this juridical-economical poetics could add to our understanding of poetic writing around 1800.

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130 Clas Livijn, *Spader Dame och novellen Samtidens fantasi* (Stockholm 1997 [1824]).
Madness and the Law of Poetry

Clas Livijn’s *Spader Dame* exposes a complex web of connections between poetic writing, money and the law. There is however a fourth factor in the equation, namely madness. In three narrative levels the traces appear of on the one hand Zachäus Schenander’s growing madness and on the other, his poetic success. These two processes – becoming mad and becoming a poet – are never differentiated from one another by means of the manifestation of a relation, fixed or fluctuating, inherent to them. Thus, Schenander does not become mad as a corollary of him becoming a poet and vice versa he does not become a poet because he is becoming mad. In other words, the distinction between poetry and madness does not seem to be necessary.

However, madness and poetry are externally connected and put into a manifest relation with one another through their common relation, in the story of the novel, to a juridical institution. In thus framing them both and establishing the possibility to decide upon and make manifest their relation to each other, the inseparability of poetry and madness becomes determinable and meaningful, whereas without the interference of the law their relation was a non-relation, impossible to determine. In the story of the novel this discursive development is portrayed in the following steps: Schenander’s poetic letters to his dead friend have been found at the mental institution Danviken, but the poet’s way to the asylum, where the distinction between his madness and poetry becomes determinably indeterminable, only goes through an arrest for loitering and suspicion of murder. In *Spader Dame*, hence, madness–poetry–law forms a sequence without starting point or end point.

If it were possible to distinguish between different modalities of representation in the novel, the poetic modus could be said to be identical with the mad modus. However, the mad-poetic can only be mediated within the framework of an administrative, juridical protocol language. Three segments from the text will suffice to demonstrate this, one from each of the three levels of the novel – that of editor-publisher, mad poet, and of administration-bureaucracy.
Benägne läsare! Visserligen tycka många ansedda män med grånade förtjänster, att de på fri fot varande studenterna skriva och trycka så många dårskaper, att man åtminstone ej behöver göra sig det senare besväret med de lyckligtvis inspärrades; och såningen att säga, så – –; men för ombytes skull kunna väl dessa blad få medfölja till glömskans odödlighetstempel: något bibliotek. Skulle en eller annan dessutom förklara utgivaren obehörig att framkomma med denna obetydlighet, så påkallar han högt den sällheten att leva under Sveriges regeringsform, – vilken uttryckligen förbjuder alla monopolier, så att herrar utgivare av visa tidningar och flygskrifter, aldrig kunna med laglig befogenhet pocka på en uteslutande rättighet, att betjäna den vòrdnadsvärda allmänheten med nonsens.

Utgivaren.

Mad poet:


Protocol:

Sedermera skred ** till granskning av dessa sådana inkomna skrifter, som funnos utgöra en samling av koncepter till brev, avsände till någon av Brakanders vänner, och ehuru dessa voro av en otydlig beskaffenhet, fann ** icke destomindre därutav, att arrestanten Brakander tillförene, under namn av Schenander, varit student och vidare skolmästare, därunder han befattat sig med förbjudna spel och råkat i missämja med herr majren Leyonbraak […].

The poetry of madness and the madness of poetry cannot speak for themselves, but have to be made understandable and intelligible from the vantage point of a textual level that, within the fiction of the novel, puts it in relation to a juridical question of guilt or innocence – that is also a question of rationality and madness.

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131 Ibid., pp. 4, 83, 99.
In the protocol that puts an end to the novel, Schenander’s poetic madness is thus decided upon, judged upon, from a discursive point that is extra-poetic. Schenander is acquitted from the murder charges as being non-rational, i.e. mad, and escapes juridical punishment. However, by means of the protocol enclosing Schenander’s own capacity to speak and construct meaning, a crime of another sort is identified, namely that which is committed in Schenander’s letters against the laws of representation and its genres; or in reverse order, against the representation of the law, the language of the administered world and of the public sphere. Hence, as the novel progresses, Schenander’s poetic project seems to slide into a juridical logic and become captured within it. The poetic mode of representation becomes located in a metonymical relation to a crime against a norm of law: The law of representation and its genres and the juridical norm of the juridical institution thus become difficult to differentiate.

The Crime of Poetry and the Juridical Paradigm of Distinction

The three narrative levels of Clas Livijn’s Romantic novel – the comment of the editor, Schenander’s letter to his dead friend and the administrative protocol that encloses these letters – could be seen as a radiograph showing the connections between three different topoi – madness, poetry and law – which effectively enables the self-understanding of poetic writing as a crime. The relation between a juridical discourse and a poetic discourse seems to be sufficiently

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132 This is in line with Louis Althusser’s description of the ISA, the institutional state apparatus. In his essay on ISA:s Althusser defines ideology as the representation of relations to the conditions of existence as they are represented in ideology. In other words, it is an imaginary relation of the “individuals to the real relations in which they live.” Furthermore, this ideology has a material existence in actions and practices that are enforced by apparatuses. The practice thus makes the idea of ideology disappear and become concealed as such. Since the aim of ideology is to produce concrete individual subjects, and thus subject them, these apparatuses work through a logic of the obvious, in which the recognition – through the act Althusser calls interpellation – of the subject is performed as if it were already always constituted. Althusser writes that the first step to a “scientific (i.e. subject-less) discourse on ideology” would be to break with ideology from within ideology – to acknowledge that one is already always in ideology. Althusser points out that ideology through interpellation means that those who consider themselves outside of ideology are in fact at the core of it; “one of the effects of ideology is the practical denegation of the ideological character of ideology by ideology: ideology never says, ‘I am ideological’” (author’s italics). Whereas Schenander’s letters could be said to be an attempt to reach a position outside of ideology in this sense, it could be said to be the particular effect of the novel as a whole to expose the workings of ideology “scientifically” in Althusser’s sense. Louis Althusser, "Ideology and Ideological State Apparatuses" in Lenin and Philosophy and Other Essays. trans. Ben Brewster (New York 1971 [1970]), p. 117 f.
operative in the meaning production of the text to warrant the broader question of how this
relation could be defined – historically as well as formally.

This question reaches beyond Livijn’s novel. If one of the characteristics of the Romantic
novel is precisely the revolt against a given order – inspired by the French revolution and its
political reverberations – the question could as well be asked about the Romantic novel as such:
How should one understand the relation between the crime against a law (or a social order) as a
motif in the texts and the self-understanding of the text as being itself related to a crime against a
law of aesthetic theory? In other words, one could ask for the specific connection between the
pragmatics and semantics of the poetic discourse.

Since this question touches on the core of Romantic literary theory, namely Schlegel’s
aspiration to a permanent parabasis – the digression in which the author addresses his audience
outside of the fiction – which transgresses, transforms and mirrors that which is enacted in the
poetry so as to make manifest its perpetual becoming, the question could easily be answered with
reference to Schlegel’s own words, or even better with any available poststructuralist theory of
language. This however risks concealing the specific historical condition that emerges in the
connection, which is not in any way self-evident, between a practice of law (which here must be
assumed to have implications beyond the limits of actual court rooms) and a certain practice of
writing: A relation between the juridical and the attempt of the time to define the literary and the
aesthetic. Such a liaison should, of course, not be construed as a cause to an effect, but rather,
with Foucault, as a discursive connection that makes something possible to be uttered as true, in
this case the juridical self-definition of poetry.\textsuperscript{133}

However, in order to determine this relation between law and poetic writing, a step back to
literature’s own law, the genre, seems necessary. The hybrid form of the Romantic novel, in
which genres are mixed and boundaries crossed, seems to make “literature” conscious of itself as
its own system of norms, which at the time when norms might actually have been enforced to
some degree, was impossible. It can, hence, be assumed that the possibility of a specific

\textsuperscript{133} For a discussion on Romantic literary theory, irony and the idea of a transcendental poetry that suspends itself in
order to create itself, see Ernst Behler, \textit{German Romantic Literary Theory}, (Cambridge 1993), p. 150 ff; a more
audacious interpretation of Romantic literary theory that has been consulted is Philippe Lacoue-Labarthe and Jean-
Luc Nancy’s, in which the Romantic fragmentation is seen as parallel with the production of the subject, which
refers to itself by negating itself, marking the contours of its absence. Philippe Lacoue-Labarthe & Jean-Luc Nancy,
awareness of the norm as contingent on its own transgression is preceded by a crisis of the norm-constituting operation. This argument could thus be summarized: It is only when the enforcement of this genre-system is disabled, as it is in the Romantic novel, that the actual reference to practices of “literature” becomes evident.

This could be understood with the help of Agamben’s above-discussed theory of the presuppositional logic of the law; in order to maintain reference to life, the norm of law must presuppose an exception to the law, in much the same way as parole confirms the reference of a word by means of simultaneously containing it as a non-referential lexical instance in langue. Thus understood as a linguistic system, the law hence has its constitutional moment in its own suspension. To once again cite Agamben, ”the rule can refer to the individual case only because it is in force, in the sovereign exception, as pure potentiality in the suspension of every actual reference.”134 Further on I will return to a discussion of how Livijn’s novel could, with the help of Jacques Lacan’s concept of Woman’s jouissance and a reiteration of the discussion of Agamben and Benjamin, be seen as aspiring to a system of order alternative to the presuppositional one. First however, I will take one step back and recapitulate the position of Schlegel discussed in the previous chapter, and the apparent connections between “literature,” aesthetics and law around 1800.

In his programmatic Athenäum-fragment, Schlegel makes an explicit allusion to a juridical terminology: "Sie allein [Universal poetry] ist unendlich, wie sie allein frei ist, und das als ihr erstes Gesetz anerkennt, daß die Willkür des Dichters kein Gesetz über sich leide."135 The poetics of endless becoming, escaping every theoretical framing, is defined as a law that annuls the law through an absolute act of will. As seen in the previous chapter, Schlegel is not talking of anarchy, but of a law that is lawless. In another fragment, A. W. Schlegel puts righteousness and poetry as each other’s opposites: "Die moralische Würdigung ist der ästhetischen völlig entgegengesetzt."136

Novalis too has dedicated a few fragments to the concept of law, in which he seems to make an attempt to a Romantic philosophy of right. What is important is what definition is not

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136 Ibid., 182
granted to law: "Ein echtes Gesetz kann ich nur insofern erkennen, verstehn, als ich darnach handle” and in another fragment, "[d]as Recht ensteht erst in der Sphäre der Individuen.” However, Novalis also writes the following: "Das allgemeine Ich besitzt *ipso jure* die Akzidenzen, und zwar *ex jure identitatis.*”¹³⁷ Hence, from the first quote it becomes clear that it is only through the force of law that law can be understood and known by the individual I’. From the second quote it seems that this nominalist law only permits *das Recht* when it is realized in the sphere of individuality. From the last quote however, it would seem as if the universal I’ only possesses individuality through the force of law. Whatever else could be said of Novalis’ law, it appears to identify legality with its facticity.

Unlike Schlegel’s *Lucinde: Bekenntnisse eines Ungeschickten* and Novalis’ *Heinrich von Ofterdingen,*¹³⁸ the transgression of genre rules in Livijn’s novel does not succeed in becoming manifest within the confines of a poetic discourse, without the need of extra-poetic points of reference. Nonetheless it performs such a transgression. It is thus important to emphasize that the poetic crime in Livijn’s novel also is a motif, put against the motif of an actual juridical institution, whereas the crime of the transgression in a novel such as Schlegel’s *Lucinde* only seems to take place within the limits of a poetic discourse. *Thus, the novel Spader Dame thematizes the affinity between the genres of representation and a juridical reality. What the novel does not do, however, is to articulate it in any particular statement.*

When Poetry Escapes Law: The Economy of Poetry and the Temporal System of Signs

Livijn’s *Spader Dame* does not only thematize the conflict between poetry and law within the opposition of the two terms *madness* and *law,* but also in the two oppositional motifs of *exchange* and *punishment.* Whereas exchange eradicates hierarchical relations and substitutes

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them with relativity, punishment sustains these relations; whereas the former is determined by a paradigm of the experiment, according to which truth is not contingent on a norm, canon or dogma, the latter is the enforcement of precisely this paradigm of verification. Poetry thought of as exchange would then be structurally equal to an experiment and the logic of punishment its opposite. In his own account, Schenander is a poetic exchanger, and thus, as Otto Fischer has noted, someone who translates signs into other signs according to the principles of the discipline of political economy as it emerges in the end of the eighteenth century. The poet Schenander situates himself in a semiotic universe where the signified always is another signifier


Schenander’s mad-poetic writing as an exchange of signs – of money, kisses, hopes – is however, as has been discussed above, only presented within the framework of juridical protocol sentences aiming at establishing Schenander’s guilt or innocence in anticipation of a punishment.

Fischer understands this as a discursive control which forces Schenander’s letters into a semantic referentiality according to the restrictions of the public sphere. Furthermore, Fischer argues that the novel shows how this control of discourse in the end fails, as it is contaminated by Schenander’s madness. However, this could be expressed differently as a restriction of Schenander’s discourse within the text, as only made possible when subordinated to the juridical control of the public sphere. It is precisely through the subordination of Schenander’s letters to this juridical interpretation that the criminal “Brakander” – the name Schenander gets when he lets himself be mistaken for a wanted criminal – again can become the madman-poet “Schenander” and be discursively transported from the prison cell to the madhouse, where his madness can be expressed, as the protocol states, in gardening and writing.

Av vaktmästaren är sedermera den underrättelse lämnad, att Schenander, efter dess ankomst till dårhuset, varit i början svår att styra. En dag hade han märkt vaktmästarens dotter sysselsatt att plantera några blommor, och på begäran fått tillstånd att biträda henne. Efter den tiden hade hans

139 Fischer, p. 9.
140 “Although when I closer consider it, I do not desire more than what I am capable to return. I am an exchanger. I want to convert feelings, I want to exchange kisses, I want to realize expectations; and I do not reminisce, that the bank – earth – is empty of real coins.” Livijn, p. 41.
uppförande helt och hållet förändrat sig. Han hade sökt sysselsättning och än arbetat i trädgården, än åter skrivit. Likväl hade hans sinnesförvirring understundom varit synbar, då han utbrustit i högst besynnerliga tal till blommorna, fåglarna och molnen, ja till och med till de frusna rosorna på fönsterrutorna.  

If, then, the question is no longer to what extent Livijn’s novel contains a subversive gesture towards a modern capitalist society of the spectacle, as Fischer argues, but rather how its manifest self-understanding – according to which poetry and law are inextricably entangled – the question of Schenander’s poetic success or defeat vis-à-vis the discourse police of the public sphere becomes less pertinent. Thus, rather than an interpretation of a form of resistance, the knowledge interest here would be that of the relation between poetry and the public sphere as such. It then becomes clear that the poetry only achieves its freedom – its “poetic license” – by means of the incrimination of this freedom in the public sphere. Only when put in relation to a law can poetry, in the capacity of madness, fulfill its discursive function as being without any law. Through the transport to the mental institution, Schenander at last becomes situated outside of every jurisdiction, if only to be subject to that permanent judgment that, according to Foucault, was the essence of the extra-juridical asylum. 

Meanwhile, the conflict between exchanging and judging that must precede the suspension of juridical questions through the internment in the asylum – by means of which Schenander is left in peace to write – correlates to the above discussed bio-political conflict in the end of the eighteenth century between political economy and public law: The traditional juridical sovereignty reaches an impasse when its subjects are simultaneously economical (outside of law) and juridical (inside of law) and a new sphere of power emerges in the form of a control and disciplining of the population, of man as species – what Agamben calls bare life. In

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141 Ibid., p. 103.
142 I use this term loosely after Jürgen Habermas. Thus the knowledge interest at stake here is closer to that which Habermas identifies with the social sciences, exposing the contingency of an order that is intrinsically social. Jürgen Habermas, Knowledge and Human Interests, trans. Jeremy J. Shapiro (Boston 1971), 308 ff.
143 Fischer notes that Schenander never is immune to the hegemonic discourse and that Schenander as well as revealing the phantasm of the public sphere can become his own undoing. However, I argue that what Fischer poses as conflict, could as well be understood as interdependence. Fischer, p. 11.
144 Foucault writes that “[i]n previous times, unreason was placed outside judgement, to be arbitrarily handed over to the powers of reason. Now, it was judged, and not just once, on entry to the asylum, so as to be recognised, classified and declared innocent forever; instead it was caught in a perpetual judgement, which never ceased to hound it and apply its sanctions, proclaiming faults and demanding a frank admission of wrongdoing, banishing anyone whose errant ways risked compromising the social order for a long time. Madness escaped arbitrariness only to fall into a sort of endless trial, for which the asylum provided the police, the prosecutors, the judges and the executioners.” Foucault (2006), p. 503.
other words, the law as a hermeneutically determined norm becomes a powerless tool subordinated to premises that are contradictory to the classical juridical, namely the premises of the experiment. This leads to a positivist concept of law, according to which its reference to life consists solely in the facticity of any particular implementation of it.

This new bio-political relation between law and economy, discussed in chapter 1, corresponds to the relation in the novel between the protocol and Schenander’s letters. His poetic writing as an exchange of signs assumes a position opposed to the question of guilt and innocence posed by the law, parallel to the position of the emerging field of political economy. However, in the novel as well as in the public sphere these two principles are as much opposed as they are dependent on one another. The triangular relation that structures Spader Dame between 1) the medium of money and the medium of poetry 2) poetry and madness and 3) poetry and law, thus exposes how the self-understanding of poetic writing as a transgression of the law of representation relates to a public sphere in which the force of law has lost the objectivity of the legal norm to the “pure force” of political economy.

**Excursus 1: Marx**

The principle of exchange upon which Schenander’s poetics is modeled, in contrast to the juridical discourse, is one of equivalence by means of difference. Some fifty years later, this principle is rephrased in Karl Marx’s privileging of exchange value over use value. The commodity, Marx writes in the first volume of *Capital*, acquires a double existence as value-form and physical form; however, this value-form is only attained through the equivalence between physical forms, in Marx’s example between the linen that later becomes the coat.

> It is the expression of equivalence between different sorts of commodities that alone brings into relief the specific character of value-creating labour, and this it does by actually reducing the different varieties of labour embodied in the different kinds of commodities to their common quality of human labour in the abstract.\(^\text{145}\)

> Nur der Äquivalenzausdruck verschiedenartiger Waren bringt den spezifischen Charakter der wertbildenden Arbeit zum Vorschein, indem er die in den verschiedenartigen Waren steckenden, verschiedenartigen Arbeiten tatsächlich auf ihr Gemeinsames reduziert, auf menschliche Arbeit überhaupt.\(^\text{146}\)


In other words, it is only by means of the abstract equivalence in exchange that difference comes into expression in the first place. The physical form of one commodity thus becomes the value-form of another commodity; the body of one commodity “acts as mirror to the value” of another.147 The linen, then, expresses its exchange value in relation to the use value of the coat. Hence, the two values are bound up in a temporal process where “linen” only acquires its signification through the realization through labor of its virtual capacity as “coat.” Further on, Marx notes how this gives the commodity a “mystical character” as fetishism, in which human labor is given an objective form separate from it. Labor, then, is only given a value through the relation between different products – commodities – of labor. In this, commodities become different from natural phenomena, as their exchange value-relations have no relation to their physical properties. The exchange, then, is the equilibrant force, in which all things, as the objective form of exchange value, are reducible to one another.

However, the impact of physical properties on this system of equivalence is not simply dismissed – contrary to what Fischer argues is the case with Schenander’s semiotic universe of total translatability. Rather, a mystical, hieroglyphic, and fetishistic bond attaches sign and thing to one another – and here Marx’s language reaches its own impasse – as two ontological strata separated by the relative value of exchange and intertwined by the fixed value of labor-time. In other words, it is a system that is both semiotic and empirical; “in the midst of all the accidental and ever fluctuating exchange-relations between products, the labour-time socially necessary for their production forcibly asserts itself like an overriding law of Nature.” Value, then, arises from human labor – from a reference to life – but is nonetheless detached from this reference in its becoming an objective form, distilled in things. A disjunction thus appears between the use value that remains in the sphere of human life and the exchange value, which exceeds this reference through its almost-autonomous circulation of signs.148

The circulation of money as capital is, of course, the realization of this pseudo-autonomous system of exchange value-signs. Whereas the formula for circulation of commodities C-M-C (commodity-money-commodity) results in something qualitatively new, a

148 In a footnote to the quoted passage, Marx quotes Engels saying that a law “that asserts itself only by periodic revolutions” is a law of Nature. The value of labor-time is this hidden law of nature to which the social activity of exchange is subject to. This seems to mean that a facticity of law is the precondition for the absolute relativity of exchange. Marx, 1978, p. 322 f.
new use value, the circulation of money as capital M-C-M indicates a perpetual expansion of value without reference to any physical properties. In contrast to the miser, a “capitalist gone mad,” for whom accumulation of exchange value has become an end in itself, the capitalist is someone who realizes that only constantly renewed exchange of exchange value will increase it; in other words, that renewed differentiation – connections created between signs – will increase the sum total of signs in circulation. In this Marxian sense, Schenander is, like all Romantics, a poetic capitalist struggling to overcome his inborn impulse to become a miser.

The never-ending augmentation of exchange-value, which the miser strives after, by seeking to save his money from circulation, is attained by the more acute capitalist, by constantly throwing it afresh into circulation.149

Die rastlose Vermehrung des Werts, die der Schatzbildner anstrebt, indem er das Geld vor der Zirkulation zu retten sucht, erreicht der klügere Kapitalist, indem er es stets von neuem der Zirkulation preisgibt.150

This “occult capacity” ("okkulte Qualität") possessed by money to add surplus-value to itself is completely dependent on the movement of value in the transition between the two forms of value: commodities and money; things and the signs denoting them. The capitalist, Marx says, “knows that all commodities, however scurvy they may look, or however badly they may smell, are in faith and in truth money.”151 All things are in truth signs, which will increase in number the more one exchanges one denomination – in the double meaning of this word – for another. There is here a doubling of the material world that echoes a theological motif: Call one thing by another name and turn it into another thing, while still keeping the original thing. This is the privilege of exchange value; to not only represent but also sustain the facticity of the commodity as use value. Thus, at a mere structural level one could say that two ontological levels are constructed as both separated and fundamentally supporting one another.

In one of the most unconcealed theological moments of this passage in Marx’s text, the surplus value’s relation to the original exchange value is described as that between father and son. Instead of being the mere representation of the relations of commodities, value in this form enters “into private relations to itself” and “differentiates itself as original value from itself as surplus-value; as the father differentiates himself from himself qua the son, yet both are one and

150 Marx, 1962, p. 167 f.
of one age.” Father and son are thus one only by means of separation into two, since only by producing surplus value does the original value become capital; “so soon as the son, and by the son, the father, is begotten, so soon does their difference vanish, and they yet again become one ….” In this paradoxical structure, the son is the father of his father and hence they are one by means of difference.

This structure of capital – in which exchange value becomes capital only through the simultaneous separation and union of original value and surplus value in the M-C-M formula – is however why a crisis in the circulation of signs and things inevitably will occur. Whereas commodities must be converted back into money in order to have value, this is not the case with money. The form of circulation, which presupposes the inseparability of sale and purchase, thus contains a possibility of crisis since money – i.e. exchange value – can claim its independence in a temporal deferment of the exchange back into new exchange value according to the M-C-M formula. Money, Marx writes in the Crisis Theory, thus has two different functions at two different points in time as a measure of value and as a realization of value that may not correlate if, in the temporal interval between them, the value in fact has changed. Hence, the formula of the capitalist crisis is that the two phases of the circulation process have become independent from one another through their fluctuation over time and hence must be reunited by force, i.e. money must, for a moment, become an arbitrary denotation in order to restore a regular process of circulation.

This is the crisis of the semiotic transactions of Livijn’s Schenander. Signs being temporal by nature through their S-T-S formula of circulation (sign-thing-sign), the surplus of denotation will, for the poetic madman as well as for the political economist, sooner or later eclipse the things denoted.

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153 For a discussion of the temporality of wealth in modern economic thought, see Foucault, 1994, p. 253 ff.
Excursus 2: Lacan, the Four Discourses and the Non-Presuppositional Order of “Poetry”

However, in the novel’s reflection of the newly emerged biopolitical public sphere – in which the law has lost its force but emerges with renewed strength as spectacle – the individuality of a poetic idiom, of a poetic exchange, is recaptured in that same order of economic exchange that excludes everything but a bare life deprived of identity. In this poetry as exchange – as opposed to a poetry enforcing a system of genre-norms – the presuppositional order of law, discussed above in connection to Agamben, is countered by an order functioning in a radically different manner that seems to negate the very concept of order; a non-presuppositional order.

However, before approaching the question of order and order in Livijn’s text, something should be said about the four Lacanian discourses and how they can help explicate the meaning-production of Livijn’s text.

It is tempting to see Schenander as a hysteric, criticizing and questioning the master signifier $S_1$ according to Lacan’s diagram of the four discourses.\(^{155}\)

\[
\begin{array}{cccc}
| & U & | & M & | & H & | & A \\
|---|---|---|---|---|---|---|---|
| $S_2$ & $a$ & $S_1$ & $S_2$ & $S_1$ & $S_2$ & $S_1$ & $a$ \rightarrow $S_1$
| $S_1$ & $\$ & $S_1$ & $\$ & $a$ & $S_2$ & $S_2$ & $\$
\end{array}
\]

In this diagram, the four different discourses are mapped out as the discourses of the University, the Master, the Hysteric and the Analyst. The discourses can be understood according to a sender-receiver-schema, in which the left side is occupied by factors in the speech of the subject and the right positions factors to which the subject’s speech is subjected. The upper positions are occupied by the overt and the lower positions by the hidden and repressed truth of these overt...

manifestations. The upper right position is that of the Other and the upper left that of the dominant factor determining the discourse.

The letters of the discourse formulas designate knowledge as $S_2$ as the aspect of language that is “diacritical, synchronic, systematic” and thus, as all knowledge, based on the signifying articulation.\textsuperscript{156} It is in the intervention of $S_1$ in this field of signifiers $S_2$ that something becomes represented and the subject emerges: In Seminar XVII Lacan formulates this as an intervention in a field that is “an already structured field of knowledge [savoir].”\textsuperscript{157} In the diagram of the discourses the $S_1$, i.e. the master signifier, thus designates the signifier which the divided subject $\$ \$ depends upon for meaning and identity; it gives meaning to knowledge. In any case, the logical connection between master signifier, knowledge and subject is seen in how the divided subject $\$ \$ emerges as the result of the intervention of the master signifier $S_1$ in $S_2$; “it is at the very instant at which $S_1$ intervenes in the already constituted field of the other signifiers, insofar as they are already articulated with one another as such, that, by intervening in another system, this $\$, which I have called the barred subject, as divided, emerges.”\textsuperscript{158} The subject is in other words originally divided and lacking. In the diagrams, then, the subject arises as an effect of signification, which simultaneously establishes both the subject and the master signifier, as factors interdependent on each other. The subject $\$ \$ thus becomes the element that verifies a signifier as a master signifier $S_1$ at the same time as the $\$ only emerges through the intervention of the master signifier in the battery of signifiers $S_2$.

Furthermore, there is the surplus jouissance, what is called the object $a$, which is both negated in the emergence of the subject $\$ \$ and constituted as such through this neglect.\textsuperscript{159} Bruce Fink notes that this is one of Lacan’s important contributions – to have extended the concept of structure so as to show the limits and impasses of structure as integral to structure. These exceptions to structure are on the one hand the subject and on the other the object $a$ as cause of desire. The object $a$ is thus, writes Fink, “the real which is encountered at the points where language and the grids we use to symbolize the world break down.”\textsuperscript{160} The surplus jouissance

\textsuperscript{158} Ibid., p. 15.
\textsuperscript{159} Bracher, pp. 112.
\textsuperscript{160} Bruce Fink, The Lacanian Subject; Between Language and Jouissance (New Jersey, 1995), xiii-xiv.
thus seems to be the point of excess in the signifying articulation that makes the discourse function as more than structures intrinsic to language.

In the university’s discourse knowledge hides the violence of the master signifier, working on the object $a$ as a knowledge that cannot be articulated, which hides the divided subject which is thus produced. In the master’s discourse, echoing the Hegelian master-slave-dialectic, the master signifier overtly dominates through the knowledge of the oppressed – the knowledge of the slave – and thus hides as its truth this divided subject $S$ from whom it acquires its knowledge. In the analyst’s discourse, however, it is the master signifier that is worked upon as the repressed truth of the divided subject $S$. Finally, in the hysteric’s discourse, which would be that of Schenander the mad poet, the divided subject criticizes the master signifier $S_1$ whose truth is knowledge $S_2$. In this “she” – the hysteric is a woman for Lacan – affirms the dominance of the master signifier while undermining and negating it, very much as “poetry” in Schenander’s speech undermines and presupposes the law.

Lacan says of the hysteric subject that she is motivated by “knowing at what price she herself is this person who speaks. For, qua object $a$, she is the fall, the fallen object, fallen as an effect of discourse, which in turn is always broken at some point.”161 In other words, this subject is an effect of discourse and, through this very effect it tries to gain knowledge about how it becomes this effect.

This, however, only seems to apply for a “Lacanian reading” of Schenander’s letters, attempting to analyze the “speech” of the text. Surely there is a hysteric discourse at work in the particular speech-position of Schenander in the text. However, the operative discourse, here again in the Lacanian sense of this term, of the whole text seems to be that of the analyst. In the discourse of the analyst – according to Lacan logically related to that of the hysteric – the “analyst” becomes, in the dominant position an “underwriter [gage]” of the divided subject’s – the analysand’s – unlimited speech and thus functions as “the cause of the analysand’s desire” which is however “destined to become a loss, to be eliminated from the process.”162 Hence, the positioning of the surplus jouissance $a$ in the dominant position seems to mean that the same transformation of knowledge that takes place in the master discourse, here is strangely mimicked and reversed: The dominant position as nonarticulated unlimited speech attains the knowledge of

161 Ibid., p. 34.
162 Ibid., p. 38.
the Other. Rather than being a matter of attaining knowledge of something, it is here the function of knowledge as such that is of interest: The analysand’s free speech does not lead to a new production of meaningful knowledge $S_2$, but by means of the logic of knowledge-production this knowledge-production is undermined and exposed. Since the extra-structural factor object $a$ is in the dominant position, knowledge-production becomes exposed as precisely “discourse.” In the analyst’s discourse, then, the hysteric, divided subject experiences her own hysteric discourse. In the same way, Livijn’s novel exposes the knowledge-production of the hysteric Schenander. The dominant position of the novel’s discourse is not occupied by Schenander the hysteric or her desire to negate the master signifier, but by the object $a$ which remains nonarticulated in the very discourse it determines; as the real in which the symbolization of the world falters; as the cause of desire – the Other’s desire – and not desire itself.

Returning to the question of order and of something exceeding the notion of order in Livijn’s text, help can be found in Lacan’s logical formula of “sexuation” – of how the subject must be either male or female – which Lacan develops in Seminar XX.

<table>
<thead>
<tr>
<th>Man</th>
<th>Woman</th>
</tr>
</thead>
<tbody>
<tr>
<td>$\exists x$</td>
<td>$\exists x$</td>
</tr>
<tr>
<td>$\forall x$</td>
<td>$\forall x$</td>
</tr>
<tr>
<td>$\phi x$</td>
<td>$\phi x$</td>
</tr>
</tbody>
</table>

It is important to note that “male” and “female” here does not refer to actual physical attributes or strategies of cultural construction. However, Lacan maintains that the human being is principally sexed as either man or woman, but only insofar as this means that there are two
possible effects of castration for the barred subject $. There are, in other words, two ways of lacking: the male and the female way.\textsuperscript{163} Hence, in this sense “sexuation” here means that the body in fact does not exist in its capacity of body before there is a jouissance; i.e. before it goes through the castration of language, since it is in the jouissance of knowledge that the body “suffers language,” paradoxically the language that also keeps the possibility of a little jouissance open for the $. What is provided in this Lacanian concept of sexuation is then nothing less than an alternative to the biological and cultural models of gender; a third model in which there is no symmetry or gradation between the two identities “man” and “woman” but instead a radical split as a function of the castration of the subject in becoming. Lacan’s notorious claim that there is no sexual relation – i.e. between man and woman – is thus supported by how these forms of lacking do not form a symmetry or complementary relation to each other, but rather are formed separately as one of two available functions of being a speaking being. This is, however, to the advantage of the women-side of things: Whereas the man is left with only his phallic jouissance in language – i.e. the mediated jouissance made possible and sustained by the very castration of language that limits jouissance – this form of lacking jouissance has an alternative, although asymmetrical, in the jouissance of women.

For the purpose of illustrating the competing orders – of law, of economy, of poetry – in Livijn’s text, I will here understand the formula for the distinction between man and woman in Seminar XX as between two logical orders through which a speech-position of the subject is made possible.

Attached to the logical formula of man and woman

\[
\begin{array}{cc}
\text{Man} & \text{Woman} \\
\exists x - \Phi x & -\exists x - \Phi x \\
\forall x \Phi x & -\forall x \Phi x \\
\end{array}
\]

\textsuperscript{163} However, my use of this diagram departs somewhat from Lacan, who on psychoanalytical grounds is forced to insist on a strict correlation between sexuation and sexuality. For example, Lacan does say that whoever situates himself as a man will have no chance to “make love with a woman’s body, otherwise stated, for him to make love, without castration.” This, Lacan says, “is the result of analytic experience.” I find this claim impossible to accept, and it is here adjusted to that the two positions, the two functions of Woman and Man, are impossible to occupy at the same time. The very appeal of this model proves this impossibility: We, as men or women, can understand both these two forms of jouissance in identifying with them. Jacques Lacan,\textit{ The Seminar of Jacques Lacan Edited by Jacques-Alain Miller: On Feminine Sexuality, The Limits of Love and Knowledge: Book XX, Encore 1972-1973,}\ trans. Bruce Fink (New York, 1998). p. 71.
is the connected diagram of jouissance. On the male side there is the phallus $\Phi$ and the barred subject $\&$ pointed in the direction of the object $a$ on the female side, along with the Woman $La$ pointed in the direction of a signifier $S$ in relation to the barred Other as the lack in the Other ($A$), and finally in the direction of the phallus $\Phi$ on the male side.

To start with an explication of the strictly logical part of the diagram, the male $\exists x \neg \Phi x$ indicates that at least one male (the "existential" $\exists$) is not castrated and thus enjoys uninhibited jouissance – this is the figure of the primal father – whereas $\forall x \Phi x$ indicates that all men (the universal quantifier $\forall$) are castrated. In other words we have a closed set of men; of all men that are castrated with an outside of this set where the non-castrated man must be in order for the set of castrated men to remain closed. This is in other words the logic of bureaucratic language and of law in which, as was discussed in Chapter 1, an outside must be presupposed, through an inclusive exclusion, for the order to acquire actuality; for the set to be closed; the language to have reference; the law to be in force.

On the woman’s side of the formula, the $\neg \exists x \neg \Phi x$ shows in a double negation that there is no woman who is not a function of the phallus. This is in other words logically identical to the male $\forall x \Phi x$, saying that all subjects are castrated, but still indicates another experience; it indicates the difference between the affirmation of castration for men and the negation of the negation of castration for women. In $\neg \forall x \Phi x$ however, the universal quantifier $\forall$ is itself negated, which indicates that there is in fact no universal of women who is a function of the phallus. Hence the barred Woman; “‘Woman’ (la) is a signifier, the crucial property [proper] of which is that it is the only one that cannot signify anything, and this is simply because it grounds woman’s status in the fact that she is not-whole.”

This not-all of women in other words determines women as an open set that lacks totality and solely consists of singularity. Thus, in this side of the formula we do not have the logic of presupposition – there is no attempt to establish a totality by means of a inclusive-exclusive presupposing of an outside of the inside – which always requires something like the sovereign, the primal father, master signifier or any other figure of this sort for the closed set to stay intact. In contrast, there is no outside of the open set of women.

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One way of understanding this relation or non-relation between man and woman, seems to be that the open set of women becomes the radical opposite of the male $\exists x - \Phi x$; instead of being the foundation of the closed set of men, it marks the possibility of the absolute undermining of this presuppositional order of men; it provides an outside that is not the preserving and mitigating primal father/sovereign but instead that which threatens to destroy the presuppositional order of men completely. In other words, the open set of women could here be seen as something echoing the divine violence that Benjamin sees as “outside the law, as a pure immediate violence” and which, Benjamin writes, “furnishes the proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible […].”\textsuperscript{165} Without taking this analogy too far, the sexual non-relation seems to be indicative of the relation or non-relation between an order which is determined from a point outside of it – and thus both external and internal to it – and a non-relational order in the sense that it does not engage in this inclusive-exclusive logic of presupposition. The announcement of an order of “poetry” that is not an order would be the possible subversive force of Livijn’s text. However, Schenander’s activities take place on the threshold of these two speech-positions of man and woman. On the one hand, the “poet” aspires to become the exception to the law; to reach the position of $\exists x - \Phi x$; to be exempted from the phallic inhibition of laws and language alike. In other words the “poet” is in this capacity positioned as a man. On the other hand, there is the poetic-mad-economic undermining and overcoming of the presuppositional order of law by means of the economic paradigm of exchange, of semiotic interchangeability without any reference to a point zero, a $\exists x - \Phi x$, both inside and outside of the semiotic structure.\textsuperscript{166}

To return to the lower part of the diagram, it indicates the limits of love and knowledge that follows upon this sexuation; the division of subjects into two speech-positions. The most important aspect here, is that the Woman as part of a non-order (a not-all, a not-whole, a non-totality), has access to a signifier $S$ that upholds the lack in the Other ($\mathcal{A}$). This is however only in addition to being directed towards the male phallic jouissance, which the not-all of women do not have, as indicated in $\neg \forall x \Phi x$ and which not at least one woman is not a function of as

\textsuperscript{165}Benjamin, 1978, p. 297.
\textsuperscript{166}This is in other words the logic of sovereignty as explained by political theology, which in Agamben’s account, following Carl Schmitt, functions as language, as a logic of presupposition in which the juridical reference is presupposed by being suspended. The order of law and language attains force and reference by presupposing the non-juridical or non-linguistic, prior to the actuality of the juridical or prior to linguistic reference. Agamben, 1998, p. 46 f.
indicated in \( \exists x \ \neg \Phi x \). The Woman’s jouissance is in other words not completely exempted from the phallic function, but in not following the logic of the primal father (the including-excluding) there is here no illusion of escaping the phallic function by hoping to become the father or the sovereign. Whereas the “poet” in Livijn’s text seems to occupy the position of trying to overcome subjection in language (castration), the text however – its particular meaning-production in the interfolded discourses of law, economy and poetry – asserts that there is no possibility of overcoming this subjection, but only of exposing it.

In accessing the lack in the Other, then, the Woman’s jouissance has a relation to the Other insofar as it, Lacan says, “qua Other, […] can but remain forever Other.”\(^{167}\) Hence, it is the fact that there is no Other of the Other that is here inscribed in the signifier marking it as barred \( S(4) \); it shows the Other in its “most radical sense.”\(^{168}\) This amounts to an experience of lack which is not itself lacking; perhaps it can be described as a full experience of lack. Whereas the man’s jouissance in the presuppositional order of law and referential language needs an object to mediate it – some kind of substitute for what is lacking – the woman’s jouissance consists in experiencing the lack in the body’s jouissance as such. This seems to resemble something like Roman Jakobson’s functions of language; on the one hand the referential function, dependent on context and situation and hence always striving to overcome these contextual disruptions as a lack in the meaning of the statement and on the other hand the poetic function that says the restrictions of the code with which it is said. What seems like a tectonic shift from this however, is Lacan’s insistence that there is no relation between these two functions. A structuralist account of such functions would instead insist on their complementary, relational character. The important question is then how the lower part of the diagram relates to the upper logical formula, and the fact that there is no totality of women, no Woman. An experience (a jouissance) of lack as lack, of restriction as restriction, is thus seen to necessitate a logic that is not in any relation to the kind of order which presupposes its outside in an inclusive exclusion. In other words, there is no primal woman through which a closed set of women could be established. This possibility of “Woman’s jouissance” – or as is the case here, of “poetry” as an order – thus depends on the absence of universality; “[i]f it inscribes itself there [as woman], it will not allow for any universality – it will be a not-whole, insofar as it has the choice of


\(^{168}\) Ibid.
posing itself in $\Phi x$ or of not being there $[de\ n'en\ pas\ être]$.” ¹⁶⁹ Hence, in the woman’s $-\exists x - \Phi x$, $\forall x \Phi x$ the absence of universality is analogous to the absence of a force of law or a fixed referentiality of language. It guarantees that no fixed order can be established. If there is movement towards exposing discursive restrictions – the interdependence between poetic freedom and law – in Livijn’s text, this is the formula it follows. By exposing the discursive network which gives each of its components meaning, Livijn’s text at least aspires to a point which restrictions in language and its logical order of presupposition does not reach.

A Note on the Medial Perspective: Poetic Writing and Money

The conflation of economy and poetry as two possible relations between information and reality – united in Spader Dame by their common opposition to the order of law – also poses the question of their respective medial qualities.

Initially it should be noted that Livijn’s novel without greater difficulties can be read along the lines of Friedrich A. Kittler’s analysis of writing systems in the end of the eighteenth century and beginning of the nineteenth century. Zachäus Schenander’s letters can thus be seen as an attempt to articulate a pure signified, modeled upon the voice of the mother/nature – what in Kittler’s analysis becomes the Romantic text’s “circulation of the origin.”¹⁷⁰ Although this is not a motif in the novel, Schenander’s poetry can be seen as originating from the woman and as having the woman as its final destination; the productive variable in Schenander’s writing remains throughout the novel the woman that evades Schenander’s own practice of signification through her code name: “Spader Dame.” For Kittler, the motherly transcendental signified is not only a theoretical concept but also an actual discursive effect of a pedagogical practice in which reading skills are acquired by means of the mother’s voice.¹⁷¹ The function of such a transcendental signified, a signified without any signifier, can be detected in the self-understanding of Livijn’s novel. The story narrated in the novel revolves around productive and

¹⁶⁹ Ibid., p. 83.
¹⁷¹ Kittler, p. 66 f.
distributive connections between the writing author and a female voice. Schenander’s apprenticeship, his *Bildung*, which takes him from the position of tutor to that of mad poet, is from beginning to end a search for the silent woman – the “Queen of Spades” (“Spader Dame”) – who inspires him to write. This woman becomes the ideal picture without original that Schenander, as every Romantic before him, fantasizes about. In the woman, the “Queen of Spades,” he rediscoveres those hieroglyphs (“hieroglyfer”) that he already knows since the first sighs of his language instruction; they are the signs he claims to already have read (“förr läst”) and already knows (“känner […] fullkomligt”). It is furthermore the nameless woman, naturally lacking the capacity of signifying her pure signified, who allows him to carve his magic runes (“trollrunor”) only to later awake from his hallucinogenic writing and cry out his horror when reading what could not be written: “I was horrified when I read through what I had written. Am I mad of love?” (“Jag förskräcktes vid genomläsningen av vad jag skrivit. Är jag vansinnig av kärlek?”).¹⁷² This may not be an explicit manifestation of that hostility towards writing which, according to Kittler, defines the “writing system” of this time. However, the text produces its meaning and narrates its story by means of a clear distinction between writing and voice and an imbalance between male signifying and the female signified.

In the manifest opposition between a protocol language and Schenander’s poetic discourse there is, too, a similarity with the relation Kittler identifies between the public servant and the poet. As has been discussed, Schenander’s poetic discourse is only made possible by being opposed and contrasted with the official language of the public servants who incarcerate him.¹⁷³ The official, institutional framework presents Schenander’s – in fact quite intelligible writing – as utterly incomprehensible and unutterable; as something akin to the utopia of a pure signified that Schenander himself acknowledges that he does not achieve. The possibility of “poetry” thus relies on a relation to the state, the institutional and the official, in order for poetry’s failure to write the voice to become presented as written voice. It should be said that this relation between poetry and state in Livijn’s novel does not express itself in the exact same way as in Kittler’s examples. Livijn’s novel does not exactly identify the poet with the public servant in order to recruit new public servant, as Kittler claims is the case with Romantic writing in the

¹⁷³ It can in this context of course be added that Livijn himself was such a public servant, and that his successful career reached its peak when he administered a reform of the Swedish prison system. Kittler, 103 f.
German context. It does however presume that these two discursive activities are defined and constituted through their opposition to one another.

Hence, the fact remains that Schenander’s discourse in the novel must be presented as the writing it denies. It suffices to picture Schenander’s letters as independent of all those official and institutional frameworks – the police in the story, the protocol explaining the story – to realize how the discursive function of these frameworks is meant to both conceal and expose the poetic letters as writing. Hence it is significant that Schenander at the asylum engages in gardening and writing.

Han hade sökt sysselsättning och än arbetat i trädgården, än åter skrivit. Likväl hade hans sinnesförvirring understundom varit synbar, då han utbrustit i högst besynnerliga tal till blommorna, fåglarna och molnen, ja till och med till de frusna rosorna på fönsterrutorna.¹⁷⁴

(He had sought an occupation and sometimes worked in the garden, at others yet again been writing. Even so his derangement had occasionally been apparent, when he burst out in utterly peculiar speeches to the flowers, the birds and the clouds, yes even to the frozen flowers on the windowpanes.)

In the concluding protocol the formula poetic writing/public writing = poetic writing has made the distinction between the two activities gardening and writing superfluous. A voice emerges from this synthesis between vegetation and writing, a voice that never departs from its origin in nature from where it can articulate the “utterly peculiar” (“högst besynnerliga”) signifiers without any particular signifieds – in other words the voice of the mother in the beginning of the nineteenth century.

It is however uncertain if the relation between voice and writing in Livijn’s case is the most productive one. Without support from Kittler’s analyses of German writers it is difficult to convincingly argue that the most important “network component” – the woman – has a sufficiently significant function in the self-understanding of Livijn’s text. The series mother/woman–voice–writer–poem is in Spader Dame of less importance than the productive relation between the public and poetic discourses. It is only through this latter relation that the love, which motivates Schenander’s poetic project, attains its significance as necessary for a poetic non-writing.

¹⁷⁴ Livijn, 1997, p. 103.
More revealing is the medial relation between money and poetry. Two perspectives here seem possible; on the one hand money is the translatability of everything into everything as was discussed above in connection to Marx; on the other there is the medial aspect of money as an actual, physical system of conveying information. Jochen Hörisch thus understands money as an “ontosemiological” schema of representation that, along with the religious communion and electronic media, put things and words, being and meaning, into a relation to each other. According to Hörisch’s argument, money becomes the key medium during the Renaissance for an ontosemiology of covering (Deckung). Just as the denomination of a coin only is “covered,” i.e. secured, by the head on its other side – or more precisely the gold reserve guaranteed by that head – philosophy, science and law seek to have their utterances “covered” by something absent from the actual utterance; empirical evidence, dates, universality, etc. Poetry however, is according to Hörisch the medium that does not require “coverage” for its utterances. Hence, it becomes the only medium through which a reflection on this monetary ontosemiology is possible. In other words, while aesthetic writing shares the lack of use value with money, it differs from money by not being necessitated by something outside of itself. As a corollary, there is according to Hörisch since the Renaissance an affinity between money and poetry that is also a rivalry; poetry sees in money a competitor which achieves what only poetry should be allowed to achieve; ”die Welt zu regieren und ihren (Richtungs-)Sinn zu bestimmen.”

As has already been discussed, there is a semiotic structure in Livijn’s novel that could be said to reflect the new social order of political economy. There is also, as Fischer notes, a motif of society as a phantasm. This manifest motif of the society of the spectacle could be seen as supporting Schenander’s own simulacral discourse in which there is no reference to an original reality. Signs, for Schenander, signify other signs. However, perhaps there is also a thematization in Schenander’s letters of an ontosemiological lack of “coverage.” In addition to the explicit comparison of poetry and money in the text as forms of “exchange” (“växling”), there is the motif of the card game already presented in the title of the novel. An unopened letter is thus compared with a card that has not yet been turned.

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175 This term works better in German, in which one can have Deckung for a purchase, a conclusion, etc.
177 Fischer, p. 9 f.

Later on, in Schenander’s fantasy about the temple of reason, the game of cards played by the evangelists of reason points out the affinity between reason and chance. The card game in the temple of reason is thus presented as a bizarre sermon of Enlightenment, held by Schenander’s antagonist Major Leyonbraak.

Major Leyonbraak förrättade där gudstjänst. Han tjänade inför altaret och höll fänighetens konungabok i sina händer. Han lade boken på det gröna täcket, han öppnade den och läste: Mina söta bröder! I frödige kalvar från Midian! I benåsnor från Gath! Låt oss skatta ollonen och stryka mjölonlöven från våra känsliga bröst. […] och vi skola genom kärlek omfatta varandra och trästa varandra; emedan människosläktet nu lever i slaggtiden, och lyktgubbarne lärt sig att med stadig arm bära upplysningens facklor.179

Only chance dictates the relations between signs and things. In the former quote this is explicitly stated at the level of the sentence; in the latter it is expressed by means of a satirical juxtaposition of tropes, i.e. a card game, religion and Enlightenment philosophy.

However, Schenander’s own discourse, by acquiring meaning through opposition to a public, juridical discourse, seems to be a discourse in which the semiotic structure of “coverage” has become superfluous. The result is a simultaneous closeness and distance between “poetry” and money. Money is first appropriated by poetry as identical with it and then exposed within poetry as dependent on the external “coverage” of what is present by something that is absent, which poetry can do without. The central passage can once again be quoted.

178 “Now it has finally arrived, it lays before me. What does it contain? The first card of a whole game of life. Ace of Hearts or ten of Spades? Happiness or death? Already the storm carries on its waves fluttering petals, they are from a torn flower of life and they float here and there, just as the expectations of the mortals.” Livijn, p. 72.
179 “Major Leyonbraak held a sermon there. He served in front of the altar and had king’s book of stupidity in his hands. He laid the book on the green canvas, he opened it and read: My sweet brothers! Thou lush calves from Midian! Ye donkeys from Gath! Let us laugh the acorns and stroke the bearberry leafs from our sensitive chests. […] and through our love we shall embrace each other and console each other; while mankind now lives in the time of rubbish and the will-o’-the-wisp has learnt to carry with a steady arm the torches of the Enlightenment.” Livijn, p. 85.
Dock när jag närmare betänker det, så begär jag ej mera, än vad jag förmår återbära. Jag är en växlare. Jag vill omsätta känslor, jag vill växla kyssar, jag vill realisera förhoppningar; och jag erinrar mig ej, att banken – jorden – är tom på verkliga mynt.\textsuperscript{180}

Nature is the bank. No value that cannot be returned is necessary. This is the capitalist’s crisis of circulation having been suspended in becoming permanent. There is no longer any forcible unification of the two separated steps of circulation, sale and purchase. Instead, exchange value has been given a complete privilege in relation to the value of the things that should “cover” its own worth. The coins “covering” these exchangeable signs are “real” and there is no purchase without an immediate return. The “real coins” of the earth do not run the risk of becoming the arbitrary values of a circulation in crisis. Such real coins, as opposed to those in the gold reserves, become the correlates to the poetic word, and not to money. These words of “poetry,” then, are – in this particular discursive network – not in the need of an absent guarantee of meaning; of something beyond the word itself that affirms that its transactions are covered by an account of meaning with sufficient balance.

There is however a much more direct connection in Livijn’s text between money and a critique of Enlightenment when “the goddess of Utility” (“Nyttans gudinna”) is said to be kissing “the chaffering nation! Which trades with everything, with honor and cotton, with promises and sugar” (“schackrande nation! Som handlar med allt, med ära och ull, med löften och socker”).\textsuperscript{181} It is not trade in itself – the monetary organization between things and signs – that is criticized here, but how the commerce is managed. The monetary regulation of the world is not opposed to another – e.g. a “poetic regulation” – but is criticized for being flawed. An excessive principle of utility – “And man is born into life for utility, and now – even after death” (“Och för nyttan är ju människan född i livet, och nu – även efter döden”)\textsuperscript{182} – has distorted the original utilitarian aims. The critique here is thus one of a commerce which has lost “coverage” for the relations between things and signs that it attempts to determine; with Hörisch’s word a defunct ontosemiology.

\textsuperscript{180} Ibid., p. 41.
\textsuperscript{181} Ibid., p. 81.
\textsuperscript{182} Ibid. The remark that man serves utility even after death refers to the commerce with bones from graveyards for the production of fertilizers. Ibid., 163.
Hence, it would seem that the critique of the monetary framework of Enlightenment rationality in Livijn’s text does have a medial component. The mediality of money is placed in proximity to that of “poetry,” although they are then separated through the former’s dependence on semiotic “coverage.” However, the critique of the ontosemiology of money is presented in connection to a juridical discourse which implements the ontosemiological maneuvers of “coverage” of the monetary medium. The confusions in the closing protocols concerning Schenander’s identity, his name and legal accountability, seem to be satirical cases of precisely the attempt to find juridical “coverage.” The monetary-poetic utopia of Schenander – in which there can be no crisis of circulation and the logic of “coverage” becomes redundant – is in itself only expressed on the conditions that it has “coverage” in the protocol as innocent, incomprehensible, mad and poetic. From this perspective the novel generates a complex and paradoxical configuration of themes in which 1) the poetic freedom from a monetary ontosemiology only takes place through identification with the monetary medium and 2) this poetic freedom from the monetary ontosemiology in itself is dependent on the logic of “coverage” inherent to such an ontosemiology – although now transposed to the discourse of law.

Conclusion

The claim of this chapter has been that the poetic discourse of Livijn’s novel is enfolded within a juridical discourse. This enfolding presentation of “poetry” operates through a simultaneous difference and affinity between the “poetic” and the monetary in its two capacities: as a medium and as the means of an economic discourse, which emerges in contrast to the juridical. In the meaning production of the text, the enfolding-presenting juridical discourse is what translates poetic “unintelligibility” into intelligible madness.

The achievements of Zachäus Schenander as a poet are parallel with his institutionalization at the asylum. Schenander’s journey to the asylum is however only completed by means of a legally motivated arrest, through which both his innocence and his madness is determined. Furthermore, the language of legal protocols in which Schenander is examined as a
legal subject, seems to be preconditioned by a language of economy; one that cannot be completely enclosed by the juridical demands for names, birth certificates, accountability and reason. Hence, the law is both necessary for translating the poetic-mad-economic representation into intelligibility and shown as obsolete by this very same poetic-mad-economic representation.

This relationship between the juridical and the economical on the one hand and between the juridical and the poetic on the other, is not merely a motif in the novel. Schenander’s modus of representation is also a transgression of the norm of representation enforced by the language of the juridical institution. Thus, the “poetical” was seen to have a double relation to the crime against a law. On the one hand the poetic transgression of the norm of law becomes a precondition for its production of meaning; on the other hand “poetry” undermines and overcomes this legality in being meaningful in a manner – economical, mad, poetic, non-presuppositional – that eludes the legal order.

Two digressions from Livijn’s text were made. The first one attempted to illustrate an affinity between Marx’s conceptualization of the circulation of capital and the poetic-economic meaning-production of the novel. In the second detour I tried to conceptualize the discursive functions and their interconnections in the novel with on the one hand the Lacanian concept of discourse and on the other hand to the two positions of man and woman, where the latter evades and exposes the pre-suppositional order of referential language.

The relation in Clas Livijn’s *Spader Dame* between an economy of poetry and a legality of the public sphere was compared with the new “governmentality” that according to Foucault enters in the second half of the eighteenth century: A public sphere consisting of subjects simultaneously economical (uncontrollable by the law) and juridical (uncontrollable as population and species). The force of law no longer exerts power. Instead, power is exerted with the economical experiment as the principle of verification: The law becomes the spectacle that supports a governmentality with diametrically opposed premises. The same relation of both conflict and interdependence between economy and law was shown in the both productive and restricting relation between Schenander’s letters and the interpretation of these in the enclosing protocol. The aporetic triangle of interdependence between the concept of “poetry,” economy and law was finally seen as the fate of the poetic medium when it together with money has become the constitutive opposition to the law.
The definition of the aesthetic genre of “poetry” at work in this “novel,” hence requires elaborate connections to be made to discourses generally thought as not pertaining to aesthetics. An attempt to finally summarize these connections as they have appeared could be to distinguish between three different “discursive movements” in how the novel classifies the genre of “poetry;” 1) in opposition to an empty force of law and its bureaucratic language 2) with discursive means dependent on this discourse of law – and its positivist concept of the norm – to point out that “poetry” and its subgenres are what they are “by law” but only insofar as there is no law and 3) in junction and an “almost identity” with the discourse of political economy and the qualities of money operative within it.
4. Summary

This thesis has approached the question of the juridical in three different sets of texts. Whereas the first chapter aimed to clarify and take a stance in regard to the difficulties pertaining to the historicity and ontology of any legal order, the latter two contrasted two opposed paradigms of aesthetic classification, while also attempting to provide nuanced readings of the two primary texts, Kant’s *Observations on the Feelings of the Beautiful and Sublime* and Livijn’s *Spader Dame*. Kant’s text exemplified a pre-juridical paradigm of aesthetic classification – i.e. means of articulating variations of the question “what is art?” – and Livijn’s text, along with Schlegel and the critical Kant, exemplified a classificatory paradigm in which this question has become inseparable from certain practices belonging to a juridical as well as an economical discourse.

To extract from these readings a comprehensive conclusion of either historical or structural kind does not seem possible, or at least not very honest, as the studied material has been limited and the theoretical considerations numerous. These readings should instead be understood as a proposal for further analysis of on the one hand correspondences between historical shifts in how “the aesthetical” has been articulated and shifts in the political, juridical, and economical discourses. On the other hand they leave the question open whether these correspondences lend themselves to ontological-structural or historical explanations. However, whereas the philosophical debate on the ontology of law exposes the intrinsic split between these two analytical methods, the readings of Kant and Livijn could serve to nuance the opposition between the two radical positions in the vein on Agamben.

To some degree the two encounters with historical documents should thus be seen as an experiment in relation to two ostensibly opposite sets of methodology and to their possible consolation. One conclusion does however seem as inevitable as it is obvious: The ontological model of order (legal, poetic, etc.) does not reach those discourses in which the pre-suppositional logic is absent, as it is in the early text of Kant, and the only means to understand these systems as meaningful would thus be to try to grasp their historical specificity.

The problem of ontology and historical specificity exposed in the contemporary discussions of order could thus be said to reverberate in the readings of the two historical texts, each in its own particular way grappling with the question of how to order things with words. In
the end it has been my ambition to expose this blind spot between what is historically specific and what is an ever-present ontological structure in these two efforts to make sense of the world.
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