Work to Rule

Rethinking Pashukanis, Marx and Law

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CONTENTS

Abstract

Karl Marx, and later the Soviet jurist, Evgeny Pashukanis, both argued that the legal subject arises from exchange relations peculiar to capitalism. This is usually misunderstood as a 'commodity form' theory of law, whereby the equivalence of the exchange relation leads to the abstractly equal legal subject of liberalism. This is a wrongheaded approach that has led Marxist legal theory down any number of dead-ends, and renders it unable to comment on contemporary inquiries into the force of law, the grounds of law's authority or the attack on the fiction of the unified subject. However, by taking the point of departure not as the exchange relation *per se*, but rather the exchange that takes place in the relations of production characteristic of capitalism - the wage relation, which masks the extraction of surplus - Marx and Pashukanis yield riches for the analysis of law. For the work of both writers embodies a fundamental Hegelian point: control over labour is itself a source of law's force.

By beginning from here and placing labour at the centre of the analysis, three themes that pervade contemporary critiques of law - *Gewalt*, authority and subjectivity - are each opened up to new readings. In considering each of these three themes, the fundamental focus of interrogation is the configuration of the relationship between labour and the economic, on the one hand, and law, the state and the political on the other. The critique of *Gewalt* thereby becomes one of demonstrating that the force inherent in the labour relation is neither a-legal nor reducible to state sanctioned force, and as such, is imbricated in law's complex relationship with force/violence. As to authority, labour is found to dissolve any clear distinction between sovereign command and employer command, and the structure of authority that permeates both private and public law is intimately linked with the question of value. The subject, as the site of the separation of citizen and labour, opens itself up to an historical and theoretical enquiry.

As well as regenerating Marxist legal theory, this approach also enables labour to be moved back into view in contemporary debates over law, sovereignty and exceptionality. It becomes apparent that the taking of emergency measures was a question of meeting the potentially law-founding violence of labour. Authority is intimately connected with guarantee, especially the guarantee of value. And the subject reduced to 'bare life' is found to be premised on an unacknowledged separation of labour, a misrendering of subjects as unproductive.

By conducting the analysis in this manner, it is argued, the rise of emergency measures and the decline of the guarantee of rights are linked to the decline in abstract labour, a 'real abstraction' of modernity essential to the fictive equality of the legal subject. It is only by taking control over labour - not mere exchange - as the starting point that one can get from 'work' to 'rule' and offer this contemporary critique in the spirit of Pashukanis and Marx.

Statement

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution and I affirm that to the best of my knowledge this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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The problem of the relationship between organisation and capitalist subordination of labour power is – if we look closely – a traditional problem of the theory of right and the theory of the State.

Michael Hardt and Antonio Negri
Labor Of Dionysus

Introduction

> The problem of the relationship between organization and [capitalist subordination of labour power] is - if we look closely - a traditional problem of the theory of right and the theory of the State. ... In the natural right tradition, for example, the alternation between and articulation between contracts of union and contracts of subjugation are philosophical attempts to hypothesize a formal explanation of a real problem. ... Only the capitalist organization of labor, however, exemplifies the paradox in a historically definite form and reveals its nature in daily practice.
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> Antonio Negri and Michael Hardt, *Labor of Dionysus*[1]

The contemporary form of capitalism is a central question for many scholars. So too is the apparent decline of the 'rule of law' and the increase of unchecked state power. One might think that Marxism, with its central concerns of economy and domination, would be able to connect these two fields of debate. However, much of Marxist legal theory is in a parlous condition. Orthodox Marxism continues to skate around the 'holes' in its theory when it comes to questions of law and state.[2] At the same time, those others interested in questions of emergency and exceptionality fail to interrogate the place of labour. As such, even as the changing nature of work 'reveals in its daily practice' the tensions between contract and command that colour theories of right and the state, the interconnection between 'work' and 'rule' goes unexplored.

This thesis is driven by the theoretical conviction that the Marxist study of law is faltering because - ironically - it has failed to properly conceptualise the relationship between labour, force and law. This failure is in large part due to misreadings of the key text in the area, *A General Theory of Law and Marxism*, by Soviet jurist Evgeny Pashukanis.[3] In short, these readings have proceeded from the assumption that law somehow derives from the commodity form, that the abstract legal subject is an effect of widespread commodity exchange. The failure to develop a theory that follows Karl Marx from circulation into the hidden abode of production has resulted in a faltering body of

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[1] Michael Hardt and Antonio Negri, *Labor of Dionysus: A Critique of the State-Form*, Minneapolis, University of Minnesota Press, 1994, 76.

[2] A phrase borrowed from Mike Macnair: Mike Macnair, 'Law and State as Holes in Marxist Theory', *Critique*, 34, no. 3, 2006, 211-36.

[3] Evgeny Pashukanis, "A General Theory of Law and Marxism," in *Pashukanis, Selected Writings on Marxism and Law*, ed. Piers Beirne and Robert Sharlet, London; New York, Academic Press, 1980; Evgeny Pashukanis, *Law and Marxism: A General Theory*, trans. B Einhorn, London, Ink Links, 1978.

thought that has little to say about the contemporary situation. However, by uncovering another Pashukanis - one concerned with authority, guarantee, abstract labour and force - this thesis charts a potential alternative Marxist approach to law. This is the Pashukanis that attracts the interest of Antonio Negri and Giorgio Agamben. This line of argument - which runs from G. W. F. Hegel to Marx to Pashukanis and onwards - places questions of *Gewalt* (violence/force), labour, origin and separation at its core. By developing this Hegelian argument, the Marxist critique is in a position to engage with the debates about law and exceptionality.

An overview of the Marxist study of law (Chapter 1) demonstrates its relatively anaemic contemporary condition. Pashukanis' contribution stands out as exceptional for its insight and creativity, explaining his attraction for many Western theorists. In Chapter 2 'Pashukanis applied', this thesis considers the subsequent application of Pashukanis' theories, most notably by China Miéville, the most recent and rigorous exponent of a certain understanding of the Russian jurist's thought. Miéville, despite the integrity of his approach, is emblematic of the misunderstanding of Pashukanis as advancing a 'commodity form' theory of law, whereby the equivalence of the exchange relation leads to the abstractly equal legal subject of liberalism. This approach has led Marxist legal theory down any number of dead-ends, and renders it unable to comment on contemporary inquiries into the force of law, the grounds of law's authority or the attack on the fiction of the unified subject. The 'Open Marxists' and the German 'State debate' also took Pashukanis as a point of departure in attempting to understand contemporary state-forms. Their work is examined as an unfulfilled gesture towards the proper concerns of a Marxist legal theory, namely how are the political and the economic represented as separate, and how law cannot be rendered as either part of the 'base' or the 'superstructure'.

In these chapters that together make up Part I 'Marx, Pashukanis and Law', there will be no attempt to distil any proper Marxist definition of what law 'really' 'is' or 'does'. The first lesson of even orthodox jurisprudence is to caution against equating a study of law with the question 'What is law?'. Well before the blows of deconstruction assailed legal theory, writers cautioned against a futile quest for an exhaustive or exclusive definition of law.[4] Further, writers such as Hans Kelsen complicated this question even more by seeking to identify the proper object for a study of law, a Kantian problematic that often

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[4] See e.g. M. D. A. Freeman and Dennis Lloyd Lloyd of Hampstead, *Lloyd's Introduction to Jurisprudence*, London, Sweet & Maxwell, 2001, Ch2.

went misunderstood in Anglo-American circles as yet another attempt to essentialise law.[5] Nonetheless, with a few exceptions, including Olufemi Taiwo's development of the theory of legal naturalism, Marxist theorists often blundered blindly into this field ready to proclaim what law really was, what it really did or how it was really used.[6] The lack of sensitivity to these questions might explain its never having developed into a coherent corpus respected within legal academe, or it may be that the historical/philosophical shifts of the 1970s to 1990s would have put Marxist legal theory on life support in any event. Whilst there ultimately may be merit in assessing how the Marxist approach relates to legal positivism, natural law theories or the broad rubric of 'critical' legal scholarship, or even what a Marxist approach would have to say about the traditional questions of law, morality and obedience, that is not the task here. For what is demonstrated by the analysis of the field in Part I is that Marxist legal theory is still learning to walk unassisted on its own two feet, and that it is necessary to first build up its strength and set it in the right direction before asking it to engage in battle with others. This thesis argues that by going 'back to basics', it is found that Hegel, Marx and Pashukanis provide the resources and guidance for this task. Until this is done, the Marxist legal inquiry will probably continue to attract no more than the customary dismissals given to it by critical and traditional jurisprudence alike.

This situation is somewhat unfortunate, for as was noted at the start of this introduction, the concerns of Marxism - domination, property, the state - are often similar to those of jurisprudence. Within traditional jurisprudence, the ability to use force in the name of law - to give effect to a judgement, or to sentence someone to imprisonment, or to inflict a punishment for not obeying the law - is a key question. H L A Hart, for example, famously noted that for law to have ethical purchase, there must be a distinction between the edict of the gunman, who forces someone to act upon pain of death or injury, and that of the state, who compels subjects to act in a certain way for fear of incarceration.[7] To the extent that traditional jurisprudence is an apologia for law, debates can tend to be coloured by a concern with finding and defending the situations in which law can 'properly', or in some instances 'justly', use force in its name. Rather than explore these important tensions within orthodox jurisprudence, the concern in this thesis is closer to

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[5] Hans Kelsen, *Pure Theory of Law*, Berkeley, University of California Press, 1967. Cf Jes Bjarup, "Continental Perspectives on Natural Law Theory and Legal Positivism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin Philip Golding and William A. Edmundson, Malden, Oxford, Blackwell, 2005.

[6] Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law*, Ithaca, Cornell University Press, 1996.

[7] H. L. A. Hart, *The Concept of Law*, Birmingham, Alabama, Legal Classics Library, 1990, 18ff.

that critical strand of legal theory, which asks what the implications are for law itself when it calls on force in its name. This problematic examines both the force or violence that founds legal orders - revolution, colonisations, enclosures - and how this force or violence persists in the self-justifications of the established legal order, as well as the related force or violence inherent in acts of legal decision and judgement. The key enquiries in this field follow in the footsteps of Robert Cover, Walter Benjamin and Jacques Derrida, and these will be referred to during this thesis. Yet even these debates can share with their orthodox counterparts an unexamined Weberian commonplace that the law and the state have a monopoly on legitimate violence. That is, despite the radically different perspectives on what it means for violence to be done in the name of law, to found it either temporally or rhetorically, it often appears as if *only* the state or law stands in a position to legitimately appropriate violence. One could meet this contention with an argument from natural right, condemning some instances of force-backed state law as failing to adhere to standards external to the positive law itself. But that is not the response taken here, for such a response evades the question Benjamin poses, which is how violence can be said to be exercised justly in the first place.

Instead, this thesis is centred around what will be argued is a fundamentally Hegelian point: the violence which founds law, both temporally (in key historical moments) but also rhetorically (as the ongoing external 'origin' of law to which law returns when enacting forceful decisions) is never simply unmarked, undifferentiated force. Rather, it is always *inter alia* a force exercised over *labour*, a control over potential. As such, the instantiation of law is always a (re)ordering of existing relations of force/violence in such a way that law's foundation is marked by the new ordering of labour. So, when in a legal order 'law' turns to 'violence' either to appropriate it, distinguish it from itself or find a source of legitimacy there, it does so in an environment where both 'law' and 'violence' are each marked by particular relations to systems of domination over labour. And in the labour relation, one finds a parallel movement occurring, where the 'justness' of command over labour seeks its foundation at times within law, and at times outside of it. These are not the normal conclusions drawn from readings of Hegel. Nonetheless, they are Hegelian because, as will be argued in Part II of this thesis, '*Gewalt*', Hegel placed labour at the heart of the question over the justness of the force exercised by the modern state. It will be further argued in Chapter 3 'Work Force' that this Hegelian understanding of force/violence was also Marx's. He did not relegate the 'force of law' to some superstructure, a presumption that then requires one to bring it into an accidental relationship with other allegedly external categories like 'state', 'labour' and 'class'.

Marx's own understandings of *Gewalt* demonstrate a considerably more fluid movement between the force of law and the force of capital, where the primary concern is demonstrating that at times control over labour appears as a question of law, at other times a question of work. This argument, foreshadowed in Part I but advanced in more detail in Chapter 3, sets the tone for the thesis. In short, it will be argued that by going back to labour, not commodities in general, a new avenue of legal inquiry is opened up. This approach asks: how is the *Gewalt* of the organisation of labour and the exercise of command over labour configured, and what consequences does this have for the exercise of the force of law? And what is to be gathered from examining the ways in which control over labour is at times a legal question, and at times not?

The critique of *Gewalt* thereby becomes one of demonstrating that the force inherent in the labour relation is neither a-legal nor reducible to state sanctioned force, and as such, is imbricated in law's complex relationship with force/violence. From this perspective, the concerns of Benjamin are seen in a new light. Once it is no longer assumed that only the state exercises legitimate violence, there appears in Benjamin's text another *Gewalt* - that exercised by the employer. Indeed, this *Gewalt* neither seeks to found a new order nor calls itself 'law preserving', and has gone virtually unremarked upon in subsequent commentary, yet it forms the very heart of Benjamin's analysis: the strike is an escape from a certain *Gewalt*. By reading Benjamin together with his reception in Agamben - who, incidentally, appears to be the first writer to draw Benjamin and Pashukanis together - Chapter 4 'A Violence Indirectly Exercised' argues that the questions of 'force of law' and 'emergency' necessarily involve the question of the coercive nature of labour, and labour's suspension is nothing less than a question of the political.

Gewalt, however, is only one aspect of law, albeit the one that usually concerns Marxists. Just as important, but oft neglected, is the question of authority. Lurking in the question of authority are riches for an inquiry into the relationship between law and labour. John Austin, the English jurisprude who sought to develop a rigorous legal positivism to underpin sovereignty, is forced back to the Roman figure of *auctor* in his attempt to distinguish the command of an employer from the command of the sovereign. Chapter 5 'The law-giving talent of the factory Lycurgus' begins Part III of the thesis - 'Law, Authority and Value' - and applies Agamben, Marx and Pashukanis to this problem of Austin's, arguing that the structure of authority, and the guarantee of transactions, ought be central questions for the Marxist study of law. They highlight that the authority operative in the sphere of 'rule' is understandable only in its relation to that prevailing in

the sphere of 'work'. Labour is found to dissolve any clear distinction between sovereign command and employer command, and the structure of authority that permeates both private and public law is intimately linked with the question of value.

While most readings of Pashukanis do not pay sufficient attention to authority as it appears in his work, the notable exception is Antonio Negri. In a text that has not yet been published in English, Negri, it will be argued in Chapter 6 'Pashukanis' Empire', provides a reading of Pashukanis radically different from the orthodoxy. Negri does not develop a 'commodity form' theory of law, but instead does what Marxist legal theory has hitherto failed to do: examine the peculiar exchange that is at work in the labour relation. Negri is not an Hegelian. Nonetheless, Negri's opposition of constituent vs constituted power has a similar tone to Hegel's identification of the modern state as a controller of labour. This thesis does not seek to reconcile Negri's Spinoza with Marx's Hegel. Nor does it accept wholeheartedly Negri's reading of Pashukanis. However, because both Negri and Hegel begin from a certain identification of the control over labour with the force of the state, Negri's analysis provides the framework for an inquiry into law in the spirit of Pashukanis. Negri's engagement with Pashukanis, together with his and Michael Hardt's intertwining of legal theory with an analysis of labour, also provide the oft-ignored background to the well-known *Empire*.[8] By reading Negri's and Hardt's work in this vein, Chapter 6 again identifies the pivotal role played by labour in the contemporary debates surrounding emergency and sovereignty.

It is therefore clear that much will be said in this thesis about the largely unnoticed themes in Pashukanis' work, namely force, authority and value. However, not only does this analysis ultimately return to questions of sovereignty and emergency, but it also comes back to what is usually taken as Pashukanis' primary contribution: a theory of legal subjectivity. Orthodox legal theory can be disposed towards taking the legal subject - the individual who is subjected to the law - as coincident with what the law calls a 'natural person': the human being. This must be immediately qualified - some legal subjects are not natural people and some natural people are not legal subjects - but nonetheless the legal subject is in some way a separate pre-existing entity that appears before the law. Indeed, in some versions of theory, these subjects are the source of law and/or a yardstick by which to measure law's legitimacy, as is often the case in theories of 'human rights', for example. Critical perspectives, however, have interrogated this

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[8] Michael Hardt and Antonio Negri, *Empire*, Harvard University Press, 2000.

position. In addition to the criticisms of the inherently partial nature of every allegedly universal subject, psychoanalytically informed legal theory in particular (but by no means exclusively) has demonstrated that subjects are called into being by the law. But what if this 'calling into being' happens elsewhere? Pashukanis' innovation was to argue that the Marx's analysis of the fetishism of commodities - whereby the forces of capitalism turn relations between people into relations between things - also explains the creation of legal subjects. Legal subjectivity, that is, is a consequence of capitalist exchange and production relations.

In Part IV 'Subject', it will be argued that the orthodox reading of the 'legal subject' in Pashukanis - a unified entity that brings goods to market - is in drastic need of re-reading. One can no longer talk of 'the legal subject' in the same broad theoretical brushstrokes as Pashukanis: the intervention of a century's thought and particularly the contribution of Michel Foucault make any such grand theoretical attempts fraught. However, this thesis will not attempt to synthesise or reconcile these other important areas of theory, but borrow from them instead to critique the Marxist approach on its own grounds. Pashukanis' work is usually misunderstood as a 'commodity form' theory of law, whereby the equivalence of the exchange relation leads to the abstractly equal legal subject of liberalism. This is a wrongheaded approach that renders Marxism unable to comment on contemporary inquiries into the force of law, the grounds of law's authority or the attack on the fiction of the unified subject. That is, if the argument in this thesis has succeeded, then any Marxist theory of legal subjectivity must proceed by way of a dual inquiry: first, into how the 'subject before the State' and the 'labouring subject' are rendered as separate from each other; and secondly, how the current relationship between the organisation of labour and its subordination is manifested in the subject. The subject, as the site of the separation of citizen and labour, opens itself up to an historical and theoretical inquiry. This thesis thus concludes by dwelling on what ought to have been recognised as Marx's and Pashukanis' fundamental contributions to understanding legal subjectivity. Chapter 7 'Abstraction, Equality and the Legal Subject' returns to the concept of separation, pivotal for Agamben but born with Marx's *On the Jewish Question*. It is there argued that the abstractly equal legal subject is bound up not only with the Hegelian separation of state from civil society that reconfigures feudal domination over labour, but also with a concept developed through Marx's critique of Hegel: abstract labour. Subjects in Pashukanis weren't equal merely because commodities were equal, but because workers had to sell their labour through the mediating equivalent of the wage relation. If this is right, then the developments of capitalism in the century since

Pashukanis take the legal subject in the opposite direction to that usually understood by Marxist orthodoxy: the spread of commodity relations doesn't lead to a more perfected legal subject, but rather the decline of abstract labour as a measure of value brings with it attacks on the fictive equality of Marx's egoistic individual of civil society. Agamben's subject reduced to 'bare life' is found to be premised on an unacknowledged separation of labour, a misrendering of subjects as unproductive. This is further complicated by the changing relations between capital, state and labour and the concomitant reconfigurations of law, authority and command that have been charted throughout the thesis. The last chapter, Chapter 8 'Subjects without entitlements', is a contribution towards the much needed work of drawing these elements together so as to advance some propositions about the legal subject of neo-liberalism. It is argued the rise of emergency measures and the decline of the guarantee of rights is linked to the decline in abstract labour, a 'real abstraction' of modernity essential to the fictive equality of the legal subject. Throughout this thesis, the law relating to work functions as an ongoing illustrative example, and in the concluding chapter, recent changes to Australian labour law are treated as emblematic of the theoretical tendencies considered. The chapter concludes by considering what Marx's *On the Jewish Question* might look like in the current environment.

In each of the four parts of this thesis, the methodological approach is thus to situate the labour relation at the heart of the inquiry, and then explore how the figures of 'work' and 'rule' are separated and/or related, thereby illuminating that control over labour beats at the heart of the force, authority and subjects of law.

The title of this thesis derives from a particular industrial tactic, whereby workers perform 'to the letter' only those tasks set down in any relevant rule book or set of regulations. This tactic usually amounts to unlawful industrial action. Why is it illegal to do exactly what your employer or the state tells you to do? Because even the most hardened lawmaker is forced to admit that labour is the true creator of value, and that the creative labour of the worker is required if the job is to get done. There is something that exceeds the narrow constraint of rule, a supplement that is usually taken for granted. This thesis seeks to explain the relation between living labour and the law that seeks to corral it. It thus opens up onto a second, more expansive question: how does Marxist theory get from 'work' to 'rule'? It is not a simple question, for more often than not, Marxism hasn't taken 'work' as its starting point, but rather the commodity exchange. Hardt and Negri suggest it is more than coincidence that the enquiries into 'work' and those into 'rule'

each perpetually oscillate between theories based on contract or command: the labour contract vs. natural rights from private property; the social contract vs. the sovereign who decides on the exception. The theoretical distance from 'work' to rule' is shorter than usually recognised.

This project began by asking what those in the Marxian tradition would have to say about the figures of law and state that interest the likes of Agamben. It became apparent that there was virtually no dialogue between the two camps, largely because - with a few notable exceptions - Marxists have failed to accord the question of law the importance others bestow on it. Thus it became necessary to go back to basics, and consider the outlines of a Marxist enquiry into law, and then to engage critically with contemporary debates about exceptionality. What this uncovered, however, was that the questions of labour, law, emergency and violence were imbricated from the very beginning. Not only in the strand of thought centred around Marx and Pashukanis, but also in the works of Agamben, Benjamin and Carl Schmitt. This thesis thus is an attempt to rethink Marxist legal theory by way of critical engagement with such thinkers, with dual aims: of contributing to Marxism by asking that it take seriously the body of thought in the critical legal tradition; and of insisting that jurisprudence recognise once more that labour exists at its core. It is only by taking control over labour - not mere exchange - as the starting point that one can get from 'work' to 'rule' in the spirit of Pashukanis and Marx.

PART I

MARX, PASHUKANIS & LAW

Chapter 1 – The Marxist study of law

Marx was an economist, philosopher and political organizer.[1] The fields of thinking inspired by his work range from political science to cultural studies, from literary theory to economics. However, no consistent corpus has developed in legal theory. There are some significant works, which will be discussed in this chapter, and Marx's own insights are usually scattered and unsystematised, though contain flashes of brilliance and underlying logics. As issues central to the Marxist endeavour begin to pervade the wider field of legal theory - the 'empire' of globalised capitalism, the role of human rights, the fate of the nation state - there is an anaemic body of thought that can intervene now in the name of Marxism. In this chapter, the thesis begins by considering the existing attempts to theorise a Marxist approach to law and Marx's original sources upon which they draw. Most attention will be given to Pashukanis, the writer who has done the most to systematically develop Marxist legal theory.

To understand Marx's analysis of commodity fetishism, one turns to the opening chapters of Volume 1 of *Capital*.[2] However, one searches in vain for any similarly extended treatment of the topic of law, or even the state. Even when one collates a significant number of Marx's and Engels' disparate references to law in the one place, as Maureen Cain and Alan Hunt and Paul Phillips variously have done, the mosaic does not result in a clear theoretical picture.[3] Reflecting on his own 1984 work on Marx and law, and on a body of subsequent Marxist legal scholarship from a variety of authors, Robert Fine notes in the preface to a 2002 reprint of his book that:

> Marx's extraordinarily profound critique of political economy was not matched by a parallel critique of political philosophy ... his analysis of the economic forms of modern capitalist society was not matched by a parallel analysis of the legal and political forms of modernity. Sometimes the legal and political forms of modernity were simply ignored; more often the legal and political superstructure was reduced to their relation to the so-called economic base. For example, the capitalist state was understood in terms of its functions for the reproduction of capitalist production, its instrumental uses by the capitalist class, or its determination by the commodity form. These functionalist, instrumentalist and derivationist ways of thinking were capable of producing important significant insights into the relation between political forms and their economic content,

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[1] For a study of his non-academic life, see Otto Rühle, *Karl Marx: His Life and Work*, New York, New Home Library, 1943.

[2] Karl Marx, *Capital: A Critical Analysis of Capitalist Production*, trans. Samuel Moore and Edward Aveling, vol. 1, Moscow, Progress Publishers, 1954.

[3] Maureen Cain and Alan Hunt, eds., *Marx and Engels on Law*, London, New York, Academic Press, 1979; Paul Phillips, *Marx and Engels on Law and Laws*, Oxford, M. Robertson, 1980.

but they did not address the formal aspects of law, morality and politics themselves.[4]

For heuristic purposes, this chapter provisionally adopts this taxonomy of instrumentalism (law is wielded as an instrument by the ruling class), functionalism (law serves the function of maintaining or reproducing the capitalist mode of production) and derivationism (the form of law can be derived from or is an expression of the relations of production).

Instrumentalism

Too much time need not be spent on instrumentalist views. As Paul Hirst notes, virtually no one within Marxist scholarship considers this fully adequate to a theory of law.[5] Deriving from comments found in *The Communist Manifesto*, such as that the 'executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie,' and from some of Marx's studies of how specific laws criminalise and repress working-class activity, these approaches developed a focus on the repressive content and form of state activity.[6] Attention was drawn to the 'class bias' of laws and the criminalisation of working-class activity as a means of social control. The problem with such approaches is that they are only true as far as they go, which isn't very far, and even then that their truth is only partial. Whilst one can clearly point to instances of law being brought to bear in repressive fashion, this by no means explains the countless instances in which law operates without direct coercion of any member of the working class. These approaches also tend to be less applicable in fields of law outside of the obvious spheres of crime and the protection of property, hence unable explain the waxing and waning juridicisation of other forms of social relations. It will become apparent that no argument is being made here for law's 'neutrality'; however, Marxist legal enquiry ought not begin

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[4] Bob Fine, *Democracy and the Rule of Law: Marx's Critique of the Legal Form*, New Jersey, The Blackburn Press, 2002, Preface (unnumbered pages).

[5] See the introduction by Paul Hirst to Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, trans. Elizabeth Kingdom, London, Routledge & Kegan Paul, 1979.

[6] Karl Marx and Friedrich Engels, *The Communist Manifesto*, London, New York, Verso, 1998. For illustrations of and critical responses to the instrumentalist views, see e.g. Steven Box, *Power, Crime, and Mystification*, London, New York, Tavistock Publications, 1983; J Braithwaite, "The Political Economy of Punishment," in *Essays in the Political Economy of Australian Capitalism*, ed. Ted Wheelwirght and P Buckley, Sydney, Australia and New Zealand Book Co, 1980; Pat Carlen and Mike Collison, eds., *Radical Issues in Criminology*, Oxford, Martin Robertson, 1980; Luigi Ferrajoli and Danilo Zolo, 'Marxism and the Criminal Question', *Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy*, 4, no. April, April, 1985, 71-100; Bob Fine, ed., *Capitalism and the Rule of Law: From Deviancy Theory to Marxism*, London, Hutchinson, 1979; Richard Kinsey, 'Marxism and the Law: Preliminary Analyses', *British Journal of Law and Society*, 5, no. 2, Winter, 1978, 202-27; Richard Quinney, "Crime Control in Capitalist Society: A Critical Philosophy of Legal Order," in *Critical Criminology*, ed. Ian R. Taylor, Paul Walton, and Jock Young, London ; Boston, Routledge and Kegan Paul, 1975; Csaba Varga, *Marxian Legal Theory*, Aldershot, Dartmouth, 1993.

from a point that takes 'state' and 'law' as empirically given concepts, the one wielded by the other.

Functionalism

The functionalist approach to law has its genesis in a familiar passage of Marx's from the 1859 Preface to A *Contribution to the Critique of Political Economy*.[7] Although written as part of a discursive introduction, in which Marx recounts his employment and study history, and intended as a 'few brief remarks regarding the course of my study', this passage has received considerable attention in Marxist scholarship on law (and of course not just on law: the terminology of base and superstructure haunts Marxism).[8] It is perhaps understandable, given the fragmented nature of Marx's work on law, that something approaching a coherent summary would take such prominence. Further, given that Marx describes these lines as the 'general conclusion ... which, once reached, became the guiding principle of my studies', the words carry a certain weight.[9] Nonetheless, with hindsight it is questionable whether an attempt to fit 'law' into the confines of an architectural metaphor was an appropriate guiding principle for Marxist

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[7] The passage is as follows: 'In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or - this merely expresses the same thing in legal terms - with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure.' Karl Marx, *A Contribution to the Critique of Political Economy*, Moscow, Progress Press, 1970, 20-21.

[8] See e.g. the important role played by this architectural metaphor in Louis Althusser, "On the Reproduction of the Conditions of Production," in *Lenin and Philosophy, and Other Essays*, ed. Louis Althusser, London, NLB, 1971; Janet Campbell, *An Analysis of Law in the Marxist Tradition*, Lewiston, N.Y., E. Mellen Press, 2003; Hugh Collins, *Marxism and Law*, Oxford, New York, Clarendon Press, Oxford University Press, 1982; Paul Q. Hirst, *Law, Socialism, and Democracy*, London ; Boston, Allen & Unwin, 1986; Paul Q. Hirst, *On Law and Ideology*, London, Macmillan, 1979; E. Kamenka, "A Marxist Theory of Law?," in *Marxian Legal Theory*, ed. Csaba Varga, Aldershot, Dartmouth, 1993; Kinsey, 'Marxism and the Law: Preliminary Analyses'; John Mepham and David-Hillel Ruben, *Issues in Marxist Philosophy*, Brighton (Sussex), Harvester Press, 1979; Ralph Miliband, "Marx and the State," in *Democracy and the Capitalist State*, ed. G Duncan, Cambridge, Cambridge University Press, 1989; Dragan Milovanovic, *Weberian and Marxian Analysis of Law: Development and Functions of Law in a Capitalist Mode of Production*, Aldershot, Brookfield, Avebury, 1989; Alice Tay Erh Soon and E. Kamenka, 'Karl Marx's Analysis of Law', *Indian Journal of Philosophy*, 1, no. August, 1959, 17-38; Alan Stone, 'The Place of Law in the Marxian Structure-Superstructure Archetype', *Law and Society Review*, 19, 1985, 39-67; Varga, *Marxian Legal Theory*; Andrew Vincent, 'Marx and Law', *Journal of Law and Society*, 20, no. n4, 1993, 371-97; Gary Wickham, "Turning the Law into Laws for Political Analysis," in *Social Theory & Legal Politics*, ed. Gary Wickham, Sydney, Legal Consumption Publications, 1987; Raymond Williams, 'Base and Superstructure in Marxist Cultural Theory', *New Left Review*, 82, no. 3-17, 1973.

[9] Marx, *A Contribution to the Critique of Political Economy*, 20.

legal scholarship: it necessitates the most unconvincing of contortions to explain why Marx regularly treated laws as *preceding* the mature economic relations of capitalism, as will be seen below. Nonetheless, the problems encapsulated in the *Preface* would continue to frame much of the debate about law. On the one hand, law appears to be relegated to the 'superstructure'. On the other, it appears impossible to describe the economic 'base' without reference to terms like 'property' and 'contract' that are an admixture of economy and law.[10] Law occupies a liminal zone, being separate from the base yet constitutive of it. It was even charged by H. B. Acton that this rendered Marxism itself internally incoherent.[11]

G. A. Cohen was a key proponent of a version of historical materialism that sought to posit a functional relationship between the ontologically separate 'economic' base and the 'ideal/ideological' superstructure.[12] His Marxism responded to Acton's claim by producing a rigorous and logically coherent reading of the *Preface*, which separated and excluded 'law' from the relations of production. Property and ownership are not legal concepts expressing rights, according to Cohen, but rather they express powers that a person/class may have in relation to a thing. These production relations correspond to the stage of development of the forces of production. The 'legal superstructures' are institutions that stand in a *functional* relationship to the relations of production: 'superstructures are as they are because, being so, they consolidate economic structures'.[13] Cohen avoids any suggestion of crude determinism (which had plagued some Marxism from the Second International) and stresses the importance of the function of law in the reproduction of the relations of production.[14] To analyse law is thus to understand it as an entity separate from and standing in a particular relation to relations of production (which in turn stand in a relation to the forces of production): 'The economic structure is separate from (and explanatory of) the superstructure.'[15]

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[10] This was a point made by both defenders of Marxism as well as its critics. See e.g. Collins, *Marxism and Law*; Paul Q. Hirst, *Marxism and Historical Writing*, London, Boston, Routledge & Kegan Paul, 1985; Derek Sayer, *The Violence of Abstraction: The Analytic Foundations of Historical Materialism*, Oxford, New York, B. Blackwell, 1987.

[11] See the exchange between Acton and Cohen in Gerald A Cohen and H. B. Acton, 'Symposium: On Some Criticisms of Historical Materialism', *Proceedings of the Aristotelian Society, Supplementary Volumes*, 44, 1970, 121-41 and 43-56.

[12] G. A. Cohen, *Karl Marx's Theory of History: A Defence*, Princeton, Princeton University Press, 1978.

[13] Ibid., xi.

[14] In this he bears similarity to the 'Austro-Marxist' Karl Renner: Karl Renner, *The Institutions of Private Law and Their Social Functions*, London, Routledge and Kegan Paul, 1949.

[15] Cohen, *Karl Marx's Theory of History: A Defence*, 218.

In the *Grundrisse*, Marx considers the method of argument of those bourgeois economists who elide the differences between various historical modes of production, posit a continuity of the 'natural' principles of economy, and then allege that in each epoch two similar factors are found: '(1) property; (2) its protection by courts, police, etc.'[16] They then deduce that that there is no essential difference between capitalism and its predecessors. Marx's response to the second factor is as follows:

> to 2. Protection of acquisitions etc. when these trivialities are reduced to their real content, they tell more than their preachers know. Namely that every form of production creates its own legal relations, form of government, etc. In bringing things which are organically related into an accidental relation, into a merely reflective connection, they display their crudity and lack of conceptual understanding. All the bourgeois economists are aware of is that production can be carried on better under the modern police than e.g. on the principle of might makes right [*Faustrecht*]. They forget only that this principle is also a legal relation, and that the right of the stronger prevails in their "constitutional republics" as well, only in another form.[17]

One might read this, with Wal Suchting, as giving support to Cohen's argument that the relations of property are relations of power: by use of superior force ('might makes right'), legal relations are created that are more conducive to new forms of production.[18] However, this does not exhaust the possible readings. Marx's use of the term *Faustrecht* has been variously translated as 'club-law', 'might makes right' and 'law of the jungle.'[19] Whilst these terms (especially the last two) convey part of the idiomatic meaning, it is also worth remembering that the term has a history associated with the German method of resolving feudal disputes over ownership of land. Thus Hegel writes of 'the genuine ancient right of private warfare *[Faustrecht]* which, in the constant disputes over such confused ownership, gave temporary possession to the stronger arm and sustained it therein until the arm of its adversary grew stronger.'[20] The historical meaning highlights a point made by Marx: even in situations where there is no superintending authority, there

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[16] Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* trans. Martin Nicolaus, Harmondsworth, Penguin Books, 1973, 87.

[17] Ibid., 88. The last three sentences appear in the original German as follows: 'Die Roheit und Begriffslosigkeit liegt eben darin, das organisch ||5| Zusammengehörende zufällig aufeinander zu beziehn, in einen bloßen Reflexionszusammenhang zu bringen. Den bürgerlichen Ökonomen schwebt nur vor, daß sich mit der modernen Polizei besser produzieren lasse als z.B. im Faustrecht. Sie vergessen nur, daß auch das Faustrecht ein Recht ist und daß das Recht des Stärkeren unter andrer Form auch in ihrem „Rechtsstaat" fortlebt.' Karl Marx, "Einleitung Zu Den „Grundrissen Der Kritik Der Politischen ŒKonomie"," in *Marx Engels Werke*, ed. Institut für Marxismus-Leninismus beim ZK Der SED, Berlin, Dietz Verlag, 1983, 23.

[18] Wal Suchting, 'On a Criticism of Marx on Law and Relations of Production', *Philosophy and Phenomenological Research*, 38, no. 2, 1977, 200-08.

[19] Pashukanis, "A General Theory of Law and Marxism," 90; Pashukanis, *Law and Marxism: A General Theory*, 134.

[20] G W F Hegel, "The German Constitution," in *Hegel: Political Writings*, ed. Laurence Dickey and Hugh Barr Nisbet, Cambridge, Cambridge University Press, 1999, 70.

can still be law. Marx's claim is that this ability to associate *Recht* with the exercise of force of one over another persists in the conception of 'law' in the bourgeois constitutional state *[Rechtsstaat].* The similarity between the protection of the means of production by 'police, judiciary etc' in different epochs is that the principle that 'force prevails' is inherent in the notions of law accompanying each period. But whereas the force of law was previously 'outside the state', or more properly 'stateless' *[Faustrecht]*, it now inheres in another form 'in' the state *[Rechtsstaat.]*

Marx's commentary on 'club-law' foreshadows a point developed by Pashukanis to which this thesis will return. However, the element in this quotation from Marx which receives least attention is his accusation that the failure of bourgeois analysis lies in its bringing together two concepts - 'form of production' and 'law, legal relations etc' - that organically belong together [*organisch Zusammengehörende*] into an 'accidental' relationship. Suchting stresses Marx's use of Hegelian terminology used to describe this accidental relation [*Reflexionszusammenhang*]. For Hegel, 'reflective understanding takes ... differences to be *independent of* one another, and at the same time, also expressly affirms their relativity; but still combines them side by side, or one after the other, by an "Also", without bringing these thoughts together, without unifying them into the notion.'[21] Giving the lie to crude variants of instrumentalism or economic determinism, it is argued here that for Marx law could not be thought as a discrete entity standing in causal relation to a mode of production (where a certain mode causes a certain separate legal system). However, it also calls into question a fundamental tenet of the functionalist perspective, namely that the interaction of 'law' and 'property' - which are 'organically' related - can be understood by first radically segregating 'property' from any 'legal' relation and then attempting to reunite them. In this vein, Hunt argues that Cohen cannot define the transition from the purchase of a product of labour by the artisan to the purchase of labour-power by an employee without reference to 'contract' - a concept even Cohen concedes is paradigmatically legal - and thus cannot explain a fundamental moment in the creation of capitalist relations of production without reference to law.[22] The solution, for Hunt, is not to move towards E P Thompson's position that 'Law exists at every bloody level', but instead to begin to 'elaborate a constitutive [i.e. of subjectivity and social relations] theory that retains a concern with issues of determination and

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[21] Suchting, 'On a Criticism of Marx on Law and Relations of Production', 206. Quoting Hegel.

[22] Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law*, New York, Routledge, 1993, 199.

causality but sets itself the task of employing a conception of causality that is not unidirectional and that can grapple with questions posed in terms of the mediation between legal relations and economic (and other forms of social) relations.'[23]

As is apparent, this dialogue is generated by the perceived necessity of bringing 'base' and 'superstructure' into some theoretically stable relation to each other that allows sense to be made of 'law'. There has been more than enough ink spilt over decades on the question of the relation of 'base' to 'superstructure'. Suffice to say that for a significant period of time, Marxist studies of law were caught in the orbit of this black hole.[24] And the conundrums only multiplied. How was one to consistently interpret the topography sketched in the 1859 *Preface* when a number of counter-indications appear in the Marx-Engels corpus? Engels, for example, admits at one point that the 'economic system is the basis, but the various elements of the superstructure ... juridical forms ... [and] legal ... views ...and their further developments into systems of dogmas ... also exercise their influence on the course of historical struggles and in many cases determine their forms in particular'.[25] The superstructure of a building may 'exercise its influence' on its foundations, but the form of the foundation is set well before the upper layers are built. And what of the times where Marx speaks of specific laws altering the mode of production, such as the Factory Acts or the use of law to create the existence of a working class where there was none (as in convict Australia)?[26] It is obvious that the metaphor has its limits, and superstructure and base do not stand in a simple causal or functional relationship. However, the metaphor gained a force that made departure from the base/superstructure model subject to fierce criticism. A Marxist legal theorist thus wrote in 1978 that 'the power of this linguistic hegemony is such that any demand to collapse the distinction appears tantamount to an heretical rejection of theoretical tradition. Indeed the heresy seems to require the "scientifically" - because architecturally - impossible.'[27]

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[23] Ibid., 210; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, London, Allen Lane, 1975.

[24] For an extended discussion of this point, and of the metaphor's influence on Althusser, Poulantzas and Thompson, see Kinsey, 'Marxism and the Law: Preliminary Analyses'. See too Stone, 'The Place of Law in the Marxian Structure-Superstructure Archetype'.

[25] Letter from Engels to Bloch, quoted in Cain and Hunt, eds., *Marx and Engels on Law*.

[26] Marx, *Capital: A Critical Analysis of Capitalist Production*, Chs 10, 28 and 33.

[27] Kinsey, 'Marxism and the Law: Preliminary Analyses', 209.

Ideology

As 'base' and 'superstructure' were theorised in a number of different ways, so the role of law became more perplexing. One way out of the dilemma seemed to be offered by the concept of ideology.[28] The influence of Antonio Gramsci here was significant on Marxists writing between the 1970s and early 1990s. As Colin Sumner exemplifies, the introduction of Gramsci's work into theories of law was attractive because his theory of ideology and hegemony purported to find a place both for coercion and consent.[29] Given that Marxism seemed to oscillate between the poles of emphasising law's violence and law as ideology, the Gramscian schema of a ruling class ruling by 'consent if it could but by force if it had to' lent itself to a study of law. The concept of ideology was also the subject of attention from theorists in the field of critical realism, and a more sustained application of this theory to law was made by writers like Cain and Valerie Kerruish.[30] The Gramscian position was developed in the work of Althusser, who saw law as existing as both Ideological State Apparatus and Repressive State Apparatus. One of the most significant recent attempts to 'resolve' the question of base/superstructure was Althusser's concept of relative autonomy, where the 'base in the last instance determines the whole edifice.'[31] Thus for Nicos Poulantzas law plays a role in reproducing individuals as subjects for capital but it also exercises coercive force where necessary.[32] One should pause here too and remember that for Althusser a key example he uses to illustrate his model of interpellation is an agent of the law, a *police* officer, yelling 'Hey, you there.'[33] However, in some instances this line of argumentation became simply a combination - rather than a theoretical resolution - of instrumentalism and functionalism. When law rules by force, it is because it acts in its instrumentalist guise (RSA); when there is no

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[28] Maureen Cain, "Gramsci, the State and the Place of Law," in *Legality, Ideology, and the State*, ed. David Sugarman, London, New York, Academic Press, 1983; Antonio Gramsci, *Prison Notebooks*, London, Lawrence & Wishart, 1971; Hirst, *On Law and Ideology*; Valerie Kerruish, *Jurisprudence as Ideology*, London, New York, Routledge, 1992; David Sugarman, ed., *Legality, Ideology, and the State*, London, New York, Academic Press, 1983; Colin Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, London, New York, Academic Press, 1979; Varga, *Marxian Legal Theory*, Part 6.

[29] Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, esp 266ff.

[30] Maureen Cain, 'Realism, Feminism, Methodology, and Law', *International Journal of the Sociology of Law*, 14, no. 3-4, 1986, 255-67; Valerie Kerruish, "Epistemology and General Legal Theory," in *Social Theory & Legal Politics*, ed. Gary Wickham, Sydney, Legal Consumption Publications, 1987; Kerruish, *Jurisprudence as Ideology*. While this work is not explicated here, the influence of Kerruish's in claim for the ontological primacy of social relations permeates this thesis.

[31] Althusser, "On the Reproduction of the Conditions of Production," 130.

[32] Nicos Poulantzas, 'On Social Classes', *New Left Review*, No 78, Mar/Apr, 1973, 27-54, esp 128ff; Nicos Poulantzas, *Political Power and Social Classes*, London, New Left Books, 1973; Nicos Poulantzas, 'The Capitalist State: A Reply to Miliband and Laclau', *New Left Review*, No 95, Jan/Feb 1976, 63-83.

[33] Althusser, "On the Reproduction of the Conditions of Production," 163.

force, it is ideological (ISA). Ultimately, this can become merely a descriptive categorisation of how 'law' operates and the theory loses its explanatory power. Against the initial impulses of Althusser, 'law' is then understood in an empiricist fashion, bearing similarities with legal positivism: theory understands as 'law' that which is called 'law' and, as Sumner notes, it becomes almost exclusively concerned with law as norm.[34] Ultimately, little attention was paid to the specificity of law: emblematically, even though Althusser promises readers in *On the Reproduction of the Conditions of Production* that 'I shall give a short analysis of Law, the State and Ideology', the remaining pages of his work are grouped under the headings 'The State' and 'On Ideology', with the third absent.[35]

If the notion of relative autonomy increasingly appeared an illusory resolution, a more fruitful application of Althusser's work to the study of law came through the use of his (Lacanian influenced) conceptions of interpellation.[36] Paul Hirst, for example, conducted a sustained engagement with the conceptions of law and ideology, first inspired by and subsequently moving away from Althusser.[37] Ultimately, for Hirst, the Althusserian concept of ideology loses its purchase because it implies an indefensible notion of social totality:

> Marxists have classically considered law as being merely the judicial expression of the actual relations of production and that these relations are given in their form by the structure of the mode of production. I have argued at length that the relations of production cannot be held to secure their own conditions of existence without the introduction of the problematic concept of a totality which internalises its effects.[38]

The fundamental error of Marxism, incapable of rectification by Althusser, is thus said to be the assumption that relations of production exist independently of law and that the latter is to be understood in some sense to follow (whether by derivation, causation or expression) from the former.[39] For Hirst, this invariably results in a devolution of theory to unsustainable functionalism and then determinism, and as such Althusser's work is ultimately useless for a study of law. Hirst's primary extended illustration of Marxism's

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[34] Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, 263ff.

[35] Althusser, "On the Reproduction of the Conditions of Production," 131.

[36] On the question of Althusser's interpretation of Lacan, see Joe Valente, "Lacan's Marxism, Marxism's Lacan (from Zizek to Althusser)," in *The Cambridge Companion to Lacan*, ed. Jean-Michel Rabaté, Cambridge, New York, Cambridge University Press, 2003.

[37] Hirst, *Marxism and Historical Writing*; Hirst, *On Law and Ideology*.

[38] Hirst, *On Law and Ideology*, 137.

[39] Ibid., Ch 3.

failure with respect to law concerns the joint-stock company (i.e. a company in which various owners hold shares). For Hirst, Marxism can only understand this as an 'expression' of changes in the (externally occurring) forces of production, whereas the form of capital's organisation was in fact the result of political and legal (i.e. superstructural) struggles.[40] This is primarily a failure inherent within Marx's work itself to conceive of legal subjectivity other than as inherently linked with an individual human being.[41] This is an important issue. Once Pashukanis' and Bernard Edelman's work is considered, the import of the critique of subjectivity becomes apparent.

For the moment, by way of response to Hirst, the understanding of law's relation to relations of production implicit in his criticism is not one to be taken take from Marx in this thesis. As indicated above, one ought not bring these concepts into a merely accidental relation to each other. It is also worth pausing to deal with the question of 'base' and 'superstructure', at least for this thesis. First, it is not considered necessary here that a theory of law contort itself to a topographical metaphor that is not used consistently throughout the Marxist corpus. Secondly, as suggested above, the thrust of this thesis will be that law is best apprehended as certain social relations understood in a particular way, or in Friedrich Karl von Savingy's words that open Agamben's *Homo Sacer*: *'Das Recht hat kein Dasein für sich, sein Wesen vielmehr ist das Leben der menschen selbst, von einer Seite angesehen'* - Law has no existence for itself; rather its essence is the life of humans themselves viewed from a particular perspective.[42] Within the tradition of legal theory this is hardly a radical notion, and Savigny was one of Marx's teachers, but within the Marxist tradition it places the argument outside of the orthodoxy. Law will not have an essence that can be placed in a (causal/functional/determined) relation to a base. Rather, as the discussion of Pashukanis, Edelman and Agamben will elaborate, to understand a relation as legal is not to exhaust the ways that relation can be understood. What becomes important for Marxism is thus understanding how certain relations are understood as legal relations, and how this connects with questions of economy.

Within the traditions of Marxism and law, this approach is perhaps best exemplified by Derek Sayer. Sayer's main argument against Cohen is that there are numerous instances where Marx and Engels consider: (i) social relations to be productive forces (such as

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[40] Ibid., 136-44.

[41] Ibid., Appendix.

[42] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford, California, Stanford University Press, 1998.

forms of co-operation, the protestant 'work ethic', activity of the state); (ii) relations other than non-legal ownership relations to be relations of production (such as familial relations); and (iii) superstructural elements as part of the 'base' (such as law, political formations, religions). Instead, it ought properly be understood that for Marx:

> production relations are, very simply, any and all social relations which are demonstrably entailed in a given mode of production, or [quoting Marx] "way in which [people] produce their means of subsistence" ... Marx's reference to the superstructure as "ideal" or "idealistic" hold the key to his entire base/superstructure metaphor. The "superstructure", in brief, is simply the "ideal" form in which the totality of "material" relations which up the "base" itself are manifested to consciousness, not a separable order of reality at all.[43]

Jason Read develops an analogous argument in asserting an expansive conception of 'mode of production' and the need for subjectivity (including legal subjectivity, which *contra* Hirst needn't be reduced to the question of the individual) to be considered as productive.[44] To understand the relation between base and superstructure as capable of being rendered in functionalist, determinist or instrumentalist ways is thus to misunderstand the level of Marx's argument. As with Marx's general argument about commodities, understanding law as something with an existence in itself is what is fetishistic. To repeat: this is not a new argument for legal theory, it being well advanced by Savigny and subsequently forming the basis of many lines of jurisprudential enquiry.[45] There won't be much talk of 'superstructures' in this thesis, but if required to take a position, it would be that '"Superstructures" are the 'social forms of consciousness' in which the 'essential relations' of society are immediately grasped, and their analysis is coterminous with Marx's critique of immediate appearances'.[46] This reading removes the requirement for the 'entertaining contortions' before one could recognise 'co-operation as a productive force for nascent capitalism, or jurisdiction as a production relation in feudalism, which on any reasonable view of the evidence they surely were.'[47]

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[43] Sayer, *The Violence of Abstraction: The Analytic Foundations of Historical Materialism*, 75, 84.

[44] Jason Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, Albany, State University of New York Press, 2003, 55, 81.

[45] From a traditional perspective, see e.g. Freeman and Lloyd of Hampstead, *Lloyd's Introduction to Jurisprudence*, Part 2. For a critical perspective, Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford, Hart Publishing, 2005.

[46] Sayer, *The Violence of Abstraction: The Analytic Foundations of Historical Materialism*, 91.

[47] Ibid., 147.

The hiatus

Pashukanis wrote in 1926 that 'Marxist critique of the general theory of law is still in its early stages'.[48] Tellingly, Edelman was able to write as late as 1979 in almost identical words that 'Marxist theory of law is still in its early stages.'[49] However, after a small stream of articles and edited volumes in the early 1980s and after projects like Fine's that attempted to reclaim the 'radical' potential of democratic forms (sometimes embodied in law) for an emancipatory project, the second half of that decade and the whole of the 1990s saw little specifically Marxist activity.[50] Eventually, other events caught up with the inability to legally square the base/superstructure circle. In English speaking Marxist legal theory, this period of the 1980s and 1990s is one of a growing interest in certain understandings of French post-structuralist thought. During this period, Marxist analyses of law by and large gave way to a body of thought inspired by (often second-hand readings of) writers such as Foucault, Jacques Derrida and Jacques Lacan. Dragan Milovanovic thus wrote in 1995: 'The postmodern approach to law has ushered in a new legal paradigm. Its contours are only recently taking form. In many ways it is a response to the shortcomings of some aspects of Marxian and neo-Marxian critical theory, which failed to offer a bona fide conception of the active human subject.'[51] Whilst Milovanovic rightly suggests the importance of Lacan as a corrective to this lacuna in Marxist analysis of law, it ought not be assumed that the so-called 'postmodern approach to law' is characterised by a fondness for Marxism or a desire to fix the gaps in any Marxist legacy it may have. Indeed, the trajectory of writers like Hirst and Gary Wickham (contra Hunt) suggest a desire to understand law by reading Foucault against Marx. Thus Wickham in his *'Turning the Law into Laws for Political Analysis'* cites Marx and Engels as emblematic thinkers of a unified conception of 'the Law', 'representative of a certain way of constructing and understanding the politics of laws', and whilst making 'no comment on the appropriateness of these ... concepts and this project for the places in which Marx

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[48] From the Preface to the Second Russian Edition. Pashukanis, *Law and Marxism: A General Theory*, 36.

[49] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, 23.

[50] Bob Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques*, London, Pluto, 1984. For work produced in the early 1980s, see e.g. Nancy Anderson and David F. Greenberg, 'Formalist Theories in Marxist Analyses of Law', *Conference paper*, 1981; Collins, *Marxism and Law*; Alan Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law', *Law and Society Review*, 19, 1985, 11-37; Phillips, *Marx and Engels on Law and Laws*; Stone, 'The Place of Law in the Marxian Structure-Superstructure Archetype'; Sugarman, ed., *Legality, Ideology, and the State*; Csaba Varga, *The Place of Law in Lukâcs' World Concept*, Budapest, Akadâemiai Kiadâo, 1985.

[51] Dragan Milovanovic, "Postmodern Law and Subjectivity: Lacan and the Linguistic Turn," in *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*, ed. David Stanley Caudill and Steven Jay Gold, Atlantic Highlands, N.J., Humanities Press, 1995, 38.

and Engels worked or for the times in which they worked,' he merely argues that for contemporary analysis in Australia 'they are not immediately appropriate and should be overhauled.'[52]

Emblematic of this shift away from any of the understandings of law offered by Marx - but almost unique in retaining an avowed orientation towards Marx - is Hunt. After producing key works on Marx and law, his texts were thereafter almost exclusively concerned with Foucault, notions of governmentality and regulation taking preference over law. Indeed, in the titles of his works we can almost discern the trajectory of Marxist legal thought itself: *Law State and Class Struggle*; *The Ideology of Law*; *The Sociological Movement in Law*; *Towards a Constitutive Theory of Law*.[53] In an interesting reflection on his intellectual history - which he described as an attempt at *'Getting Marx and Foucault into Bed Together!'* - Hunt explains Marx's ongoing attraction as a pole of engagement thus:

> The focus on relations helps hold at bay that great vice of legal enquiry which objectifies law, exemplified as "the Law", which makes it appear as an objectified entity that pre-exists the institutional apparatuses and practices that provide its conditions of continuity and independence. It is in order to avoid this objectification of law that I have come to refuse to take "law" as my object of inquiry and instead take as my point of entry either "regulation" or "governance" (and I have not settled whether these are the same or different starting points). Both concepts have the merit of being "processes" that have their point of impact on various forms of "relations". I am persuaded that social studies of law should do everything possible to avoid treating law as an entity standing apart because that view is precisely an ideological tenet of liberal legalism.[54]

As with Hunt, the spirit of Marx that animates this thesis refuses to treat law as an 'objectified entity' that can be brought into a contingent relation with the economic or social. Any analysis of law that expresses a fidelity to Marxism must proceed from the starting point that social relations have an ontological primacy, and that unwrapping the mystery of 'legal relations' is the Marxist critique.[55] What hopefully will become apparent throughout the thesis is that it is precisely the ongoing separation of 'the law' from other 'relations' that is the proper object of study. With Hunt, this thesis will seek to correct

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[52] Wickham, "Turning the Law into Laws for Political Analysis," 40-41.

[53] Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law*; Alan Hunt, 'Law, State and Class Struggle', *Marxism Today*, 20, no. 6, 1976, 178-87; Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law'; Alan Hunt, *The Sociological Movement in Law*, Philadelphia, Temple University Press, 1978; Alan Hunt and Gary Wickham, eds., *Foucault and Law: Towards a Sociology of Law as Governance*, London, Boulder, Pluto, 1994.

[54] Alan Hunt, 'Getting Marx and Foucault into Bed Together!', *Journal of Law and Society, vol 31, no 4, pp 592-609, Dec 2004*, 31, no. 4, 2004, 592-609, 602-03.

[55] Cf Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law*, Ch11.

Foucault's 'expulsion of law' and instead insist on the importance of positive and civil law in 'exercising control over or exempting from control the different forms of disciplinary regulation,' whilst at the same time accepting with Foucault that law constitutes social relations and subjects and is no mere superstructural epiphenomenon.[56] However, instead of treating 'modes of regulation' (e.g. of labour relations) as 'relatively autonomous' systems that can change over time, we will instead build on Hunt's unpursued insight that systems of labour law demarcate the boundary between 'work and politics.'[57] With this overview of the trajectory of significant strands of Marxist legal theory, it is now necessary to explore another aspect of the tradition of Marx, namely that which focuses on the form in which law appears under capitalism, for this has proved to be the most fruitful and enduring line of enquiry.

Derivationism

A Soviet jurist writing in the early decades of the twentieth century, Evgeny Pashukanis' development of a Marxist approach to law was paralleled by the developments within Russia. His best known work *A General Theory of Law and Marxism* (hereafter '*General Theory*') linked the developed form of law to a developed form of capitalism and thus predicted the withering away of law in the transition to communism. This was a more than theoretical concern for Pashukanis: his activity in senior positions under Lenin was wholeheartedly directed towards the radical reduction in the number and length of laws and the dismantling of the court system. This ultimately brought him into conflict with Stalin and the official position of the Soviet Communist Party in the 1930s, committed as they were to strengthening the state. Pashukanis engaged in a series of recantations of some of his earlier work, but was eventually killed after being officially determined a class enemy in 1937. The (re)printing of his works in English translation, together with political movements and interests at the time, provided the basis for a 'rediscovery' of his work from the late 1960s to the early 1980s.[58]

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[56] Ibid., 285, Chs 12, 13.

[57] Ibid., 325.

[58] For an overview of Pashukanis' life, see foreword and introduction to Piers Beirne and Robert Sharlet, eds., *Pashukanis, Selected Writings on Marxism and Law*, London, New York, Academic Press, 1980. An excellent detailed history is found in Michael Head, *Evgeny Pashukanis: A Critical Reappraisal*, Abingdon, New York, Routledge-Cavendish, 2008. For discussions of Pashukanis during this period of the 1960s to 1980s, see Anderson and Greenberg, 'Formalist Theories in Marxist Analyses of Law'; C. J. Arthur, "Introduction," in *Law and Marxism: A General Theory*, ed. E. B. Pashukanis, London, Ink Links, 1978; C. J. Arthur, 'Towards a Materialist Theory of Law', *Critique*, 7, Winter, 1976, 31-46; Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*; Kamenka, "A Marxist Theory of Law?."; Kinsey, 'Marxism and the Law: Preliminary Analyses'; Rett R. Ludwikowski, 'Socialistic Legal Theory in the Post-Pashukanis Era', *Boston College*

Pashukanis took from Marx two basic ideas: 'to approximate the legal form to the commodity form' and to demonstrate that 'the philosophy of law based on the category of the subject with his capacity for self-determination ... is actually, basically, the philosophy of an economy based on the commodity.'[59] Taking it for granted that the coercive apparatuses of the state were significant in class struggle, Pashukanis sought to demonstrate that the contemporary form of law - the idea of an abstract, equally applicable entity that adjudicates claims of right - was a product of the developing conditions of capitalism. Whilst some forms of law existed in various pre-capitalist societies, only under a capitalism with widespread commodity production does the notion develop of the 'subject in law'- a formally equal entity with claims to rights. What interested Pashukanis was how materially unequal individuals came to be represented as formally equal subjects. Instead of beginning with the *Preface*, Pashukanis begins with *Capital* and the analysis of commodity fetishism.

For Marx, the fetishism proper to capitalism was the appearance and understanding of commodities as things in themselves, whereupon in the sphere of commodity exchange:

> the existence of things *qua* commodities, and the value-relation between the products of labour which stamp them as commodities, have absolutely no connection with their physical properties and with the material relations arising therefrom. There it is a definite social relation between men that assumes, in their eyes, the fantastic form of a relation between things.[60]

In Marx's analysis, commodities appear to us as incarnations and embodiments of a positive concept of 'value'. The 'valueness' of a commodity appears to inhere in the commodity itself. It is this that renders all commodities commensurable with each other. Money - the commodity with no 'use-value' - appears as pure embodiment of value as such, and can thus be exchanged for any commodity. However, by following Marx and descending into 'the hidden abode of production', it is discovered that, at its core, there is an exchange taking place that is other than it appears: the wage relation. The worker produces the (value of a) commodity, but is paid not an amount equivalent to that value, but rather an amount equivalent to the use-value of the worker's labour. The employer

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International and Comparative Law Review, 10, no. 2, Summer, 1987, 323; Milovanovic, *Weberian and Marxian Analysis of Law: Development and Functions of Law in a Capitalist Mode of Production*; Steve Redhead, 'The Discrete Charm of Bourgeois Law: A Note on Pashukanis', *Critique*, 9, 1978, 113-20; Nigel Simmonds, 'Pashukanis and Liberal Jurisprudence', *Journal of Law and Society*, 12, no. 2, Summer, 1985, 135-51; Colin Sumner, 'Pashukanis and The "Jurisprudence of Terror"', *The Insurgent Sociologist*, 10, no. 4, 1981, 99-106; Varga, *Marxian Legal Theory*; Ronnie Warrington, 'Pashukanis and the Commodity Form Theory', *International Journal of the Sociology of Law*, 9, no. 1, Feb, 1981, 1-22.

[59] Pashukanis, *Law and Marxism: A General Theory*, 38, 39.

[60] Marx, *Capital: A Critical Analysis of Capitalist Production*, 77.

extracts the surplus. The exchange is 'equal' (the worker is 'fully' paid for her 'work') and 'unequal' (the employer extracts the surplus value created). The 'unequal' aspect of this exchange cannot be represented (even though/because it is the source of the capitalist machine), and is excluded from the universe of exchange/value. The fetish for Marx consist in the fact that we don't understand the relation between commodities as bringing into contact relations between producers - even though that is what we are doing in the act of exchange - but rather as the relation between things: 'We are not aware of this, nevertheless we do it.'[61]

For Pashukanis, the unfettered process of production needs something to turn subjective wills to exchange into objective acts of exchange. This is the legal subject: 'It is the social relations of owners of commodities that has as its "reflex" the legal form' and 'The legal relation between subjects is simply the reverse side of the of the relation between products of labour which have become commodities.'[62] People could not relate to each other in the production process - either as exchangers of commodities or as capitalist/labourer - without there being a 'particular relationship between people with products at their disposal, or subjects whose will resides in those objects'. In other words, there can be no exchange and fetishism of commodities without also the simultaneous creation of the legal subject: 'The social relation which is rooted in production presents itself simultaneously in two absurd forms: as the value of commodities, and as man's capacity to be the subject of rights.'[63] Though Pashukanis does not use this term, his argument is emblematic of Read's position referred to above: that there is a certain subjectivity that is *productive* for capital.

As capitalism and commodity exchange spread, so begins the process of abstraction of the creation of a subject. The process of exchange takes place under the guise of equivalence - commodities are equal to each other and, over time, there develops a universal equivalent (money). In the same manner, out of the clamour of trade the equality of the traders (legal subjects) gains universality. It is from this universality of abstract equality that notions of state and law arise. They appear to have nothing to do with the economic relations of civil society, but in fact *have their source* there. Thus:

> In a society where there is money, and hence individual private labour becomes social

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[61] Ibid., 78-79. See to Žižek's excellent reading of this aspect of Marxism in the opening chapters of Slavoj Žižek, *The Sublime Object of Ideology*, London, Verso, 1989.

[62] Pashukanis, *Law and Marxism: A General Theory*, 82, 85.

[63] Ibid., 112, 13.

> labour only through the mediation of a universal equivalent, the conditions for a legal form with its antitheses between the subjective and the objective, between the private and the public, are already given. Only in a society of this kind does political power have the possibility of setting itself up in opposition to purely economic power, whose most profound manifestation is the power of money. Simultaneously with this, the statute form also becomes possible.[64]

Not surprisingly, Pashukanis also references Marx's *On the Jewish Question*. The relevant quotation is worth setting out at length, since it not only guides Pashukanis' thought but will be returned to often in the remainder of this thesis:

> The *constitution* of the *political state* and the dissolution of civil society into independent *individuals* – who are related by *law*, just as men in the estates and guilds were related by *privilege* – are achieved in *one and the same act*. But man as a member of civil society, inevitably appears as *unpolitical* man, as *natural* man. The rights of man appears as natural rights, for *self-conscious activity* is concentrated on the *political act*. *Egoistic* man is the *passive* and merely *given* result of the society which has been dissolved, an object of *immediate certainty*, and for that reason a *natural object*. The *political revolution* dissolves civil society into its component parts without *revolutionizing* these parts and subjecting them to criticism. It regards civil society, the world of needs, of labour, of private interests and of civil law, as the *foundation of its existence*, as a *presupposition* which needs no further grounding and therefore as its *natural basis*. Finally, man as he is a member of civil society is taken to be the *real* man, man as distinct from citizen, since he is man in his sensuous, individual and *immediate* existence, whereas *political* man is simply abstract, artificial man, man as an *allegorical, moral* person. Actual man is acknowledged only in the shape of the *egoistic* individual and *true* man only in the form of the *abstract citizen*.[65]

This also means that, for Pashukanis, 'Law as an objective social phenomenon cannot be exhaustively defined by the norm or regulation.'[66] To seek law's foundation in the state (i.e. as a norm) is to fail to see that law arises from civil society (but this civil society is in turn constituted by the 'one and the same act' that separates the state from it). A key insight of Pashukanis is that a relation may exist between two parties, which has legal characteristics, independently of the strength/existence of a third coercive force. The state is produced by civil society, rather than the other way around. 'The distance from the production relation to the legal relation is shorter that so-called positive jurisprudence thinks, unable as it is to do without a mediating and connecting link, state authority and its norms.'[67]

For Pashukanis, the development of a notion of public law only reaches fruition - and its full differentiation from private law - with the full development of the notion of public

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[64] Ibid., 42-3.

[65] Karl Marx, "On the Jewish Question," in *Early Writings*, London, Penguin, 1992, 233-4.

[66] Pashukanis, *Law and Marxism: A General Theory*, 87.

[67] Ibid., 93.

authority. Pashukanis traces the 'earliest and most complete ... separation between the public law principle of territorial sovereignty and private land ownership' in places such as German trade cities.[68] As with Max Weber, the city is defined by its having a market and was a crucible of the forces that came to be modernity.[69] In the city *Stadtluft macht frei.* However, this 'independent' 'public' power arises because of the development of relations external to it:

> effective power acquires a markedly juridical, public character, as soon as relations arise in addition to and independently of it, in connection with the act of exchange, that is to say, private relations par excellence. By appearing as a guarantor, authority becomes social and public, an authority representing the impersonal interest of the system.[70]

Though there are external factors in state development (for example, the fighting of wars), or times when the coercive apparatuses of the state are deployed in moments of crisis, none of these need to be configured legally. However, power as guarantor of exchange 'not only employs the language of law, but also functions as law and law alone, that is, it becomes one with the abstract, objective norm.'[71]

Pashukanis argues that, under feudalism, immediate relations between people (e.g. lord and serf) contained force by virtue of the nature of the relationship. To the extent that an external reference was needed, it was theological. In the transition to capitalism, the 'civil society' of commodity exchangers could not admit of the existence of force in either 'free' exchange or in the 'free' immediate employment relationship. In this regard, the worker's relationship to employer, though similarly immediate, is not a personal relationship of force: the worker is 'free' to leave. Similarly, the 'impersonal force' of the state does not compel the worker to stay. Under capitalism, the common law source of the power of an employer over their workers - an ability to direct reasonably and lawfully that never finds expression in any statute - derives not from the personal figure of the employer, but from their contingent position (as owner of means of production) as participant in a system, where the social productive forces are *external* to the contingent positions of those participating in the social relations.

Consistent with his theory that force within civil society is the precursor and source of the force of the state and of law, Pashukanis concludes that 'the concept of theft arose before

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[68] Ibid., 137.

[69] Cf Max Weber, *Economy and Society: Vol 2,* New York, Bedminster Press, 1968.

[70] Pashukanis, *Law and Marxism: A General Theory*, 137.

[71] Ibid.

the concept of property.'[72] And, interestingly, he argues that the concept of pactum or 'pact' derives from *pax* - peace i.e. end of a dispute - not 'contract'.[73] Force's appearance as equivalence - behind which lurks the force of trade - explains for Pashukanis why, in criminal law, punishment, guilt and sentences appear in the form of equivalences. Sentencing in particular - where one knows in advance how much of a portion of one's liberty will be given up in exchange for an illegal act - epitomises this. Pashukanis claims Aristotle (and Hugo Grotius) in support of this view, arguing that Aristotle was 'the author of the definition of crime as an involuntarily concluded contract: the punishment concludes the contract.'[74] Hence one pays the price for a crime, or pays one's debt to society. Pashukanis notes that in Roman law, crimes were compensable by money, and debts compensable by bodies. The principle of equivalence was naked, but had not yet moved to colonise other spheres of law and life. But by the start of the twentieth century, the process was almost complete: 'Industrial capitalism, the declaration of human rights, the political economy of Ricardo, and the system of imprisonment for a stipulated term are phenomena peculiar to one and the same epoch.'[75]

This thesis must now proceed in a different direction to most former Marxist legal scholarship. Alive in Marx and Pashukanis is a spirit that seeks to understand legal forms as the result of *separations* of the 'legal' from other forms of social activity. Contained within Pashukanis and Marx are the elements needed to animate this spirit: the creation of the commodity 'labour power'; the need for force to be exercised in a variety of forms; the role of authority and guarantee as commodity production expands; and their various effects on legal subjectivity. Rather than hypostasising any one 'legal form' that can then be brought into contingent relationship with the 'economic', more interesting is exploring the complex ways in which the two are produced and reproduced as separate. It is in this neglected direction that this thesis will head, focusing on these separations and reseparations at the level of force/violence (Part II), authority, guarantee and value (Part III) and the legal subject (Part IV). Further, the quotations from Pashukanis set out in this chapter cannot but locate labour - and the command over labour (i.e. production relations) - as central categories in the development of law, but this insight, born with Hegel, also almost universally has been overlooked. But the argument is getting ahead of

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[72] Ibid., 167.

[73] Ibid., 168.

[74] Ibid., 169.

[75] Ibid., 181.

itself. First it is necessary to consider the reception of Pashukanis' thought and thereby see how this thesis relates to the other extended discussions of the influential Soviet jurist.

Chapter 2 - Pashukanis applied

The work of Pashukanis has prompted few extended reflections within Western academe. Miéville's *Between Equal Rights: A Marxist Theory of International Law* is the most rigorous attempt to apply Pashukanis to the field of international law.[1] Miéville, publishing his book in 2005, had the benefit of almost a twenty year gap between his work and the flurry of activity in Marxism and law discussed in Chapter 1. Miéville's work is a faithful application of a certain understanding of Pashukanis and extends the latter's thinking in a direction towards which Pashukanis himself gestured. Michael Head's recent *Reconsidering Pashukanis* is largely biographical, and situates Pashukanis' thought in its proper historical and political context.[2] Bernard Edelman's *Ownership of the Image: Elements of a Marxist Theory of Law*, was translated into English in 1979 and is a different kind of endeavour altogether, being an attempt to philosophically advance Pashukanis and apply him through an analysis of French cinema law.[3]

Unlike Miéville, Head's aim is not to theoretically advance Pashukanis' work, but rather to make an argument for its ongoing relevance. Head's is the first work to critically reappraise the usual designation of Pashukanis as an anti-Stalinist. Head notes in detail that soon after the publication of *General Theory*, Pashukanis began to align himself with pro-Stalin factions, suggesting that this may have helped his propulsion to the heights of Soviet legal institutions.[4] Indeed, there is even a suggestion that hints of this alignment are discernible in Pashukanis' *General Theory*. Head also draws attention to the often overlooked fact that Pashukanis was attempting to reconcile a commitment to the decline of law with a society beset by civil war, under immediate threat from abroad and embarking on a 'New Economic Policy' that was designed to temporarily *increase* commodification and property rights. Despite delivering heavy criticism for an opportunistic pro-Stalinism that was ultimately worthless, Head concludes that Pashukanis' 'tragic fate ... does not negate his initial theoretical contribution.'[5] Head's primary focus - the debates and conflicts within Russia that informed Pashukanis -

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[1] China Miéville, *Between Equal Rights: A Marxist Theory of International Law*, Leiden, Brill, 2004, 189.

[2] Head, *Evgeny Pashukanis: A Critical Reappraisal*.

[3] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*.

[4] Head, *Evgeny Pashukanis: A Critical Reappraisal*, 153.

[5] Ibid., 252.

diverges from that of this thesis, and so this thesis will not respond to his work in close detail. But with Head, it is argued here that the spirit that initially animated Pashukanis is one to be kept alive.

Edelman takes Pashukanis as his point of departure and reads him together with Hegel and Althusser to analyse the law of cinema and photography. Inexplicably, Edelman's work is completely absent from Miéville's and Head's books. Edelman's work is of a different order to the other texts: it is a philosophical engagement with Pashukanis around the question of subject formation. This chapter will focus primarily on Miéville's theoretical elaboration, for it epitomises a certain problematic understanding of the 'commodity form' of law. The critique of Miéville will draw on Edelman, but extended discussion of the latter will be saved until Chapter 3 when Hegel is discussed. This chapter then moves to a consideration of the 'state debates' in the late 1970s to early 1990s which took Pashukanis' methodology as their point of departure. It finishes by considering the 'Open Marxism' which flourished during and after these debates and which opens up new ways of understanding the question of the 'legal form'. This chapter not only concludes the discussion of the main Marxist approaches to law, but through the criticism of these perspectives continues to develop a key argument of this thesis: that Marxist legal theory has traditionally failed to find a stable place for the force of law, and that this stems from failing to place the labour relation at the centre of the analysis. The questions of force and authority over subjects will be further opened up in this chapter but more fully pursued in Parts II and III respectively. Likewise, the substitution of commodities in general for the particular commodity labour-power leads to misunderstandings of Pashukanis' theory of legal subjectivity, a point that will be initially argued here and developed in Part IV.

'Between equal rights, force decides'

Miéville's work is a significant application of Pashukanis to the field of international law. Though it will be subjected to some criticism here, as a recent work reviving and applying Pashukanis with the stated aim of contributing to Marxist scholarship on law, it is to be applauded. Its rigour makes it worthy of detailed discussion. Miéville takes guidance not only from Pashukanis' commodity form theory of legal subjectivity but also

from his brief work on international law.[6] Miéville's work has as one of its targets the burgeoning literature concerning international law and the preoccupation with whether arrangements between sovereign states can be counted as law given the absence of any superintending authority. To answer this question, Miéville covers in detail the history of international law, including its existence prior to the population of the world by what are now understood as 'states'. After summarising this historical argument, his theoretical contribution is considered.

For Miéville, a 'fundamental moment in inter-polity law' occurred with the discovery of the 'New World': Europe's relationship to the Americas - one of dominance and appropriation - marked the birthplace of 'international law'.[7] This period in Europe was marked internally by the decline of the Holy Roman Empire and the soon to occur Reformation: legal principles predicated on the existence of the Empire were thus in a state of transition. Spain and Portugal, in their colonisation of the 'New World' began the process of international law by agreeing on a series of 'global lines of division and distribution'.[8] Vitoria, legal theorist and theologian, was pivotal in creating a spatial and legal order to explain this new colonialism.[9] He located sovereignty within the Christian states precisely because of their Christianity. These states could wage a 'just war' on non-Christian peoples. In Miéville's words: 'The beginnings of an international law of independent sovereign powers is thus predicated on a colonial disempowering of non-Western subjects'.[10] As the capacity to plunder the New World grew and was in turn met with fierce resistance, Vitoria theorised that although the 'natives' had formally equal rights with the Spaniards, prevention of trade (or for that matter the prevention of the spreading of the Gospel[11]) could be met with force. Miéville sees this formal equality in a manifestly unequal encounter as the epitome of the form of international law.

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[6] See Evgeny Pashukanis, "Selections from the Encyclopaedia of State and Law: 'International Law'," in *Pashukanis, Selected Writings on Marxism and Law*, ed. Piers Beirne and Robert Sharlet, London; New York, Academic Press, 1980.

[7] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 169.

[8] Miéville quoting Schmitt, Ibid., 172.

[9] On Vitoria, see e.g. Ernest Nys, ed., *Francisci De Victoria: De Indis Et De Iure Belli Relectiones*, Buffalo, N.Y., William S. Hein, 1995; Anthony Pagden and Jeremy Lawrance, eds., *Francisco De Vitoria: Political Writings*, Cambridge; New York, Cambridge University Press, 1991.

[10] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 175.

[11] William Rasch, 'Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy', *Cultural Critique*, 54, 2003, 120-47.

The period between 1494 and 1648 witnessed decline of feudalism and nascent state formation.[12] The creation of Amity Lines, beyond which force in Schmitt's words could be used 'freely and ruthlessly', were the initial solutions to a new global ordering. For Miéville, the Amity lines were merely a brief interlude. The formation of sovereign states as domestic reactions against feudalism soon provided the structuring principles of both domestic and inter-polity relations. However, the sovereignty of states - their subjectivity in the international order - did not carry with it any implicit notion of equality of states. Thus Grotius, one of the foundational writers of international law, could write of the formal existence of unequal treaties between unequal powers.[13] However, the sixteenth and seventeenth centuries were also a time of massively expanding trade, much of it by sea. Whereas this trade had previously been regulated by principles associated with the previous epoch, disputes over trade and 'sovereignty over the sea' increasingly came to be understood as matters of both 'public' sovereign right and 'private' trade between entities. The ability to lay claim to a conquest at sea, for example, became linked to the capacity of the state to rule internally/domestically (i.e. its existence as a 'proper' state). An element of this form of 'mercantile colonialism' from the eighteenth to very early nineteenth century was the conduct of trade through monopoly companies, such as the East India Company. Because these companies were responsible *inter alia* for control of territories they occupied, the colonies were not granted recognition as subjects of international law. However, expansionary capitalism chafed against the privileges accorded the monopolies. The end of the monopoly companies in the nineteenth century thus prompted questions over the legal status of the colonies. The solution in India, for example, was to acknowledge its existence as a legally defined 'state' but maintain British rule over it:

> Where colonialism succeeded, international law had to recognise the colony's subservient existence. The alternative was more dramatic: when it became clear the American insurgents would not be contained by Britain, it became inevitable that they be recognised as an independent state. That was the result of failed colonialism.[14]

This opened the way to what Miéville terms 'the imperialism of recognition', in which the question of whether a state would be *recognised* as subject - and hence with sovereignty

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[12] See too Felix Gilbert, ed., *The Historical Essays of Otto Hintze*, New York, Oxford University Press, 1975, Chs 4 & 5; Rasch, 'Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy'; William Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*, London, Birkbeck Law, 2004.

[13] Quoted in Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 180.

[14] Ibid., 235.

over its own territory - became a key method of exercising power. Hence the political significance of French recognition of the US at a time when France and Britain were still antagonistic. Indeed, the significance of recognition of legitimate sovereignty persists today: '*the defeat of formal imperialism does not mean the end of an imperialist order, and even the very legal fabric of post-colonialism can be constitutive of such an order, in a new form*'.[15]

By the 1880s, Miéville writes, the 'pressures towards juridical recognition of the colonies were strong. With the spread of universalisation of commodification under capitalism, law - including international law - had a similar universalising dynamic, with a tendency towards the realisation of the juridical sovereignty of polities'.[16] There were parallel tendencies in Japan and China to begin to use the terminology of Western international law and to demand recognition on the basis of their sovereignty. To move quickly in this summary to the era after World War II, the formation of the United Nations - with formally equal sovereign state subjects being the units of the treaties and the ongoing General Assembly - represents the culmination of the universalisation of the principle of sovereign states as abstractly equal subjects. For Miéville, the growth of international law between formally equal states is not contradicted by wars between states, the suppression of one state by another, manifestly unequal trade and plunder or the absence of any superintending determinative authority. Instead, these are the very factors that make up the history and essence of international law:

> [T]he international legal form assumes juridical equality and unequal violence of sovereign states. In the context of modern international capitalism, that unequal violence is imperialism itself. The necessity of this unequal violence derives precisely from the juridical equality: one of the legal subjects makes law out of the legal relation by means of their coercive power - their imperialist domination. Specifically in its universalised form, predicated on juridical equality and selfdetermination, international law assumes imperialism. At the most abstract level, without violence there could be no legal form. In the concrete conjuncture of modern international capitalism, this means that without imperialism there could be no international law.[17]

In forms of economy prior to capitalism, exchange did not presume equality. It is only with the development of capitalism - and through the changing ways that polities have related to each other over time - that a system of abstract equality develops, argues Miéville. Following that development, these subjects appear to be endowed with legal

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[15] Ibid., 236. Emphasis in original.

[16] Ibid., 256.

[17] Ibid., 293.

personality, so that the notion of right then becomes detached and abstracted. With the deepening of this notion of the abstract equality of sovereign states, the fiction is maintained of law's possible existence 'above' these states. Scholars who argue over whether international law is law without a superintending authority thus miss the point: international law *is* this process of trade and conflict, and it has *produced* its subjects: *'Pashukanis has here, in passing, solved the most tenacious problem of the legality of a decentralised legal system.'* [18] This, then, is for Miéville a direct exemplar of Pashukanis' theory: out of unequal economic relations characterised by force there arises an increasingly abstracted notion of right which presumes formally equal subjects. It is difficult to argue with Miéville's fundamental thesis that the global historical production of states is tied up intimately with the development of capitalism; or that that any recourse to international law as something existing above states, to which states can potentially be held accountable, suffers from naiveté as to law's history and function. Pashukanis shared these views and considered that commodity form theory could usefully explain them at both the domestic and international level.[19] However, questions remain as to whether Miéville's is a proper understanding of Pashukanis' theory, and whether the former's application of the latter survives the transition from domestic to international law. These questions arise at two levels: the treatment of force/violence and the treatment of the state as a subject analogous to the individual legal subject.

The abstraction of violence

A problem with Miéville's approach is his failure to completely pursue the analysis of the commodity form, and to instead resort to functionalism and instrumentalism at important points in his argument. When discussing violence, for example, he rightly notes the conundrum posed: if there is no necessity for an external state, but violence in some way inheres in commodity exchange, and law requires violence, then from where does law's violence come?[20] At this point, the title of his book applies: law's violence comes from whoever has more force, and as Marx wrote 'between equal rights, force decides'[21]. The appropriate analogy in the international sphere is thus self-help. Force is located once again outside of 'law': it reverts to a question of balance of forces. However, Miéville also reverses this argument:

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[18] Ibid., 131.

[19] Pashukanis, "Selections from the Encyclopaedia of State and Law: 'International Law'."

[20] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 133.

[21] Marx, *Capital: A Critical Analysis of Capitalist Production*, 225.

> If "force decides", after all, then it is not an equal battle between capital and labour. Within the boundaries of a nation-state, capital has on its own side *a legislature, an arm of the bourgeois state*. It is the *judicial wing of the state* that is, institutionally, given the power to force a particular content into the legal form.[22]

Law's founding power which first appeared *outside of* law (in civil society) now suddenly appears *inside of* law (*via* the legislature and the state).

The key problem here is that Miéville's analysis of the commodity form reaches a point where he must locate force in relation to the form. It is here, after having travelled so far with Pashukanis and having come to the door of the secret abode of production, that he hesitates before taking the next step. Miéville's argument can be summarised thus: contrary to instrumentalist Marxist arguments about the state being merely an expression of bourgeois will or functionalist arguments about the state's necessity for reproducing relations of production, the essence of law is to be found in external economic relations not dependent on a state. The legal/commodity form explains how law can be independent of state: legal subjectivity is necessary for capitalist exchange, which is in turn necessary for production. There is of course a need for violence/force: without that, a commodity would not be 'my' commodity. But what is it about the force of the legal/commodity form that allows it to exist independently of the force of the state? The answer is the force of the state: capitalists' power over the working class *through instruments such as law and the state*. The argument undermines its own foundations. This criticism can be extended by getting to the nub of the problem: surplus.

Consider Miéville, quoting Pashukanis in the final sentence:

> To understand, as Pashukanis clearly does, that robbery (non-consensual possession of another's commodity) goes 'hand in hand' with trade (consensual exchange of commodities), is to understand that violence is implicit in the commodity, and therefore legal, form. If 'mine" implies force to keep it from becoming 'yours', then robbery is the failure of that force, and the success of someone else's. For Pashukanis, "order is actually a mere tendency and end result (by no means perfected at that), but never the point of departure and prerequisite of legal intercourse".[23]

The argument advanced in this thesis agrees wholeheartedly with the first sentence. As to the second, its import is that force in general - irrespective of the commodity form - makes a commodity 'mine'. Miéville is in effect repeating Cohen's argument that relations of property can be understood in non-legal terms. But this then implies that the capacity of subjects to exercise force not *necessarily in their capacities as mutual*

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[22] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 120-21. Emphasis added.

[23] Ibid., 134.

exchangers of commodities finally 'decides'. The violence in the legal/commodity form under capitalism is thus not peculiar to the commodity form itself. The peculiarity is said only to be that, with widespread commodity production, capitalism has permitted the abstraction of the notion of the subject. However, Marx was at pains to argue that it is not only the abstract equality of the subject that is peculiar to capitalism, but the relation of the extraction of surplus. This brings us to an important criticism of Pashukanis. It has been said several times, by Fine, Ronnie Warrington and Arthur amongst others, that Pashukanis pays insufficient attention to production.[24] The common ground of most such critiques seems to be that if he were more closely following *Capital*, he ought to have devoted more pages to analysis of production relations. It appears to offend the sensibilities of Marxists that his work never descends into descriptions of factory life. However, it will be argued below that Pashukanis in fact *does* grasp the place of production, but that his work is expressive of the legal form at a particular moment in time. This cannot be counted as a failing intrinsic to Pashukanis, but it does mean his work lends itself to the kind of reception exemplified by Miéville and criticised by Fine et al. In responding to criticisms of Pashukanis' alleged emphasis on circulation over production by demonstrating a 'commodity' theory of law, Head is one of the few to correctly reply that Marx's analysis of the commodity form only *begins* with circulation and eventually descends into production.[25] However, Head does not proceed to do what will be done in this thesis: continue the analysis of the 'legal form' into this hidden abode.

If one is serious about asserting that the legal form is isomorphic to the commodity form, then this question of production must be considered first. Indeed, this has been the primary failing of most readings of Pashukanis. Marx's analysis of commodity fetishism led to the kernel of capitalism: 'this fetishism of commodities has its origin ... in the peculiar social character of the labour that produces them.'[26] The creation of an equal guardian to take commodities to market is a fiction not merely because (following Miéville's interpretation) supposedly equal people have unequal force, but rather because equality itself is unequal when it comes to that most enigmatic of commodities: labour.

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[24] Arthur, 'Towards a Materialist Theory of Law'; Fine, *Democracy and the Rule of Law: Marx's Critique of the Legal Form*, 8; Ronnie Warrington, "Pashukanis and the Commodity Form Theory," in *Legality, Ideology, and the State*, ed. David Sugarman, London, New York, Academic Press, 1983, 53.

[25] Head, *Evgeny Pashukanis: A Critical Reappraisal*, 216. See Warrington, 'Pashukanis and the Commodity Form Theory'.

[26] Marx, *Capital: A Critical Analysis of Capitalist Production*, 77.

The key to an analysis of the commodity form is thus, for Marx, to show how it conceals certain relations of *production*. Miéville makes the point that circulation under capitalism plays a crucial role in this particular system of production, which is part of the answer. But the mistake comes when he relegates production to a question of the *content of* law: 'the form is the form of its content, the content of domestic law under capitalism is - at an abstract level - that of class exploitation based on surplus extraction in production, and the concomitant class struggle.'[27] In one sense, this must surely be wrong - there is no enduring domestic law which in content specifically mandates the extraction of surplus. Further, by asserting that law has a 'content' at an 'abstract' level, one is left wondering exactly how this can be distinguished from the 'form' of law.

Miéville is unwittingly partly right about the role of law, but in a way that doesn't stem from his argument. Jurisprudence, labour law and political theory has tended to assume that capitalism begat 'free labour,' and indeed that capitalism definitionally requires a class of people who are able to choose which labour contract to enter into, if any contract at all.[28] However, labour researchers in particular have demonstrated that even the late nineteenth century in England was characterised by law forcing employees to work, penalising them for or prohibiting them from leaving their jobs. It transpires that command over labour was shared by law and capital for a long time:

> Wage workers commonly served under agreements that could *not* be terminated at will, and employers commonly sought to have these agreements enforced against them. ... English law gave employers effective remedies for breach of contract. English wage workers could be imprisoned at hard labour for failing or refusing to perform their labour agreements. Strict labour contract enforcement through nonpecuniary pressure of this kind was an integral feature of English wage labor in the nineteenth century. ... The origins of modern free wage labor are not to be found in the free contracts in free markets of the first half of the nineteenth century but in the restrictions placed on freedom of contract by the social and economic legislation adopted during the final quarter of the century.[29]

Robert Steinfeld finds a similar pattern in France, Germany and even the United States.[30] This is not a distinction between form and content. Such a distinction is completely unable to explain why the form of the wage relation, enduring at least through the

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[27] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 138.

[28] See e.g. Jairus Banaji, 'The Fictions of Free Labour: Contract, Coercion, and So-Called Unfree Labour', *Historical Materialism*, 11, 2003, 69-95; Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century*, Cambridge, New York, Cambridge University Press, 2001. See too M. R. Freedland, *The Personal Employment Contract*, Oxford, Oxford University Press, 2003.

[29] Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century*, 9-10.

[30] Ibid., 10 and Part II.

eighteenth, nineteenth and twentieth centuries, is at times buttressed by law commanding performance, and other times not. To locate the 'content' of command in 'domestic law' is to offer imprecision where closer theoretical consideration is needed. Instead, as the analysis in the coming chapters will show, what is at stake is the creation of a subjectivity for capital that is productive - that of the legal subject who enters the wage relation in the figure of the abstractly equal labourer.[31] The legal subject is productive because they have been separated from their means of production and forced to work. The disciplining of this productive capacity shifts contingently and historically - not formally and logically - between law and capital. Indeed, it is the problematising of this distinction, rather than the formalising of it, that holds the key to a Marxist analysis of law.

In his discussions of the legislation that enclosed land and forced people to work - 'Expropriation of the Agricultural Population from the Land' and 'Bloody Legislation against the Expropriated, From the end of the 15th Century. Forcing down Wages by Acts of Parliament' - Marx also at times without hesitation posits law as the creator of economic relations of production. Whereas capitalism and its apologists presuppose an idyllic origin of 'the complete separation of the labourers from all property and the means by which they can realize their own labour', in reality this came about in a violent passage of history: 'their appropriation is written in the annals of mankind in letters of blood and fire.'[32] Legislation initially stood in the way of the economic revolution, by attempting to retain the land allotments to wage-labourers, or fighting against the seizing of communal property, for example, but then after 'the restoration of the Stuarts, the landed proprietors carried, by legal means, an act of usurpation.'[33] The 'law itself becomes now the instrument of the theft of people's land' and '[the] parliamentary form of the robbery is that of Acts for enclosures of Commons ... decrees by which the landlords grant themselves the people's land as private property, decrees of expropriation of the people.'[34] After expropriation comes the 'so-called clearing of estates, i.e. the sweeping men off them' and the systematic passage of legislation designed to force these dispossessed people to work under pain of penalty for vagabondage, their wages fixed by Act of Parliament.[35] Marx echoes the research discussed above in noting that the statutes

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[31] Cf Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 97ff, 153ff.

[32] Marx, *Capital: A Critical Analysis of Capitalist Production*, 669.

[33] Ibid., 673-6.

[34] Ibid., 677-8.

[35] Ibid., 680, 86ff.

that allowed for criminal prosecution of the worker if they left employment early, but only civil actions against the employer, were in 'full force' in 1873, as he was writing.[36] Marx also examines the use of legislation to raise the price of land and regulate the supply of labour in colonies like Australia where otherwise the 'law of the market' created high wages and absconding workers.[37] Law and force therefore bring the working class into existence, and capital comes into the world 'dripping from head to foot, from every pore, with blood and dirt.'[38] 'As Marx argues, the state, and particularly its powers of police and violence, are then a contingent, but necessary constitution of the capitalist mode of production.'[39] Force and law as force bring economic relations into existence. This is by no means the whole story of the relation between law and work, but it must be noted that force precedes, because it helps create the proletariat as a subject that can enter into relations with capital, and thus creates the 'equality' behind 'equal rights.'

Forceful law thus creates 'equality'. But it then reappears in another guise: as reflection of class conflict between equal forces, the decision at the end of a fight. Miéville, though, takes 'between equal rights' out of its context and rarely returns to consider Marx's treatment of this second kind of 'force' that 'decides'. When Marx wrote in Chapter 10 of *Capital* 'The Working Day' that force decides between equal rights, he was discussing the struggles between classes over the length of the working day. Force 'decides' in the sense that 'the determination of what is a working-day presents itself as a result of a struggle.'[40] For a long period of capital's expansion, the working day went unregulated. Section 5 of Chapter 10 then explores the means by which *through law* workers were forced to work and the working day was compulsorily extended. One thus reads there of 'the pretensions of capital in embryo - when, beginning to grow, it secures the right of absorbing a *quantum sufficit* of surplus-labour, not merely by the force of economic relations, but by the help of the State' and the 'centuries ere the 'free' labourer ... agrees' to sell their labour.[41] Section 6 then explores the result of the forceful clash between classes and temporary victories *by labour*, not capital, that saw 'exceptional legislation' limit the

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[36] Ibid., 691.

[37] Ibid., Chapter on The Modern Theory of Colonisation.

[38] Ibid., 712.

[39] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 25.

[40] Marx, *Capital: A Critical Analysis of Capitalist Production*, 225.

[41] Ibid., 258.

length of the working day.[42] As capitalist relations of production expand outside of the factory and encompass other kinds of manufacturing, legislation begins to lose its 'exceptional' character. But for Marx, this merely spreads the struggle wider, so that this 'civil war' of equal right against equal right spreads across society, and in many instances labour obtains temporary victories.[43]

What is to be concluded from all this? A simple argument is advanced with two aspects: (1) although the subjects are 'equal' in the wage relation, (2) this is ultimately only a fictive equality existing in a *force-ful relationship* that has itself come about as a *result* of force. As to (1), Marx is clear that the fictive equality of the wage relationship was made by forceful dispossession and enclosure, often through positive law, and the recent research considered above details the hard road taken to arrive at the wage relation as a contract between 'equals'. It is a case of 'between unequal forces is decided what equality before the law means.' Consider now (2) and recall that Miéville argued that if 'force decides' 'then it is not an equal battle between capital and labour' because capital has law and the state apparatus at its disposal.[44] This is on occasions true, as (1) demonstrates, *but the point Marx is making when he uses this phrase is exactly the opposite.* It was the *force* of labour reacting against the *force* of capital now under the guise of fictively *equal* subjects, 'right against right, both equally bearing the seal of the law of exchanges', where the mightier force *decided* and this result found its way into positive law.[45] If the argument about the nature of law were to proceed solely from this syntagm 'between equal rights, force decides', then the critique of positive law would not be that it is a class instrument but rather that it is merely the expression of the perpetual battle between class forces. An enormous amount hangs on this, as the argument developed throughout this thesis shows that the force Marx is referring to cannot be reduced - as Miéville does - simply to the instrumentalist (class) force of law. Instead, it is a 'force' that creates the 'equal' subjects that then march into battle, and which continues to exist in the 'force' that one class exercises over the other, where at times that 'force' will be exercised legally, at other times not. And at yet other times the battles between forces will find their temporary resolution in the *pacts* of both private law and public law. The phrase 'between equal rights, force decides' is given its full meaning only in the

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[42] Ibid., 282.

[43] Ibid.

[44] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 120-21.

[45] Marx, *Capital: A Critical Analysis of Capitalist Production*, 225.

context of the labour relation, where the force is sometimes simply that of mundane economic relations (command over labour), and at other times that of bloody struggle, and at other times the force of the state and law.

Marx was clear that the starting point for any analysis of law ought be the exchange associated with the labour relation, not exchange *per se*. He contrasted slavery - where all labour appears as unpaid labour - with wage labour, where all labour appears to be paid for:

> There the property-relation conceals the labour of the slave for himself; here the money-relation conceals the unrequited labour of the wage-labourer.... Hence we may understand *the decisive importance of the transformation of value and price of labour-power into the form of wages, or into the value and price of labour itself. This phenomenal form, which makes the actual relations invisible, and, indeed, shows the direct opposite of that relation, forms the basis of all juridical notions of both labourer and capitalist,* of all the mystifications of the capitalistic mode of production, of all its illusions as to liberty, of all the apologetic shifts of the vulgar economists. ... The jurist's consciousness recognises in this, at most, a material difference, expressed in the juridically equivalent formula: "I give that you may give; I give, that you may do; I do, that you may give; I do, that you may do".'[46]

When conditions for commodity capitalism are widespread (i.e. the situation Pashukanis is concerned with) the extraction of surplus itself - this core legal/economic relation - is where violence resides. And what enables the commodity exchange to become widespread? Not merely more frequent trading, but 'only when and where wage-labour is its basis does commodity production impose itself upon society as a whole; but only then and there also does it unfold all its hidden potentialities.'[47]

The argument made above is thus that for a Marxist analysis, the problem with commodity form theory of law is not in its overzealous attempts to establish a similarity between legal subjectivity and the form of the commodity, but rather in its failure to take the homology sufficiently seriously to find a place for the force that 'decides'. For the starting point must be the forms of subjectivity that commodity production engenders in the labour relationship. Force brings these forms of subjectivity about, but force then finds in a place internal to the production relationship. In turn, the forms of legal subjectivity capitalism engenders are productive for capital itself. This is an important point of departure for the arguments that will be advanced in the remainder of this thesis, and one that distinguishes the enquiry conducted here from most other readings of Pashukanis.

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[46] Ibid., 505-6. Emphasis added.

[47] Ibid., 550-51.

State as subject

As well as the problem of force/violence, the second set of problems concerns the state and subjectivity. Since Miéville is writing in the field of international law, the subjects with which he is concerned are states themselves, and potentially this opens up the inquiry to the other issues that will be addressed in this thesis, namely the relationship between law, force and authority (Parts II and III) as well as the proper understanding of subjectivity (Part IV). However, at least four problems arise from this 'scaling-up' of Pashukanis' theory from 'individual as subject' to 'state as subject'. First, Miéville understands that one reading of Pashukanis' logic is that the dissolution of the specificity of law arises from the inability to distinguish law from other state coercion: is club-law always law when the state wields the club? 'The focus on the materiality of law means that if no state anywhere is obeying a particular norm, a very strong case can be made that the norm has collapsed, as it is no longer meaningfully regulating anything.'[48] This is a critical issue and, as already foreshadowed, one with which contemporary legal philosophy concerns itself, namely the ability and effect of states' decisions not to operate in accordance with their own norms and/or to suspend norms to justify their own (forceful) existence. Marxism could tackle this issue seriously: it is precisely the point where law's relation to exceptionality - and its ability to suspend itself - demands investigation. Instead, Miéville posits this as a dilemma of law's inevitable oscillation between '"pure politics" on the one side and "pure morality" on the other', concluding that '[t]here is in fact no way out'. He continues, quoting Pashukanis:

> "Legal obligation can find no independent validity and wavers between two extremes: subjection to external coercion, and 'free' moral duty." ... The fact is that legal relations cannot be separated off either from moral or 'political' relations with any systemacity. This *does not represent the failure of the theory but the peculiar nature of modernity*.[49]

But a Marxist understanding of law *must* (and *can*, as it is argued in this thesis) find a way out, a way to understand this 'peculiar nature'. There is more to it than mere assertion that there is 'no such thing as a "purely" legal act'.[50] If the argument ends here, then the work done to date dissolves: there is in fact no specificity of the legal relation, and the appearance of a relation as either 'legal', 'moral' or 'political' is utterly contingent and dependent on a 'balance of forces'. In understanding the nature of the legal form, there is then no relevant difference at a theoretical level between a state acting legally or

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[48] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 147

[49] Ibid., 149-50. Emphasis in original.

[50] Ibid., 150.

illegally. Nor does it provide any conceptual armoury to explain critical contemporary developments where the rule of law is suspended, other than to assert that it is now a state oscillating back towards the pole of 'politics' rather than 'morality'. Head adopts this approach too, arguing (correctly) that Pashukanis understood the legal/illegal nature of the state, but also (incorrectly) that the current assault on civil liberties is nothing more than the 'violent' face of the state.[51] The reintroduction of these conventional categories at this point in the argument is unhelpful and leaves us with no means of understanding the particularity of the technique of suspension, or how it relates to contemporary capitalism. Miéville glimpses an alternative way out when he writes that: 'International law is a relationship and a process: it is not a fixed set of rules but a way of *deciding* the rules... The political - the violent, the coercive - lies at the heart of the legal, and nowhere is that more evident than in international law.'[52] The juxtaposition of decision and violence bears examination, and this will be the task in Part II, but the argument will not advance by continually considering the violence of the state as only contingently related to the violence of the labour relation.

The second aspect of the 'state as subject' problem concerns the relation between exchange and subject formation. For Pashukanis, legal subjectivity proper is coincident with commodity exchange relations. It existed in embryonic form before capitalism, but only with the spread of commodity exchange to near universality could one apprehend the abstract subject as such. Such subjectivity is, in turn, an essential element of the continuation of capitalist systems of production and accumulation. The existence of the subjects of exchange are thus both an effect of and constitutive of certain modes of production. What is not necessary is that there be a conception of legal subjectivity before trade can occur, rather it may also exist the other way around. What emerges from Miéville's detailed history of the origins of international law is that his 'violence which inheres in the commodity form' is the violence of exchangers against one another in their attempts to maintain their commodities or accrue further wealth. Miéville's insightful claim that the development of abstract equal (state) personality is bound together with the spread of trade and wars between (state) actors needn't be doubted.[53] Similarly, one can accept that this is intimately tied up with the beginnings of states exerting dominion and

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[51] Head, *Evgeny Pashukanis: A Critical Reappraisal*, 239-40.

[52] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, 151.

[53] But on the always-already international nature of the state, even in the way it was internally organised, see Mark Laffey and Jutta Weldes, "Representing the International: Sovereignty after Modernity?," in *Empire's New Clothes: Reading Hardt and Negri*, ed. Paul A. Passavant and Jodi Dean, New York, Routledge, 2004.

ownership over territories through the forceful exclusion of others. However, if this argument is scaled back down to the level of individual natural persons trading with each other (the thrust of Miéville's argument being that commodity form theory is equally applicable at each level), then this is the equivalent of saying that the act of exchange between individuals produces legal personality. What Marx adds, however, is a further qualification: law's contribution to commodity fetishism is *to make it appear as if* subjectivity is produced through exchange, whereas in reality the split between subject-object occurring within the subject - the ability to alienate one's essence - is the fundamental relation.

The significance of this point can be illustrated by asking: if nascent states are legal subjects, what is the relation between states that approximates to the labour contract? That is, if what commodity/legal fetishism really occults is a relation between abstractly equal subjects under capitalism, a relation which appears equal (because it is hidden by the axiom exchange = equality) but is in fact equal/unequal (because it involves the extraction of surplus when one party alienates itself in a way that the other does not), then where can one find an homologous extraction of surplus in the relation between states? At this point both Pashukanis and Miéville are silent. It may well be that the creation of abstract equality amongst states - axiomatic for contemporary international law - is necessarily bound up with, if not caused by, attempts to divide the globe for economic purposes. However, it is not clear that this abstract equality of states is necessary for a system of *global production* in the same way that (individual) legal subjectivity is for wage labour under nascent capitalism. The validity of reading 'state as subject' in the same way Marx reads individual as subject in *Capital* is thus challenged.

These first and second concerns of 'state as subject' combine in the third problem. Miéville is at pains to argue that there is no 'iron law' of the development of international equal sovereignty. Indeed, the moves towards abstract equality of nations are marked by powerful counter-tendencies. His point is, rather, that there is a *tendency* towards abstract equality, which, following his reading of Pashukanis, inheres in the development of capitalism. When discussing examples of counter-tendency - where states decide to declare exceptions to the principles of abstractly equal sovereignty - he is obliged to look for rationales for these exceptions *outside of the tendency itself*. The rationale for the suspension for the rule of law, for example, is not to be found in the *tendency* of abstractly equal sovereignty itself but in the *contingent dynamics* of capitalism. Any move towards sovereignty is explained as part of the tendency; any move away is explained as

an aspect of capitalism. Not only is this a too-cute theoretical division that explains every action in advance, but if capitalism generates both trends towards and away from sovereignty, and law is involved in both, then it seems likely that not very much has been said at all about the specificity of law.

The final concern about state as subject concerns the monopoly of violence. If the violence of the state arises from relations constitutive of civil society, then this forces a questioning of the Weberian commonplace that the state has a monopoly on the means of legitimate violence. If coercion is implicit in the commodity form, and the commodity form is prevalent, then there must be some 'legitimacy' in this non-state exercised violence. The point is noted by Edelman in the context of privatisation, which he describes as a revelation of the state's own nature: the return of power to the private.[54] However, Miéville on a number of occasions considers the state as an entity defined by its monopoly over legitimate violence.[55] This is a question to which Part II will return. But it should be noted here that there is an uneasy relationship between the essence of law (expressed in law between states) being defined as the product of infinite contestability and claims that the essence of the state (in domestic law) is the monopoly on violence. If law is law, and international law is merely emblematic of 'the legal form', then the infinite contestability of a legal argument and the lack of a superintending authority do not sit well with the very same authority having a monopoly on legitimate interpretation and violence.

Having considered Miéville's reading of Pashukanis, this chapter now turns to another line of thought that owes a debt to the Soviet jurist and that offers a more fertile way of thinking about the state.

The German state debate

Pashukanis, and those following him, derived the form of the legal subject from that of the commodity. However, only a specific era and a specific kind of capitalism allowed for an understanding of legal subjectivity as abstractly equal personality parcelled out amongst citizens of a jurisdiction. The intervening century has brought about massive changes in the nature and extent of capitalism. Indeed, even in the short period since the debates centred around the rediscovery of Pashukanis in the 1970s and 80s discussed above, the Soviet Union and its satellites have fallen and Keynesian capitalism undergone

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[54] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, 133.

[55] Miéville, *Between Equal Rights: A Marxist Theory of International Law*, e.g. 286-87.

profound restructuring. The Marxist study of law lapsed at about the time these significant global changes were taking place. The fall of the Soviet Union and the turn to the right in the West under Thatcher and Reagan posed important questions for Marxists and for the left. In particular, the decline of Keynesianism, in the face of both rising inflation and rising unemployment, raised the question of the nature of the state (which informed Marxist understandings of law) and its role in any Marxist project. In the late 60s 'the growing crisis of state expenditure immediately cast doubt on every kind of functionalist theory of the state, whether "instrumentalist" or "structuralist", Keynesian or Marxist'.[56] The debates around Pashukanis in the 70s and 80s also bore the philosophical marks of their time, especially Marxism's attempt to hold back the tide of structuralism and post-structuralism. However, little attention had been paid to whether changes in capitalism itself have impacted on the project to recuperate Pashukanis.

The nature of the state was debated from the late 1970s to the early 1990s by a number of writers in a heterodox Marxist tradition, both in Germany and in England. Despite their differences, they had in common a rejection of 'scientific Marxism' and the associated instrumentalist view of the state. 'The state debate' in Germany took place with concrete political questions in mind, the beginning of the end of the Keynesian project coinciding with the rise of a number of new social movements. On the one hand, the preceding period had demonstrated the state's willingness to intervene to redistribute wealth and exercise its command over the institutions and structures - such as education, energy and health - that pre-occupied the new social movements. On the other, the beginnings of neoliberalism saw the state begin to recede from intervention these areas, as the rise of monetarism entailed the restriction of state activity. Could one thus speak of the state as an 'instrument'? Did it have autonomy from the economic? Could the form of the state in some way be derived from the form of economic relations? Was capitalism entering a new regime of accumulation which envisaged a different role for the state? These debates - reproduced in *The State Debate* - grappled with these questions.

> The starting point of the German 'state derivation' debate is the critique of theorists (Offe and Habermas) who divorce the study of politics from the analysis of capital accumulation. Instead of simply reiterating the connection between capital and the state, however, the contributions to the debate have accepted the separation of the economic and the political and have tried to establish, logically and historically, the foundation of that separation in the nature of capitalist production. In other words, the aim has been to derive the state (or the separation of economics and politics) from the

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[56] Simon Clarke, *The State Debate*, New York, St. Martin's Press, 1991, 140.

category of capital.[57]

The theoretical fuel that powered these debates were concepts developed by Pashukanis. The German state debate was a playing out of the tensions between function and form in a concrete context. Joachim Hirsch, for example, took from Pashukanis the essential and historical separation of the political from the economic as implying that the state took on a particular autonomous form, but added that this form could only be understood through the particular functions played by the state in a particular era.[58] To periodise capitalism, Hirsch borrowed from the regulationist theorists (such as Michel Aglietta) the concept of regimes of accumulation, according to which capitalism develops specific models at particular times to provide stable systems of extracting surplus. Within each such regime, institutions such as the state perform a particular function, as do certain modes of consumption and certain economic polices. The 1970s were a time of transition between regimes. The out-going Fordist regime was characterised by Keynesian economic policy, Fordist organisation of consumption and Taylorist organisation of work. Fordism 'denotes a secular long wave of expanded capitalist accumulation by which the reproduction of labour becomes a central sphere of the valorisation of capital'.[59] The transition to the post-Fordist regime of accumulation, which Hirsch discerned, continues this concern with the reproduction of labour power, but in a different manner. Under the 'post-Fordist security state', the state's repressive aspects come to the fore.

Unsurprisingly, Hirsch's concept of an articulation of the economic, political and cultural was influenced by the work of Althusser and Poulantzas. The function of the political moment within the articulation is always to ensure accumulation can occur in the most profitable way. Over time, objective contradictions develop leading to the rate of profit falling, and one regime must give way to the next. The form of the state differs according to the nature of the regime of accumulation. Thus methodologically, once one has discerned the elements of this regime, one can discern the form the state takes and then make assessments about its nature. The debates about the essential nature of the state - whether coercive, ideological etc.- thus can be understood only through its form in a

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[57] John Holloway and Sol Picciotto, "Capital, Crisis and the State," in *The State Debate*, ed. Simon Clarke, New York, St. Martin's Press, 1991, 15.

[58] Joachim Hirsch, "Fordism and Post Fordism," in *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, ed. Werner Bonefeld and John Holloway, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991; Joachim Hirsch, "The Fordist Security State and New Social Movements," in *The State Debate*, ed. Simon Clarke, New York, St. Martin's Press, 1991.

[59] Hirsch, "Fordism and Post Fordism," 143.

particular regime of accumulation. It followed, for Hirsch, that the political debates occupying the Marxist left in the 70s and 80s needed to be framed by a recognition that the state was now taking on a different form, rendering old modes of struggle obsolete. Other participants in the German debate also focussed on Pashukanis' key question of form, arguing that it could be derived logically from the capital relation.[60]

Open Marxism

The German debate was taken up by a number of English Marxists, many of whom practised what they later termed 'Open Marxism'.[61] Their three volume *Open Marxism* series described their position not as a consistent programmatic corpus, but rather as an adherence to the openness of Marxist categories themselves, and an opposition to the 'closed' approach of deterministic, objectivist or teleological Marxism.[62] For the Open Marxists, capital is a social relation: to understand it otherwise is fetishism. The capital relation seeks to reproduce itself and is based on continual expansion and the drive to increase the extraction of surplus. This much is clear from Marx. However, this reproduction is crisis-ridden. While capital presupposes its own foundations in order to reproduce, it also undermines these foundations whenever it reproduces. For example, it presumes the separation of workers from (ownership of) machinery, but forces people to labour collectively and have technical skills. It presumes the existence of a fit labour force but emiserates workers and seeks to increase extraction of surplus value through the relative reduction of wages, the intensification of work or the lengthening of the working day. Capitalism is thus forced to reproduce itself and its crises. However, the reproduction of the capital relation - and its separation of the economic from the political - is not just crisis-ridden but antagonistic. Capital simultaneously exhibits a dependence on labour yet attempts to destroy it. Labour is necessarily present within capital, but necessarily in conflict with it. The reproduction of the relation of capital cannot therefore be accorded the status of objective economic laws. Rather, struggle is the 'objective' law of capitalism.

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[60] B Blanke, U Jürgens, and H Kastendiek, "On the Current Marxist Discussion on the Analysis of Form and Function of the Bourgeois State," in *State and Capital: A Marxist Debate*, ed. John Holloway and Sol Picciotto, London, E. Arnold, 1978.

[61] An important initial contribution to the 'state debate' is found in John Holloway and Sol Picciotto, eds., *State and Capital: A Marxist Debate*, London, E. Arnold, 1978.

[62] Werner Bonefeld et al., eds., *Open Marxism: Vol 3 Emancipating Marxism*, London; Boulder, Pluto Press, 1995; Werner Bonefeld, Richard Gunn, and Kosmas Psychopaidåes, eds., *Open Marxism: Vol 1 Dialectics and History*, London; Boulder, Pluto Press, 1992, see e.g. vi-xiii; Werner Bonefeld, Richard Gunn, and Kosmas Psychopaidåes, eds., *Open Marxism: Vol 2 Theory and Practice*, London; Boulder, Pluto Press, 1992.

This struggle cannot be avoided. What varies, however, is the form these conflicting relations take. The state is one such form. The question of the 'essence' of the state - what is the state? - is thus reconfigured to a question of form - how is class conflict appearing as and in the form of the state? John Holloway criticizes those who understand 'form' as a question of logical abstraction. Thus both the 'capital logic' approach (of Hirsch) and the 'logical derivation' approach (now exemplified by Miéville) misunderstand the concept of form:

> Inherent in the concept of form, firstly, is an emphasis on the interconnection between the different forms, on the unity-in-separation of the different forms assumed by the relations between capital and labour, and hence on the capitalist nature of the state in capitalist society. And secondly, the concept of form when associated with the state draws attention to the historical and transitory character of the capitalist state. Both aspects of this critical dimension are absent from the concept of "relative autonomy".[63]

The attempt to consider the state as separate from the economic is flawed from the beginning: 'the state cannot stand above value relations, for the simple reason that the state is inserted into such relations as one moment of the class struggle over the reproduction of the capitalist relations of production.'[64] Simon Clarke also notes that a consequence of this dismantling of the state as 'superstructural' is an understanding that questions of class and questions of state operate at different conceptual levels. The ontological primacy of the conflict of the capitalist relation poses the question of the state as a question of form of social relation and form of appearance of social relation. The unity of the political and economic consists at a level prior to the posing of the question of the political as such. To follow structuralism and piece the state and the economic together in an articulated whole is to misunderstand the nature of their unity and to subscribe to a fetishism or, following György Lukács, to reify the concept of the state. Indeed '[t]his fragmentation of the capital relation into discrete economic and political spheres is perhaps the most important aspect of commodity fetishism.'[65]

The question of the separation of the economic from the political is at one with that being argued in this thesis. This thesis will develop the argument, begun in Chapter 1, that the question of legal subjectivity was understood in a certain way by Marx, namely by proceeding from identifying the separation of the state from its basis in civil society (and the concomitant autonomisation of the state and abstraction of law) as the outcome of a

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[63] John Holloway, "The State and Everyday Struggle," in *The State Debate*, ed. Simon Clarke, New York, St. Martin's Press, 1991, 48.

[64] Clarke, *The State Debate*, 51.

[65] Holloway, "The State and Everyday Struggle," 260.

long and bloody struggle against feudal relations. Similarly, the genesis of the separation of the political from the economic under capitalism coincided, for Holloway, with the 'autonomisation of the state' and was necessarily caught up with the processes of primitive accumulation. According to Holloway, an understanding of the conflicts surrounding the period of absolutism is integral to an understanding of the kind of legal subjectivity presupposed by Pashukanis and this process of individualisation is the 'first and basic moment of the state form'. [66]

The Open Marxists also lay stress, however, on the necessity for this moment to be continually reproduced. For Holloway, the state is a 'form process', that is, an always incomplete and always contested struggle to impose capitalist social relations upon society, a struggle that becomes more acute as increasing kinds and spheres of social relations are subjected to capitalist ordering. In this way, the state-form is perpetually renewed and is capable of being understood as having a history (e.g. state institutions) without having an 'essence'. The necessity of the state is not logical but historical and if functionalism is characterised by an attempt to find the essence of the state (i.e. its essential function), Open Marxism insists to the contrary that 'the essential feature' of the state is 'its class character, its autonomy is the surface form of appearance of its role in the class struggle'.[67] Parenthetically, Miéville was thus right to identify the idea of the discrete state as a feature of a particular development of capitalism, but wrong to designate it as a question of essence rather than form of appearance of particular social relations. The intervention of the state in the reproduction of capitalist relations of production occurs - if it occurs at all - in specific manners at specific times. The Open Marxist argument continues by asserting that initial interventions came from the need to ensure the reproduction of labour power as a commodity. Over time the specific forms taken by the state (e.g. forms of administration, intervention and repression) came to centre around the sale and purchase of labour power. Accordingly, certain patterns of relationships developed around who will be dealt with (such as, for example, collectives of workers) and the way in which the sale of labour-power will be mediated. Struggle within the relationship of capitalist production thus in part becomes a struggle over these patterns of relationships: a 'struggle to constitute the state-form'.[68]

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[66] Ibid., 242.

[67] Clarke, *The State Debate*, 52, 186.

[68] Holloway, "The State and Everyday Struggle," 245-47.

However, for the Open Marxists, although the intervention of the state into the reproduction of the relations of production may seem to be continually expanding (e.g. under Keynesianism), this is not mandated by the capital relation. Accordingly, the struggle over the state form is a struggle over the *extent* and *manner* of state intervention in the reproduction of labour power. The transition to neoliberalism is one in which the state no longer 'intervenes', but remains a contested site since: 'the fact that increasingly [i.e. in the late 80s and early 90s] the mobilisation of counter-tendencies [to the rate of profit to fall] is effected through the state means that, inevitably, the whole couplet of political relations is increasingly directly permeated by the general restructuring of the general relations of production.'[69] This analysis enlivens Marxism to a further possibility: that the restructuring of the Keynesian apparatus may bring about a changed manner of intervention without the extent of intervention necessarily changing. That is, once the state ceases to be understood as standing in a functional relationship to the relations of production, the key issue is no longer merely a question of whether the state is 'big' or 'small'. Werner Bonefeld approvingly cites Negri: 'the state should be analysed as a mediation of the historical transformation of the direct production process.'[70] This argument will be pursued in Parts III and IV of this thesis.

For Open Marxism, then, the presence of labour within capital is inherently disruptive. The extraction of surplus is exploitative and the wage relation contains the seeds of capital's undermining. The writers discussed in the first chapter largely attempted to understand the relation between capital and the subjectivity of the wage relation through the methods of functionalism or through derivation. For functionalism, subjects are interpellated in a particular manner corresponding to the requirements of capital, an argument that most commonly turns on variations of the distinction between the formal equality of 'citizen' and the material inequality of the worker in production. For Miéville's derivation approach, the abstract equality of the legal subject is a question of the expression of forms of social relations. However, despite their differences and their strengths, each approach shares a relative lack of emphasis on the effects of subjectivity of the conflictual character of the capitalist wage relation. For each, the violent extraction of surplus and the contradictions it embodies are often not expressed within the form of the legal subject: conflict appears to occur outside of the realm of the legal subject. To

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[69] Ibid., 252.

[70] Werner Bonefeld, "The Reformulation of State Theory " in *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, ed. Werner Bonefeld and John Holloway, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 252.

follow the tenor of the Open Marxist position instead, one might expect to see questions of law and legal subjectivity as forms of *expression of* class conflict. Indeed, for Holloway and Sol Picciotto 'liberal state structures exhibit the same basic contradictions as liberal ideology. The mechanism which most clearly reflects the contradictions of commodity exchange is the juridical process.'[71]

There is, nonetheless, a tension within Open Marxism on the question of legal subjectivity. To the extent that the legal subject figures in their work, it appears as a relatively uncritical reading of Pashukanis. However, the idea of legal subjectivity as a form of appearance of the relations of commodity production and exchange is still a question of derivation, albeit one occurring at a more fundamental level (economic cell-form) than either the derivationists or the relative autonomist theorists (state/economy). But if the thrust of the Open Marxist argument is accepted, then, *contra* Holloway and Picciotto, there is no reason why the relation of economically engaged person/legal subject must appear as human/equal legal subject. This connection - the key to Pashukanis' argument - is contingent and historical, *not* logically derived. Holloway stumbles at this point. After showing that the emergence of abstract individualism can only be understood as a moment of the autonomisation of the absolutist state form, he then treats the process of individualisation as 'enshrined in all the basic practices of the state'.[72] It is this inability to understand individualisation before the law other than as a process of abstract equality (which necessarily comes into conflict with 'material inequality') that limits Marxist understanding of law.

This tension also creeps into the question of the separation of the political from the economic. The Open Marxist's fidelity to a certain reading of *On the Jewish Question* is apparent. However, if capital is required to reproduce itself and its own crises continually, and if the separation of the political from the economic needs to be continually reproduced, then this process of individualisation cannot be conceived of as something that only occurs once and is reproduced immutably thereafter. That is, theory needs to be alive to the prospect that the separation of political/legal from economic occurs differently under different periods of capitalism. The Open Marxists tell us at length that one cannot periodise capitalism in the manner suggested by Hirsch, as such periodisations tend to imply some kind of structural correlation between state and

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[71] Holloway and Picciotto, "Capital, Crisis and the State," 129.

[72] John Holloway, "The State and Everyday Struggle," Ibid., 242.

economy, which locates the state externally to class struggle, instead of seeing it as a form of expression of class struggle. But Clarke insists on the abstractly equal legal subject remaining a relative constant under capitalism despite changing methods of accumulation: the 'changing modes of collectivisation are not opposed to the process of individualisation. Individualisation and collectivisation are the two sides of the struggle to decompose and recompose class relations.'[73] However, the Open Marxist perspective at least contains an avenue to begin to reconstruct their own argument. If one insists on the historical specificity of 'individualisation' and decouples it from the notion of legal subjectivity inherent in the orthodox conception of the rule of law critiqued by Marx, it can be posed as a question of class composition. Pashukanis and Marx both argue for the importance of temporality and the movements needed before the question of discrete individuality could be posed. If the state is 'not just an institution, nor a phenomenon pertaining to all societies, but an historically determinate and transitory form of social relations' then the same must be able to said of the law and the legal subject.[74] The argument in this thesis thus borrows from the Open Marxists a reading of law as questions of expressions of the struggles inherent in capital as a social relation, but questions the alleged stability of their form of legal subjectivity.

Open Marxism and its interlocutors in the German state debate also gesture towards a refiguring of the question of legitimacy, of the 'right to say right'.[75] For Jürgen Habermas, a legitimation crisis arose *inter alia* because the state is required to intervene in the relations of production which thus: (a) undermines the state's pretences to neutrality; and (b) requires it to adhere to its own claims about its ability to resolve crises.[76] Hirsch shares the fundamental view that the question of legitimacy arises in relation to the state and law *qua* their ability to intervene into relations of production and distribution. When considering neo-liberal austerity policies he argues that they result in 'an increasing social cost (unemployment, marginalisation, uneven regional development or destruction of the environment) which puts in question the "acceptability" of this policy and hence the democratic legitimacy of the state.'[77] Notwithstanding significant differences between

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[73] Clarke, *The State Debate*, 63.

[74] Holloway, "The State and Everyday Struggle," 242.

[75] The phrase is taken from Zartaouldis' discussion of Jean-Luc Nancy in Thanos Zartaloudis, 'The Case of the Hypocritical', *Law and Critique*, 16, 2005, 387.

[76] Jürgen Habermas, *Legitimation Crisis*, Boston, Beacon Press, 1975; Holloway, "The State and Everyday Struggle," 234.

[77] Hirsch, "Fordism and Post Fordism," 22.

Open Marxism and Habermas and Hirsch, they share a tendency to understand the question of legitimacy in ways that tie it to its redistributive aspects. They pose this question as if the '"de-legalisation" of social conflicts' necessarily raises crises of legitimacy for state and law.[78] However, in posing the question thus, Open Marxism can become blinded to its own insights. The question of the 'legalisation of social conflicts' develops together with the intervention by the state in the reproduction of labour power. These are the essential elements of the Fordist and Keynesian apparatus. Struggles over questions of 'life' thus become questions for the state, both from below and from above. In certain respects, the state gains legitimacy from its ability to manage and resolve these conflicts (a point that will be developed in the discussion of Hardt and Negri in Chapter 6). The German and English Marxists sang in one voice, *viz* that the state's legitimacy was partly to be found outside the state itself, in the realms of the relations of production. However, their method ought conclude that the manner of constituting the political - a process continually repeated in different forms - might itself also be reconfigured. 'De-legalisation' of social conflict may not pose a question of legitimacy at all if the separation of the political and economic is carried out differently. As will be argued in Parts II and III, and indeed as Marx himself saw, law may end up being significant because it is not applied or because it is simply identified with executive fiat (rather than considered an abstract individualising universal). Despite the Open Marxist criticism of his tendencies towards periodisation, Hirsch is the more attentive to this point:

> New modes of "ideological legitimation" have to be found which paradoxically are brought about by the agents of the executives of the political apparatus themselves (such is an essential element in the strategy of Reagan, Thatcher and Strauss). The repressive protection of the established apparatuses therefore becomes increasingly important.[79]

Open Marxism deals a blow to any attempt to read a legal 'form' from the commodity form. This thesis argues, with the Open Marxists, that the capitalist relation of production is self-reproducing in a way beset by contradictions, the primary being the tension between the need to reproduce labour and simultaneously to extract surplus value. The tension will not necessarily appear as a relation of production, but again this is a contingent matter. Because this appearance is non-necessary, it follows that there is no necessary appearance in particular forms (such as 'juridical'). The question of form of appearance is contested and contingent because contradictory and crisis-ridden. And it

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[78] Ibid., 31.

[79] Ibid., 155.

further follows, it is argued here, that as the question of the reproduction of labour power is differently and more comprehensively constituted, the form of appearance of the 'legal' - as distinct from the 'economic' or 'political' - becomes itself contested. If relations of production are not understood narrowly, and if valorisation (and its attendant conflicts) takes place outside the workplace, then there is every reason to imagine that the 'economic' (and with it the 'juridical' which might arise with it) might be differently constituted now than under the kind of capitalism that influenced classical conceptions of commodity fetishism. Further, if the state is not a subject and capitalism cannot be periodised, then functionalism is dead. Inherent in functionalism, which casts a long shadow over the Marxist study of law, is the assumption that the state can be conceived as an entity with an essence capable of acting, in short, a subject.

Conceiving of state as form of social relations (and a form of appearance of social relations) destroys this grammar. The capitalist relation of production cannot be said to determine - nor even stand in any definite relationship to - 'the state' or 'the law': 'It is because the "forces and relations of production" are seen as technical relations of production and social relations of distribution that the relation between them is seen as a relation alternately of correspondence and dislocation, and not a relation of contradiction'.[80] Paradoxically, then, Marxism is left to dissolve the subjectivity of the state at the very moment the likes of Agamben seem to reassert it. However, this freeing up of the notion of the state - of the necessity to determine its functional role in advance - allows for greater understanding of the contemporary situation. Similarly, while this thesis agrees with Head that Pashukanis' relevance persists and that there is much that Pashukanis can tell us about contemporary trends such as the spread of privatisation and the assault on civil liberties, this is not merely because Pashukanis understood that the capitalist state had a dual nature, at times ruling by law and at others by force.[81] Such an insight is undoubtedly true, but tells us little about *why* the state rules in a particular way at a particular moment. After all, whereas the naked use of force is supposedly to be used to meet revolutionary struggle, the same historical state of affairs cannot be said to exist today, a point Head acknowledges.[82] This thesis agrees emphatically with Head's descriptions of privatisation and the suspension of the rule of law. The argument, however, is that a contemporary analysis in the spirit of Pashukanis which borrows

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[80] Clarke, *The State Debate*, 80.

[81] Head, *Evgeny Pashukanis: A Critical Reappraisal*, 231ff.

[82] Ibid., 239.

(having made the above-mentioned corrections) from Open Marxism, can explain much more about why the technique of emergency is becoming the norm, and why the dismantling of (certain aspects of) the welfare state marches hand in hand with increasingly authoritarian forms of rule.

The spirit of capital

To conclude, this chapter has argued that Miéville improperly abstracts from Pashukanis the idea of 'legal form'. A full understanding the form of the commodity only occurs once a central place is given to that most enigmatic of commodities, labour power, where the forceful extraction of surplus occurs under the guise of an equal contract. The Open Marxists knew this and thus treated the question of the 'derivation' as one of social composition, not logic. However, unlike Miéville, they paid little attention to the specificity of law. The most significant contributors to the Marxist debate about law thus have complementary lacunae: Miéville discusses the form of law without the force within the form of the commodity 'labour power', and the Open Marxists *vice versa*. How might the strengths of each approach might be merged and their weaknesses addressed? As has been alluded to in the introduction and this Part I, a rethinking of the Marxian relation between law and labour is required. This Part I has established the approach to ground such a reading, and some propositions can be advanced so as to form a basis for further examination in coming chapters, propositions enumerated for convenience and without any pretence to being final or exhaustive: (1) With Pashukanis and Marx, the force exercised over labour precedes and helps create the subjects of the labour relationship. (2) Force persists in this relationship once established. (3) Force also persists outside of the relationship. (4) As the labour relationship in (2) is a force-ful, and thus conflictual, relationship, but one that capital of necessity reproduces, the force in (3) can sometimes be called in aid of the maintenance of that relationship. (5) Law may be present at (1), (2), (3) or (4), but it is not necessary that it is so at any given moment: this is a question of the form of particular struggles at particular times. (6) This (i.e. (5)) doesn't render an analysis of law useless for Marxists, but merely theoretically and historically contingent, as the forms of legal subjectivity, force and state must now be read in connection with (4). (7) In conducting this analysis, a key question to be asked is how any separation between the legal and economic is effected and represented.

Marx's own analysis of the Factory Acts bears out the points being made in (5), for chapter 2 of this thesis has shown that Marx's analysis actually *reverses* the orthodox configuration of force and law contended for by Miéville. One hesitates to read too much

into one sentence, or to ask it to bear an undue burden, but perhaps Marx wasn't exaggerating when he wrote that: 'Nothing is more characteristic of the spirit of capital than the history of the English Factory Acts from 1833 to 1864.'[83] It is justifiable to take from this that the 'spirit of capital,' its control over labour and its drive to reproduce and extend this control, is necessarily bound up with law, in its creation, its reproduction and the forms of expression of the conflicts thereby generated. These propositions are simply put, but by beginning to understand law, labour and force in this manner, the Marxian legal critique unfolds so as to enable fruitful interactions with Hegel, Agamben and Benjamin, amongst others. Having come to this point, the argument is now able to advance in later parts of this thesis by considering the relationship between 'work' and 'rule' in connection with 'authority' (Part III) and how Pashukanis' legal subject stands after the historical and theoretical changes wrought upon it since his time (Part IV). Now, however, the inquiry into this figure of 'force' continues in Part II '*Gewalt*'.

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[83] Marx, *Capital: A Critical Analysis of Capitalist Production*, 265.

PART II

GEWALT

Chapter 3 - Work Force

On the one hand, law says that violence is to be abhorred: the system of rules that make up law is the proper way in which humans are to conduct themselves and resolve disputes. On the other hand, had there not been some violence in the first place - a revolution, a colonisation etc - a legal order would never have originated. And further, to give effect to the decisions of this order, the violence of the 'force of law' can be called upon. And what if the order itself is threatened: can the resort to external naked violence then be called legal? In one sense, the origin of law and the foundation of its continued existence therefore can be said to be violence: violence brought the law into being and maintains it under the guise of 'legally sanctioned force'. But this means law, despite its stated intention of transcending brute violence, is never fully rid of it: it returns to it daily (to give effect to legal decisions etc) but is also dependent on it to maintain the order itself in times of 'emergency'. In such exceptional situations, law is even often prepared to stand aside until the emergency passes: 'necessity knows no law'. And so, this 'origin' and 'foundation' is never fully left behind - the violence that is a ground of law is always returned to.

Žižek argues, claiming Kant in support, that one is to obey the law simply because it is the law - there is no need to ask why a law is a law, just accept that it is.[1] Whilst this may explain law in its quotidian (and even exceptional) operation, it must also be accepted that grander theories of law - especially in modernity - eschew self-explanations solely in the language of a nakedly violent foundation and of order for order's sake. 'Juridical concepts and juridical systems always refer to something other than themselves', wrote Hardt and Negri. They gesture towards the 'material condition that defines their purchase on social reality.'[2] There is thus an extent to which 'law' can treat 'society' as existing outside of itself, and also being a ground of law. Depending on the theorist and the legal order, 'law' may even treat 'society' as its ongoing foundation: law may be giving effect to the customs or will of the community and be required to be responsive to changes in 'society'. From a Marxist perspective, Taiwo takes this even further to develop a theory of 'legal naturalism', according to which the (pre-legal) social relations of production that

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[1] Slavoj Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor*, London, New York, Verso, 1991, 203ff.

[2] Hardt and Negri, *Empire*, 22.

define a society develop the content and standards of justice to which the system of positive law gives effect.[3]

It is necessary, however, to look behind these configurations. For what if the 'society' itself is riven with these questions of both the exercise of violence and its grounds? What if the brute violence that founded a legal order persists not just as something to be called on by law returning to its origin, but something perpetually operative yet known by another name? What if the violence existing 'in society' in fact has the same relationship to law as law has to violence, namely a *Gewalt* that calls on law when it needs to, calls on 'exceptional force' when it must, but otherwise assumes its own authority?

As foreshadowed at a very broad level in the Introduction and Part I, the underpinning methodology of this thesis is that light is shed on law when one begins from the perspective of asking how law is separated from the economic. When the question of labour is placed at the centre, the question of force becomes: how is the force that exercises control over labour separated from the force of law? That is the question being addressed in this Part II *Gewalt*. (The question of authority likewise becomes: what is the relationship between the authority of the sovereign over its citizens and the authority of the employer over its labourers? And at the level of the subject: how is the subjectivity of the worker rendered as separate from that of the citizen? These are the inquiries undertaken in Parts III and IV respectively.) The argument advanced in this chapter is that by beginning not from some undifferentiated violence, but from the *Gewalt* that is control over labour, one can draw conclusions about both sovereignty and labour, about rule and work. On the side of theories of sovereignty, it is in fact this *Gewalt* that grounds law and returns to the subject as the impersonal force of law: this argument proceeds *via* a reading of Hegel, Marx and the French theorist Edelman. This argument is shown to parallel Peter Fitzpatrick's reading of Sigmund Freud's *Totem and Taboo* as a text that illuminates the modern question of the grounds of law. By borrowing from Fitzpatrick but substituting *Gewalt* over labour for undifferentiated violence, the chapter can move to consider things from the side of labour. It is argued that Marxism would do well to cease treating the wage relation as characterised only by the private law of the contract, and instead read it just as the first part of this chapter considers sovereignty: as a *Gewalt* finding its expression in a tension between legal and non-legal forms that mirrors the dilemmas faced by law. To make the point somewhat boldly, the labour contract is a

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[3] Taiwo, *Legal Naturalism: A Marxist Theory of Law*.

constitution, and capable of being treated as such: at times *Gewalt* is exercised with legal foundation, at other times the ground of the force of law appears external. This is the proper way to understand Marx's term 'primitive accumulation'. The argument continues in the second chapter in this Part II, which will explore the separation of the grounding force of law and that of labour through the lens of exceptionality.

One final note before the argument proceeds. None of this is to invoke an argument that the force of law is reducible only to the force over labour. Indeed, if the thrust of this chapter's argument is right and the violence at law's origin is never undifferentiated but always marked, then there is no reason to think this marking stops at labour. However, this thesis is highlighting the relationship between 'work' and 'rule' and is proceeding on the basis of a fundamental significance of the place of systems of 'ruling over work'. It is hoped that the demonstrated receptiveness to contemporary debates signals a distance from any perspective that would automatically reduce other modalities of violence to the one advanced here.

Hegel, labour and right

If any questioning of law's foundations cannot escape an insistent historical fact that force and violence - *Gewalt* - is necessary to bring about and to maintain legal order, this fact is all the more troubling because modernity often seeks to locate law at the heart of the pacific foundation of society: the triumph of reason over might. This simple fact haunts classical legal theory, the latter spending most of its time in denial of the former. Some argue that even contemporary critical legal theory failed to explicitly address the place of violence until Robert Cover and Jacques Derrida moved it squarely back into view in the 1980s.[4] Testament to this ambiguous relationship between force and law, *Gewalt* can be translated as 'violence', but also as 'force' or 'power', and one can speak of *Staatsgewalt* - the (legitimate) force of the state - just as readily.[5] Peter Fitzpatrick sets out the dilemma legal theory poses for itself when it comes to the question of violence:

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[4] Austin Sarat and Thomas R. Kearns, "Making Peace with Violence: Robert Cover on Law and Legal Theory," in *Law, Violence, and the Possiblity of Justice*, ed. Austin Sarat, Princeton, N.J.; Oxford, Princeton University Press, 2001, 50-51. They are referring to works including Robert M. Cover, 'Violence and the Word', *Yale Law Journal*, 95, 1986, 1601; Jacques Derrida, "Force of Law: 'the Mystical Foundation of Authority'," in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell and Michael Rosenfeld, New York, Routledge, 1992. See too Martha Minow, Michael Ryan, and Austin Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover*, Ann Arbor, University of Michigan Press, 1992.

[5] For useful analyses, see Etienne Balibar, "Gewalt," in *Historisch-Kritisches Wörterbuch Des Marxismus, Bd5, Gegenöffentlichkeit Bis Hegemonialapparat*, ed. Wolfgang Fritz Haug, Argument, 2002. and Alberto Toscano, 'Can Violence Be Thought? Notes on Badiou and the Possibility of (Marxist) Politics', *Identities: Journal for Politics, Gender and Culture*, no. 10, 2006, 9-38.

> Law subsists in a fundamentally irenic condition, which a savage violence ever seeks to destroy from without. Within this numbed normality, violence can only be justified in the maintenance or restoration of the concordant world, and this justified violence is itself the preserve of law. Law thence, as it is so often put, has the monopoly of legitimate violence and, along with that endowment, violence outside of law becomes illegitimate. Law, in the result, has to be both violent and intrinsically associated with non-violence.[6]

Modernity offers various provisional solutions to this problematic. The self-evident authority of a founding Leviathan might be taken for granted as the bedrock of law, even where Leviathan deploys illegal force. Or originary contracts may cede to law the right to exercise force. Parallelling the dilemmas within legal theory, Marxism has often run aground charting the placement of force in relation to the economic and the legal. The orthodox topography of base/superstructure has no difficulty in simply placing both the *de jure* and *de facto* force of the state and law in the superstructure. Force is usually understood as a non-economic fact directed towards economic ends: the violence of law is the violence of the police and the judge imposing a sentence; its class nature is reflected in the economic purposes ultimately served. Commodity form theory appears to offer a more nuanced way out of this instrumentalism, critiquing law as norm. But as argued above, a certain reading of Pashukanis quickly dovetails with orthodoxy: law's violence is not integral to the analysis of law itself (law = commodity) but gets tacked on afterwards as a power self-evidently in the hand of the bourgeoisie. Marxism gets itself into this trouble because it continually forgets that the constellation of law, violence and origin must necessarily include a fourth term: labour. Hegel, however, considered that the questions of the origin of law, and of the relation of force to the (labour) contract, immediately render untenable some of these orthodox topographies of Marxism.

Read suggests that 'two "discoveries" converge in Marx: the productivity of an indifferent subjective force [i.e. labour] (Ricardo) and the need to continually subject this force to discipline (Hegel).'[7] Capitalism necessarily involves the creation of a new class of free productive labour, yet this labour must be controlled through new relations of domination that have shed their feudal origins. For Hegel, control of labour is not just a question for capital, but also a question for the state. By considering how Hegel abstracts from labouring activity to the question of the political, how he abstracts from work to rule, the foundations are laid for a reading of Marx and *Gewalt*.

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[6] Peter Fitzpatrick, *Modernism and the Grounds of Law*, Cambridge, Melbourne, Cambridge University Press, 2001, 77.

[7] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 67.

It is a mistake to consider that abstraction - in the sense of, say, the 'abstract legal personality' - simply means a generalisation or universalisation of a particular characteristic. Instead, the relationship between contracting individuals and 'abstract' legal subjects is as historical as it is formal, and is not unidirectional (e.g. from the 'economic' to the 'legal'). The person that is the 'legal subject' may arise out of the contracting relationship, but they are there as more than just a bringer of the goods to market. For Hegel, personality 'essentially involves the capacity for rights and constitutes the concept and the basis (itself abstract) of the system of abstract and therefore formal right'.[8] The subject - in what for Hegel is the first moment of its freedom - thus recognises itself as capable of willing, and of willing towards the external world. This however is only an immediate form of individuality in which the subject understands itself as standing against the external world, and thus limited. But its will is unlimited and the subject understands itself 'as something infinite, universal, and free.'[9] The subject is immediately implicated in a movement: this first moment of personality involves the abstract subject recognising itself as having a will and of the world as capable of being invested with its will.[10] Right at this stage is still 'abstract right': it can exist only in the form of a prohibition on infringing the personality of others. Until the subject overcomes this struggle, the freedom of the subject remains limited to its right to assert its will on the objective world. Other subjects and the relations between subjects have not yet appeared as a source of right. This first stage thus is associated with property, but even this is to be transcended into contract.[11]

As to property, the subject immediately finds itself split: the subject is distinct from what it perceives as the external world, but is also capable of identifying its body - and even its life - as something to which it - and only it - can stand in a properly proprietary relation. Though it may initially be confronting to consider aptitudes, abilities and attainments (of e.g. the artist or the scholar) as something 'possessed' by the subject, nonetheless these capacities are capable of being embodied in something external and alienable, and as

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[8] G W F Hegel, *Hegel's Philosophy of Right*, trans. T. M. Knox, Oxford, Clarendon Press, 1952, §34.

[9] Ibid., §35.

[10] Ibid., §39.

[11] 'Right is in the first place the immediate embodiment which freedom gives itself in an immediate way, i.e. (a) possession, which is *property* — ownership. Freedom is here the freedom of the abstract will in general or, *eo ipso*, the freedom of a single person related only to himself. (b) A person by distinguishing himself from himself relates himself to another person, and it is only as owners that these two persons really exist for each other. Their implicit identity is realised through the transference of property from one to the other in conformity with a common will and without detriment to the rights of either. This is *contract*.' Ibid., §40.

such it can be begun to be considered property in a legal sense.[12] Property, however, does not yet fully engage the subject with other subjects. A subject can take possession of something, and use it, but this is still a question of the subject relating to itself and to externality. Property is the possession and use of externality, but these are only merely the negative and positive 'judgments of the will on the thing': the infinite and universal aspect of property is however its *alienation.*[13] Thus: 'Taking possession is positive acquisition. Use is the negation of a thing's Particular characteristics' and 'Alienation is the synthesis of positive and negative; it is negative in that it involves spurning the thing altogether; it is positive because it is only a thing completely mine which I can so spurn.'[14] Alienation is what the subject may abandon or yield to the will of another. The thing alienated must be external by nature. Personality itself is not alienable: all that the subject is able to alienate is that which it invests with its will. Alienation of personality would be slavery.[15] Alienation of property requires a medium, not merely to be practically effective (in the sense that goods cannot be 'exchanged' without two parties), but also in order to bring about what the subject desires but cannot obtain through property alone: recognition.

It is this shift from property to contract - and what happens to right and to the subject in this shift - that is relevant to the argument here. Although being an *owning* subject is a foundation of subjectivity in a critically important sense - a sense which corresponds to an abstract right which doesn't yet know freedom but only the importance of not infringing on another's personality - it is only through the act of *exchange* - where right now seeks to found itself on some intersubjectivity - that the subject is *recognised* as a subject. Logically, then, the subject strives for the greatest recognition possible, leading to the entering into of a multiplicity of contracts. Civil society is the world of hungry, desiring individuals who strive for recognition by entering into a multiplicity of contractual relationships.[16] So far, this too is Pashukanis' story. Pashukanis' subject formation is Hegel's recognition. Crucially, for both writers the figure of 'right' first

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[12] Ibid., §43.

[13] Ibid., §53.

[14] Ibid., §59, Addition to §65.

[15] Ibid., §65-6.

[16] The direction of this thesis as a rethinking of Pashukanis and Marx prevents us from fully engaging here with the fruitful work of the critical theorists who explore the connections between labour and recognition: see e.g. Jean-Philippe Deranty et al., eds., *Recognition, Work, Politics: New Directions in French Critical Theory*, Leiden, Boston, Brill, 2007; Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Cambridge, Mass., MIT Press, 1996.

appears in the dyadic relationship between contracting individuals, and before the state or any deciding or sovereign third enters the stage. For both Hegel and Pashukanis, the successful contract is not merely a means of exchanging goods, but the moment of first appearance of a subject who is recognised by itself and others as (self-)identified by its will to alienate. 'The struggle for recognition can serve as a metaphor for the process of contract formation, once it is understood that the primary purpose of contract in Hegel's system is to give determinate content to the reciprocal recognition rather than to merely facilitate the acquisition of coveted goods.'[17] Contract is a social activity, and out of the mass of contracts, through the 'cunning of reason', abstract right is generated and contracting civil society adopts legal norms necessary to secure the enforcement of contracts.[18] Enforcement arises from contract less because of some primary importance of being held to a bargain, but more because the contract is a means to the more important end for the individual of recognition. And both Pashukanis and Hegel see the contract as an act that is to be continually repeated, an act in which the subject continually reproduces itself.

Subsequent interpreters of Pashukanis, however, now move immediately to call this moment the source of law under capitalism, and leap from contract to right, from exchange to the legal subject. This is the nub of Miéville's argument. Hegel's *Philosophy of Right* is indeed 'the *Bildungsroman*' of the legal person, but Hegel is only just beginning.[19] The 'freedom of the market place and the law courts, the actualised freedom of private property and contract' might be an essential moment of freedom, but it is still only a minimal one.[20] The 'legal status' produced 'in the course of the actual attainment of selfish ends' is 'interwoven with the livelihood, happiness, and rights of all', but this is just what 'may be *prima facie* regarded as the external state'.[21] Civil society, by itself, is insufficient to complete the development of right. On the one hand the particularity of individuality is given 'the right to develop and launch forth in all directions', but on the other hand at this point authority must foreshadow its appearance: 'universality has the right to prove itself not only the ground and necessary form of particularity, but also the

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[17] Michel Rosenfeld, "Hegel and the Dialectics of Contract," in *Hegel and Legal Theory*, ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson, New York, Routledge, 1991, 239.

[18] Cf Ibid., 234.

[19] Arthur Jacobson, "Hegel's Legal Plenum," Ibid., 115.

[20] Peter Stillman, "Property, Contract and Ethical Life," Ibid., 214.

[21] Hegel, *Hegel's Philosophy of Right*, §183.

authority standing over it and its final end'.[22] It is at this point that the abstract right of property and contract itself is able to be *aufgehoben*. Recognition only through contract poses problems for the subject: not only does each contract involve a compromise and a giving up of more than hoped - one would ideally like to give up nothing to get what is sought in return, as would the other contracting party, but they compromise and give up what to each is an acceptable amount - but further the increasing entry into contracts results in proportionately smaller recognition in each instance. And civil society alone cannot satisfy recognition: it 'breeds new desires without end [and] is in thoroughgoing dependence on caprice and external accident.'[23] Civil society must proceed to have right embodied as law and in the state.

Before proceeding to consider how this embodiment occurs, Hegel pays attention to the peculiarity of the labour contract (in a way that those following Pashukanis perhaps ought to have). The restriction on being able to alienate one's own personality does not mean that one cannot work for another. As seen above, Hegel's artist and scholar externalise their abilities and alienate an externalised object. But what of someone who does not sell a completed work (object) to another, but is instead at the other's direction as to how to invest will in the object? Alienation of the whole of one's time and activity is slavery, but for a period of time is permissible.[24] The novelty of the modern labourer is necessarily bound up with the question of recognition. The lord and bondsman involved each seeking recognition through the other, but when one pole of the relation was denied self-consciousness, the recognition that the bondsman returned to the lord was inherently unfulfilling: 'the attempt by self-consciousness to obtain recognition from another self-consciousness without having to reciprocate is led by the inexorable movement of Hegel's dialectics to a dramatic failure.'[25] As Rosenfeld notes, the lord of Hegel's *Phenomenology of Spirit* seeks recognition through the ability to direct the bondsman to produce goods to his specifications. However, the bondsman -who fears death - does not understand that in his relation with the lord, he is not yet in possession of his own will to alienate his capacities. The lord receives the goods - but only the goods - in an endless stream: there is no self-recognising will that can in turn recognise the lord. That recognition is sought through the direction of the production of goods is notable, for in

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[22] Ibid., §184.

[23] Ibid., §185.

[24] Ibid., §67.

[25] Rosenfeld, "Hegel and the Dialectics of Contract," 239.

the shift out of feudalism to the contract of self-recognising individuals, the ability to direct the production of goods remains, the salient difference being the self-recognition of the producer. The *ability to direct the production of goods according to specifications* remains in both the lord/bondsman and the producer/consumer relationships.

This modern labourer does not work alone: she requires others, and may require the property of others. That which is universal to subjects - the self-conscious will - attains its particularity through working on 'external things which at this stage are likewise the property and product of the needs and wills of others'; labour is thus the 'middle term between subjective and objective' and the sphere of assertion of a certain rationality which the study of political economy takes as its object.[26] The way in which subjects choose to first construct and then secondly meet their needs is a uniquely *human* endeavour. Indeed, it is only once 'the moment of liberation intrinsic to labour' is understood that abstract right can be transcended:

> In [abstract] right, what we had before us was the person; in the sphere of morality, the subject; in the family, the family-member; in civil society as a whole, the burgher or *bourgeois*. Here at the standpoint of needs ... what we have before us is the composite idea which we call *man*. Thus this is the first time, and indeed properly the only time, to speak of *man* in this sense.[27]

Hegel's analysis of labouring in the system of needs is the foundation for right being able to transcend the abstract right of civil society and thus become the proper composition of right and authority necessary for the state. Hegel announces his tripartite movement thus, each moment of which moves closer to law:

> (A) The mediation of need and one man's satisfaction **through his labour** and the satisfaction of the needs of all others — the *System of Needs*.
> (B) The actuality of the universal principle of freedom therein contained — the protection of property through the *Administration of Justice*.
> (C) Provision against contingencies still lurking in systems (A) and (B), and care for particular interest, as a common interest, by means of the *Public Authority* and the *Corporation*.[28]

The section on 'administration of justice' contains the passages that show the first signs of right not as 'abstract right' but 'right as law'.[29] The system of needs - a system of labouring and contracting, of 'needs and labour to satisfy these', a place where Hegel's driven subjects struggle for the recognition they crave - grounds right as law, but crucially *not by*

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[26] Hegel, *Hegel's Philosophy of Right*, §189.

[27] Ibid., §194, Remark to §90.

[28] Ibid., §188. Bold emphasis added; emphasis in plain italics in original.

[29] Ibid., §209ff.

way of some homology between abstract right and right as law.[30] Rather, it immediately becomes a question of *administration*. As soon as one leaves the realms of the system of needs, the system of enforcement is waiting. Thus Hegel: 'From one point of view, *it is through the working of the system of particularity that right becomes an external compulsion* as a protection of particular interests. ... It is only after man has devised numerous needs and after their acquisition has become intertwined with his satisfaction, that he can frame laws for himself.'[31] To be properly universal, these framed laws require being posited and being able to be made valid: their positivity distinguishes it from custom and urges its codification; their validability gives law its determinate quality and allows it to act back on civil society. Law - and the law of contract in particular - comes to provide a means for the securing of property. People contract in the ways recognised by the law so that their claim to title remains enforceable.

However, positive law and its application is but one aspect of law as right: if abstract right involves the capacity for recognition, and if the caprice of the world of contract is a necessary but not sufficient condition for subjectivity, then right must also be realised by the removal of 'accidental hindrances' to full personal development and the treatment of 'every single person's livelihood and welfare ... as a right.'[32] Modern law returns to the subject not just as a means of properly entering into contracts, but also in the guise of a *police/public authority* and also as the corporation. Hegel's police/public authority encompasses the function normally associated with the police, but is not strictly correlative with the modern police force: it is better understood as a combination of the welfare state and the policing agencies, responsible for surveillance, intervention in the economy, education, charity, public works and the founding of colonies.[33] And as far as the status of the corporation is concerned, 'Hegel could never decide between medievalist doctrine involving corporate independence and legal personality and a Roman law conception stressing state control and oversight.'[34] But the system of the satisfaction of needs and the universality of labour give rise to other tasks that are equally pertinent, equally a function of right, and thus Hegel's Remark to §236, worth quoting in full and analysing:

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[30] Ibid., §209.

[31] Ibid., Addition to §209. Emphasis added.

[32] Ibid., §230.

[33] Andrew Arato, "A Reconstruction of Hegel's Theory of Civil Society," in *Hegel and Legal Theory*, ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson, New York, Routledge, 1991, 307.

[34] Ibid., 311.

> Remark: At the other extreme to freedom of trade and commerce in civil society is public organisation to provide for everything and determine everyone's labour — take for example in ancient times the labour on the pyramids and the other huge monuments in Egypt and Asia which were constructed for public ends, and the worker's task was not mediated through his private choice and particular interest. This interest invokes freedom of trade and commerce against control from above; but the more blindly it sinks into self-seeking aims, the more it requires such control to bring it back to the universal. Control is also necessary to diminish the danger of upheavals arising from clashing interests and to abbreviate the period in which their tension should be eased through the working of a necessity of which they themselves know nothing.[35]

Class conflict in general - a necessary consequence of the division of labour - must likewise be resolved by this authority.[36] On one reading, this is an argument for a certain kind of welfare state that gains a legitimacy from intervening in the conditions of civil society, and it is this reading that has found favour with writers who seek to recuperate Hegel for a communitarian legal project that nonetheless pledges allegiance to contract.[37] However, the point to be underlined here instead is that the 'external compulsion' of Hegel's law is a stage of right that is an *effect* of the working through of the system of particular needs. The pyramids were constructed without the mediation of private choice and interest: slaves do not have rights as right has not yet developed to even the abstract stage of personality. This is the fundamental distinction between the slave and the labourer: the recognition of the (abstract) capacity to will and to be able to choose to seek recognition elsewhere. The capacity to control labour inherent in the relations that had slaves build the pyramids has now been refracted through civil society. Contract brings recognition and thus the Idea unfolds. However, it is not so much - as the communitarian legal scholars suggest - that a balance must be sought between control and contract, with the state weighing each side of the scales to ensure harmony. Rather, the spread of contract carries an inherent risk that the progress of the Idea might degenerate back to pre-personality relations of domination. Thus note the three usages of 'control' in Hegel's above-cited Remark: it first appears as the 'public' ordering of work; its second appearance has 'such control' bringing particularity back to the universal; the third has control preventing and ameliorating class conflict. The point is this: it is the

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[35] Hegel, *Hegel's Philosophy of Right*, Remark to §236.

[36] See also Ibid., §244-45.

[37] See e.g. the contributions to Drucilla Cornell, Michel Rosenfeld, and David Carlson, eds., *Hegel and Legal Theory*, New York, Routledge, 1991. and the analysis in Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, Ch 6. While perhaps not self-identifying as communitarian, Jay Bernstein's readings are of the same tone: Jay Bernstein, 'Constitutional Patriotism and the Problem of Violence', *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 97-109; Jay Bernstein, "Right, Revolution and Community: Marx's 'on the Jewish Question'," in *Socialism and the Limits of Liberalism*, ed. Peter Osborne, London, New York, Verso, 1991.

control that used to organise labour that is now the guardian of the Idea and of personality, appearing not just in civil society as personal characteristics of employers but now also as the external compulsion of law and authority.

In the individual contract of employment likewise. The waged labourer is working for another, but also for themselves (to obtain recognition in the form of the labour contract and also to obtain money). Further, Hegel's waged labourer is in fact fortunate enough to enter a sphere where it is not possible to consume: while working for another, there is no time to purchase. The labourer here thus learns to develop an identity worthy of recognition as well as the discipline not to consume. This self-restraint is a concrete embodiment of Hegel's freedom: an effect of the working-out of right. This is ultimately reconciled in the state, where the right of contract and all its contradictions are sublated.[38] Compulsion and restraint return through the state.

Right follows a similar path. Abstract right is foundational, but the move to *Sittlichkeit* means that the by now embodied right returns 'rights' to the subject in a different guise. The modern individual may understand itself as possessing a bundle of rights that stand comparable to the rights of others', or even of the state, and that this possession of rights in some way grounds law.[39] However, rights are to be understood properly as that part of a parcelled-out right that appears *after* the moment where state, duty and right appear embodied in the same relation.[40] After this moment, rights take on forms of their own, and although it may appear that particular rights and particular duties are correlative, nonetheless in truth it is only right and duty in general that correlate.[41] This is not to say (as with an orthodox legal positivism) that the only rights one has are those afforded by law: the right to personality remains the *sine qua non* to achieving an understanding of abstract right. However, simply because contract is the vehicle for the generation of the understanding of right, once right is embodied in the state as 'the articulation of the concept of freedom', the subject is subordinate to the state and its laws.[42] The freedom to contract then loses its ability to trump other duties.

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[38] Cf Rosenfeld, "Hegel and the Dialectics of Contract." Hegel, *Hegel's Philosophy of Right*, §196-8.

[39] Cf Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, Oxford, Hart, 2000, Chs 10, 11.

[40] Hegel, *Hegel's Philosophy of Right*, §261.

[41] Ibid., Remark to §261.

[42] Cf Ibid., Addition to §261.

Though the role of coercion in Hegel is examined by other writers, it is primarily as a precondition for allowing the actualisation and recognition of free citizens.[43] Axel Honneth in particular has developed a significant body of work that considers *inter alia* these questions of recognition and force.[44] A more sustained engagement with Honneth may bear fruit for future developments in Marxist legal thought, especially if conducted along the lines suggested by Jean-Phillipe Deranty.[45] Here a narrower question is being examined: whilst force may be necessary to enable recognition, what is the provenance of that force? This is not a question usually asked: Klaus Kaehler, for example, is able to consider the same sections of Hegel discussed above as ground for 'universal' state power without referencing the place of labour.[46] James Bohman can likewise consider the role of the Hegelian theory of the state in the face of 'globalisation' without an examination of labour, and Jay Bernstein's 'Constitutional Patriotism and the Problem of Violence' is curiously silent on this question.[47] The argument advanced in this thesis agrees with Arato that for right to become law in Hegel, state activity and intervention are required as well as the autonomous cultural production: it is through the combination of these two that 'obligatory force' is yielded.[48] However, what must be stressed is that this 'autonomous cultural production' in so far as it concerns labour is inherently conflictual, and characterised by a requirement of control. *With the transition from lord/bondsman to capital/labour, part of this requirement for control fractures and returns in the form of right as law; the remnant - the lord's prerogative to determine how the goods will be made - remains in civil society.*

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[43] Robert B. Pippin, 'Hegel and Institutional Rationality', *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 1-25, 10.

[44] See e.g. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. See too Deranty et al., eds., *Recognition, Work, Politics: New Directions in French Critical Theory*.

[45] Deranty calls for a 'microanalysis of the work situation' that examines 'contemporary workers ... requested more and more to actively engage their whole personality in the success of the business.' As will be argued in later chapters, this change is emblematic of new configurations of law, value and labour. Jean-Philippe Deranty, "Repressed Materiality: Retrieving the Materialism in Axel Honneth's Theory of Recognition," in *Recognition, Work, Politics: New Directions in French Critical Theory*, ed. Jean-Philippe Deranty, et al., Leiden, Boston, Brill, 2007, 163.

[46] Klaus Erich Kaehler, 'The Right of the Particular and the Power of the Universal', *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 147-62. Sedgwick likewise: Sally Sedgwick, 'The State as Organism: The Metaphysical Basis of Hegel's Philosophy of Right', *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 171-88.

[47] James F. Bohman, 'Hegel's Political Anti-Cosmopolitanism: On the Limits of Modern Political Communities', *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 65-92.

[48] Arato, "A Reconstruction of Hegel's Theory of Civil Society," 307.

Like Hegel, Pashukanis considers the widespread creation of a system of needs composed of contracting individuals to be the grounds for an abstract conception of (legal) personality. At a sufficiently advanced stage the law arises from the interaction of two subjects. However, for a certain reading of Pashukanis, when the law returns to greet the subject as enforcement, the force of law enters as a third figure not present in the initial dyadic relationship. Hegel's force of law, however, has inscribed its place from the start: control and right are implicated in the system of needs from the beginning, so that when the dyadic relationship of (labouring and desiring) subjects is sufficiently advanced to comprehend abstract right, the *aufheben* of this right results in both the perpetuation of the contracting/recognising subject *and* a forceful law, the latter in the form of both positive law and an authority charged with forcefully intervening into contracting life. And when law returns to the subject in the form of compulsion, the subject is to understand not just contract but *labour* as its source. Despite the foundational role that the contract plays, however, Hegel's is not an orthodox 'social contract' theory of legitimate authority. There is certainly no moment of 'pact' between the subject and the sovereign state: the role of the contract is limited to intersubjectivity. And unlike Hobbes, Hegel roots the genesis of contract in inequality, the striving of labour to escape the lord, and 'although the struggle between lord and bondsman is purely metaphoric in nature, the initial relationship between the two bears a much closer resemblance to the historical circumstance that gave rise to the era of modern purposive contract than does the Hobbesian state of nature.'[49] The authority of the state is a necessary consequence of Hegel's striving subjects. The state is an effect of contract. Further, in Locke or Rawls, for example, one apprehends the state of nature, derives therefrom the rights of humans and then ascertains - almost through a process of deduction - the rules that ought govern social relations. The state of nature is thus not only primary, but the conclusions derived from it are primary. Hegel's abstractions work the other way: the figure of abstract right is the least adequate foundation for deriving the positive laws to govern human conduct.[50] And unlike Hobbes, contract cannot be the foundation of right in the sense of a foundation that can be immediately returned to, that is always at hand to legitimate. It must be *aufgehoben*, but in doing so, the right of contract is also *aufgehoben*.

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[49] Michel Rosenfeld, "Hegel and the Dialectics of Contract," Ibid., 240.

[50] Peter Stillman, "Property, Contract and Ethical Life," Ibid., 209.

Marx and *Gewalt*

But Marx knew all this.[51] In Part I, it was demonstrated that, *contra* the instrumentalism that has been shown above to creep into even the most theoretically advanced derivationism of Miéville, the 'force of law' cannot be understood simply as something wielded by one class against another to decide conflicts. Instead, when the labour relationship is considered, Marx's analysis shows several other configurations: violence/force can create the conditions and subjects of a new legal order, such as the wage relationship, and sometimes this preceding violence/forces is exercised as law, sometimes not; in this new order (e.g. the wage relation) violence/force can persist in the everyday 'normal' activity of the order (the employer's command over labour) but it can also persist outside of the relationship in both legal and non-legal forms; and the legal form may also be one of those 'forms in which men become conscious of this conflict and fight it out', with temporary settlements recorded in (private) contracts and (public) legislation.[52]

Marx thus wrote of the role of *Gewalt* in the original process of accumulation of capital [*ursprüngliche Akkumlation*] considered in the previous chapter of this thesis. Perhaps the persistent choice to speak of 'primitive' accumulation instead of 'original' has helped blind us to Marx's insights. It is in the chapters of *Capital* on original accumulation that we find Marx telling us that '*Die Gewalt ... selbst ist eine ökonomische Potenz*': 'Violence ... is itself an economic power.'[53] It is the 'midwife' that brings new societies into being. And this kind of violence saw the 'forcible [*gewaltsame*] creation of a class of outlawed proletarians, the bloody discipline that turned them into wage-labourers, the disgraceful action of the State which employed the police to accelerate the accumulation of capital by increasing the degree of exploitation of labour'.[54] As argued in Chapter 2, the *Gewalt* inherent in the formation of capitalism could at times be the force of law and others the

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[51] Marx, of course, in considering the question of labour, reworks Hegel's notion of abstraction and asserts the importance of the category 'abstract labour.' This thesis will return to consider the importance of 'abstract labour' in more detail in the final chapter.

[52] The quoted phrase is Marx's: Marx, *A Contribution to the Critique of Political Economy*, 20-21. The preceding word, 'ideological', is omitted simply so as to avoid further discussion about that word's meaning: see e.g. John B Thompson, *Studies in the Theory of Ideology*, Cambridge, Polity, 1984; Žižek, *The Sublime Object of Ideology*; Slavoj Žižek, ed., *Mapping Ideology*, Verso, 1994.

[53] Marx, *Capital: A Critical Analysis of Capitalist Production*, 703; Karl Marx, *Das Kapital: Kritik Der Politischen Ökonomie*, vol. 1, Stuttgart, Berlin, JHW Dietz, 1922, 680. I am indebted to the electronic version of Marx's *Capital Vol 1* produced by Dr Hans Ehrbar which puts the original German and his own English translations side by side: Hans G Ehrbar, *Das Kapital: Vol 1* University of Utah, Accessed on 1 March 2006, available from http://www.econ.utah.edu/~ehrbar/akmc.htm.

[54] Marx, *Capital: A Critical Analysis of Capitalist Production*, 703.

force of economic relations. The demands of capital in its embryonic stage, when the proletariat had to be created forcibly, see capital obtain sufficient quantities of surplus labour not just *'durch bloße Gewalt der ökonomischen Verhältnisse, sondern auch durch Hilfe der Staatsmacht'* - not just though the bare force of economic relations, but with the help of the power of the state.[55]

In 'normal' times too, *Gewalt* appears, but not in the guise of direct force. In the English translation of Marx's *Economic and Philosophical Manuscripts* capital is:

> the power to command labor, and its products. The capitalist possesses this power not on account of his personal or human properties but insofar as he is an owner of capital. His power is the purchasing power of his capital, which nothing can withstand. Later, we shall see how the capitalist, by means of capital, exercises his power to command labor; but we shall then go on to see how capital, in its turn, is able to rule the capitalist himself. ... Capital is stored up-labor.[56]

In his original, however, Marx has this stored up labour returns to greet workers as:

> die *Regierungs***gewalt** über die Arbeit und ihre Produkte. Der Kapitalist besitzt diese **Gewalt**, nicht seiner persönlichen oder menschlichen Eigenschaften wegen, sondern insofern er *Eigentümer* des Kapitals ist. Die *kaufende* **Gewalt** seines Kapitals, der nichts widerstehen kann, ist seine **Gewalt**. Wir werden später sehen, einmal, wie der Kapitalist vermittelst des Kapitals seine Regierungs**gewalt** über die Arbeit ausübt, dann aber die Regierungs**gewalt** des Kapitals über den Kapitalisten selbst. ... Kapital ist *aufgespeicherte Arbeit*.[57]

As an economic force, *Gewalt* brings capitalism into being, sometimes as law, sometimes not. In its normal operation, however, as capital extracts surplus labour, this dead 'stored-up' labour becomes the power to command labour, *Regierungsgewalt*, and the purchasing power of capital is *Gewalt*. 'Marx would suggest that this qualitative change is best understood perhaps as a change in the form of violence itself, capitalist accumulation is nothing other than primitive accumulation continued onto the shop floor, and thus nothing other than a continuation of the modification of violence begun with 'bloody legislation' and the enclosure acts.'[58]

Marx is also clear that *Gewalt* is both direct violence as well as the force of the state. Transitions to new societies sometimes involve *'brutalster Gewalt'* - the most brute of force - but all employ *'die Staatsmacht, die konzentrierte und organisierte Gewalt der*

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[55] From the chapter on 'The Working Day': Marx, *Das Kapital: Kritik Der Politischen Ökonomie*, 219.

[56] Karl Marx, *Economic and Philosophic Manuscripts of 1844*, Moscow, Progress Press, 1977, 36.

[57] Karl Marx, "Die Ökonomische-Philosophische Manuskripte Aus Dem Jahr 1844," in *Marx Engels Werke - Ergänzungsband*, ed. Institut für Marxismus-Leninismus beim ZK Der SED, Berlin, Dietz Verlag, 1983, 483. Bold emphasis added; italics in Marx's original.

[58] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 29.

Gesellschaft' - the power of the state, the concentrated and organised force of society.[59] Note that the *Staatsmacht*, which Marx had above counterposed to the *Gewalt* of economic relations, now here appears as itself *Gewalt*. And critically, in this last quote from Marx, the power of the state is not organised force (in the possession) of *capital*, but rather the *Gewalt* of/within *society*, arranged and concentrated in the form of the state. Marx paid attention to the *Gewalt* that founds societies and its subsequent refraction into both the power to purchase labour and command, on the one hand, and legal and 'a-legal' force of the state on the other. When it comes to the creation of capitalism, this *Gewalt* that founds societies relates to both the employment contract that gives the capitalist *Regierungsgewalt* as well as the *Staatsgewalt* of the capitalist state. How are these related? As has been seen, Pashukanis is understood to posit an homology between the commodity form and the legal form. But how exactly does contract equal right? The suggestion that contract somehow lies at the base of law has a long and complex history and Hegel contends against any simple homology or abstraction. And is there a difference if the social contract takes a labour contract as its model? Interpreters of Pashukanis have done violence to this abstraction from contract to right because if there is a figure they haven't reckoned with, it is the Hegel of the *Philosophy of Right* that survives Marx's criticism and that lurks in the passages of Marx considered above. Retrieving this Marx is critical for the enterprise here. It provides Marxism with the means to begin to understand the significance of the labour contract for law and to re-engage with questions of violence and foundation.

What Marx and Pashukanis rightly take from Hegel is that this violence - the forceful recognition of controlled labour - is only successful in the form of contract, not in mere assertion of property. There is then a temptation to treat Pashukanis as the Marxist obverse of a social contract theorist who views contract as a metaphor for state foundation: one who sees contract as the source and form of law, but who hopes law will wither away. Contract, however, cannot alone be a metaphor for the state. Hegel begins to make the point that Marx later completes: contract from the beginning - especially the labour contract - implies control. And when contract founds right, the relation between the two is not an homology. Rather, one must ask what happens when control is set loose of its moorings in contracting civil society and returns to greet the subject. Pashukanis marches with Hegel to the end of his commentary on abstract right, but most of his

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[59] Marx, *Das Kapital: Kritik Der Politischen Ökonomie*, 680. From the chapter on 'The Genesis of the Industrial Capitalist.'

followers fail to take him along the next steps through *Sittlichkeit* to law. Instead, this thesis proceeds from the fundamental perspective that the starting point is *Gewalt* over labour, and the proper inquiry is then into how this is refracted into the force of law and the force of the employer.

Hiding production

Bernard Edelman begins to grapple with these next steps. His primary work *Ownership of the Image: Elements for a Marxist theory of Law*, is absent from virtually all other discussions of Pashukanis.[60] This is unfortunate, especially as Edelman's analysis of subjectivity has as its stated aim the development of Pashukanis' thought. A key achievement of Edelman was to develop for Marxism a method of understanding law's internal functioning. Influenced by Althusser and Jacques Lacan, and liberated from a perceived need to determine in advance that laws should on each occasion express an element of the relations of production, or provide some particular functional support, Edelman could instead interrogate law's self understanding. He, as did Poulantzas, exhorted Marxism to take seriously law's own juridical categories and the way it operates.[61] Edelman's specific contribution is to ask us to take seriously law's claim to neutrality, to its self-purging of 'economic' and 'social' from its realms. To do otherwise is 'to hand over to the law the very ground it claims.'[62] Edelman's interest is in law's ability to perceive itself as self-sufficient, with categories capable of explaining the disputes that come before it. He asks what the conditions are which enable law to do this and what the manner is in which law does it. Here is where Edelman dovetails law's silence on the question of the extra-legal with the masking of inequality of production by equality of circulation. It is precisely by making it appear as if subjects are exchangers and as if all production takes place in the realm of (equal) exchange that law *occults* (unequal) production. In the same way that it appears that equal exchange naturally creates value, so it appears that the subjects engaged in the exchange are naturally equal subjects. Law deploys categories of will and autonomy to make it appear as if subjects exist only in this sphere of circulation.

Edelman considers Hegel as expressive of the moment of subject constituted as subject/object. Edelman suggests that this moment develops in law:

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[60] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*.

[61] Cf Poulantzas, 'The Capitalist State: A Reply to Miliband and Laclau'.

[62] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, 24.

> the subject is object in law to himself whilst retaining "freedom" of himself. Freedom is demonstrated trough the alienation of the self and the alienation of the self through freedom. I mean by that that the ideological exigency of man's freedom is developed in the structure of the subject in law constituted as object in law.[63]

Thus the ability of the subject to participate in e.g. the wage relation and alienate their own objectivity is an essential part of the subject and their freedom. Secondly, still remembering the discussion of Hegel above, this ability to alienate also characterises the subject's relationship to the world, to objectivity in general. The world is capable of being appropriated and then alienated. Thirdly, the ability to alienate self and other is posited as the essence of the subject 'and the concept is sewn up. Since freedom has been made the will and since the will is nothing more that the will to contract over and with myself, I must appear as owner of myself in my relations with others.'[64] For Edelman, critical to this movement is that it takes place *within law*, and in the development of the legal subject as subject/object, law represents *circulation* as the sphere where value is created. Value is created because the subject has exercised her/his will to alienate their objectivity in the sphere of exchange:

> [A]s far as circulation is concerned, the process of capital has only brought it one more commodity, namely labour power, but this new commodity still makes no change to the laws of circulation . ... This most abstract category of the law can now reveal its truth - the putting into circulation of man. [T]he totality of the form of the subject can state its determinations, and they will never be anything more than the realization of private property.[65]

The critique of Miéville's reading of Pashukanis advanced in this thesis can be rendered in Edelman's language. In conflating the relations between individuals *qua* exchangers (contract) and individuals *qua* producers (the labour contract), Miéville confuses subject/subject relations with subject/object relations. It is a subject's power over another subject *qua subject* which for Miéville is the basis of the force inherent in law. However, the Hegelian insight pursued by Marx is that the uniqueness of legal subjectivity of the commodity form type sees the subject in law as internally riven: it can stand in relation to itself objectively. And, critically, the subject can alienate itself. Thus for Edelman the concept of the subject in law developed in Hegel's *Philosophy of Right* reflects a particular moment in the evolution of forms of property.[66] Hegel rails against the tenet of feudalism whereby a subject can be attached to land so that, in effect, land owns the

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[63] Ibid., 71.

[64] Ibid., 72.

[65] Ibid., 106-7.

[66] Ibid., 170ff.

subject. Pashukanis knows this too: 'Feudal property's chief failing in the eye's of the bourgeois world lies not in its origins (plunder, violence), but in its inertia, in the fact that in cannot form the object of a mutual guarantee by changing hands through alienation and acquisition'.[67] Hegel's is a revolutionary step, since a human now is able to alienate (part of) themselves and, indeed, this alienability is fundamental to their subjectivity. The subject is constituted as *subject/object,* but this split is also dissolved back into the subject's essence. This becomes Marx's starting point and enables him to develop a theory of value premised on the alienation of labour under the guise of equal exchange. Within this form of subjectivity - and the 'illusory idea' that this juridical subject represents not a break but a continuous development of Spirit - one finds what Edelman terms the embryonic form of the capitalist subject.[68] The (equal) subject can thus relate to itself qua object, and to another (equal) subject *qua object*. This is the essence of the labour contract, which distinguishes it from a contract for the exchange of other goods: an employer buys alienated subjectivity, the object of the subject. The labour contract has another name for Marxists: the wage relation, which embodies the extraction of surplus. But the fictive equality therein embodied is not any less important because of the abstract equality it engenders: on the contrary, *it is a form of subjectivity that is productive for capital*. If violence inheres in the part of the commodity relation that is the relation between (equal) subject-as-subject and (equal) subject-as-*object*, then it is important to understand how this manifests itself in the commodity form of law. The extraction of surplus does not recur because an employer is stronger than a worker (equal subject vs. equal subject, and force decides), but because the wage relation involves the forceful alienation of the worker's labour (subject vs. subject/object). It is thus necessary, it is argued here, to speak of the *aufheben* of force/violence, *its* conversion to dull compulsion, and to explore how it is sublated and how this sublation is understood by participants. Critical to this argument - though implicit, rather than explicit, in Edelman's work - is that extraction take place through a means (labour contract) that embodies the formal equality of the subject. This will be referred to further when considering the place of abstract labour in Part IV, and it is a key point that must be registered. It is not that the abstractly equal legal subject arises *pace* Miéville merely because subjects trade. *It arises because they work*. It arises because they alienate their personality for a period of time through the fictive equality of the labour contract. Crucial to the argument advanced in

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[67] Arthur, "Introduction."; Arthur, 'Towards a Materialist Theory of Law', 123.

[68] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, 182.

this thesis is that only by taking this relation as the central one can one say something meaningful about the force, authority and subjects of law.

For Edelman, at the base of every subject's relationship to themselves and to objectivity is the ability to appropriate and to alienate. Private property is thus the essence of a human's relationships to other humans and to themselves. Law is thus taking on the task for capitalism of rendering a subject's *imaginary* relation to the forces and relations of production.[69] Law makes it appear that the relation between subjects and themselves and between the subject and 'the real' are the same: the relation of private property.[70] '[T]his imagined relation in its turn becomes effective in practice itself . ... The individual lives and acts really as if private property were his "historical essence", and the courts "demonstrate" to him that he is right, since he has "the right".'[71] Law here thus plays a critical role in subject formation and this is its contribution to production. Edelman grapples with the same question that many followers of Pashukanis rarely ask: what happens to the force and control inherent in the labour relation when the concrete person comes to be understood as a legal subject? For Edelman, force is disavowed, and the understanding of subjectivity takes place only in the realms of alienability. This language of imaginary relations is Lacan's and Althusser's, not Hegel's. But the psychological metaphor of disavowal does parallel the Hegelian story of a repressed violence returning, a story also found in Freud's *Totem and Taboo*.

Origins of law

Any explanation of how violence returns as/in law is as much metaphorical and mythical as it is historical. Any orthodox story about the 'origin' of law necessarily involves reference to a mystical foundation outside of law, usually as a means to maintain the denial of the violence that brought the legal order into being: law can't explain the violence in legal terms, as that would be presupposing the law that was yet to come.

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[69] Ibid., 36, 77.

[70] For example, to summarise Edelman's analysis somewhat brutally, the development of French law as it attempted to deal with the then new areas of photography and cinema showed that the internal struggles of the law in coming to grip with the questions posed by the tension between the forces and relations of production is a question of the subject and the subject's relation to the real. Questions of ownership of the image produced by photographers and cinematographers were initially decided against these subjects because they had merely 'reproduced' the real and not appropriated it with their labour. As photography and cinema become more capitally intensive industries, where finance capital dominated, law was forced to revise its position and ownership rights were now accorded producers on the basis that as subjects they have 'appropriated' the real. The 'real' is always-already appropriable but both the real and the subject are produced within law. The question of law's relation to expanding forces and relations of production become questions of subjects and their relation to themselves, and to the real. See Ibid., Ch 3.

[71] Ibid., 77.

This is not a new point, and when Žižek expounds it at length, he is in the company of many others.[72] In fact, he argues, to overcome this *aporia* Kant says explicitly that one must *not* seek to know the origin of law through reason.[73] To emphasise his point, Žižek draws on Freud's *Totem and Taboo*: there is an absolute crime - the 'primordial parricide' - which founds law, and though it is repressed, it must persist so as to give law force, to be always able to be returned to, so as to justify present and future actions taken in the name of law.[74] Indeed, Žižek goes so far as to say that this is how Marx treats primitive accumulation itself: he lays bare the idyllic fantasies of the bourgeoisie, but nonetheless works backwards from existing capitalism to retroactively posit the 'missing links' that explain the current system. Critique draws attention to the violence of the founding act and the systems that repeat it, and challenges the system to account for its violence, but nonetheless any story of origins will be caught up in constituting what Žižek calls 'an impossible real that should be presupposed (reconstructed retroactively) if one is to account for the existing social order.'[75]

In *Totem and Taboo*, prior to 'society' there exists an undifferentiated power in the hands of the father. The sons, jealous of their fathers' claim over women and his untrammelled power, already feel bonds with each other. This mutuality is strengthened when they agree to kill the father. After the killing (which is not yet called a crime), there is a period where the sons exist without restriction on their activity. The dead father is eaten. After realising they have now literally 'internalised' the authority of the slain father, but fearful of the increasing disorder, the sons enter into a social contract to avoid returning to savagery.[76] The interregnum thus draws to a close when the brothers agree to introduce rule: the prohibition on murder begins (even if in embryonic form) as does the incest taboo. The totem, for Freud, embodies the continuation of the ambivalent relationship the sons feel toward the father: both the recognition that he is the source of the power to rule, and the hostility towards this power. Totem animals are thus both exalted and ritually

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[72] Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor*, 208. Cf Derrida, "Force of Law: 'the Mystical Foundation of Authority'."; Austin Sarat, ed., *Law, Violence, and the Possiblity of Justice*, Princeton, Oxford, Princeton University Press, 2001; Sarat and Kearns, "Making Peace with Violence: Robert Cover on Law and Legal Theory."

[73] Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor*, 203ff.

[74] Sigmund Freud, "Totem and Taboo," in *The Standard Edition of the Complete Psychological Works of Sigmund Freud: Vol Xiii 1913-1914 Totem and Taboo and Other Works*, ed. James Strachey and Anna Freud, London, Vintage and The Hogarth Press, 2001.

[75] Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor*, 208.

[76] Fitzpatrick, *Modernism and the Grounds of Law*, 2.

sacrificed. Freud works backwards from these totemic practices to develop this speculative myth about their origin, but remains conflicted about whether what he is describing 'actually' took place.

Following Žižek's reading of Freud, Fitzpatrick understands *Totem and Taboo* as an allegory of modern law. On one level, Freud's essay is easily read as such an allegory because it asks they key questions of jurisprudence: does law come from a violent, fixed and founding power outside of law, or does it come from the agreement of humans to subject themselves to rule?[77] The sons' new order in some sense is grounded in what has gone before it - authority is transferred from the old to the new - but at the same time it represents a radical rupture. However, immediately after the father is killed there is an interval of 'savage liberty, that perilous time of endless possibility' before the new society is instantiated.[78] So, what happens to this savage violence before the pact is formed? If it remains outside of society, how is law preserved? But if it is introduced into this new order, how is it any different from what went before it? Law is supposedly more than the naked violence which brings it into being. So, it must therefore originate in something other than that violence. But Žižek and Fitzpatrick criticise Rousseau's attempt to originate law in a social contract between freely contracting individuals for presupposing the free individuals that it seeks to explain: 'men would have to have already become before the advent of the law that which they became as a result of law.'[79] Do contracting individuals come from an act of violence, or do they originate it? The escape from this dilemma is usually to posit a self-founding 'novus actus' that turns what was hitherto unlawful into lawful violence. But these original declarations (of formal written constitutions, or the Declaration of Independence) are *legal* ones. Though they are able to be made because of an originating violence, nonetheless they are made *in* law, and they may even be the *first* legal declaration made. Though there was first violence, nonetheless the declaration is made in a scene 'saturated with legality.'[80] The origin of law presupposes elements - such as 'the people' - that are constituted by law. But these founding (p)acts of law aren't just expressed in legal terms, they also seek the additional

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[77] Marxism often repeats the two poles of this dilemma: the equal legal subject stems from contract (the exchange relation), or some external violent rupture creates a new order (the capitalist revolution). Marx himself, however, insists that this is one and the same act. Likewise, neither of these positions would satisfy Hegel, as they improperly abstract from contract to right.

[78] Fitzpatrick, *Modernism and the Grounds of Law*, 3.

[79] Ibid., 80; Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor*, 205.

[80] Fitzpatrick, *Modernism and the Grounds of Law*, 81.

security of a transcendent authority, such as the reference to God in the Declaration of Independence. The original mystical violence that the sons sought to escape comes back to justify the pact that they have just made. The ensuing 'social contract' is thus both a (modern) covenant with each other and a (pre-modern/modern) compact with the power of what went before, 'a sovereign power beyond the reach of individuals' in the guise of the father/totem.[81] A constitution both links and differentiates the finite human power of the individual brothers with the infinite human/non-human power of the father whose place the social power now occupies. For Fitzpatrick, the contract founds a new order when the agreed upon law becomes social and identified with the limitless violence of the 'law' before it and the participants then subject themselves to it. For Freud, 'what prevails is no longer the violence of an individual but that of a community.'[82] *Contra* Hegel, subjects make a pact with the sovereign; but with Hegel, the sovereign is the subjects' power to organise society reflected back at them. The individuals are submitting to nothing but themselves, but it is only when an authority figure is 'invented ... one which was determinant yet of an infinitely extensive range' that potentiality can be brought under control.'[83]

Here, for Fitzpatrick, modern law is born. This law embodies both a justified paternal authority together with rationality of a pact of humans, and 'can be seen as matching that double demand of modernity which *Totem and Taboo* serves to identify: the demand for assured position integrated with a responsiveness to all that is beyond position, a demand to be met now without resort to erstwhile solutions of a transcendent kind.'[84] But this is more than a banal statement that law is both fixed and responsive, both laid down by statute and open to creative interpretation by a judge, both the iron fist of the ruling class and a flexible tool that creates new forms of capital. Fitzpatrick's point is this: law - as order arising from a bloody act followed by compact - steps in at this point and offers *itself* as the origin. 'In Freud's myth it is law which occupies the place of the origin and finds there its own allegory with its combining the "original" elements of a persistent determining force and what was beyond determination.'[85] Law solves these modern problems of authority, violence and origin by being a way of telling the myth of origin.

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[81] Ibid., 24.

[82] Freud, "Totem and Taboo," 144.

[83] Fitzpatrick, *Modernism and the Grounds of Law*, 83, 102.

[84] Ibid., 2.

[85] Ibid., 34.

Freud's 'myth of origins reveals ... grounds of law within a social existence bereft of the transcendent variety. These grounds are possessively "of" law in that they ground law yet law also grounds them. So ... elements of modern society provide grounds of law but these elements become socially effective when brought together by law.'[86] What grounds law? Well, provided law is allowed to tell the story of what grounds law, it will provide grounds both inside and outside of law.

These questions of origin are constantly asked, all the more so if the foundation of law is a self-foundation. For Fitzpatrick, Freud's anxiety about whether the tale of the slaying of the father 'actually' occurred is telling: modernity has increased the need for stories of origin (e.g. of law) at the same time as we become increasingly doubtful about the scientific veracity of such stories. But here is where law excels. It is more than content to step outside of itself, into 'society', provided that it returns to itself: e.g. "Of course, society will change, and it is the judge's role to consider these changed conditions and balance it against the need for certainty in law before reaching a decision". In this sense, law provides a space to constantly ask about origin. And a national founding act justified by a constitution is marked by the same structure of authority as a judge making a 'finding' of law based on new social conditions. As such, the origin at play here is never simply one founding act, but rather one to which legal actors must continually return: law offers 'a time in which the origin, by repeatedly "modifying the moorings", becomes the origin of what is now'.[87] To return to Fitzpatrick's reading of Freud, the worship/killing of the totem is continually repeated, and the old question of origin is repeated in new conditions. Law is that reasoned pact which must persistently return to something other than itself to justify itself, and this is why it can offer itself as origin. But this 'compelled putative settlement' is a 'responsive apartness': a relationship combined of elements that are 'proximate and applied as well as parallel and opposed.' There is a 'productive impossibility' of returning to an original position.[88]

Despite its ability to engage and captivate, there is a weakness in Fitzpatrick's argument, stemming from his debt to Derrida which allows him to situate 'savage violence' at the heart of law.[89] In this schema, there exists naked brute force just beyond the realms of law, and law's role is to both demarcate itself from this violence but also retain the right

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[86] Ibid., 1.

[87] Ibid., 89-90.

[88] Ibid., 104, 56.

[89] See Ibid., 73-79.

to apply this violence. And in its normal operation, force/violence inheres in law. The enforceability of law is nothing more than something which we must accept and reckon with in each act of calculable/incalculable decision. What matters for Derrida is that the application of force be done through law in the name of justice, or 'deconstruction as justice'. However, even with the inscription of 'violence within law', there appears to be a finite limit to the universe of relevant potential constellations between law and violence: violence can be either inside or outside of law, or both, but it always stands in a relation of belonging or of not-belonging.

> Legality ... has constantly to be *made* applicable, not because of its irresolution but as a defence against savagery's constant challenge to civilisation... Savagery may lend its violent force to law, but it is law which constitutes and contains that force within itself. And whilst savagery may provoke a civilizing law into being, it is law which delineates that savagery by separating civilisation from it. Yet ... for law to be in its response, that savagery must remain more than extensive with it.[90]

The metaphors are spatial and the verbs varying degrees of acquisition. And within this Derridean schema, it becomes law's decision whether or not to appropriate this violence. (Benjamin, of course, poses a violence outside of law, that of divine violence, a revolutionary violence that suspends law: more on that in the next chapter.) Violence is treated primarily as a question of judgment, jurisdiction and above all, decision: 'it is in the legal decision - the decision of the subject, the judge, the legislator - that law becomes operative'.[91] For Derrida, law's violence continually reappears because one must decide.[92] And Robert Cover, who is rightly hailed for reintroducing violence to law, sees the epitome of violence in the figure of the judge who decides. Cover's dictum that interpretation takes place in the field of pain and death was a necessary rejoinder to both Dworkin and a certain prioritisation of the text of the law. If the 'force of law' coveys a double sense of the genitive - law has a force-ful quality, but also that force is possessed by law - it is argued here that the second sense is crucial to the figure of decision. But all this remains the violence of sanction, of someone who decides to apply the law.[93]

But none of this is the violence that operates on subjects when they act in accordance with - not breach - law's rules. If one is asking questions of foundation, the figure of

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[90] Ibid., 36.

[91] Ibid., 104.

[92] Derrida, "Force of Law: 'the Mystical Foundation of Authority'."

[93] Cover, 'Violence and the Word'. The essays collected in Sarat, ed., *Law, Violence, and the Possiblity of Justice.*, though 'critically' analysing Cover, remain concerned with the question of the consequences of law appropriating violence.

decision and judgment is not the most adequate way of understanding the violence of law in its operation in the labour contract. The power of command and sanction does not reside in normal times primarily with the court, or the parliamentary sovereign, but with the employer. Except where there is an emergency or strike, or an exceptional historical period, rarely does a positive labour law in advanced capitalism compel people to work. And it is not that the judge in the 'normal' situation enforces an employee to work for an employer, but rather refuses to do so.[94] The employer routinely commands employees. Law is not threatened by the routine exercise of power by individual employers over individual workers, nor of the general dependence of workers on capital in general, a state of affairs which only came about through the bloody *Gewalt* of original accumulation. Labour law recognises the employer has the right to give employees reasonable and lawful directions, but to say that the law is the foundation of this power is to stand the question on its head: this is the Hegelian argument above. What must be accepted is the possibility that there exists a *Gewalt* that does not exist in a relation of belonging/not-belonging to law, a *Gewalt* that can regularly be applied by self-appointed employers without threatening law. Law may not have the monopoly of legitimate *Gewalt*.

As a fellow reader of Freud, Fitzpatrick takes much from Žižek. But Fitzpatrick leaves unexplored a key insight of the latter. In his reworking of Marx's notion of commodity fetishism, Žižek seeks out what it is that becomes 'mystified' when the subject is formed under capitalism. Under feudalism, relations of control inhered in subjectivity. It was expected that the lord would control the bondsman. But the enlightenment shift to an abstractly universal humanity had to re-represent these relations of domination. Although Edelman did not approach it as a question of fetishism, the focal point of his analysis is shared with Žižek, *viz* what happens to the relations of domination inherent in the wage relation when subjects are presented as equal? Domination is repressed. As Read argues, 'the destruction and creation of new forms of cooperation entails the destruction and creation of the old forms of sociality and subjectivity. Thus it is possible to find in Marx a

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[94] 'Specific performance' is the legal term used to denote a court ordering that a specific task be performed, that a contract be abided by. In short, 'force of law'. In the ordinary course, to order specific performance in the employment context has been held 'disastrous' and anathema to liberty. And, just as the common law severely limits the monetary damages that may be paid in the event that a contract is fundamentally breached and brought to an end, so the steady removal of unfair dismissal protections limits the employer's legal exposure in the event that the contract is ended other than mutually. See J. J. Macken et al., *The Law of Employment*, Sydney, Lawbook Co., 2002, Ch8. See too the authorities usefully collected at Rachel Mulheron, '*Maritime Union of Australia (MUA) V Patrick Stevedores Pty Ltd*: Marrying Injunctive Relief and Labour Supply Contracts', *James Cook University Law Review*, 6, 1999, 152-64.

third moment of primitive accumulation, after the expropriation or destruction of the previous mode and its violent legislation, a moment of normalisation that bears on subjectivity and sociality itself.'[95] For Žižek, the subject is structured around a necessary non-knowing of this domination. As such, this disavowed must return to greet the subject in some guise. And this is the importance of understanding the formation of subjectivity in the context of the transition form feudalism to capitalism, and then the universalisation of the latter:

> [The feudal] fetishism in relation between men has to be called by its proper name: what we have here are, as Marx points out, 'relations of domination and servitude' - that is to say, precisely the relation of Lordship and Bondage in a Hegelian sense; and it is as if the retreat of the Master in capitalism was only a *displacement*: as if the de-fetishization in the 'relation between men' was paid for by the emergence of fetishism in the relations between things' - by commodity fetishism. The place of fetishism has just shifted from inter-subjective relations to relations 'between things': the crucial social relations, those of production, are no longer immediately transparent in the form of interpersonal relations of domination and servitude (of the Lord and his serfs, and so on) - they disguise themselves - to use Marx's accurate formula - 'under the shape of the social relations between things, between the products of labour'.[96]

The value-creating capacity of labour and its appearance under capitalism as the commodity 'labour power' form the foundation of Marx's analysis of capital. It was argued above that a fundamental weakness in Marxist analysis has been its failure to understand that the 'commodity form' theory of law is only Marxist if it has a proper place for the peculiar commodity labour power. It was also suggested that Marxist legal theory has trouble finding a place for violence and force within law. The ignorance of labour is the problem. If something is repressed, it will return. Identifying the symptom is a step towards identifying what is repressed, for the latter will usually manifest itself in the former. Žižek reports that according to Lacan, Marx invented the symptom.[97] As Žižek also notes, Lacan finds the symptom's genesis in Marx's analysis of the transition from feudalism to capitalism. In this transition something happened, but this something is repressed; this repression will manifest itself in the symptom, and the subject will necessarily engage in a form of fetishism (ideology) that will have to come to grips with the non-knowing of the repressed.

Marx tells us that two key things happen in the transition: feudal relations of domination are violently torn asunder and a new proletariat violently created under the guise of

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[95] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 36.

[96] Jacques Lacan, 'R.S.I.?', *Ornicar?*, 4, 1975; Žižek, *The Sublime Object of Ideology*, 26.

[97] Žižek, *The Sublime Object of Ideology*, 23.

freedom; and relations between humans come to appear 'fantastically' as relations between things - commodities. Following Žižek, it is argued here that the labour contract is also the 'universal symptom' where this repression is distilled/expressed: in the new contract, equivalent exchange becomes its own negation, as the exchange between labour and capital is both equal (the worker is remunerated - it is a free exchange), and unequal (the labourer submits to capital).[98] This movement - of *Gewalt* to repression of *Gewalt* to its later return to greet the subject - is by now becoming familiar. In what could well be read as an injunction to the followers of Pashukanis, 'the parallel between two modes of fetishism ... is by no means a simple homology ... relations between men are definitely *not* "fetishised" [as they were in feudalism]. The predominant and determining form of their interrelations is not domination and servitude but a contract between free people who are equal in the eyes of the law.'[99] Relations of domination no longer appear as justified by the personal qualities of the employer. As will be argued later, this is only true up to a point: the development of capitalism and the shifting sands of authority and legality do in fact quickly move the foundation of the employer to command out of the sphere of contract. But the thrust of Žižek's argument is correct: what is of interest is precisely the way in which the relations of domination seem to disappear but then ultimately return. Edelman made an attempt to squarely address these issues. And Žižek's is a reading of Marx and commodity fetishism that lends itself to this thesis' reading of Pashukanis.[100]

Greater alignment by Fitzpatrick with Žižek's engagement with Marx would have highlighted that the time of rule by Freud's father isn't simply an undifferentiated violence which then is confronted by the democratic equality of the sons. Rather, in so far as Freud is telling a *modern* story, it is a time of (feudal) control over labour. For Fitzpatrick and Derrida, violence can only be either a transcendent undifferentiated violence outside of law to which law periodically seeks recourse for its justification (by identification or by

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[98] Ibid., 22.

[99] Ibid., 25.

[100] Much more could be said about Žižek's departure from the Marxist notion of fetishism, and his reworking of Marx's 'for they don't know what they do' to 'they know what they are doing, but they do it anyway'. For the purposes of our argument in this chapter, it is not strictly necessary to engage with this reworked notion of fetishism: Žižek's point about the transition to capitalism stands independently of his subsequent melding of Lacan with Marx. But we do begin here to see the importance of psychoanalytic categories for Marxism. In the same vein, we ought also note that this offers a means of resolving some of the dilemmas that plagued Mieville. For while 'the State'/'the Law' appear as Subjects in the interpellation of subjectivity, it is not necessary that they exist as ontologically separate subjects. That is, what is critical is the *appearance* of 'the State'/'the Law' as 'S'ubject in the formation of the individual as 's'ubject. As will be seen, this becomes a useful distinction when tracing the changing nature of the form of the state.

distinction), or the routine violence of law's application *by law*; for Žižek there is another violence which both founds and then persists without necessarily having to be applied by law. Part of Hegel's 'control over labour' returns in the guise of the police; the other part (to which Žižek and Edelman draw attention) remains refracted throughout civil society and is the right to control labour inherent in the wage relation. 'The intimate relation between the formation of the capitalist mode of production and violence found in primitive accumulation has as its correlate the materiality of social relations that pre-exist capital.'[101] The Marxist study of law ought be concerned with teasing out the various legal and non-legal ways this original violence of 'control over labour' returns to greet labouring subjects.

The emphasis on decision, and consideration of violence only as inside/outside law, leads to the second half of Fitzpatrick's book, concerned with how law instantiates nations. It is unsurprising that Fitzpatrick's generative law helps create constitutions. But the question of law-founding violence is about more than the orthodox concern with nations and the documents that frame them. To return to Freud, the time after the death of the father is a time of potentiality. For Freud, the father's supreme power being reinvented as a social power to which the brothers can submit, the 'revived paternal authority', does not evolve until after a 'long lapse of time', and only after 'decisive cultural changes' does 'the *original democratic equality* that had prevailed among all the individual clansmen became untenable.'[102] The totem becomes God and 'supreme' only after the interregnum comes to a slow end and only after the patriarchal family has been 'gradually' instituted.[103] Although the law-founding pact was ultimately entered into, it was perhaps done with the distinct feeling that things would have been better otherwise:

> Each of them would have wished, like his father, to have all the women to himself. ... the brothers had no alternative, if they were to live together, but - not perhaps until they had passed through many dangerous crises - to institute the law against incest. ... Here, too, may perhaps have been the germ of the institution of matriarchy ... which was in turn replaced by the patriarchal organization of the family.[104]

Freud himself cautions that 'we must beware of interpretations which seek to translate [the scene of the sacrifice of the God where God has supreme power] in a two-

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[101] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 35.

[102] Sigmund Freud and Anna Freud, eds., *The Standard Edition of the Complete Psychological Works of Sigmund Freud: Vol Xiii 1913-1914 Totem and Taboo and Other Works*, London, Vintage and The Hogarth Press, 2001, 148. Emphasis added.

[103] Ibid., 149-51.

[104] Ibid., 144.

dimensional fashion as though it were an allegory, and which in doing so forget its historical stratification.'[105] When returning to consider *Totem and Taboo* in his later *Group Psychology and the Analysis of the Ego*, Freud even suggests that two further steps - the Mother Goddess, who arose at the end of the 'gynaecocracy which had become established during the fatherless period', and then the mythical Hero who singularly does what the brothers together did - must be chronologically interposed between totem and God.[106] In that later work he also argues that while the individual is in 'group' state - which is something before it has fully returned to the primal horde, the horde being the figure of power both before parricide and then later in instantiated law - '[it] has a sense of omnipotence; the notion of impossibility disappears for an individual in a group.'[107] And when he tells us this, he includes an explicit footnote referencing *Totem and Taboo*.

True, the subsequent contract relies on the mystical non-legal power of the time before the murder to justify itself. But the contract itself is a *decision* to bind constituent power in favour of constitution. Also true that it is a fraught, circular attempt to disavow a mystical foundation of the new order being instantiated; but it is not just a decision to keep pre-parricidal savagery at bay, it is a decision - in the form of a contract - to limit post-parricidal potentiality, to reinstate impossibility. It is a decision to limit the rights of the sons, or to end the gynaecocracy, or to accept that it is time to return to the horde. And this second decision against potentiality involves the decision to create a state of affairs on which law can be imposed.

To speak of 'potentiality' is, of course, a complicated question. And in the political context in which it is being used here, one immediately encounters the vexed question of whether potentiality is ever productive of political ends, a question considered in the discussion of Benjamin and Agamben in the next chapter. As Clare Colbrook remarks regarding Agamben: 'Potentiality is properly ... given in *poiesis* or the opening of a space enabling the human to view himself not as an actual being but as the possibility of viewing and form-giving as such.'[108] One might, with some justification, assert that this necessarily leads to an affirmative politics that will seek to perpetually defer the decision to enter into a compact and bring the Freudian interregnum to an end. Is this deferral

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[105] Ibid., 149.

[106] Sigmund Freud, *Group Psychology and the Analysis of the Ego*, New York, WW Norton & Co, 1959, 13.

[107] Ibid.

[108] Clare Colebrook, 'Agamben: Aesthetics, Potentiality, and Life', *South Atlantic Quarterly*, 107, no. 1, 2008, 107-20, 113.

sustainable? What would need to be teased out is the relationship between *poiesis* and *praxis*, for at this point the argument advanced in this thesis diverges from Agamben: potential *qua* human *capacity* to produce is not reducible to either 'a potential for this or that end' nor creating 'our ends from ourselves, with our "self" having no essence or proper potential other than this capacity to create without end.'[109] The middle path is found in arguments like Negri's, whereby potential is always a 'power to' that is implacably set in opposition to a 'power over,' or in those arguments that proceed from a Marxian conception of 'species-being', the collective potential of the human that is not directed towards any end in particular. Some aspects of these arguments will be explored later in the thesis. With Paolo Virno, however, the position advanced in this thesis is that labour-power itself now 'means *potential* to produce. Potential, that is to say, aptitude, capacity, *dynamis*,' something which in today's world cannot 'be reduced to an aggregate of physical and mechanical attributes' but also 'the "life of the mind".'[110]

Justice cannot be done to these complex points here, points on which political positions will pivot, but they are raised to highlight the importance of this space before the compact of the brothers. Even in the absence of agreement over whether a politics of pure means is possible, or whether there is space for some other understanding of a potential without ends, the compact necessarily forecloses an alternative constitution just as much as the violent act of founding. To return to the Hegelian point made above, labour is the creative source of order, but order must control labour. The contract to create this state of affairs grounds itself in the same terrifying violence that heralded the new order. The generative capacity of law of interest here is isn't so much its ability to find a ground outside of itself to explain its force. Rather, aim is taken at law's power to make it appear as if the contract was peaceably concluded, as if contract represents the pacific opposite to the preceding violent act, two opposed poles which law can then oscillate between. When Benjamin (and sometimes Hegel) says that the participants to a contract are afterwards left feeling compelled, as if things 'would have been better otherwise', this is because each contract *is* a decision for things not to be otherwise.

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[109] Ibid.

[110] Paolo Virno, "Notes on the General Intellect," in *Marxism Beyond Marxism*, ed. Saree Makdisi, Cesare Casarino, and Rebecca E. Karl, New York, Routledge, 1996, 81.

The (labour) contract is a constitution

By way of supplement to Fitzpatrick's reading, what is sought to be taken from Freud's allegory is that to limit potentiality (and not just savagery), to bring about the order that is necessary for a society of rule, the *contract* embodies originating violence as does the 'violent' *act*. The contract that ends the interregnum is less like a contract between equals for the sale of goods and more like the treaty that follows a war. Marx's tale of the creation of the proletariat through a combination of violence and law thus mirrors the pacts made in the Declaration of Independence with a fictitious people. The overthrow of feudalism created a new order of free people engaging in commerce with each other; it soon became apparent, however, as people fled or refused to work, that this new foundation was built on a fiction. The term *original* accumulation now has its full import: *the proletariat had to be called into being - largely within law - so that there could be a contract which could originate*. The bloody origins of capitalism were sealed with contracts of a particular kind: labour contracts. And later, at the end of the 'civil wars' over the working day, in place of 'the pompous catalogue of the "inalienable rights of man" comes the modest Magna Carta of a legally limited working-day, which shall make clear 'when the time which the worker sells is ended, and when his own begins".'[111]

But the act of original accumulation no more 'creates' law than law created capitalism. For Marxism, capitalism began violently, but one is left wondering whether law preceded it or came after it. Giles Deleuze and Félix Guattari write:

> Hence the very particular character of State violence: it is very difficult to pinpoint this violence because it always presents itself as preaccomplished. It is not even adequate to say that the violence rests with the mode of production. Marx made the observation in the case of capitalism: there is a violence that necessarily operates through the State, precedes the capitalist mode of production, constitutes the 'primitive accumulation' and makes possible the capitalist mode of production itself. From a standpoint within the capitalist mode of production, it is very difficult to say who is the thief and who the victim, or even where the violence resides. That is because the worker is born entirely naked and the capitalist objectively 'clothed', an independent owner. That which gave the worker and the capitalist this form eludes us because it operated in other modes of production. It is a violence that posits itself as preaccomplished, even though it is reactivated every day.[112]

The fact that laws were used to bring this society into being appears to be incompatible with a certain base/superstructure understanding of law. The conundrums posed in the modern critique of law - the need to be able to explain the origin of something in terms

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[111] Marx, *Capital: A Critical Analysis of Capitalist Production*.

[112] Giles Deleuze and Félix Guattari, *A Thousand Plateaus*, trans. Brian Massumi, London, New York, Continuum, 2004, 494.

that come both before and after the origin - also infect the Marxist study of law. Here this thesis follow Fitzpatrick and Žižek, and asserts that Marxism probably has misunderstood what it is that makes law law. Or better: Marxism since Pashukanis never really has engaged with the debates about what law is. Instead of seeking to see law as either product or antecedent, it is argued here instead that law is something present at the origin of the violent (re)order(ing) of dead over living labour because this *Gewalt* over labour is a ground of law. Marx knew this, and had no trouble reversing the orthodox suggestion that economy somehow produces law. This chapter began with the Marx of his *Economic and Philosophical Manuscripts* who said that the power of 'stored-up' labour over living labour was a *Gewalt*. Consider now the preceding sentences, in which Marx quotes political economist Jean-Baptsite Say:

> What is the basis of capital -- *i.e.*, of private property in the products of another's labor?
>
> > "Even if capital cannot be reduced to simple theft or fraud, it still needs the assistance of legislation to sanctify inheritance."
>
> How does one become an owner of productive stock? How does one become owner of the products created by means of this stock?
>
> > "Through *positive law*."[113]

That *Staatsgewalt* can originate and reproduce capital and that capital is *Regierungsgewalt* ought cause superstructural heartburn no longer. Marxism likes origins: feudalism gave birth to capitalism, and capitalism will give birth to communism. But it is a mistake to think that origins are ever left behind, as Fitzpatrick tells us. Original accumulation never occurs only once: capitalism is a continual process of reappropriating the commons. Further, the method of extraction of surplus is also dynamic (or, for some Marxists, dialectical). With each new appropriation of the commons or new method of extraction of surplus, law can be there to provide an explanation of this new form of violence. However, this does not mean that the explanation takes place solely in legal terms, or that there is a legal expression for every act of violence: indeed, it is precisely the interrogation of what appears as 'legal' and the shifting of violence between public law, private law and 'outside of law', that is of interest. What is also of interest is the way in which (labour) law relates to its violent origins, how it represents and iterates the original violence that lurks there and how the *Gewalt* - the command and control of dead over living labour - is returned to the subject as law. Marxism ought accept some of the advances in the critical study of law; in return,

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[113] Marx, *Economic and Philosophic Manuscripts of 1844*, 36.

Marxism can rightly demand that those concerned with law also be concerned with labour.

The Marxist study of law must now begin treating the (labour) contract as a constitution. This is the import of Pashukanis' insight that the pact of 'compact' comes from *pax*. But it must be realised that contract cannot be simply abstracted from to get to law. As mere abstraction, contract provides insufficient foundation. Right is only fully realised as law when its conflictual basis returns to greet the subject in both the private contract and the external state. The wage relation is special pact between victor and vanquished. As Hegel and Marx show, it is a result of a travel first through property (and expropriation, including of surplus value) then through contract, before its latent *Gewalt* returns as something approaching the general 'force of law', when original accumulation ultimately gives way to the dull compulsion of economic relations. (Of course, the exceptional use of direct force - savage violence or 'so-called primitive accumulation' - always lurks in the wings.) Even Freud does not jump straight from contract to law without detouring through certain kinds of violence. This thesis is searching here for a metaphor that explains the place of violence at the heart of the (labour) contract. There is, of course, a question as to the sufficiency of adopting the psychoanalytic metaphor of foreclosure as Edelman and Žižek do. Putting aside the broader question of the appropriateness of psychoanalytic categories for law, foreclosure can condemn force to never being recognised within law in its normal application and only in the most traumatic/revolutionary of circumstances.[114] However, it will suffice for the moment, for as no sooner as one has settled on the 'contract' as the proper mode of explanation of the

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[114] Žižek's subjects are, of course, split: formed around a foreclosed void. The psychoanalytic experience concerns the confrontation and then traversal of that void. Žižek's general approach is use the theoretical edifice of this individual experience at the level of the social: if the individual subject is split, the social subject is split; as there exist various forms of fantasy that the individual partakes in, so there are broader fantasies that structure society; if there is a traumatic kernel that the individual must confront, so must there be a hidden unspeakable violence around which society organises itself; and so on. There have been efforts - not least by Žižek himself - to graft this theoretical approach on to a radical political program. At the core of this approach is the need to radically identify with the disavowed as the true universal. Fabio Vighi, for example, draws together Žižek, Agamben and Pasolini to make the case for the quasi-pathological identification with the excluded *homo sacer* in lieu of a politics of human rights: we are not all human, but we are all in Guantanamo Bay: Fabio Vighi, 'Pasolini and Exclusion: Žižek, Agamben and the Modern Sub-Proletariat', *Theory, Culture & Society*, 20, no. 5, 2003, 99-122. There can be no doubt that this approach yields riches at the level of subjectivity and ideology. However, like the mobile phone camera picture screened on a television news bulletin, there can be an unsatisfying imprecision that results from 'scaling up' from the individual to the social. Contrary to the trend of what has been argued thus far in this thesis about the force at work in (social) law, the kind of violence at the core of a given (individual's) psyche may not necessarily bear any relation to the repetitive 'violence' (if indeed it can be called violence) that marks that individuals attempts to keep the foreclosed at bay through fantasy structures. There are doubtless helpful insights that come from considering the perverse or hysteric fantasy structures of social ideology that explain foreclosed original violent founding acts. However, such arguments must be advanced carefully and step-by-step.

Gewalt in the wage relation, capitalism has already moved on. Indeed, as will be argued below, as soon as employment begins to lose *de facto* the character of a direct relationship between two individuals, so the Pashukanisian 'cell-form' of the contract ceases to be the authoritative representation of the wage relation.

Conclusion

This chapter has advanced two arguments. First, Marx's understanding of *Gewalt* - pivotal to an analysis of law - does not proceed from *a priori* distinctions between state/legal force and economic force which are then required to be brought into some theoretical relation to each other. Instead, capital is a social force that requires the exercise of control over labour: whether this appears as *Staatsgewalt* or the employer's *Regierungsgewalt* is a second-order question. There is no need to assign theoretical primacy to one or the other. This argument thus avoids the pitfalls attendant on a base/superstructure understanding that allocates the force of law to the superstructure. More importantly, however, it provides a means for resolving the difficulty epitomised by Miéville in finding a place for the state-backed force of law in a 'commodity form' theory of law. Hegel explains that one cannot simply draw an homology between contract and right - contract is inadequate for this - but that there is force inherent in the labour relationship, and with the spread of contracts the constellations of feudalism, property, law and subject are undone and reconfigured; Marx adopts this argument but shifts attention to the labour relationship, one founded by violence and whose continuation effects continual reseparations and relations of dominations.[115] The force of law, therefore, when called in aid of contracting individuals (*a fortiori* in the labour contract) is not something external to the relationship. It is rather the return to subjects of the requirement for control of labour inherent in Hegel's system of needs, a system through which 'right becomes an external compulsion' in the form of the coercive and administrative elements of the state, as argued above. Secondly, in addition to standing the usual Marxian understanding of force and economy on its head, and giving a certain priority to the former by treating capital primarily as a relation of force exercised over labour, it also has been argued in this chapter that new light is shed on questions of work and of rule. As to the latter, if the force of law derives from a Freudian coupling of law-

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[115] 'The capitalist system presupposes the complete separation of the laborers from all property in the means by which they can realize their labour. As soon as capitalist production is once on its own legs, it not only maintains this separation, but reproduces it on a continually extending scale.' In the chapter 'the Secret of Original Accumulation': Marx, *Capital: A Critical Analysis of Capitalist Production*, 668.

founding act and compact, then it must be understood that this social contract is not merely the pacific opposition to savage violence, but rather a continuation of the control over labour power necessary to instantiate a new legal order. A reading of Fitzpatrick's argument highlighted this point. And conversely, from the side of 'work', the labour contracts that characterise work open themselves up to being understood as unsteady attempts to legitimate command over labour, 'unsteady' because they too are legal forms that bear the same complicated relationship to violence that law does. The participants to the labour contract come to the scene saturated in legality, and their relationship to violence is just as much in issue as the subjects of Rousseau's social contract. The labour contract is a constitution.

These arguments reflect positions that will unfold in this thesis. For they set the backdrop for an examination of why the ground and nature of authority in the labour relationship bears similarity to that in the sphere of the legal/political (Part III). And why, as Part IV will argue, the separations between the legal/political and the 'private' sphere of labour wrought upon the subject, the shifting categories of 'citizen' and 'worker', are best understood by way of theoretical and historical examinations of the shifting configurations of control over labour. Law holds the labour relationship at a peculiar distance: it is a ground of law, and thus it sees there both historical origin and, as later chapters will argue, a continually altering origin to which it can return. When the *Gewalt* of the employer is looked at next to the force of law, it could be said even that the resemblance is *unheimlich*, uncanny. But one doesn't just feel a strange lost familiarity towards the *unheimlich*, but also threatened. Marxist study has hitherto avoided attempts at charting this relationship of familiarity and threat. That it has done so is all the more surprising given the explicit attention paid to these questions by Benjamin, a writer with a significant affinity with Marxism. Unforgivably, Benjamin's *Kritik der Gewalt* appears to have gone entirely unconsidered in Marxist legal scholarship.[116] It is to this text that this thesis now turns, where one also finds a 'violence indirectly exercised' that has hitherto gone unnoticed in critiques of Benjamin.

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[116] Walter Benjamin, "Critique of Violence," in *Selected Writings*, ed. Marcus Paul Bullock and Michael William Jennings, Cambridge, Belknap Press, 1996.

Chapter 4 - A violence indirectly exercised

It has been argued thus far that placing labour at the centre of the 'normal' relationship between *Gewalt* and law leads to a rethinking of this relationship, as well as altering the way in which the labour relation is conceived. This argument is strengthened when the places of law and *Gewalt* in the 'exceptional' situation are examined. The 'exceptional' situation - the declared state of emergency where the normal operation of law is suspended - has become the site of much recent debate. Indeed, Agamben argues that the exceptional situation reveals the truth about the relationship between force and law. However, just as most readings of the 'normal' relationship between force and law fail to consider the place of labour, so too is it absent from discussions surrounding exceptionality. This absence is brought into sharper relief when it is recalled that Benjamin's critique of *Gewalt*, which underpins Agamben's analysis, was expressly concerned with the labour strike. This chapter begins by reconsidering Benjamin in the light of the arguments advanced thus far in this thesis, and then discusses Agamben's theorising of the relationship between law and force. In the course of this examination, it is necessary to consider the position of Schmitt, with whom Agamben and Benjamin are engaged in a complex relationship. The consideration of Schmitt reinforces the importance of placing labour at the centre of any examination of emergency and exceptionality. It is concluded that questions of 'force of law' and 'emergency' necessarily involve the question of the coercive nature of labour, for the suspension of labour in the strike is nothing less than a question of the political. This chapter, which concludes Part II *Gewalt*, thus pursues the arguments developed in Part I by deepening the connection between the force of law and control over labour, this time from the perspective of the exceptional.

In 1921, Benjamin's *Critique of Violence* was published.[1] Three years later, the first edition of Pashukanis' *General Theory* appeared. Pashukanis had studied in Munich in 1910-1914 and received his doctorate in law while Benjamin was only a few hundred kilometres away in Freiburg. When Pashukanis moved from Munich back to Russia, Benjamin moved to Munich where Pashukanis had just been. Despite their contemporaneity, and despite nearly sharing a city, there is no obvious record in

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[1] Ibid.

Pashukanis' work that he read Benjamin, or *vice versa*. Given the extreme circumstances of their lives, the lack of encounter between these two important figures is perhaps unsurprising. But what remains inexplicable is the failure of Marxist legal theory to introduce them, a task left to Agamben. Agamben approvingly alludes to Benjamin's reading of Kafka's new attorney, who retreats to the hills to study laws of the town without any intention of applying them.[2] Agamben continues:

> What can be the meaning of law that survives deposition in such a way? The difficulty that Benjamin faces here corresponds to a problem that can be formulated (and it was effectively formulated for the first time in primitive Christianity and then later in the Marxian tradition) in these terms: what becomes of the law after its messianic fulfilment? (This is the controversy that opposes Paul to the Jews of his time.) And what becomes of the law in a society without classes? *(This is precisely the debate between Vyshinsky and Pashukanis.)* These are the questions that Benjamin seeks to answer with his reading of the 'new attorney'.[3]

Attention must be paid to Agamben's sole explicit reference to Pashukanis, the attorney who literally struck out pages from the books of Soviet law, directing himself to the practical application of its withering away.[4] Agamben's oeuvre directs itself towards the possibility of thinking the suspension of the relationship of law to life. If the desire to maintain the spectre of the 'force of law' in extreme and exceptional situations where law no longer applies is what is at stake for Paul, or in the dialogue between Schmitt and Benjamin and, ultimately, also for Agamben, then in this question of the constitution of the political it is significant that the 'Marxian tradition' 'effectively formulates' the problem taxing Benjamin. When this formulation appears in the debate between Pashukanis and Vyshinsky (his Stalin-appointed successor), there is little difficulty in aligning the poles of their argument with those of Benjamin and Schmitt respectively. For Agamben, the question of deposition and suspension of the relation that binds the law to the anomic space outside law is also the question of the political ontology of humanity. That the revolutionary general strike - through 'pure' withdrawal - is able to strike at this relation and thus depose/suspend it suggests a closer connection between labour and 'force of law' than might otherwise be suspected. Given the critical status of Benjamin's work for Agamben's philosophy, it is necessary to move back into the latter's view the

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[2] Franz Kafka, "A Country Doctor," in *The Penal Colony, Stories and Short Pieces*, ed. Willa & Edwin Muir, New York, Schocken Books, 1948.

[3] Giorgio Agamben, *State of Exception*, trans. Kevin Attell, Chicago, London, University of Chicago Press, 2005, 63. Emphasis added.

[4] Piers Beirne and Robert Sharlet, "Editors' Introduction," in *Pashukanis, Selected Writings on Marxism and Law*, ed. Piers Beirne and Robert Sharlet, London, New York, Academic Press, 1980; Head, *Evgeny Pashukanis: A Critical Reappraisal*, Chs 5-8.

question of labour and its 'withdrawal' or 'estrangement'. By being attentive to the ways in which the force of the employer and the force of the state are represented as separate, this chapter argues that these questions of labour and the strike, contract and command and law and emergency were imbricated from the very beginning.

Strike

> It is true that the omission of an action, or service, where it amounts simply to a 'severing of relations', can be an entirely nonviolent, pure means. And as in the view of the state, or the law, the right to strike conceded to labor is certainly a right not to exercise violence but, rather, to escape from *a violence indirectly exercised by the employer*, strikes conforming to this may undoubtedly occur from time to time and involve only a 'withdrawal' or 'estrangement' from the employer. The moment of violence, however, is necessarily introduced, in the form of extortion, into such an omission, if it takes place in the context of a conscious readiness to resume the suspended action under certain circumstances that either have nothing whatever to do with this action or only superficially modify it.[5]

That the 'severing of relations' in the strike is a kind of violence, which can, in the right circumstances, be 'pure means' and at the same time 'entirely nonviolent' speaks of Benjamin's concern to distinguish his critique of violence from the kind that fails to interrogate the relationship between violence and law.[6] For Benjamin, responses to state violence - such as opposition to the death penalty or to military conscription - cannot be concerned merely with asking whether the violence is directed towards just ends. Such natural law approaches fail to appreciate the problem posed by positive theories of law, namely that they turn the question into one of whether violence is legally sanctioned (and hence a just means). Positive theories of law attempt to guarantee the justness of violence by introducing the distinction between 'so-called sanctioned and unsanctioned force.'[7] This merely displaces the problem to another level, however, leaving unexamined how it is that one can posit violence as sanctioned in the first place. Benjamin responds by removing the question of violence from the realm of means directed towards ends, instead approaching it as a dialectic between law-founding violence and law-preserving violence. The former establishes law violently. It is the mythic violence of constitutions, of legal pacts following military conquests. No sooner is a claim of justness (violently) made, however, than it must be (violently) preserved: law-founding violence calls forth law-preserving violence. Recognising its mythical foundations, law-founding violence

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[5] Benjamin, "Critique of Violence," 239. Emphasis added.

[6] Benjamin, writing in German, uses the term *'Gewalt'*. This chapter will generally persist with the English translation of 'violence', but this is attended with the same problems as alluded to in the last chapter, *viz* the ability of *Gewalt* to be translated as violence, force or even power.

[7] Benjamin, "Critique of Violence," 237.

must use law-preserving violence in its refusal to countenance any other law-founding violence, thus ensuring the cycle of its decay. Law-founding violence denies other law-founding violence, then is ultimately met and overcome by it, and the latter in turn calls on further law-preserving violence.[8]

In this context the right to strike occupies a curious status since it appears to allow a violence to exist - the right to use coercion (force) to obtain certain demands (ends) such as higher wages - outside of the law-founding/law-preserving dialectic. Here Benjamin draws on Sorel's distinction between the political strike (which will be ended by the meeting of certain demands) and the revolutionary general strike. The former is permitted only in so far as its violence does not seek to be law founding. In the event that it exceeds this ambit and threatens to found a new order (as was not uncommon at the time Benjamin was writing) or indeed becomes another type of strike altogether - the revolutionary strike which threatens to *depose* the whole dialectic of law-founding and law-preserving violence - then it well be met with law-preserving force. Attention is drawn here to the terms in which Benjamin describes what happens in both the political law-founding and the revolutionary law-deposing general strike:

> labor will always appeal to its right to strike, and the state will call this appeal an abuse (since the right to strike was not 'so intended') *and will take emergency measures*. For the state retains the right to declare that a simultaneous use of strikes in all industries is illegal, since the specific reasons for strikes admitted by legislation cannot be prevalent in every workshop ... The strike shows that [violence] is able to found and modify legal conditions, however offended the sense of justice may find itself thereby.[9]

Chapter 8 of this thesis considers the prohibitions on 'pattern bargaining' recently introduced by the Australian Government in its *Workplace Relations Act 1996*, where industrial action taken in support of common outcomes across multiple businesses is unlawful, along with the longstanding capacity to remove the right to strike where 'essential services' are threatened. This legislation shows that Benjamin's critique has lost none of its purchase. The further significance in the current chapter is in a demonstration of the historical and theoretical imbrication *from the beginning* of labour, emergency and sovereignty in theories of exceptionality. For Benjamin, the revolutionary general strike will both depose the logic of law-preserving/law-founding force (*Kritik der Gewalt*) and

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[8] Ibid., 300.

[9] Ibid., 239-40.

bring about the real state of emergency (eighth *Thesis*).[10] Werner Hamacher emphasises the distinction between the revolutionary strike that *deposes (entsetzt)* and the 'political' strike that seeks to instantiate and found. The revolutionary general strike 'is a non-violent means of annihilation of legal as well as of state violence', the 'annihilation' of all legal violence, the 'annihilation of state violence [*Staatsgewalt*], and, like divine violence, is "law-annihilating"'.[11] This annihilation is only destructive because it destroys the dialectic of law founding and law preserving violence: 'The "nothing" which takes place in the proletarian general strike is most readily distinguished from ... any logically or ontologically defined nothing, by the fact that in it the sheer mediacy of all social relations opens up, and all the formal and especially juridical restrictions of these relations are *suspended*.'[12]

Or, in the words of the Benjamin quote first appearing in this chapter, the strike as 'pure means' is a withdrawal or estrangement. The violence of the revolutionary general strike is 'pure' because it suspends the relation between violence [*Gewalt*] and the juridical. As such, the revolutionary general strike *strikes* at this relation. It is 'pure' not because of any innate characteristic of the activity of the strike (indeed, it may be difficult to distinguish between the revolutionary and political strike by the actions that constitute them), but because it seeks to render inoperative without itself seeking to produce. The political general strike, by contrast, is means to an end: it seeks to found, to produce, to maintain the dialectic of law-founding and law-positing violence and, as we shall see, of sovereignty to the exceptional space. As Hamacher and Robert Sinnerbrink observe, Benjamin is here siding with Rosa Luxemburg and those communists who advocated the importance of the general strike against others who derided such 'spontaneism' in favour of the strengthening of the centralised party form, so that it may morph into the potential state in the transitory phase of the dictatorship of the proletariat.[13] This question of politics as the ability to *suspend* a relation - posed by Benjamin as the question of a certain kind of *striking* - is perhaps *the* political question for Agamben. After considering

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[10] Walter Benjamin, "Über Den Begriff Der Geschichte," in *Walter Benjamin: Sprache Und Geschichte*, ed. Rolf Tiedemann, Tuttgart, Philipp Reclam jun., 1992, 145-6.

[11] Werner Hamacher, "Afformative, Strike: Benjamin's 'Critique of Violence'," in *Walter Benjamin's Philosophy : Destruction and Experience*, ed. Andrew E. Benjamin and Peter Osborne, London ; New York, Routledge, 1994, 118,19.

[12] Ibid., 119. Emphasis added.

[13] Ibid., 117; Robert Sinnerbrink, 'Deconstructive Justice and the 'Critique of Violence': On Derrida and Benjamin.', *Social Semiotics*, 16, no. 3, Sept 2006
200612, 2006, 485-97.

Agamben's work, and how Benjamin figures therein, this chapter returns to these question of suspension, violence and law with an examination of the place of the 'violence indirectly exercised by the employer' to which Benjamin refers.

Law and life

Many theoretical responses to the activities of Western governments since September 11 2001 are characterised by a resurgence in the use of the concept of 'sovereignty'.[14] This has dovetailed with increasing interest in Agamben, whose reworking of Benjaminian and Schmittian themes of sovereignty and exceptionality seemed to presage these events. But the concept of sovereignty is slippery. To talk of sovereignty can be to talk of many theoretically incommensurable things. Does it mean merely the force of law, or something beyond it? Or if one is actually again speaking about 'the state', how is this reconciled with Foucault's assault on the usefulness of any such theoretical category when talking of power? Or is the 'sovereign' merely a synonym for the executive arm of government, masking a lament for the decline of the rule of law? These confusions multiply when considering the 'state of exception', as that upon which the sovereign decides. The force of law is its capacity to bind: to say that a statement has the 'force of law' is to say that it must be followed.[15] In the exceptional situation - when, for example, a head of state declares a 'state of emergency' - certain laws may be suspended and acts that in normal times would not be considered law - such as the direction of a minister or a military general - may be said to have the 'force of law'. The Schmittian definition of sovereignty is to be the figure able to *decide* when the exceptional situation will be declared.[16] What happens to the law when an exceptional situation is declared holds the key for understanding both the syntagm 'the force of law' as well as the key *relations* between law and life, which, for Agamben, constitute the questions of politics proper.

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[14] See e.g. Matthew Calarco and Steven DeCaroli, eds., *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007; Stewart Motha, 'Democracy's Empire: Sovereignty, Law, and Violence', *Journal of Law and Society*, 34, no. 1, 2007, 1-2; Rasch, 'Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy'; Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*.

[15] Agamben's use of 'force' does not allow it to be directly equated with Benjamin's '*Gewalt*': Agamben is attempting to detail how the various usages of 'force' are configured, a constellation which does not directly map onto the configurations sketched by Benjamin or Agamben. This chapter will use Agamben's terminology (force of law, force of ~~law~~, form of law) and conclusions will be drawn about the relationship between Benjamin and Agamben towards the end of the chapter.

[16] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, Cambridge, Mass., MIT Press, 1985.

In this relation between law and life, *homo sacer* is pivotal. To understand this notion, reference can first be made to Julia Kristeva's reading of Hanna Arendt's analysis of the French *Declaration of the Rights of Man and the Citizen*.[17] Arendt draws attention to the differential use of the terms 'man' in the first Article and 'citizen' thereafter. She asks what is to become of those who are human, but are not citizens (i.e. are without a nation/state). There, where one ought to find the apex of 'human rights', one finds instead people subject to 'barbarity.'[18] For Kristeva, this gap between the foundation of rights - being human - and the method by which these rights are to be secured - being a member of a 'political association' - was contested from its very genesis. Further, to the extent that there may have been a concept of a 'nation' in the eighteenth century, she recalls that this often designated an imagined cultural community, not necessarily coterminous with the political association that might guarantee a human's rights. Thus it was possible in 1792 for the French Legislative Assembly to bestow French citizenship on certain 'citizens of the world' who were born and resided outside France, approving 'a statute of (honorary) integration ... which, in the name of human universality, recognised as *French* those who had done the most for mankind.' The very notion of 'foreigner' - referred to at the time as "a barbarous term that is beginning to make us blush" - was the subject of bitter struggle, in part enshrined by the guillotining of its opponents.[19]

Agamben, like Kristeva, suggests that it is from the place of this 'gap' between citizen/subject and human that one ought to seek to invent a new politics. However, the status of this gap and its relation to the *polis* is the place of Agamben's most radical claims. The ancient Greeks, Agamben argues, did not have one word for 'life', but drew a distinction between *zoē* - bare life, life as such - and *bios* - political life, the citizenry. Agamben agrees with Foucault that a key element of modernity is the entry of *zoē* into the sphere of the *polis*, the politicisation of bare life as such, 'the point at which the species and the individual as a simple living body become what is at stake in a society's political strategies'.[20] The *polis* is structured around this distinction between *bios* and *zoē*: between

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[17] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 126-34; Hannah Arendt, "The Perplexeties of the Rights of Man," in *The Portable Hannah Arendt*, ed. Peter Baehr, London, Penguin Books, 2000, 31-45; Julia Kristeva, *Strangers to Ourselves*, New York, W W Norton, 1994, 148-54.

[18] Kristeva, *Strangers to Ourselves*, 151.

[19] Ibid., 156.

[20] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 3. Agamben and Foucault do significantly differ, however, over the nature and commencement of this incorporation. While both accept it as characteristic of the modern state after the eighteenth century, there are significant differences about the previous eras, with Agamben often extending his arc to antiquity. Aside from the broader question as to whether this unfairly collapses important distinctions in state-form, this has also led to a questioning of the use of the term

the political life of the citizen and the 'good life' of the human. The capacity to decide when a human is *bios* - a bearer of rights - and when merely *zoē* - just alive - is the original sovereign decision. If Schmitt said that 'Sovereign is he who decides on the state of exception', who decides when the law will not apply, then Agamben now extends the usually understood reading of this phrase to become a question not just of *when* and *where* the law will not apply, but also *to whom*. The ability of the sovereign to decide that a person is *zoē* and not *bios* - or, following Kristeva and Arendt, man but not citizen - is not an aberration, *but the very foundation of the modern operation of the polis*. This category of person who is *zoē* but not *bios* is the *homo sacer*.

The relation of the sovereign to *homo sacer* is by no means one of mere exclusion. It is rather an inclusive exclusion: *homo sacer* is included in the *polis* precisely by being excluded from it. The sovereign's capacity to decide on this exclusion is foundational to the sovereign itself. Thus the sovereign's foundation is in some sense located outside its normal operation, outside the law, even though this foundation is precisely the point where the juridical/sovereign order does not apply. This relation between the sovereign and *homo sacer* is termed a relation of *ban*, a term Agamben borrows from Jean-Luc Nancy:

> *ban* (from the old Germanic term that designates both exclusion from the community and the command and insignia of the sovereign) to this potentiality ... of the law to maintain itself in its own privation, to apply in no longer applying. The relation of exception is a relation of ban. He who has been banned is not, in fact, simply set outside the law and made indifferent to it, but rather abandoned by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable.[21]

To Arendt, Agamben answers that declarations of rights founded on the human as such are precisely the documents that express perfectly the source of sovereign power and so explicate the sovereign's prerogative to decide when one is citizen and when one is not. Usually this gap between human and citizen is elided: most people are born into the state and become citizens as by nature. The human is the 'immediately vanishing ground (who must never come to light as such) of the citizen.'[22] This structure is brought into question

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'biopolitics', a point that will be returned to later in the thesis. Peter Fitzpatrick, 'Bare Sovereignty: Homo Sacer and the Insistence of Law', *Theory and Event*, 5, no. 2, 2001; Catherine Mills, "Biopolitics, Liberal Eugenics and Nihilism," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007; Paul Patton, "Agamben and Foucault on Biopower and Politics," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007.

[21] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 29.

[22] Ibid., 128.

only by the figures of the refugee and other 'disquieting elements' of humans who are not citizens.[23]

If the relation of *ban* implies a *decision* whether to apply the law, then this creates a complex topology in instances where the law is not applied. Agamben's Schmittian sovereign - who decides whether to apply law - is simultaneously a part of the law being suspended yet also outside it. The 'state of exception' or state of emergency is here the emblematic form, in which the 'normal' operation of law is suspended, the law not applied, although it cannot be said that the law itself ceases to exist. The extreme case is the decision by a head of state to suspend the constitution to safeguard the constitution. What does Agamben say about the *force* and the *form* of law in this instance? The state of exception opens the possibility for a statement *that is not properly speaking 'law'* to have the force of law. In the exceptional situation, for example, a written direction of the Minster of the Crown must be complied with even though the direction itself is not a law. In short, it has the force of law. For Agamben, the limit case is Nazi Germany where the Führer's word had the force of law.[24] In the normal situation, the claim that something has the force of law is referable to a foundation (the mystical basis of which we shall explore shortly). In the exceptional situation, where the law has been suspended, it remains nonetheless important to *claim* that a statement or edict has the force of law. A further distinction can be introduced now as operative in this exceptional space: the force of law where law has nonetheless been suspended is denoted by Agamben as force of ~~law~~. In this exceptional zone, what becomes of the suspended law? It cannot be said to be no longer 'in force' - it has been suspended, not repealed - but it is not being applied. This is Agamben's *form of law*: pure being in force without significance, without application. Thus 'just as essential for the juridical order is that this zone - wherein lies a human action without relation to the norm - coincides with the extreme and spectral figure of the law, in which law splits into a pure being-in-force [*vigenza*] without application (the form of law) and a pure application without being in force: the force of ~~law~~.'[25]

If the tussle in the extreme situation is over the signifier 'force of law', the 'indeterminate element' that 'floats', this is because what is at stake is the ability to claim the force of

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[23] Giorgio Agamben, *Means without End: Notes on Politics*, trans. Cesare Casarino and Vincenzo Binetti, Minneapolis, London, University of Minnesota Press, 2000, 15-36.

[24] Agamben, *State of Exception*, 38.

[25] Ibid., 60.

law *in a zone in which law does not apply*. It can be said, then, that the force of law exists in the normal situation because that sovereign entity can also claim force of ~~law~~. The state of exception illuminates the existence of force of ~~law~~, 'certainly something like a mystical element, or rather a *fictio* by which the law seeks to annex anomie itself.'[26] Force of ~~law~~ thus 'keeps the law working [*in opera*] beyond its formal suspension' and prevents the opening up of a new space in which law may be deactivated, or rendered inoperable.[27] The coexistence of form of law and force of ~~law~~ in the exceptional situation, together with the tendency of the exceptional situation to become the rule, is what enables the contemporary sovereign to maintain that the law remains in force, while at the same time acting without regard for the norm. Increasingly prevalent tendencies of legal activity correspond to the elements of the exceptional situation. 'Form of law', for example, finds expression in circumventing positive law in the name of sovereign will, such as the establishment of Camp Delta at Guantanamo Bay, where the law remains formally in force but is not applied: '[the] normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that - while ignoring international law externally and producing a permanent state of exception internally - nevertheless still claims to be applying the law.'[28]

'Force of law' in Agamben's strict sense is exemplified by executive acts which take place sanctioned by positive law but which would otherwise not be 'law', phone taps carried out *pursuant to* a law permitting phone taps, for example, or detention *pursuant to* anti-terror legislation. But 'force of law' exists because of force of ~~law~~, its mystical foundation, and because it can be expressed as 'form of law' in exceptional situations. Under the aegis of the exceptional, presidential phone taps thus can be carried out *in violation of* positive law (i) because the (breached) laws nonetheless remain in force (law without its application: form of law) and (ii) because of the assertion of sovereign decision to *act* by suspending the law and simultaneously claiming force of law in the name of a friend/enemy distinction (application without the law: force of ~~law~~). In turn, the distinctions between force of law, force of ~~law~~ and form of law become blurred, but not irrelevant. The form of law as a third element in the topology of the exceptional situation is law that is in force but not enforced. It retains its legal character because it is enforce*able*, if the sovereign were to so decide. It thus corresponds, it is argued here, with

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[26] Ibid., 39.

[27] Ibid., 64.

[28] Ibid., 87.

what Benjamin denotes the *threat* of law being enforced, the characteristic of law-preserving violence. That the question of whether a particular law will be enforced is always contingent, and that one cannot assume proportionality between action (crime) and response (punishment), is essential to law's spectrality. For Benjamin, as will be seen shortly, spectrality reaches its apotheosis with the modern police, where the contingency of the application of law blurs with the force of law-founding violence. Agamben thus stresses the distinction between norm and exception as a distinction that is only brought about by *decision*, not by any logical operation.

From this, it can be concluded that to say that something has the 'force of law' not only is to say that force can be called on in aid of a (speech) act in the normal situation, but also that it presupposes and appropriates the exceptional situation in which the same force can be called in aid of a (speech) act despite the absence of law. The 'force' of law, then, operates whether or not there is law. Agamben variously refers to this capacity for the force of law to appear to exist independently of law (force of ~~law~~) as 'spectral', 'mystical' or 'a sort of legal *mana*', something that is sought to be appropriated by both constituted and constituent power.[29] All of these various elements are for him part of the same machine: 'Force of law that is separate from the law, floating *imperium*, being-in-force [*vigenza*] without application, and, more generally, the idea of a sort of 'degree zero' of the law - all these are fictions through which the law attempts to encompass its own absence and to appropriate the state of exception, or at least to assure itself a relation with it.'[30]

Despite being perhaps the most significant contribution of *State of Exception*, the syntagm 'force of ~~law~~' must be read together with its counterpart 'form of law' - the being in force without application - which is arguably the primary motif in Agamben's work. Indeed, prior to *State of Exception*, 'form of law' was identified as the key method by which the relation of *ban* operated in his argumentation concerning law, life and language. Prior to *State of Exception*, Alexander Garcia Düttman noted that Agamben's notion of sovereignty is defined as '"*Geltung ohne Bedeutung*", as "being in force without significance"... a *pure* relation which includes that to which it relates by way of abandoning and excluding it.'[31] When abandonment is understood as mere technique or

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[29] Ibid., 51.

[30] Ibid.

[31] Alexander Garcia Düttman, 'Never before, Always Already: Notes on Agamben and the Category of Relation', *Angelaki*, 6, no. 3, 2001, 3-6, 4.

logic of sovereignty, its appeal to an understanding of the current situation is clear: the instances in which law holds life in this relation of ban and applies by not applying (form of law) seem ever more prevalent. However, the full radicality of Agamben's position comes from his assertion that this relation of *ban* is also an ontological question, operating in the distinction between human and animal. The question of the human/animal relation is approached via a reading of Martin Heidegger, a reading that refuses to define an essence of 'life'.[32] Agamben identifies in modernity an anthropological machine, in which the human is constructed through an ambivalent relationship to the animal. This classical machine works by holding the animalness (of the human and the animal) in a relationship to the humanness of the human that is a relationship of *ban*, of inclusive exclusion. For Agamben, the device for recognising the human by looking at the animal is bound to create a kind of liminal figure: the animal within the human that must be there to found the human, but is excluded from the human because it doesn't possess some essential characteristic. In other words, in trying to draw a *line* with the aid of this machine, one creates a *zone* of exception. Identifying the animal in the human necessarily becomes a question of identifying the 'living thing' or being that we hold in a relation of *ban*. Within each human, and within humans in general, there will be the characteristic that is excluded from the properly human. The relation of an individual human to their own animal self, and the relation of some humans to other non-human humans, becomes a relation of exception, of *ban*. It has the same structure as the relation of the sovereign to bare life.

There is, however, more than mere structural homology at work in the sovereign/life and human/animal relations. For Agamben, politics is thinkable without bare life, but it is impossible to conceive of a sovereignty in which bare life doesn't exist. To think of the end of bare life is to thus think of the end of sovereignty. In both *Homo Sacer* and *The Open*, Agamben treats the exchange between Kojève and Bataille on the nature of man at the end of history at ostensibly divergent but structurally identical points in his argument. In *Homo Sacer* it surfaces at the end of his analysis of sovereign power, but before the start of his explication of bare life.[33] The emphasis is on the 'end of history' and the necessity to move beyond thinking of the law as 'pure being in force without

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[32] Giorgio Agamben, *The Open: Man and Animal*, Stanford, California, Stanford University Press, 2004; Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude*, Bloomington, Indiana University Press, 1995.

[33] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 60-1.

significance'. 'What is precisely at play here is the figure of sovereignty in the age of the fulfilment of human history' is the sentence that begins a paragraph that considers the Kojève/Bataille debate about man's reconciliation with his animal nature. *The Open*, however, has barely begun before Chapters 2 and 3 devote themselves to a discussion of the Kojève/Bataille exchange.[34] Setting the scene for the remaining endeavour, Agamben writes that: 'Perhaps the body of the anthropophorous animal ... is the unresolved remnant that idealism leaves as an inheritance to thought, and the aporias of philosophy of our time coincide with the aporias of this body that is irreducibly drawn and divided between animality and humanity.'[35] It is thus not merely that the relation of ban is at work in both the life/sovereignty and human/animal couplets. More than this: in modernity, when the State takes as a primary concern the management of life, the attempt to understand and assert some political particularity for 'the human' over and above 'the animal' is irrevocably tied up with the operation of sovereignty. Rather than attempt to define/discover 'mere life' and then add some special 'human' quality, Agamben's reading of Heidegger is thus an attempt to consider how the human might 'sit with' the animal, to take animal as the human's point of departure but without asserting a continuity between the animal and human based on 'life'.[36] Agamben reads Heidegger's as an argument that we are always capable of returning to our animal selves. Indeed, this animality must not be sacrificed, nor is it necessarily divisible from what might be the essence of 'the human'. Heidegger suggests that in passing from the first to the second structural moments of boredom - as one goes from realising that things around them have captivated them but they are nonetheless bored, to realising that there is a possibility that these things captivating them could be beings, that they have potential to be - then one can recognise what it means to be animal and to be human. Heidegger calls for this to be a moment of suspense, where humans allow 'to lie fallow' (*brachliegend*) the possibility of relating to the *Enthemmende* in a manner the animal cannot. The recognition that the *Enthemmundsring* exists, but that it can be left to lie fallow, is the

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[34] Agamben, *The Open: Man and Animal*, Chs2-3.

[35] Ibid., 12.

[36] For Heidegger, the jewel at the centre of the human is the animal's captivation, which is at once an extreme and intimate exposure to the open, but also an intense closedness, for it can never see the open as the open, as potential for being. The animal is rather captivated by the *Enthemmende*, that which disinhibits it, which draws it out of itself. Indeed, in an important sense, the animal *is* this series of relationships with its disinhibiting ring: the tick is the relationship with the three disinhibitors of the odour of butyric acid, the temperature of thirty seven degrees and the typology of skin characteristics of mammals: Ibid., 46. This 'ecstatic' being-drawn-out-of-itself and being-captivated by its disinhibiting ring is a characteristic of the animal that humans can approximate most closely in the state of boredom.

proper relationship of human to animal. The major political questions thus become issues of how to relate to the undisconcealedness of a disinhibiting ring, of the conflict between concealed and unconcealed. For Agamben, however, at the point humans now find themselves historically, the anthropological machine has intervened. The current *Stimmung* is one in which nothing is allowed to lie fallow. Instead, the 'life inside the disinhibiting ring' is identified and broken open, to expose it and control it. The question then arises: what is the status of this life that is identified within a disinhibiting ring, and then conquered? It is 'bare life'.[37]

The attempt to follow Heidegger and identify (with) the animal in that second structural moment of boredom - to understand the disinhibiting ring as having the potential to be a being, but to let it lie fallow, *brachliegend* - has in all hitherto attempts brought with it the creation of something like bare life. Whilst Agamben talks of the 'ontological structure' of sovereignty that produces 'bare life', it must be understood that bare life is *produced* through a process of separation. Thus Agamben in *Homo Sacer* refers to 'the ontological structure that we have defined as the paradox of sovereignty (or sovereign ban).'[38] Agamben ends *The Open* with the reference to Benjamin's thesis that technology is not the mastery of nature, but the mastery of the relationship with nature. Where Heidegger would have had one think about how to master this suspenseful relationship, Agamben leaves one with suggestions that in fact result in abandoning - once and for all - the animal to the 'unsaveable'. Humans would then cease to seek to demarcate, within the human, the 'animal', mere 'being alive' parts of 'humanity'. But 'if in modernity life is more and more clearly placed at the centre of State politics (which now becomes, in Foucault's terms, biopolitics), if in our age all citizens can be said, in a specific but extremely real sense, to appear virtually as *homines sacri*, this is only possible because the relation of ban has constituted the essential structure of sovereign power from the beginning.'[39]

Decision v. deposition

What do animality/humanity and bare life/sovereignty have to do with the endeavour here? There are a number of ideas introduced in the above paragraphs that will be drawn on later in this thesis: the treatment of law as a device that creates and separates the

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[37] Ibid., 70.

[38] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 59.

[39] Agamben, *The Open: Man and Animal*, 117.

human, so fundamental to Agamben's analysis, will be considered in Chapter 7 as a certain reading of Marx's *On the Jewish Question*, and through this the question of the separation of the 'natural' human from the 'public' human will be brought back to an examination of the point around which this thesis is circling, namely the relationship between law and control over labour. Further, the above reading opens up the question of authority, for the ability to decide on the exception is inherently connected with the question of who is authorised to exercise force. The distinction between authority and force of law is not a neat one, but the question of authority and its relationship with law and value will be further pursued in Part III. But for now, closer attention is paid to the lineage of Agamben's exceptional situation and the notion of 'suspension'.

As the simultaneously *ontological* and *political* convergence of the forces that hold life in a relation of *ban* is understood, Agamben returns the argument to where this chapter started.[40] He expressly invites the consideration of his project as part of investigation of the research suggested by Benjamin in *Kritik der Gewalt*, namely to discover how life *came to be treated as* sacred, and to determine the proper response. Here the discussion of the operation of the relation of 'ban' at work in the human/animal couplet rejoins the investigation into the operation of sovereignty and the relationship of law to life. Agamben is no mere observer of a certain post-September 11 political logic; rather, the primary trope in his work is the abandonment or suspension of the relation of *ban* itself. Agamben's use of 'ban' has come under criticism, as has his conflation of the politics of sovereignty with a 'biopolitics' that allegedly insufficiently historicises the various configurations of law's relationship to life.[41] Some of these arguments will be taken up in Chapter 7, but it is clear that for Agamben, the relation between the human and animal (which politics appropriates by demarcating the 'human') must be suspended, as must the relationship between law and life (which sovereignty seeks to annex by way of the state of exception). It is for this reason that Kafka's eponymous new attorney, who retires to the hills to study the old laws of the town, interests both Benjamin and Agamben. For the new attorney, the laws of the town are now to be studied and their previous use - that of

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[40] On the importance of understanding Agamben's biding together of ontology and politics, see Bruno Gulli, "The Ontology and Politics of Exception: Reflections on the Work of Giorgio Agamben," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007; Catherine Mills, 'Playing with Law: Agamben and Derrida on Postjuridical Justice', *South Atlantic Quarterly*, 107, no. 1, 2008, 15-36.

[41] See Patton, "Agamben and Foucault on Biopower and Politics."; William Rasch, "From Sovereign Ban to Banning Sovereignty," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007.

being forcibly applied - is superceded. Kafka's attorney seeks thus to put law to some new use. 'One day', Agamben asserts as his political strategy, 'humanity will play with the law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good.'[42] To find a new use for law means to sever its relationship with its forcible application. For Agamben, as has been argued, sovereignty refuses to suspend law other than in limited states of exception; the 'real' state of emergency, by contrast, frees law from its relationship to violence. For Benjamin, Kafka's figures demonstrate that the law which is studied but no longer practiced is the gateway to justice. As Agamben reads Benjamin, then, justice is a question of law's relationship to force being deposed. And has also been seen, this is the central concern of *Kritik der Gewalt*.

The concern in the previous chapter was to move beyond an idea of *Gewalt* that would exist only in a relationship of belonging/non-belonging with law. It was argued there that there exists a Derridean refusal to countenance such a *Gewalt* by the inscription of violence at the heart of law. It is seen again now. For Derrida, it is argued here, the need for each of law, justice and decision is the structure of politics. It is impossible to not make a decision, and such decisions must always be made in the name of justice but with the aid of law. A violence outside of this structure is terror, and thus Derrida makes an (astounding) critique of the Benjaminian conception of any violence outside of this apparatus: because it may be unknowable at the time whether such violence is divine or mythic, this opens the way for mythic violence done in the name of the divine, such as the Holocaust.[43] Philosophy cannot justify a violence outside of law, but Benjamin and Agamben, by contrast, see the deposition of the structure of law/justice/decision as the primary political task, and the use of (divine non-)violence as the means of breaking the nexus between the act of decision and its immediate enforcement in law.

Agamben refers to another of Benjamin's distinction, in the eighth of the *Theses on the Philosophy of History*, between the 'state of emergency', which has become the rule, and our task to bring about the *real* state of emergency (*die Herbeiführung des* wirklichen *Ausnahmezustands*).[44] If the virtual state of emergency maintains the structure of sovereignty - by declaring the exceptional situation so as to maintain power - the real

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[42] Agamben, *State of Exception*, 64. See too Mills, 'Playing with Law: Agamben and Derrida on Postjuridical Justice'.

[43] Derrida, "Force of Law: 'the Mystical Foundation of Authority'," 62.

[44] Agamben, *State of Exception*, 3. Benjamin, "Über Den Begriff Der Geschichte," 145.

state of emergency deposes or destroys it.[45] A crucial point must be remembered here: while the sovereign can decide on the virtual state of exception, it is structurally impossible for it to decide that sovereignty be deposed. The 'decision' to bring about a real state of emergency is thus not made by the sovereign. The history of the oppressed - *die Tradition der Unterdrückten* - teaches that the 'state of exception' has become the norm, a norm which must now be suspended. It is argued here that this returns to an important decision of Agamben's to side with Benajmin against Schmitt. Where Agamben writes above that 'human action without relation to the norm' is essential to the juridical order, he adopts the Schmittian sovereign decision on the state of exception, which seeks by its action to incorporate this anomic exceptional space in the juridical order. Here again is encountered the topology of inclusive exclusion that structures sovereignty. But if Schmitt seeks to annex this space for sovereignty, Benjamin seeks to free it for pure, divine violence. The struggle over the relation of this space to the juridical order Agamben calls a 'gigantomachy [battle of the giants] concerning a void'.[46] But if what is at stake here is 'in the last analysis, the status of violence as a cipher for human action', then it ought not be thought as a simple kind of originary violence.[47] Nor ought it be thought as necessarily the same kind of violence, as if it were a single pawn being moved about on a chessboard. Further, just as the victory of a player in a game is not some kind of 'original' state of affairs, so this kind of pure violence is not something pre-existing but then inscribed into law: instead it is what is at stake in the contest itself.[48] The suspension of this relation between sovereign and life, and between human and animal, had been prefigured by Benjamin. As Hamacher notes, Benjamin's is in fact a critique of production, in the political, linguistic and technical sense. He seeks to show not the performative and productive potential of the act, but it's a-formative (or 'afformative') possibilities: 'By defining the realm of the political from the point of view of the work stoppage, and in terms not characterizable as linguistic *action*, Benjamin's theory avoids the mistake of transcendental pragmatic accounts of social and political life - the mistake of allowing the production paradigm to be resurrected in the paradigm of

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[45] Cf Hamacher, "Afformative, Strike: Benjamin's 'Critique of Violence'," 112.

[46] Agamben, *State of Exception*, Ch 4.

[47] Ibid., 59.

[48] Ibid., 61.

performativity.'[49] Suspension/deposition will only destroy successfully if it is affirmative and refuses to justify itself by the structure of future anteriority.

A *Gewalt* indirectly exercised

Why, though, can a severing of relations with the *employer* be the kind of violence that threatens *law*? More specifically, why is it that without any change in the nature of the act of withdrawal, an extortionate withdrawal that goes 'beyond what is intended' threatens law-founding violence (which then meets it with emergency measures) and the withdrawal as pure means likewise threatens to depose the whole dialectic of law-founding/-preserving violence? When Benjamin remarks that it is only in the view of 'the state, or the law, [that] the right to strike conceded to labor is certainly a right not to exercise violence but, rather, to escape from a *violence [Gewalt] indirectly exercised* by the employer', this thesis pauses to consider more closely this 'violence indirectly exercised by the employer'.[50] For despite the pivotal role played by the figure of the wage relation in Benjamin's text, this violence never reappears as such. But if one is attentive to the text and its various assertions that the state maintains a monopoly on legitimate violence, then what of the status of the violence/force exercised by the other party to the wage relation?[51] Indeed, Benjamin's dialectic of violence relies on the *hostility* of law-founding violence towards other violence, if for no other reason than that it threatens to bring to light the violence of a constitution's own founding. Derrida deconstructs Benjamin's allegedly strict demarcation between law-founding and law-preserving violence, but leaves untouched the distinction between the violence of law and 'violence indirectly exercised'.[52] How does Benjamin's text maintain its consistency in the face of this second kind of force?

An obvious first response is that the employer exercises a force legally conferred by the state, a kind of delegated authority, and hence indirectly exercised. The refusal to work is perhaps an *illegal* act because it contravenes a positive legal obligation. What the striking workers have in common with Benjamin's 'great criminal' is that they both simultaneously refuse to be bound by state law and offer up the prospect of a new founding violence. To be sure, the striking workers may be disobeying a law of the state

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[49] Hamacher, "Affirmative, Strike: Benjamin's 'Critique of Violence'," 123.

[50] Benjamin, "Critique of Violence," 239.

[51] On Benjamin and the question of the state's monopoly of violence, see too Walter Benjamin, "The Right to Use Force," Ibid.

[52] Derrida, "Force of Law: 'the Mystical Foundation of Authority'," 38ff.

that applies to prevent disruption to 'essential services'. However, Benjamin is not arguing that this is the relevant factor that makes their act violent: instead, it is that they are withdrawing from the employment relationship. A withdrawal without demand is pure violence, and with demand is means-end violence. A subsequent prohibition of the withdrawal by the state is irrelevant to the 'violence' of the withdrawal. So, it cannot be that the strike is violent because it contravenes a positive legal obligation to work.

Instead, it is argued here, if the employer is exercising *Gewalt*, and the withdrawal is violent, the relationship can be characterised as one that embodies *Gewalt*. Benjamin is therefore at one with the argument developed in this thesis: that the employer's power to command is a *Gewalt*, a *Regierungsgewalt*. Unlike the examples of the army and education considered by Benjamin where 'the system strives to limit by legal ends even those areas in which in which natural ends are admitted in principle,' work is a sphere in which one person will exercise force over another in order to achieve certain ends, a *Gewalt* being routinely exercised which does not threaten the state and incite the same striving to limit.[53] If employers are also able to exercise violence, and if this is a particular kind of violence that is neither law-preserving nor an alternative, threatening, law-founding violence, then Benjamin's thesis must be rescued by turning it back on itself and asserting that law-founding and preserving violence is *not* coincident with the question of the state.

For Derrida (and sometimes Benjamin), law's force in relation to the contract comes from the spectrality and threatening nature of law-preserving violence. The violence is always conditional: it is a prospect of violence in the future that may occur where there has been a breach of the contract, Agamben's form of law. If this is so, then even 'peacably concluded' contracts have the prospect of their enforceability inscribed in them because the force of law can be called upon if either side attempts to treat another other than in accordance with their agreement. Benjamin is thus led to posit as 'pure means' only those kinds of dialogue and agreement where force *cannot* be called on in aid of dispute, where there is no sanction against lying. The labour contract is manifestly not such an agreement by 'pure means', but nor is it one where violence is only called on in the figure of the deciding judge. Indeed, unlike many other kinds of contracts, the law will now rarely order specific performance of a labour contract, as argued earlier. To use Agamben's terminology, 'form of law' is the employer's ability to dismiss an employee

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[53] Benjamin, "Critique of Violence," 238.

form the employment relationship, 'force of law' is the employer's right to direct, 'force of ~~law~~' is the foundation of that authority. It is force of ~~law~~, not force of law, which lurks in an inside/outside topological relationship to the wage relation. Force of law inheres in the normal operation of the wage relation, a point amply demonstrated by the consideration of the effects of the withdrawal from the wage relation as 'pure means'. And it is at the employer's discretion as to how to exercise this power. As with the police, however, form of law can blur with force of law, and direction is given under pain of expulsion from the workplace: "Perform this task or I will sack you." This, of course, follows long struggles, and as discussed above, for much of the nineteenth century the law would force work. The point here is to complicate the question, and assert that as between the parties to the contract, it is not the case that law only figures as a potential threat in the event of breach: rather, in many ways the law encourages the bringing to an end of the contract rather than its continued performance. Where the law does figure, however, is in bolstering the employer's right to direct. The labour contract is not so much enforceable in its breach, but rather in its observance is enforceability itself. Benjamin says that 'like the outcome [i.e. threat of enforcement], the origin of every contract also points toward violence. It need not be directly present in it as lawmaking violence, but it is represented in it insofar as the power that guarantees a legal contract is, in turn, of violent origin even if violence is not introduced into the contract itself.'[54] This thesis thus now adds a necessary supplement to this argument: the gesture towards the violent origin of the labour contract illuminates much more than a power of guarantee exercised 'in turn' upon breach. Rather if, following Pashukanis, the 'pact' of the compact derives from *pax*, the peace that comes after the settlement of a dispute, then what was at stake in that dispute - namely the right to command, Benjamin's own 'violence indirectly exercised' - *is now itself* the subject of the contract. If 'totally non-violent resolution of conflicts can never lead to a legal contract', then this is *a fortiori* so in the case of the labour contract.[55]

If there is an appropriate analogy for the *Gewalt* inhering in the labor contract, perhaps it is the Benjaminian police. This spectral presence is not invested with the right to take life, but is a Gewalt 'for legal ends ... but with the simultaneous authority to decide these ends itself within wide limits.'[56] Its spectrality arises because '[u]nlike law, which acknowledges in a 'decision' determined by place and time a metaphysical category that

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[54] Ibid., 243-44.

[55] Ibid., 243.

[56] Ibid., 242.

gives it claim to critical evaluation, a consideration of the police institution encounters nothing essential at all.'[57] The enforceability of law-preserving violence, its threatening nature, its spectral appearance as a kind of policing: what is this if not what is exercised in the normal operation of the labour contract, 'control over labour'? Considering the *Gewalt* of the employer as akin to the modern police is ultimately an imperfect analogy: while both embody the force that can exceed the preservation of law and instead found it, nonetheless the employer doesn't proceed in the name of the state, nor command pursuant to a power delegated by law. Derrida, however, understands a broader conception of the police, something akin to Hegel's *Polizei* considered in Chapter 3. After rightly noting Benjamin's police's 'degeneration' into a spectral presence which founds and preserves law as a feature of its specifically modern nature, Derrida says that:

> the police that thus capitalize on violence aren't simply the police. They do not simply consist of policemen in uniform, occasionally helmeted, armed and organised in a civil structure on a military model to whom the right to strike is refused, and so forth. By definition, the police are present or represented everywhere that there is force of law. They are present, sometimes invisible but always effective, wherever there is preservation of the social order. The police aren't just the police (today more or less than ever), they are there, the faceless figure of a *Dasein* coextensive with the *Dasein* of the *polis*.[58]

Derrida reads Benjamin's concern with the degeneration of the police as a misplaced critique of democracy and the assertion of a division (law-founding/law-preserving) that is unsustainable. But this passage of Derrida's can be taken in a different direction. The presence of policing wherever there is force of law, preservation of order, would seem to lend itself to the argument advanced in this chapter. Further, however, if Derrida is taking aim at a modern configuration of law, might there not be something in the suggestion that this broader operation of law '*capitalises* on violence'? To capitalise on *violence*: how can one even do this unless violence can *create* something more by subjection to a process that can be repeated? How could one possibly take violence and turn it into something more, make a profit out it, if not in the sphere of work? The capitalisation epitomised by interest - where money turns into a greater sum of money and it appears as if money itself did the increasing - is the site of the fiercest critique of Marx for its fetishism. Work must be introduced into the equation. In fact, to 'capitalise on violence' is an apt description of what the employer does pursuant to the wage relation. Resolving the question of the police in Benjamin is not essential for the argument advanced here.

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[57] Ibid.

[58] Derrida, "Force of Law: 'the Mystical Foundation of Authority'," 44.

What is sought to be illustrated by the above, however, is that in the figure of the police, as with the employer, the question of the exercise of *Gewalt* is not simply one of delegated state power but instead something that gestures towards law founding violence. As Agamben also argues, the elements of this topology collapse in the limit situation. His focus is on the 'public' law of constitutions. However, an examination of the place of labour law in the 'limit' situation illustrates this point equally well.

The *Führer* of the factory

The divine violence of the revolutionary general strike is capable of suspending the relation of ban. Benjamin says that the state meets such a strike with emergency measures. If the fracturing of law in the emergency situation allows for the proper understanding of law itself, taken to its limit situation when the word of the *Führer* becomes law, where force of ~~law~~ coincides with life, then the argument being advanced - that control over labour is imbricated with explanations of the force of law - is supported by considering the fate of labour law in the Third Reich. Having looked at work and the exception from Agamben and Benjamin's perspective, it is time to consider it from Schmitt's.

The *Gesetz zur Ordnung der nationalen Arbeit* of 20 January 1934 - the 'Law for the Organisation of National Labour' - was crafted to give the proprietor of a factory the maximum authority.[59] Tellingly, the proprietor (or his delegate) was deemed the *Führer* of the factory and the workers the followers (*Gefolgschaft*), working together for the advancement of the factory as well as the people and the state.[60] As regards his followers, the factory leader ['*der Führer des Betriebes*'] '*decides*' ['*entscheidet*'] on all operational matters.[61] The state appointed 'trustee' was able to intervene in and be involved in certain aspects of the management of the enterprise (such as the setting of minimum wages) but this right was limited, and it 'would be a mistake to assume that the trustee has the power to expropriate an entrepreneur who acts in a socially irresponsible fashion.'[62] The formal obligations imposed on both leader and followers by the remainder of the law were

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[59] Otto Kirchheimer, "State Structure and Law in the Third Reich," in *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer*, ed. William E. Scheuerman, Berkeley, University of California Press, 1996, 170; Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944*, New York, Harper & Row, 1966, 419-27; Reichsgesetz, "Gesetz Zur Ordnung Der Nationalen Arbeit (20.01.1934)," ed. Law of Third Reich (documentarchiv.de, 1934).

[60] Reichsgesetz, "Gesetz Zur Ordnung Der Nationalen Arbeit (20.01.1934)," §1.

[61] Ibid., §2.

[62] Kirchheimer, "State Structure and Law in the Third Reich," 161.

primarily ethical/political: participants were required to act consistently with deepening the relations of trust and good faith in the enterprise and advancing the national interest, these obligations being superintended by 'Social Courts of Honour.'[63] Given that parliament purports to authorise the power of the *Führer des Betriebes* and circumscribe its operation (even if not in practice), caution must be exercised against any over-hasty identification of employer with sovereign. Nonetheless, given Schmitt's prominent role in the legislative apparatus of Nazi Germany at the start of 1934 (when the labour law was passed) it seems reasonable to suggest that the references to the 'leader' that 'decides' were more than coincidental. Indeed, Michael Stolleis asserts that the definition of the factory as community was expressly taken from Schmitt and was repeatedly referred to as a 'concrete order', this being a Schmittian phrase.[64] If the *Führer des Betriebes* can decide with regard to a population of followers, all bound together by trust and honour, if the legal protections previously afforded to an individual employee had all but disappeared under the guise of 'general concepts' of trust, people and good faith, and if 'any criticism of economic or social policy can be interpreted as a disturbance of community spirit and as constituting sufficient reason for immediate dismissal', this is perilously close to suggesting that in the exceptional situation, an employer holds an employee in a relation of *ban*.[65]

This further illuminates the relation of sovereignty in two ways. First, although in the exceptional situation the sovereign/employer might abandon the citizen/employee, *of equal weight is the threatening prospect of the employees abandoning the employers*. Neumann advances the thesis that a structural pillar of the Nazi juridical structure was its hostility towards trade unions and the possibility of working class mobilisation.[66] Schmitt's own concern about labour mobilisation should be read in this vein: *The Concept of the Political* argues that the designation of the political entity is primarily a question, to speak in Marxist parlance, of a balance of forces.[67] Sovereignty exists where

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[63] Taylor Cole, 'Corporative Organization of the Third Reich', *Review of Politics*, 2, 1940, 438; Taylor Cole, 'National Socialism and the German Labour Courts', *Review of Politics*, 3, no. 2, 1941, 169-97; Kirchheimer, "State Structure and Law in the Third Reich," 161.

[64] Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, Chicago, London, University of Chicago Press, 1998, 71.

[65] Kirchheimer, "State Structure and Law in the Third Reich," 163; Franz Neumann, "Labor Law in Modern Society," in *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer*, ed. William E. Scheuerman, Berkeley, University of California Press, 1996.

[66] Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944*.

[67] Carl Schmitt, *The Concept of the Political*, trans. George Schwab, Chicago, University of Chicago Press, 1996, 42.

there is a capacity to make the most fundamental decisions about the critical situation to go to war and take life, 'even if it is the exception.'[68] By now, it ought not surprise that Schmitt then immediately defends his position against the challenge posed by the granting of a right to strike. Although the organisation of labour unions might prevent the waging of war, for Schmitt it is only their historically contingent inability to constitute themselves as a grouping able to wage war that denies sovereignty to labour. Although Benjamin's messianism contrasts with Schmitt's anxiety, the right to strike - potentially to withdraw from the political grouping and also to assert labour's own right to rule - accords labour a certain status with respect to sovereignty.

Secondly, but relatedly, the means of exercising rule over the citizenry and rule over labour here begin to collapse into each other. Thus some Nazi schools of thought even argued for the abolition of the idea of the labour contract altogether and labor law started 'showing strong traits of public law under the reign of the idea of the community'.[69] Reading section 4 of Schmitt's *The Concept of the Political*, one is struck by Schmitt's persistent references to labour, as he argues strenuously that the concept of class can cease to be a purely economic question and instead become a properly political one, and that the political is by no means exhausted by the state.[70] When he advances this point, it is argued here, what is at issue in the fight in the exceptional situations for the right to found law, the battle over the categories of force of ~~law~~ and form of law, the granting of the limited right to strike vs. the proletarian general strike, 'is nothing less than the definition of what Schmitt calls "the political".'[71]

Labour and class played a central role in the jurisprudential debates on the question of the exception between Schmitt and his interlocutors Franz Neumann and Otto Kirchheimer, the latter an erstwhile student of Schmitt's. Schmitt explicitly advanced the thesis that a strong, coercive state was necessary to meet the growing social crises brought about by working class organisation.[72] Further, the lack of an authoritarian figure who can 'decide', and the subsequent crises in the Weimar state, were brought about

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[68] Ibid., 38.

[69] Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, 70. Neumann would later regret the 'anti-rational' tendencies, begun during the Weimar republic, which laid the groundwork for the arguments against contract.

[70] Schmitt, *The Concept of the Political*, 37-45.

[71] Agamben, *State of Exception*, 51.

[72] Carl Schmitt, 'Starker Staat Und Gesunde Wirtschaft', *Volk und Reich Politische Monatshefte*, 2, 1933. William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, Cambridge, Mass., MIT Press, 1994, 81.

because social and economic conflicts had made their way into the sphere of the political, and required the state to become a regulator rather than enforcer. The state had become what Schmitt called a 'total state', and liberalism was yet to realize that state intervention was the death knell of sovereignty.[73] Schmitt's hostility to liberalism was matched by a ferocious support of capitalism in the form of a call for a strong state that would suppress class conflict. This is perhaps the most vicious interpretation yet of the Weber that saw the rise of the welfare state as the beginning of the end of its legitimacy, yet it is a spirit that persisted in the likes of Hayek and other conservatives who argued against the social planner state.[74] Neumann and Kirchheimer saw this argument for what it was, and their own defence of the 'rule of law' was as much an explicitly anti-capitalist argument as it was liberal defence. Indeed, as radical social democrats and participants in the more optimistic strand of Frankfurt school inspired thought, they saw capitalism itself as a barrier to the full unleashing of the democratic potential of the rule of law. They thought that 'the history of the capitalist political economy and decisionist modes of law are interconnected' and Kirchheimer argued that 'the imperialism of the normless emergency in contemporary politics corresponds to a real crisis in the history of bourgeois society: with the emergence of radical anticapitalist politics in the early twentieth century, parliamentary bodies are increasingly paralyzed.'[75] In Scheuerman's words:

> Schmitt responded to the disintegration of democracy's social base and the concomitant decline of institutions essential to it (such as parliament) by transforming the emergency into centerpiece of political theory. Only a dictatorial regime making the emergency omnipresent could guarantee the elimination of 'undesirable groups', like left-wing parties and labor unions, that had come to pose a real threat to the status of hegemonic social and political groups.[76]

If the case of the Third Reich is the limit case of exceptionality, then it ought not be forgotten that the Reichstag emergency decrees were first ushered in on the pretext that a communist had burned down parliament.[77] Article 1 of the decree is oft repeated: it is the provision which suspends sections of the constitution and thereby makes it permissible 'to restrict the rights of personal freedom, freedom of opinion, including the freedom of

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[73] Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 73.

[74] Ibid., Ch2.

[75] Ibid., 165, 72.

[76] Ibid., 184.

[77] Deutsches Reich, "Verordnung Des Reichspräsidenten Zum Schutz Von Volk Und Staat," ed. Deutsches Reich (1933).

the press, the freedom to organize and assemble, the privacy of postal, telegraphic and telephonic communications, and warrants for house searches, orders for confiscations as well as restrictions on property'. But the immediately preceding words of the preamble are rarely quoted, yet critical: 'On the basis of Article 48 paragraph 2 of the Constitution of the German Reich, the following is ordered in defense against Communist state-endangering acts of violence [*kommunistischer staatsgefährdender Gewaltakte*].' Agamben's juridical/legal analysis takes as emblematic a decree that on its face seeks to forestall a certain kind of violence, yet this fact is absent from virtually all current considerations of the centrality of techniques of suspension. This is more than mere historiography: if anything can be abstracted from the debates in which Schmitt was implicated, it must contain a recognition that the order which must be established before law is imposed is amongst other things an ordering of labour.

When Schmitt in 1933 writes an article entitled 'Strong State, Sound Economy', the link between work and rule is made explicit.[78] In this article, written in the same year as the Reichstag fire decree and Hitler's seizing of power, Schmitt addresses the concern of industry that the state has grown too big, extending into too many spheres of social life, and replies to their call for the autonomy [*Selbstverwaltung*] of the economic sphere. Schmitt agrees with their assessment of current affairs, but sees this as a sign of the German state's weakness: this *quantitative* expansion of the state to the point where it is no longer possible to demarcate the political from the social is not to be confused with the increased (military, technical and administrative) strength of the state. The lack of 'state-free spheres' is a consequence of the 'total state,' which is only 'total in a purely quantitative sense, in the sense of simple volume, not in the sense of intensity and political energy'.[79] These spheres should be 'depoliticised', but this is not the same as having a weak state. Whilst business leaders may call for self-rule of the economic, or a second chamber to the parliament to allow a greater dominance of business voices, Schmitt on the contrary lays the blame for the politicisation of the economy at the foot of the multi-party state that makes compromises between opposing factions and thereby extends its reach into society. What is needed is a redefinition of the properly political,

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[78] Schmitt, 'Starker Staat Und Gesunde Wirtschaft'. Cf Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 265.

[79] Schmitt, 'Starker Staat Und Gesunde Wirtschaft', 4.

an internal demarcation of what is political and what is not, something that can only be done by a strong, authoritarian state. '*Der Staat soll wieder Staat werden.*'[80]

What is the source of the authority of this new state? It is certainly not a new formal constitution, writes Schmitt, as the German people are not currently well-disposed to this historical task. Instead, the state should be afforded all means available (including those provided by article 48) and should seek 'unmediated [*unmittelbaren*] contact with the real social forces of the people [*den wirklichen sozialen Kräften des Volkes*]'.[81] The labouring tasks facing the German state are already big enough, writes Schmitt, that there needn't be a new constitution that seeks to ground these endeavours. On the contrary: 'Only out of success [of these tasks] and achievement does authority arise. Not the other way around. One may not begin authority with a proclamation.'[82] When the regime has direct access to labour, unmediated by constitutional institutions or a multi-party state, then the problem of authority is resolved. By calling on these forces in an unmediated fashion, by directly ordering labour, then society can again start to consider 'other reasonable distinctions, in particular that between state rule, true economic self-rule and the individual sphere of freedom'.[83]

Gigantomachy concerning labour

This excursion into the relationship between Third Reich labour law, its mirror configuration of work and the political and the important role of labour in Schmitt's work allows the argument in this thesis to be advanced. *Crucial to Schmitt's theory of the state is organisation of and control over labour*: only once this has been achieved can he begin to think about the other basic political distinctions. And critically, at the same time as the suspension of the constitution takes place, *unmediated control over labour is said to come before what is often referred to as the 'primary' distinction between political and non-political*. In the 'work of the nation' the genitive works double-time: not just the historical task of the nation and the identification of its enemies, but also the ordering of its productive forces. And this is not just the path to a 'sound economy', but to *legitimacy* and *authority*. In interpreting the Schmittian concept of 'decision' and its persistence in Agamben, neither the historical context nor the express terms of the debate can be

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[80] Ibid., 7.

[81] Ibid., 13.

[82] Ibid., 9-10.

[83] Ibid., 13.

ignored. Without devolving to economism, this thesis asserts that the deciding sovereign is for Schmitt a response both to the rise of revolutionary workers movements and to the (for Schmitt adverse) consequences of social-democratic pacts (like the Weimar constitution) that have made questions of life and work the concern of the state. His 'states of emergency' aren't invented textual fictions: for Schmitt and his interlocutors, they were situations arising from below that threatened a new social order. Rule over labour becomes a precondition for rule *per se*.

If the Hegelian argument and the reading of Schmitt advanced in this thesis are correct, they dovetail with the status Benjamin gives to the violence exercised by the employer: this *Gewalt* is not state-sanctioned for in fact the ordered and controlled exercise of this *Gewalt* is a *precondition* (Schmitt) and *source* (Hegel) of law-founding and law-preserving violence. Schmitt, of course, is well known for arguing that order must first be created for law to exist: law cannot be imposed on chaos. The 'right' to impose this order rests on the annexation of the anomic space outside of law - the claim to what Agamben calls force of ~~law~~. As also argued above, Benjamin and Schmitt struggle over the status of the violence exercised in this anomic place. More can now be said about that status. Consider it first from Schmitt's side, the side of the ruler: Schmitt's claim that control over labour precedes the ability to define the political parallels his insistence that order must first be created for law to function. Consider it now from Benjamin's side, the side of the labourer: the creative force of labour exists in a relationship characterised by violence, but has the potential to escape it by means of withdrawal without any demand for the resumption of order. For Schmitt, for there to be 'the political' as such, wherein there is an identifiable sovereign, there must first be unmediated control over labour; for Benjamin, labour withdrawing from the *Gewalt* exercised over it likewise poses the question of the existence of 'the political' as such. The argument being advanced here is that for both Benjamin and Schmitt, this anomic space isn't simply one of an undifferentiated violence: it is a space where rule over work is itself an issue. For reasons that will be argued in Ch 7, it is Agamben's unambiguous identification of labour with the dynamics of law-founding violence that stops him from coming to this conclusion himself. It is a battle over of 'the status of violence as a cipher' for control over work. It is a gigantomachy concerning labour, not a void.

The arguments advanced so far in this thesis can be explained in the terminology discussed in this chapter. The right to command characterises and inheres in the employment relationship. But, with Agamben, the force of law is premised on force of

~~law~~. This is where the question of production can be further advanced. When Pashukanis' legal subject appears as a freely contracting equal individual, this is not *pace* Miéville because force has disappeared from the contract and can only be reintroduced in the form of an external 'state' or 'law'. Rather, what the commodity form of legal subjectivity occults is the right to command the extraction of surplus. Its form of law occults force of ~~law~~. But as argued in the last chapter, the basis of the legal right to purchase labour suffers no less than that of constitutions from the problems of mystical foundations. This is seen not only in those violent historical moments where foundation could rely on future anteriority, but also in those exceptional moments where the legal form of abstract equality is *suspended*. If this potential to command - Agamben's 'power to bind' - is enforceability itself, then the place of labour law in the exceptional situation demonstrates the capacity for this potential to fracture and for the sovereign employer to have complete responsibility for 'internal' affairs and to decide who will be friends/followers. Force of ~~law~~ might then be in the shifting possession of the *Führer* or the *Betriebsführer*, but with the taking of 'emergency measures' never in the hands of the employees. It ought be registered that Agamben's reception of this Schmittian sovereign has come under attack, as has the theoretical usefulness of the concept *per se*.[84] As this thesis is attempting to highlight a particular point - the place of labour - in Agamben's theory of sovereignty, these broader criticisms cannot be considered in depth. But to these critiques can be added something further: Agamben fails to find a proper place for Benjamin's strike.

Conclusion

In 1927, three years after Benjamin's *Critique of Violence* appeared, Pashukanis reflected on his *General Theory* and wrote:

> I tried in my work to show that for the Marxist it is not necessary to ... explain law through a juridicized state. From such a 'positivist' theory of law, I called for a return to Marx who shows how 'the creation of a political state and the division of civil society into independent individuals ... is accomplished by one and the same action' [quoting Marx's *On the Jewish Question*]. ... By concentrating attention on the omnipotent state in the sphere of the creation and support of the legal form (generally obligatory laws, the force of judicial decision, the strict execution of sentences etc.), the positivist jurists consciously or unconsciously conceal the far more important

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[84] William E. Connolly, "The Complexities of Sovereignty," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007; Peter Fitzpatrick and Richard Joyce, 'The Normality of the Exception in Democracy's Empire', *Journal of Law and Society*, 34, no. 1, 2007, 65-76; Andrew Norris, 'Sovereignty, Exception, and Norm', *Journal of Law and Society*, 34, no. 1, 2007, 31-45; Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*.

> extra-legal, extra-statutory [and] extra-judicial power of the state which is directed towards the defence of class sovereignty by every means, all of which are outside the legal form.[85]

The defence of sovereignty by a means outside the legal form - what is this if not presaging the same problematic Agamben addresses in *The State of Exception* under the syntagm force of ~~law~~? The normative state - issuing laws, making decisions - cannot exhaust the definition of law. There is necessarily an extra-legal element of force or power. This question of this extra legal element of force - the zone of anomie which Schmitt seeks to annex to law but Benjamin seeks to free, and which Agamben takes as a necessary point of departure - cannot be understood separately from the question of force that inheres in the organisation of labour, it has been argued here. A quote from Marx can be revisited and considered in a new light: 'The dull compulsion of economic relations completes the subjection of the labourer to the capitalist. Direct force [*Gewalt*], outside economic conditions, is of course still used, but only *exceptionally* [*ausnahmsweise*].'[86] *Gewalt* is not just an economic power that can found the labour relationship, but the relation between the subjection within the labour relationship to this force outside of the relationship is also understandable as one of norm to exception. As Agamben and Schmitt would tell us, this situates the argument immediately on the terrain of foundation and origin, not logical or formal derivation. *Gewalt* thus ceases to be the question of a traditionally understood relation between base and superstructure, where a supposedly external coercive force is brought into a contingent relation with labour. Rather, the enquiry continues to be: how is this *Gewalt* over labour separated and represented as separate within each of law and labour?

The understanding of this anomic space as one marked by *Gewalt* over labour impacts not just on the labour relationship, but on sovereignty and its justifications, for even if this space is anomic it is nonetheless a space of control over labour. If, as Agamben argues, sovereignty operates through the separation of something fictively originally unified into something included and something excluded, of placing an excluded part into the realm of the sacred, and if sovereignty then operates by 'assuming a relationship' with this excluded, then this chapter has argued that the status of the violence in this place has two consequences. From the side of law, the *polis* can only ever be separated when there is

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[85] Evgeny Pashukanis, "The Marxist Theory of Law and the Construction of Socialism," in *Pashukanis, Selected Writings on Marxism and Law*, ed. Piers Beirne and Robert Sharlet, London; New York, Academic Press, 1980, 199.

[86] In the Chapter 'Bloody Legislation Against the Expropriated: Forcing Down of Wages by Acts of Parliament': Marx, *Capital: A Critical Analysis of Capitalist Production*, 689. Emphasis added.

control over labour. Where labour withdraws and does not seek to refound, this structure of separation is threatened. From the side of labour, the labour relationship is understood as a question of rule, partly explicable by virtue of contract or command but only contingently so, for claiming force of ~~law~~ likewise remains a space of a struggle over who is able to exercise this particular *Gewalt*, a question of *authority* rather than mere legality. It is this commonality that explains their asymptotic relationship as the limit situation approaches, as employer becomes *der Führer des Betriebes*. It is also this commonality that explains the importance of control over labour from the important perspective of authority: this is the subject of the enquiry in the next chapter, which begins Part III 'Law, Authority and Value'.

To summarise this argument in other words: as soon as it is understood that labour is controlled labour, the *Gewalt* that ushers in capitalism and institutes a new system of control of labour is split into both the individualised command of dead over living labour (Marx's *Regierungsgewalt*) as well as the state (*'die Staatsmacht, die konzentrierte und organisierte Gewalt der Gesellschaft'*). Each of these *Gewalt* is then exercised by means of a logic of separation. Within the state, it is the logic of force of ~~law~~, the exercise of power by those who can claim the right to give law when there is no law. Within the sphere of labour, it remains as the right to direct labour, separate labour from its product and then the final separation of the use-value of the product from its exchange value. In both spheres, the logic of exceptionality is at work: in the normal course, direction appears to proceed from lawful authority whose foundations lie elsewhere. But what is also seen in the exceptional situation is the *regrouping* of a previously split *Gewalt*: labour becomes controlled by law, and the head of the factory looks more like a head of state.

To say that the *Gewalt* of command over labour opens itself up to the same kind of analysis as the *Gewalt* of the state is a continuation of last chapter's argument that the (labour) contract is a constitution. It also reinforces a point made in the introduction, namely that when in a legal order 'law turns to 'violence' to appropriate it or distinguish itself from it, it does so in an environment where 'law' and 'violence' are each marked by particular relations to systems of domination over labour. In answer to a problem posed in Chapter 1 in the reading of Pashukanis, *this* is the proper homology between economic and legal forms. And because of their fictive original unity the two *Gewalt* may at times re-unify and appear as the same, and at other times appear separate. The fictional original state of pre-parricidal *Gewalt* is not just one of control over life, but control over labour. Where Chapter 2 of this thesis introduced this also as Marx's notion of *Gewalt*, and

Chapter 3 broadened this to understand Hegel as positing here the source of the force of law, this chapter has continued the argument by detailing the relevance of this *Gewalt* for the contemporary critiques that take exceptionality as their point of departure. The Marxian understanding of the role of law and force in the labour relationship has been advanced, but labour has also been moved back to its rightful place in the discussions of Agamben, Benjamin and Schmitt.

This chapter also makes a point almost universally overlooked in the contemporary receptions of Agamben's Schmitt. If there is one lesson to take from Schmitt's *The Concept of the Political* it is that the question of the political and sovereignty *is not* the same as that of the state. Schmitt is clear: the 'juridic formulas of the omnipotence of the state are, in fact, superficial secularizations of theological formulations of the omnipotence of God,' whereas the properly political can be founded and 'derive its energy from the most varied of human endeavours.'[87] To make a broad statement, in the current discussions of 'sovereignty' and 'emergency' it often appears as if the only subject is the sovereign state. In the contributions to one collected volume, for example, Negri's piece stands out as being the only one concerned with expressly finding a place for labour.[88] The search for developing a politics of change from Agamben's work continues, but the debate centres on the adequacy of 'bare life' to stand in as such a subject.[89] Current attempts to bring the question of the economic back to connection with the political using Agamben's thought are likewise characterised by this sovereign-centred approach to subjectivity.[90] Perhaps, as Paul Passavant suggests, this is endemic to Agamben's thought itself.[91] What has been argued here is that this discussion of *emergency without subjects* is an unjustified distillation of the debates encircling

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[87] Schmitt, *The Concept of the Political*, 42, 38.

[88] Calarco and DeCaroli, eds., *Giorgio Agamben: Sovereignty and Life*; Antonio Negri, "Giorgio Agamben: The Discreet Taste of the Dialectic," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007. See too the articles gathered under in the Journal of Law and Society under the title 'Democracy's Empire': Motha, 'Democracy's Empire: Sovereignty, Law, and Violence'. Also Andrew Norris, ed., *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer*, Durham, London, Duke University Press, 2005.

[89] Matthew Calarco, "Jamming the Anthropological Machine," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007; Mills, 'Playing with Law: Agamben and Derrida on Postjuridical Justice'; Ewa Plonowska Ziarek, 'Bare Life on Strike: Notes on the Biopolitics of Race and Gender', *South Atlantic Quarterly*, 107, no. 1, 2008, 89-105.

[90] See e.g. Jacqueline Best, 'Why the Economy Is Often the Exception to Politics as Usual', *Theory, Culture & Society*, 24, no. 4, 2007, 87-109; Patrick Dove, 'Living Labour, History and the Signifier: Bare Life and Sovereignty in Eltit's Mano De Obra', *Journal of Latin American Cultural Studies*, 15, no. 1, 2006, 77-91.

[91] Paul A. Passavant, 'The Contradictory State of Giorgio Agamben', *Political Theory*, 35, no. 2, 2007, 147(28).

Benjamin, Schmitt, Neumann and Kirchheimer. The withdrawal from a relation of violence exercised by the employer can - when the strike is a means to an end - be a political question as such. If there is a willingness to resume work 'under altered conditions', then the disruption of production is merely a (particularly useful) tactic to claim force of ~~law~~ or, to say the same thing, the right to decide who is the enemy. But the contrasting singular, divine violence of the 'proletarian general strike, whose method is the unconditional suspension of state power (*Staatsgewalt*) and whose form is justice, would be, in the political sphere, the violence of the political itself.'[92] A contemporary treatise on the legal right to strike thus gets itself into precisely the same problems of law and exceptionality developed by Benjamin and Agamben, unable to find any clear point at which 'political' strikes against government policy cross over into 'unlawful' coercive attempts to get the government to change that policy or resign.[93] In the same way that Agamben's jurists are 'silent about that which concerns' them when it comes to the exception, labour law jurisprudes pass over this 'grey area' of the emergency without recognising that it contains all the secrets of the foundation of legal order. To reiterate the point argued here, it is not mere coincidence that the structural problem in jurisprudence's analysis of the right to strike appears in the same terms as that of law in the emergency: rather, they are different expressions of the same problem. To escape the violence exercised by the employer - when done as pure means - is thus simultaneously to suspend political violence as such.

Pashukanis makes this point in a different, more tragic way. In 1936, a few months before he was killed, and just 3 years before Benjamin's death, Pashukanis abjectly recanted. He described his early work as 'false and opportunist', decried the 'ridiculous ideas concerning the suppression of the class struggle and the weakening of the dictatorship of the proletariat', and said that the 'author of the *"General Theory of Law and Marxism"*' - which was of course himself - 'put forward theories that were erroneous, deserving of criticism and totally misrepresentative of Marxism'. His retraction, which makes for some of the most painful and tragic reading, inadvertently gives us the key to an understanding a necessary element of the suspension of law.

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[92] Hamacher, "Afformative, Strike: Benjamin's 'Critique of Violence'," 119.

[93] Tonia Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, Oxford, Oxford University Press, 2003, esp Ch 2.

> [Full Communism] signifies a condition in which people are capable of working without 'overseers and auditors', without legal norms, without coercive force, and without the state. ... The process of the withering away of the state can therefore begin no sooner that the disappearance of the coercive nature of labour. This constitutes the basic economic premise for the process of withering away, for the gradual demise of state power. ... Bukharin put these processes in the following order: first the abolition of the armed forces, then the instruments of oppression, prisons etc. and finally the coercive nature of labour. ... Lenin reverses this order. What Bukharin placed at the end, Lenin places at the beginning, as the first fundamental premise without which it is impossible to speak of the instigation of the process of withering away.[94]

For Pashukanis, the end of the overseers and auditors, the moment where people would work without coercive force, was the moment where a deposed law would become the gate to justice. This was of course intended as a coded plea to Stalin, an indication that he understood that labour needed to be coerced for some time yet and that communism was a rapidly vanishing horizon. Pashukanis' recantation is based on the premise that jurists like him (amongst others) had too hastily identified the commencement of law's withering away. But given the maintenance of the coercive nature of labour - as mandated by Stalin - the bootstrap logic of the argument concludes that there can be no demise of law. These words were what was likely Pashukanis' last ever published article. In a plea for his life, he grasps at what he perceives will be understood as the most essential part of law, its ultimate justification, namely the coercive nature of labour. It is to the status of the authority of these 'overseers and auditors' that this thesis now turns.

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[94] Evgeny Pashukanis, "State and Law under Socialism," in *Pashukanis, Selected Writings on Marxism and Law*, ed. Piers Beirne and Robert Sharlet, London; New York, Academic Press, 1980, 351.

PART III

LAW, AUTHORITY & VALUE

Chapter 5 - The law-giving talent of the factory Lycurgus

> The factory code in which capital formulates, like a private legislator, and at his own good will, his autocracy over his workpeople, unaccompanied by that division of responsibility [*Teilung der Gewalten*], in other matters so much approved of by the bourgeoisie, and unaccompanied by the still more approved representative system, this code is but the capitalistic caricature of that social regulation of the labour-process which becomes requisite in co-operation on a great scale, and in the employment in common, of instruments of labour and especially of machinery. The place of the slave-driver's lash is taken by the overlooker's book of penalties. All punishments naturally resolve themselves into fines and deductions from wages, and the law-giving talent of the factory Lycurgus so arranges matters, that a violation of his laws is, if possible, more profitable to him than the keeping of them.
>
> Karl Marx, *Capital*[1]

This thesis now moves to examine further aspects of work and rule foundational to the argument advanced in this thesis: those of command and authority. For Agnes Heller, modernity is the capacity to continue to ask 'Why?', a characteristic that inevitably leads to an aporia when asking questions about the legitimacy of political ordering.[2] As has been seen in Part II, one cannot talk about the force of law without also considering the a-legal space outside of law that grounds it. To be able to appropriate this space, and thus speak with the force of law, is also to claim that one has the authority to command. Towards the end of the previous chapter it was argued that for Schmitt the ordering of labour was itself a source of authority, that the ordering of labour allowed the imposition of rule and was a precondition to the formation of the properly political. Further, the question of authority is arguably tied up with the question of metaphysics and critique itself: the 'right to say right' necessarily presupposes a space of foundation from which to judge (critique) and thus parallels a law with putative foundations that generate its legitimacy.[3] Derrida's reading of Benjamin that was considered in the last chapter thus has the full title 'Force of Law: The "Mystical Foundation of Authority"'.[4]

Despite its implicit connection with the space outside of law (which the previous chapters have shown to be a space where *Gewalt* is exercised over labour) it is

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[1] Marx, *Capital: A Critical Analysis of Capitalist Production*, 400. In the chapter 'Machinery and modern Industry'.

[2] Agnes Heller, *A Theory of Modernity*, Malden, Blackwell Publishers, 1999, Ch 1.

[3] Zartaloudis, 'The Case of the Hypocritical'.

[4] Derrida, "Force of Law: 'the Mystical Foundation of Authority'."

nonetheless important for the Marxist inquiry into law to consider what it means to talk of law and authority, because much of the Marxist analysis has started out from the presumption that the command of the state and the command of the employer are *a priori* different. This is not just a question of *Gewalt*: it is also a question of authority *qua* the right to rule over a citizen or exercise command over a worker. Perhaps the Marxist approach is a legacy of a base/superstructure understanding, which separates legal from non-legal power, so as to prioritise the latter epistemologically and ontologically. Or maybe it is an internalisation of the Weberian commonplace that the state possesses a monopoly on the legitimate use of violence. Or maybe the catch-all concept of 'ideology' was meant to encompass such questions. But the argument advanced in this thesis thus far must lead now to the inquiry: what actually is the difference between the authority of the command of an employer and that of the sovereign? Initially, the answers seem obvious: the employer does not exercise political power or issue commands with the force of law; there are limits on the employer's power to command which don't apply to sovereignty; and the right to direct only persists as long as the contract endures - one is free to leave employment at any stage. But it is more complicated than it seems: as we saw with Miéville's analysis of the rise of the East India Company, or the fate of labour law during the Third Reich, the locus and nature of the power to direct is not always so easily classified; some natural law theories argue for innate restrictions on sovereign power too; and there is a long lineage of contractarians who argue that the sovereign also obtains power by consent, a consent obtained through the same kind of 'forced choice' that requires those without labour to sell it. As with *Gewalt*, supposedly separate spheres blur.

In this chapter, the argument of this thesis will be continued by demonstrating that new light can be shone on the concept of authority, a concept critical to law and critique, by placing labour at the centre of the inquiry. This chapter will therefore focus on that aspect of 'authority' that is concerned with the separations of law from labour charted in this thesis.[5] Instead of accepting an *a priori* distinction between the two spheres, it is argued that the method of distinguishing the two instead reveals an essential feature of authority: it is always-already a question of the right to rule over labour. Austin's inquiry into the source of 'command' demonstrates this. When 'work' and 'rule' are re-separated thus,

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[5] Cf Hamacher on the importance of Marx's *'On the Jewish Question'* and the separations wrought thereby for an inquiry into the grounds of right and rights: Werner Hamacher, 'The Right to Have Rights (Four-and-a-Half Remarks)', *South Atlantic Quarterly*, 103, no. 2-3, April 1, 2004, 2004, 343-56.

important aspects of authority - command and guarantee - persist in both. It is argued that the authority operative in the sphere of 'rule' is understandable only in its relation to that prevailing in the sphere of 'work'. Labour is found to dissolve any clear distinction between sovereign command and employer command, and the structure of authority that permeates both private and public law is intimately linked with the question of value. This chapter thus examines authority as it appears in Marx, Austin, Agamben and Pashukanis, laying the groundwork for a more detailed historical enquiry in the following chapter.

Marx and authority

Authority was important to Pashukanis, as will be argued later, but was also present in Marx. Marx's reference to Lycurgus in the paragraph that opens this chapter is important, and the relation between capitalist and legislator more than mere analogy. Lycurgus did not simply have an attachment to law, developing so excellent a system of legislation that he took the oracle's advice and decided not to return to Sparta, thus leaving the republic's inhabitants bound to their prior oath to follow his laws. Rather, with Lycurgus is encountered also the question of authority: 'the Senate, the representation of authority in the republic, could function - in the words of Plutarch ('Life of Lycurgus') - "as a central weight, like ballast in a ship, which always keeps things in a just equilibrium"'.[6] For Arendt, authority is that which commands obedience without resorting to persuasion or coercion, and its justification since Plato has involved recourse to models outside of the realm of the political, such as medicine and labour: 'What [Plato] was looking for was a relationship in which the compelling element lies in the relationship itself and is prior to the actual issuance of commands: the patient became subject to the physician's authority when he fell ill, and the slave came under the command of his master when he became a slave.' Aristotle too 'could take his examples only from the prepolitical sphere, from the private realm of the household and the experiences of a slave economy', and 'all prototypes by which subsequent generations understood the content of authority were drawn from specifically unpolitical experiences, stemming either from the sphere of "making" and the arts ... or from the private household community.'[7] But if political authority is explained by its relation to economy, then what models explain the authority located within the economy itself? Marx's factory owner exercises *Gewalt* without any

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[6] Hannah Arendt, "What Is Authority?," in *The Portable Hannah Arendt*, ed. Peter Baehr, London, Penguin Books, 2000, 476, 88.

[7] Ibid., 484-5.

'division of powers': laws become entwined with wages. The 'factory Lycurgus' possesses a 'law-giving talent' because of his economic authority, and, as 'private *legislator*', the only model left to explain the source of this economic authority is a political one, but with the latter already modelled on the former.

Marx's reference to the factory Lycurgus reappears towards the end of *Capital*. When the laws that fixed and later regulated the payment of wages (referred to in Chapter 2 of this thesis) were repealed in 1813, Marx was clear about why this happened: the laws 'were an absurd anomaly, since the capitalist regulated his factory by his private legislation.'[8] Marx was even more explicit in his earlier *Poverty of Philosophy* that authority over work is a zero-sum equation between state and employer: 'It can even be laid down as a general rule that the less authority presides over the division of labor inside society, the more the division of labor develops inside the workshop, and the more it is subjected there to the authority of a single person. Thus authority in the workshop and authority in society, in relation to the division of labor, are in *inverse ratio* to each other.'[9] This thesis does not go so far as to pretend that something as simple as a proportional formula is adequate now to explain the concepts treated by Marx. These approaches are, however, examined as an indication of something deeper at work. It is worth noting that at the same time as Marx aligns employers with rulers, he also persistently describes production according to 'the very model of disciplinary power, the army, "that a capitalist should command in the field of production is now as indispensable as that a general should command on the field of battle"' capital being 'both the command of "an industrial army of workers" and as power akin to, *and descended from*' that of the 'despots of Ancient Egypt and China'.[10] Marx's adoption of Hegel's analysis of the control exercised by Egyptian rulers to build the pyramids ought be recalled again too: 'This power of ... Egyptian kings ... has in modern society been transferred to the capitalist, whether he be an isolated, or as in joint-stock companies, a collective capitalist.'[11] Just as the metaphor of 'army' used by Marx opens itself up to an analysis of the discipline of the factory, so too can his allegories of the authority of 'rulers' and the transmissibility of authority open itself up to a broader analysis of the nature of command over 'workers'.

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[8] Marx, *Capital: A Critical Analysis of Capitalist Production*, 691.

[9] Karl Marx, *The Poverty of Philosophy*, Amherst, Prometheus Books, 1995, 164.

[10] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 93. Quoting Marx. Emphasis added.

[11] Marx, *Capital: A Critical Analysis of Capitalist Production*, 316.

What argument is advanced in this chapter from the above? It is that Marx understands authority over work to be something that can be transmitted, that can shift between the state and the employer, that the ability for authority to be so transmitted and rendered discloses something intrinsic to the nature of authority, and thus that political rule is properly understood in both its identity with and its separation from command over labour. Already, Arendt's analysis, where political authority is explained by its relation to economy, can be seen as going some way towards this point. The reading of Austin and Agamben below will strengthen the argument. And pursuing this point ultimately brings the argument back to a fundamental insight of Marx's: if authority is indeed something so transmittable, and if the central question is rule over work, then as capitalism develops and becomes more co-operative, then authority over the production process *may ultimately break free from the personality of the employer and inhere in the production process itself*. This last point will be considered at the end of this chapter, for it forms the basis of the next Chapter 6, which charts the history after Marx of these changing relations between law, authority and value-creating labour.

Distinguishing work from law: Austin and *auctor*

If one were to look for an argumentative foil, one that epitomised a definition of sovereignty as a separate, non-economic activity, it would be unsurprising to select the analytical jurisprudence of John Austin.[12] Often regarded as the epitome of nascent English legal positivism (a view shared by Pashukanis, as we shall see later) Austin's series of lectures first published in book form in 1832, *The Province of Jurisprudence Determined,* is a systematic effort to distinguish the laws of a sovereign as the true object of jurisprudence. Austin was a pupil of Bentham and avidly adhered to his mentor's description of natural law theories of rights as 'nonsense on stilts'. Instead, all laws were for Austin a species of command, the latter being the expressed desire of someone in a position able to inflict a sanction or pain on the addressee of the desire.[13] There are other

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[12] Austin is, of course, no longer regarded as an exemplar of legal positivism, and the identification of law merely as command is unsustainable. However, as a primary target of Pashukanis, and as perhaps the highpoint of a conception of jurisprudence as rigorous definitions and classifications, he is worthy of treatment here. If we are to find any rigorous attempt to delineate the sovereign from the non-sovereign, it will be here. For a defence of Austin, see Roger Cotterrell, *The Politics of Jurisprudence*, London & Edinburgh, Butterworths, 1989, 64ff. Cf Hart, *The Concept of Law*; Brian Rix, "Positivism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin Philip Golding and William A. Edmundson, Malden, Oxford, Blackwell, 2005.

[13] John Austin, *The Province of Jurisprudence Determined*, Brookfield, Vt., Dartmouth, 1996, 11.

commands that are not laws because they are only given occasionally or at particular instances and addressed to specific actions, not a class of action:

> If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. ... But if you command him *simply* to rise at that hour, or to rise at that hour *always*, or to rise at that hour *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct.'[14]

After defining laws as a subset of commands, Austin proceeds by way of taxonomy to determine the proper province of jurisprudence: its laws must emanate from a definite political superior, or from someone exercising delegated political power. There are two other kinds of laws properly so called, but which don't fall within this province: divine laws set by God; and laws 'properly set by men but not as political superiors, nor by men as private persons in pursuance of legal rights', which Austin calls 'positive morality.'[15] The distinction between jurisprudential law and positive morality is of most interest here.

All laws must emanate from a determinate source, and have a determinate person able to inflict a sanction, and thus much of what appears as positive morality - such as the laws of fashion or the laws of honour - are actually not laws at all. However, when determinate persons issue commands to other determinate persons, and when the former is superior because they are able to inflict a sanction on the latter in the event of non-compliance, then this is the realm of rule or law. Examples of such rules might occur in the state of nature, in a pre-political society, when humans command other humans.[16] The main distinguishing feature between positive morality and positive law proper is that whilst the former might emanate from a superior, the latter emanates from a *political* superior: a sovereign. Sovereignty obtains where the bulk of a given society is in a habit of obedience of submission to a determinate and common superior, whether that superior is an individual or a body of persons (such as a parliament), and where that superior is not in a habit of obedience to anyone else.[17] This is essentially an empirical test, with the question of motivation for obedience technically irrelevant, and there is certainly no mythical contract ever entered into to ground the sovereign's power.[18] The sovereign is indivisible and legally illimitable, but may require subordinates to exercise power on its

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[14] Ibid., 14.

[15] Ibid., Lecture V.

[16] Ibid., 103.

[17] Ibid., 147.

[18] Ibid., Lecture VI.

behalf, and the enforceable decisions of judges are also a form of delegated sovereign power.

For Austin, therefore, all that separates a command issued by a more powerful individual from a command issued by the sovereign (or an individual exercising powers delegated by the sovereign) is that the latter is habitually recognised as sovereign. (This is perhaps the hallmark of legal positivism generally: the identification of the source of law and the procedure by which law is made is all that is needed to turn will into law.[19]) Provided that the command applies to a class of actions, not merely to one action, there is nothing in the content of the command that allows the kind of law to be identified. Employment figures in Austin's attempt to distinguish between laws proper and laws of positive morality: '[I]mperative laws set by parents to children; imperative laws set by masters to servants; imperative laws set by lenders to borrows; imperative laws set by patrons to parasites' are all imperative and determinate laws, but as they are 'not set by their authors in pursuance of legal rights, they are not positive laws but rules of positive morality.'[20] When it comes to the troubling question of work, however, Austin recognises that things are not as clear as they seem. For Austin, slavery, though morally abhorrent, nonetheless has been sanctioned 'in every age' by positive law and positive morality.[21] When the master exercises power over the servant, is this a delegated legal power or some other power? Austin devotes a long footnote to the problem:[22] on the one hand, the master has legal rights over a slave, so any command he issues presumably can be backed up with some kind of sanction, and is set 'circuitously by the sovereign' (the same phrase Austin uses to describe judge-made law); on the other, the master is not under any duty to exercise the power over the slave, and issues the command of his own 'spontaneous movement'. Laws issued by employers are, then, simply a 'compound' of positive law and positive morality.

Despite his insistence on determining jurisprudence's province by rigorous taxonomy, and despite almost ending his discussion of the topic with this description of the master's command as a 'compound' of both positive law and positive morality, he does go further:

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[19] Cf Peter Stillman, "Property, Contract and Ethical Life," in *Hegel and Legal Theory*, ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson, New York, Routledge, 1991.

[20] Austin, *The Province of Jurisprudence Determined*, 115.

[21] Ibid., 134-35.

[22] Ibid., 139ff.

> though the law set by the master is set circuitously by the sovereign, it is *set or established by the sovereign at the pleasure of the subject author*. The master is not the instrument of the sovereign or state, but *the sovereign or state is rather the instrument of the master*.[23]

Suddenly Austin's supreme sovereign, not in the habit of obedience to anyone else, becomes the instrument of the master, positing laws set at the latter's pleasure. Austin's difficulties are now not taxonomic, but definitional. And these difficulties are potentially fatal: his whole endeavour is aimed at producing an analytic definition of law that will not be contaminated by notions of morality (natural law theory) or grounded in some common will (e.g. Savigny), and a conception of sovereignty as not itself in turn subordinate either to reason (again, natural law theory) or to other sovereigns or humans. Labour causes such trouble for Austin's fundamental distinctions because the act of the employer's command is a law and, whilst positivism prides itself on being the theory by which laws can be determined with reference to source, the source of the employer's command appears, in contradictory manner to be both of the sovereign and (impermissibly) above it.

Perhaps sensing the damage he does to his own enterprise, Austin begins to freewheel. Of the laws made by men in their capacity as private persons, he identifies 'laws autonomic', where there is 'an autonomia residing in the subject authors ... made by its author of his own spontaneous disposition.'[24] This is an untenable move, however: why would autonomic persons be in the habit of obedience to others *qua* their autonomy? Indeed, Austin admits that the term 'autonomic' applies to every law made by the sovereign, 'independence of legal duty being the essence of sovereignty.'[25] He quickly tries to recuperate, telling us that, despite being autonomous, the 'subject authors' exercise legal rights 'conferred', but he forgets that he has just used this term - author - to describe the state's subordination: 'the law ... is set or established by the sovereign at the pleasure of the subject author'. At this point, Austin all but gives up:

> Laws which are positive law as viewed from one aspect, but which are positive morality as viewed from another, I place simply or absolutely in the first of those capital classes. If, affecting exquisite precision, I placed them in each of those classes, I could hardly indicate the boundary by which those classes are severed without resorting to expressions of repulsive complexity and length.[26]

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[23] Ibid., 139 emphasis added.

[24] Ibid., 139.

[25] Ibid.

[26] Ibid.

It is telling that the analytic rigour which defines Austin's enterprise - an analytic method allegedly superior to 'naturalistic' approaches and by which we can properly determine jurisprudence's province - is unable to classify the operation of the labour relationship and can adopt a taxonomy only by means of intellectual compromise. It is also telling that he attempts to maintain the coherence of this enterprise through the figure of the author or *auctor* (a term also important for Hobbes[27]).

In the sphere of private law, the *auctor* is that figure in Roman law able to complete an act, confer some authority in it, so as to make it legally valid.[28] 'The Digest of Roman law thus notes that *non debeo melioris condicioni esse, quam auctor meus, a quo ius in me transit* [my right to property is, in a necessary and sufficient fashion, founded on that of the buyer, who 'authorises' it].'[29] The *auctor* necessarily stands in relation to another person who does not have the legal capacity to complete the transaction or to act themselves. Thus the father authorises the marriage of the son and makes it legally valid. It is not that the father acts as the son's representative by virtue of some legal power: rather 'it springs directly from his condition as *pater*.'[30] It is thus 'not so much the voluntary exercise of a right as the actualisation of an impersonal power in the very person of the *auctor*.'[31] The *auctor* authorises. The figure of the auctor also appears in a particular kind of transaction, the *mancipatio*. The seller would convey goods to the buyer, but the *mancipatio* was reserved for the most important kinds of goods, notably certain kinds of people (slaves, minors etc) over whom the seller had power. The seller (*mancipio dans*) thus gives this power to the buyer (*mancipio accipiens*) by authorising the buyer to exercise power over the slave. Authority guarantees the right to confer (legal) power.[32] The seller also is obliged to defend the buyer in any suit challenging the newly acquired authority, providing a further sense in which the original authority guarantees power.

For Agamben, there is a structural analogy between the *auctor* of private law and the *auctoritas* of public law, an analogy revealing something fundamental about the

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[27] Mark Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital', *Law and Critique*, 14, no. 2, 2003, 147-65.

[28] Cf Agamben, *State of Exception*, Ch 6; J. A. Borkowski and Paul J. du Plessis, *Textbook on Roman Law*, Oxford, Oxford University Press, 2005, Ch 4.

[29] Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital', 153.

[30] Agamben, *State of Exception*, 77.

[31] Ibid.

[32] Cf Magdelain quoted in Ibid., 82.

relationship between authority and law. The same figure of *auctor* is in Roman law designated the most 'proper prerogative' of the Senate: although it did not possess power in the sense of the magistracy - the power to command or to bind - the Senate was nonetheless charged with ratifying the magistrates' decisions.[33] The Senate could not act on its own motion, as it were, to generate decisions, but was charged with validating or annulling them. Most significantly, the Senate would decide, for instance in times of war, when the legal power (*potestas*) of the magistracy would be suspended and when it would be able to be exercised. And in the most exceptional situation, even the Senate could be usurped: when Augustus, in 27BC after a period of interregnum, decided to restore the republican constitution, he referred to himself as '*auctor* of the highest standing' and, in so doing transferred power back to the Republic: 'Augustus would thus be the *auctor* of the rights rendered to the people and the Senate, just as, in a *mancipation*, the *mancipio dans* is the auctor of the power acquired by the *mancipio accipiens* over the transferred object'.[34] Here is the structural analogy between private and public law, which illuminates the nature of law: there is a relation between sovereign authority and legal power whereby the former's intervention is necessary to decide when the latter will apply.

This notion of authority (of a father or ruler or seller) ultimately stands in a specific relation to power (e.g. of the son or people or buyer): 'the normative element needs the anomic element in order to be applied, but, on the other hand, *auctoritas* can assert itself only in the validation or suspension of the *potestas*'.[35] Authority appears to emanate from the *auctor* in their personal capacity, but this is a 'person' in whom the distinction between public and private is non-existent or, more accurately, the distinction between public and private cannot be used to define the source of the *auctor's* authority: the Führer did not occupy any (public) office of 'Führer', but simply *was* the Führer. The source of authority stems ultimately from the structural relation between authority and (public) power, the ability of the former continually to suspend and separate itself from the latter. As between the servant and their new owner, the latter has power over the slave, the right to command bodies, because authorised by someone in a position to so authorise. As between the magistracy and the subjects of its decisions, the legal power to bind exists because it has been authorised by the Senate or by the '*auctor* of the highest

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[33] See too Arendt, "What Is Authority?," 487.

[34] Magdelain in Agamben, *State of Exception*, 82.

[35] Ibid., 86.

standing'. For Agamben, the figure of authority is structurally correlated with legal power in a way that enables both to persevere. This relation of authority to power unfolds throughout Agamben's thought in relation to law and life, human and animal, anomie and nomos.[36] As argued in the last chapter, there is no original *potestas* over which *auctoritas* can command, no ontological priority accorded to one or the other, but rather both are produced through the same system of separation. There is no original state of unity.

Following Aristotle and Plato, Austin searches in the figure of the author for a solution to the dilemma of the source of the master's power over the servant. This figure can somehow be both the exercise of a legal power and the non-legal source of this power. The query as to the legitimacy of the master's command - this untangleable compound of law and the life of positive morality - leads Austin to the figure of the *auctor*. The master has this authority because he/she stands in a peculiar relation to law: outside of it, with a force appearing to emanate from their person, a force that allows them to use the state as their instrument; yet also inside of it, as some kind of exercise of existing law, something derived from the state. Agamben seeks the answer to the questions 'where does the "force" of the *auctor* come from? And what is the source of this power to *augere*?' and finds here the 'structural analogy' between private and public law that is the secret of law itself.[37] It is ultimately a question of separation, 'the fracture of something to which we can have no other access than through the fiction of their articulation.'[38] Agamben sketches the topology of this power: the master is able to exercise power over the servant because so authorised. Thus Austin may be clarified: in the normal course, a master exercises something like a legal power over their servant, a power that may derive from contract or from positive law, but this is only possible because the master also possesses some kind of authority related to law which doesn't appear to spring from law itself. Further, the master then becomes *auctor* themselves should they ever wish to perform another transaction involving the slave: the source of the authority (as opposed to the power) will in fact oscillate between being one of the master's personal qualities, some

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[36] Ibid., 88.

[37] Ibid., 76.

[38] Ibid., 88.

kind of non-transmissible power springing from the person, and being something conferred by another in a position to so authorise.[39]

Austin shows that the question of the employer's command leads to the question of authority, which can only be answered by provisionally accepting the artificiality of a separation between positive law and positive morality, between law and life; Agamben argues that this separation concerns the question of authority and law itself; Pashukanis, as will be seen next, pre-empts Agamben and answers Austin by historicising the relation between this separation and the rise of capitalism. What is drawn attention to here is the fracture opened between law and authority or, in the instance of concern in this thesis, between the law of contract of employment and the authority of the employer. Authority is not something merely derived from law: the purchase of the wage relation does not fully legitimate the employer's exercise of power. There is a non-legal element - an anomic space outside the contract - that grounds the employer's authority. The factory Lycurgus is, in this sense, sovereign: power appears to be granted by law, but life outside law grounds authority. As will be argued later, Marx and Pashukanis show that the content of the relationship between the law (of employment) and life outside the law (of employment) is ultimately a question of the development of contradictory tendencies within capitalism. Specifically, the legitimacy of command appears at times as a legal question, and at times a social one.

Following but critiquing Agamben, Ewa Plonowska Ziarek has made an interesting intervention into the question of bare life, slavery and sovereign power. If bare life is produced as the 'remnant of a destroyed form of life', if it is the emptying of an existing identity, then one can no longer simply treat this as an effect of sovereign decision, for bare life then becomes a site of contestation.[40] The suffragette hunger strike, for example, is thus a reassertion by 'bare life' of its own life against sovereignty. Similarly, she argues that slavery was a form of total domination that renders the slave 'socially dead' and

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[39] Pashukanis himself comments on the *mancipatio*: 'The establishment of permanent markets created the necessity for settling the question of right of disposal over commodities, and hence for property law. The property title *mancipatio per aes et libram* in ancient Roman law shows that it arose simultaneously with the phenomenon of domestic exchange.' Pashukanis, *Law and Marxism: A General Theory*, 122. Whilst Pashukanis was often rightly criticised for a selective appropriation of elements of ancient legal history, a point he himself acknowledged less than two years after publishing his primary text, nonetheless this passage confirms Pashukanis was keenly attuned to the importance of separating the question of property simply from the question of force (as Miéville understands it) and instead making it a question of the authority that can guarantee exchange. Warrington, 'Pashukanis and the Commodity Form Theory'. See Pashukanis, *Law and Marxism: A General Theory*, 45, 122.

[40] Ziarek, 'Bare Life on Strike: Notes on the Biopolitics of Race and Gender', 103.

precedes the slave's struggle for release from the 'parasitical dependence' of the slaveholder. The slaveholder is forced to exclude the slave, yet seek a means of making a profit out of them, and thus 'if the sovereign decision on the state of exception captures bare life in order to exclude it, the biopolitics of slavery is confronted with the profitable inclusion of socially dead beings.'[41] Ziarek hits the mark in noting that 'although subjected to the violence of the master rather than to sovereign banishment, enslaved life in Aristotle's *Politics*, like the obscure figure of *homo sacer* in Roman law, blurs the boundaries between the inside and outside of the political.'[42] This analysis shares two key points with the argument in this thesis: first, there is a complicity between sovereignty and the control over labour; secondly, the perpetual threat of the withdrawal from the relation of *ban* is the counterpart to exclusion by the sovereign. Nonetheless, in taking the (correct) step of attempting to relate the domination of the sovereign with the domination of the slaveholder, Ziarek's consideration of the slave as bare life leads her to argue:

> that the violent production of social death functions as a hidden territory not only of politics but also of commodity exchange. Consequently, the substitution of social death for biological death indicates a possible transformation of the sovereign ban into ownership and exchange. ... In place of a sovereign decision on the state of exception, we have institutionalized containment within the law of a permanent anomaly, which confounds the differences between life and death, destruction and profit.[43]

By arguing that the slave is a figure whose submission is 'total' and not understandable as one subjected to relations of production, and therefore not subjugated within the production relation at all, the slave only reappears as a commodity who is 'profited' upon through exchange. Slaves were doubtless bought and sold. But this by no means exhausts their status. Slaves built the pyramids, but as Hegel and Marx argue, the control over slaves persists but changes its form, and this control is what reappears as right. And further, this thesis has been at pains to argue that capitalist 'commodity exchange' is something quite different from the relations pertaining under conditions of slavery. It is thus wrong to assert that the sovereign *ban* 'transforms' into ownership and exchange. Instead, to put it consistently with the argument in this thesis, what the sovereign and the slaveholder share is the authority to command the slave, an authority transmitted to them and grounded in force of ~~law~~. Yes, 'absolute power merges with the absolute ownership

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[41] Ibid., 96.

[42] Ibid., 95.

[43] Ibid., 96-97.

of *res'* but this does not make slavery a 'permanent anomaly' which is counterposed to sovereign power: rather, the structure of authority (including over labour) always carries with it the prospect of transmission and abandonment, and this is less a case of sovereign power 'transforming' into the power to make a profit, but of the hidden complicity between the two.[44] Ziarek's argument is important, and ultimately the distance between it and that of this thesis is not that large, but it determines one's point of departure: does the economy meet sovereignty because there are created figures of 'bare life' that can be bought and sold? Or is sovereignty instead an attempt to control productive life, from which control there springs forth numerous historical/philosophical configurations of authority? Ziarek replicates Agamben's strategy (which will be discussed further in chapter 7) of excluding productive capacity from the status of bare life, and is thus left with no choice but to construct a politics upon the foundation of an emptied 'form of life'. This illustrates both the difficulty in reclaiming Agamben for an emancipatory politics and the constant forgetting of the peculiarity of class - class is not a mere characteristic or form of life which can be excluded to produce bare life, as Ziarek argues, but is a relation of power which thus has an affinity with sovereignty.[45] The source of authority over the slave was *inter alia* the transmissible authority to dominate labour, an authority that persisted in private and public law

The character of authority in Agamben - its existence in a zone outside law, which in the most extreme situation coincides with the person of the *auctor* - appears in Marx and Pashukanis. The sovereign/master isn't simply outside law: the power exercised must have a relation to law and, in the now 'normal' situation, is exercised as legal power. But the relation between these two elements is capable of numerous constellations:

> It is founded on the essential fiction according to which anomie (in the form of *auctoritas*, living law, or the force of law) is still related to the juridical order and the power to suspend the norm has an immediate hold on life. As long as the two elements remain correlated yet conceptually, temporally and subjectively distinct (as in republican Rome's contrast between the Senate and the people, or in medieval Europe's contrast between spiritual and temporal powers) their dialectic - though founded on a fiction - can nevertheless function in some way.[46]

It is important to be alive to the appearance of this fracture in reading Marx, for whom the legitimacy of the employer's command similarly shifts from legal justification to being

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[44] Ibid., 96.

[45] Ibid., 93.

[46] Agamben, *State of Exception*, 86.

a question of authority, and in Pashukanis, for whom the construction of this authority is as crucial as the construction of the legal subject.

Pashukanis on authority, state and law

Like Agamben, Pashukanis is aware of 'authorisation in the private-law sense of a mandates [sic] to conclude legal transactions.'[47] This is the (private) counterpart that develops fully when the (public) state is 'constructed in practice' behind the city walls, when the public purse, officials and functionaries arise, and with them the concept of the 'public office ... the material embodiment of the public nature of power.'[48] The private law sense of authority becomes in this moment 'separated from public office.'[49] Whereas Agamben's *auctor* is a creature of antiquity, for Pashukanis it is only in modernity that it is fully separated into public and private forms. Agamben at times seems to tell a story of modern sovereign power, at other times his arc extends to classical Greece. Agamben and Pashukanis may thus be at odds regarding the duration of the story each is telling. However, Agamben's reading accentuates what needs to be better understood in Pashukanis: that the development of public authority and its locus in the state complements a citizenry vested with the private *power* to conduct their own transactions, which can then be *authorised* (in the sense of guaranteed) by public office. Critically, authority is not thereby the sole preserve of the public: authorisation, in this 'private-law sense of a mandate to conclude legal transactions,' also remains a concern of the private, that is, of the economic, which is why Austin looks to the author to understand the source of the master's right to command. With Arendt's formulation in mind, it is argued here that what ultimately occupies Pashukanis is what happens when the material basis of the master/slave relationship - an economic model foundational to authority - is replaced by the employer/employee relationship.

In an important and obvious sense, dealt with in previous chapters, Pashukanis' whole critique is aimed primarily against the likes of Austin who would identify law with state-emanating command. But Pashukanis doesn't merely offer a competing version of what law or the state 'is'. Rather, the identification of the state as a unified locus of command is treated as a symptomatic misapprehension of a particular stage of development of

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[47] Pashukanis, *Law and Marxism: A General Theory*, 148. Oddly, this sentence is omitted from the Beirne and Sharlet translation: Beirne and Sharlet, eds., *Pashukanis, Selected Writings on Marxism and Law*, 100.

[48] Pashukanis, *Law and Marxism: A General Theory*, 148.

[49] Ibid.

capitalism. For Pashukanis, the Austinian closed loop of state, law and command is thus the jurisprudence of nascent monopoly capital:

> Bourgeois jurists usually define law as the totality of norms to which a state has given coercive power. This view of law typifies so-called legal positivism. The most consistent representatives of this trend are the English jurists: of the earliest Blackstone (eighteenth century), and thereafter Austin. In other European countries legal positivism also won itself a dominant position in the nineteenth century, because the bourgeoisie either gained state power or everywhere achieved sufficient influence in the state so as not to fear the identification of law with statute. ... If law in its entirety was the complex of orders proceeding from the state, and consolidated by sanction in the case of disobedience, then the task of jurisprudence was defined with maximum clarity.[50]

So what, for Pashukanis, is the distinction between law and state? Ultimately, if law is the outcome of exchange between two actors, then when there is conflict (the lawsuit) it must be resolved by someone. But this someone does not need be a third: for Pashukanis, there is a strong identification of self-help with law. The guarantee may actually be provided by a party to the transaction. With an advanced commodity economy, however, guarantee by a third becomes essential: this is the state, which is, in this sense, a product of the civil lawsuit. But the state is more than mere neutral guarantor of contract: at times it acts violently to preserve the conditions for the law of value. The state, in short, must act to prevent capitalism from ending, something that preoccupied bourgeois practitioners and theorists in Pashukanis' time. The state thus also can be grasped from the perspective of organised class force. Pashukanis also concedes to the state administrative/regulative functions. However, none of this is to grant the state an 'essence'. At times, force is doubled into state and law; at times it is not. If law arises from the lawsuit, and at a certain point develops the means by which exchangers know they will have secure title, then law is 'the product and the guarantee, the latency and the potentiality of the lawsuit.'[51] But the state is neither a function of law, nor law of the state: the question of the state was for Pashukanis no less mystifying than the question of the commodity.

The question Pashukanis asks of Engels' *Origin of the Family* is a simple one: if the state is a 'party' or 'organ' of the bourgeoisie, then why does class rule not take place through direct force? Why does it become detached and impersonal? Dissatisfied with any answer to the effect that the bourgeoise does so because it is advantageous not to rule directly, which reduces law to a kind of smokescreen, Pashukanis instead poses this as a question

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[50] Beirne and Sharlet, eds., *Pashukanis, Selected Writings on Marxism and Law*, 286-87.

[51] Antonio Negri, "Paschukanis Lesen," in *Kritik Der Politik: Johannes Agnoli Zum 75 Geburtstag*, ed. Joachim Bruhn, Manfred Dahlmann, and Clemens Nachtmann, Freiburg, Ça ira, 2000, 38.

of the 'reproduction/redoubling' of reality, in much the same way that Marx and Feuerbach understood religious thought.[52] Factual domination exists in the form of the organisation of the relations of production: law's great merit is to facilitate the perpetuation of this domination by reproducing domination in the form of an abstract power guaranteeing the 'normal' run of exchange (through the designation of the rules of contract) and its simultaneous existence as arbitrary force in the form of the state. Both of necessity must be presented as abstract and impersonal, and at a remove from their polar counterpart of civil society, since the latter must remain the place of free exchange. When Pashukanis writes 'to the extent that society represents a market, the machinery of the state is actually manifested as an impersonal collective will, as the rule of law, and so on', there is thus state/law at one pole, market at the other, and direct coercion as embodied in an abstract general will necessarily located in the former so as not to destroy the essentially 'free' nature of the latter.[53]

What is the 'guarantee' thus given and what is its 'public' nature? Just as for Weber every city was defined by a market and the development of life behind the city walls which enabled the circulation of political power as well as currency, so too for Pashukanis is it in the medieval European cities that the importance of the state as guarantor of the conditions of circulation emerges: it is 'by appearing as a guarantor' that 'authority becomes social and public, an authority representing the impersonal interest of the system.'[54] For Weber's inhabitants fleeing the roaming *imperium* of the countryside beyond the city walls, *Stadtluft macht frei*: immediately the role of authority as guarantor takes on both internal and external dimensions. The peace is kept within and wars waged without. And the purpose and effect of waging wars externally bears significant responsibility for, in turn, shaping the state-form, particularly the early modern state form, in ways that do not admit of legal definition.[55] But the force that guarantees trade for the inhabitants is not necessarily conceptually identified with the army that will wage war.

To conceive of the state as a unified personality which can embrace functions is to misunderstand the question of state-form. What Pashukanis has in his sights is not only the concept of the *Rechtsstaat* as an 'independent' entity standing above economic

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[52] Pashukanis, *Law and Marxism: A General Theory*, 138-40.

[53] Ibid., 143.

[54] Ibid., 137.

[55] Ibid., 147. See too Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton, Princeton University Press, 2006, Part One.

relations, but also those who imagine that 'the state' refers to an existing, unified entity, that it is any less a subject of reification than the commodity. Actions are taken in the name of the state, but any theory that proceeds from the premise of the 'state as a person' is necessarily wrongheaded: the personality of the state, its creation as *public* authority, 'power as the 'collective will', as the 'rule of law', is realised in bourgeois society to the extent that this society represents a market.'[56] The state is not a person, though it necessarily presents itself as the embodiment of an abstract, public authority, since only in this way can coercion be conceptually distanced from exchange. The preconditions for coercion-free exchange must be brought about and maintained. They may certainly be brought about coercively, but the entry into specific contracts cannot be mandated. It is for this reason, answering Engels, that the machinery of coercion cannot be represented as the private machinery of the ruling class, but must be abstracted.[57] The presentation of the state as unified combined with the general rule of law becomes an ideal solution for the bourgeoisie because it misrepresents the real source of its domination.

But the settling of conflicts during 'normal' times is not the state's sole function, and the bourgeoisie is continually aware that class society is not only a market, but also a battlefield, and the machinery of the state a powerful weapon. Both internally and in foreign policy, the state is a 'power factor', and this requires a 'correction ... to the theory and practice of its constitutional state [*Rechtsstaat*]'. The more crises develop, both internally and externally, the more the *Rechtsstaat* becomes a 'disembodied shadow', and at times the mask is discarded altogether.[58] Thus:

> The state as an organization of class domination, and as an organization for the conduct of external wars, does not require legal interpretation and in essence does not allow it. This is where so-called *raison d'etat* (the principle of naked expediency) rules. On the contrary, authority as the guarantor of market exchange not only may be expressed in terms of law, but itself appears as law and only law, and is merged entirely with the abstract objective norm. Therefore, every juridic theory of the state which wishes to embrace all the functions of the latter, necessarily appears inadequate. It may be a true reflection of all facts of state life, but gives only an ideological, i.e. distorted reflection of reality.[59]

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[56] Pashukanis, *Law and Marxism: A General Theory*, 146.

[57] Ibid., 139-41.

[58] Ibid., 149-50.

[59] Pashukanis, "A General Theory of Law and Marxism," 92. These insightrs might have saved Marxist legal analysis much anguish had they been heeded, since the breadth of their understanding encompasses much subsequent debate over state, law and exceptionality. It is more than just a suggestion that 'the state' can on the one hand act violently and on the other behind the 'rule of law', the understanding of Miéville and Head (see Chapters 2 and 3). Instead, it is a question of how 'authority' is 'expressed', and the complicated relationship of authority to force (Chapter 4) is bound up with the expression of law as guarantee. But for the

For the purposes of the argument in this thesis, the following is taken from Pashukanis: there is a fracture in his work between naked expediency and the rule of law. Further, it is not just that the notion of the legal subject - and its necessary representation as universal - arises with the sufficient spread of the commodity form. What also occurs is the detachment of coercive power from its embodied persona. That is, the justification for coercive activity previously linked to the lord *qua* lord had, to use contemporary language, both political and economic functions: dominance was reinforced through force, as was economic wealth. Increasingly, however, as the peace is kept not for the lord's sake, but for the sake of traders who trade freely but rule over workers, the coercive aspect of power cannot occur directly in the workplace, the site of the exploitation. It is necessary for capitalism at a certain stage of development for there to be freedom to alienate in the workplace too. The direct coercion necessary to guarantee the reproduction of the conditions of the law of value, in the form of the impersonal state, thus becomes the counterpart of the legal subject. For Pashukanis, to presume that the state is a subject, whether derived from positivist or natural law sources, and thus to treat questions of domination and subservience as merely questions for state and law, is to dehistoricise the birth of the modern state and its connection with trade, and to miss the

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purposes of the argument being pursued now, this passage also shows Pashukanis urging Marxism against any pronounces "The law is ..." or "The State is ..." end with a noun denoting a discrete object, let alone an anthropomorphic noun. Kelsen, too, at times pursued a version of this argument. In his *God and the State*, Kelsen maintained that the state as entity did not exist, only that activities were conducted in the name of the state, that the state was merely the legal order itself viewed from a certain standpoint: Hans Kelsen, "God and the State," in *Hans Kelsen: Essays in Legal and Moral Philosophy*, ed. Otto Weinberger, Dordrecht, D Reichel, 1973. Of course, Kelsen was aiming his argument against the likes of Schmitt, who would assert that the state had a non-legally defined existence that allowed it to stand above the rule of law. Kelsen is also at pains to suggest that the state admits only of Kantian/legal definition, and in this he is at odds with Pashukanis. However, the structure of the argumentation is the same, demonstrated if it is accepted that for Pashukanis 'at times a certain formalism that had previously been thrown out the door returns through the window, now effected by the argument of the direction of the development of the commodity form': Negri, "Paschukanis Lesen," 35ff. That is, at times Pashukanis embarks on an enquiry into the nature of law that appears intent on finding law's essence and the establishment of the proper methodology that would allow us to determine what law is (viz the expression of certain social relations in the moment of the creation of the commodity form). In this, his line of enquiry is not that distant from the likes of Kelsen, concerned at finding the study of law's proper object: cf Bjarup, "Continental Perspectives on Natural Law Theory and Legal Positivism."; Cotterrell, *The Politics of Jurisprudence*, 113ff. This is why Kelsen is able to respond to Pashukanis that Pashukanis has merely misunderstood his object, and taken an idea of law that is mere representation of law, not law properly grasped as object of study: Hans Kelsen, *The Communist Theory of Law*, N.Y., Praeger, 1955. If Pashukanis can assert that 'in fact the activity of state organizations goes on in the shape of decrees and edicts emanating from individuals [while] juridical theory assumes ... that the state, not individuals, issues these orders' it may be granted that Pashukanis in fact has more in common with his *bete noir* Kelsen than he imagines: Pashukanis, *Law and Marxism: A General Theory*, 145. It is this similarity that leads Negri to suggest that Pashukanis' critique of Kelsen is at times a caricature, a *'reductio ad absurdum'*: Negri, "Paschukanis Lesen," 33.

host of relations of domination that exist outside of, but intersect with, the one-dimensional views of state and contract.[60]

Command, law and work

Having shown Pashukanis' understanding of authority, how does this relate to the right to command labour implicit in the *auctor* of Austin and Agamben? At first approximation, the relations of production that begin to exist in the workplace appear contractual but simultaneously also matters of almost feudal subservience: the employer is able to legislate internally. The employer's power is not some express delegation of state power, but a quasi-natural right, employer as *auctor*. But this description is not entirely accurate. As Pashukanis argues, the relations of domination do not appear to spring from the personal qualities of the employer, but first from contract - one is working for another, not for oneself - and then later simply from the employer's position in the organised conditions of production. Thus Marx:

> The authority assumed by the capitalist as the personification of capital in the direct process of production, the social function performed by him in his capacity as manager and ruler of production, is essentially different from the authority exercised on the basis of production by means of slaves, serfs, etc. Whereas, on the basis of capitalist production, the mass of direct producers is confronted by the social character of their production in the form of strictly regulating authority and a social mechanism of the labour-process organised as a complete hierarchy -- this authority reaching its bearers, however, only as the personification of the conditions of labour in contrast to labour, and not as political or theocratic rulers as under earlier modes of production.[61]

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[60] For natural law theory, in the 'intercourse between commodity owners, the necessity authoritarian coercion arises whenever the peace is disturbed or a contract not fulfilled voluntarily': Pashukanis, *Law and Marxism: A General Theory*, 144.. It is not difficult to see how contract based natural law theory moves from here to justify sovereignty, nor to eternalise it. Like Pashukanis, natural law theory can posit the abstract will of the state as the counter-pole to abstract individualism. Unlike Pashukanis, the specific historical conditions under which this arises – viz the development of exchange – are misapprehended and the abstraction of the state is wrongly given an eternal quality. As regards positivism, the error is to see the source of law as emanating from the state/sovereign. For Pashukanis, exchange historically comes to 'require a third party who personifies the reciprocal guarantees which the owners of commodities mutually agree to as proprietors, and hence promulgates the regulations governing transactions between commodity owners': Pashukanis, *Law and Marxism: A General Theory*, 149.. Distilled in this one sentence is the frame of Hart's critique of Austin, according to which a command-based theory of sovereignty is not able to adequately account for the rule-based nature of power-conferring rules: see Hart, *The Concept of Law*.. In {Cotterrell, 1989 #396, Cotterell defends Austin at length against this attack from within, correctly noting that Austin himself understood that not all laws directly involved sanction, but that the sanction lay in the form of having a transaction determined to be invalid: ultimately, even if not immediately, every law can be traced back to a sanction. However, this mode of defence is not only slightly laboured, but unnecessary. When the force of law is not considered as emanating from the state, but rather from the participants in the (rules of) exchange themselves, then the distinction between rule and command is reframed: contractual behaviour is no longer the opposite of command, but its polar partner. Command is abstracted so as to allow for contract to continue.

[61] Karl Marx, *Capital: The Process of Circulation of Capital.*, trans. Samuel Moore and Edward Aveling, vol. 2, Moscow, Progress Publishers, 1956, 881. From the Chapter 'Distribution Relations and Production Relations.'

That is, whoever the employer is, that person has the right to legislate within the workplace *because of* the way production is organised. The authority to command *within* the workplace moves from mere contract (the employer's right to command labour, including unpaid surplus labour) to the nature of the conditions of production (the employer's right *qua* employer). Of course, a whole host of relations of domination exist *outside* this juridical arena: in some sense, the real domination occurs because there exists a class of people who have nothing to sell but their labour and, as such, are *forced* to alienate, albeit to no capitalist in particular. And capital also retains power, though not in 'public' form, through its armies of strikebreakers and industrial associations.[62]

It is argued here that Pashukanis essentially charts a moment of separation of relations of domination into three: domination within the factory (in the form of that which accompanies the wage relation); domination by the state (in the form of state norm, positive law); and domination outside of factory and state (in the form of the private power of employers, and in relationships of dependence on employment). Domination within the factory is legitimated first by contract (the mere fact that one is working for another) and then, as the appearance of contractual equality is eroded by machinery, by the nature of the production process itself (domination by employer *qua* employer, by the production process *qua* the production process). The second kind of domination (by the state) moves from being understood as obedience to universal norm to submission to organised violence. Neither of these forms of domination is reducible to the other, and none is capable of representation in the forms of feudalism: neither in the factory, because it is not the Lycurgus of antiquity but the '*factory* Lycurgus', nor in the state, because the sovereign's rule is no longer personal. Although both were born in the city, the command of the factory is never the command of the state because a worker cannot be compelled to work. The third kind, domination outside of both factory and state, is the subject of less attention by Pashukanis: once separated from means of production, the relationship is one of the worker's dependence on capital in general.

Pashukanis' position can be explained in the language of Agamben's analysis of authority. Because there can be no slavery under capitalism, the employer cannot stand in a personal position of *auctor* to the employee. The source of authority thus initially appears as a question of legal power, *potestas*, that which derives from the contract. But this is a contract for the extraction of surplus, and soon the conditions of production

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[62] Pashukanis, *Law and Marxism: A General Theory*, 141.

develop to a point where surplus is extracted via highly organised methods. The source of the employer's right to command loses its grounding in *potestas*, though the employer still commands nonetheless. The non-legal *auctoritas* that now grounds power is the organisation of the conditions of production itself. The employer is *auctor* not because of personal qualities but because of their position, and the employer is now like the *mancipio accipiens*: I have the right to command you because the conditions of production have given me that *auctoritas*. This is the private law remnant of *auctoritas,* separated from the public authority that has by now found its expression in the guarantee of contract in general.

To return to Pashukanis' own understanding of authority, the relations of domination hitherto legitimated either personally or through the 'reproduction/redoubling' of reality (in the religious sense criticised by Marx and Feuerbach) were, importantly, linked to an inalienability of land. Alienability of land and of personality (though only for discrete periods of time) produce relations of domination which begin to be accompanied by different representations of legitimacy. What must break free from the immediate relations of production is only that element of domination tantamount to slavery: the compulsion to work for a particular person. Other than in phases of original accumulation, as Pashukanis understood them, this compulsion is outside the sphere of law. What remains subject to legal interpretation is the justification for domination within the factory: this is initially a consequence of *contract*. As has been argued, the state, as guarantor of the performance of contracts, necessarily impersonally addresses itself to all citizens, and the relationship between state and citizen is polar. Command becomes present as abstract enforceability, the sanction should the law (of contract) not be complied with, the counterpart to abstract authority.

For Foucault, likewise, a new form of disciplinary power was invented in the seventeenth and eighteenth centuries that was:

> absolutely incompatible with relations of sovereignty ... [It] applies primarily to bodies and what they do rather than to the land and what it produces ... [and] ... made it possible to extract time and labour, rather than commodities and wealth, from bodies... [This] type of power is the exact, point-for-point opposite of the mechanics of power that the theory of sovereignty described or tried to transcribe ... [and] one of bourgeois society's great inventions. It was one of the basic tools for the establishment of industrial capitalism and the corresponding type of society. ... This power cannot be described or justified in terms of the theory of sovereignty. It is radically heterogenous and should logically have led to the complete disappearance of the great juridical

edifice of sovereignty.[63]

Why did the edifice not so disappear? For Foucault, 'this theory [of sovereignty] and the organisation of a juridical code centred upon it, made it possible to superimpose on the mechanism of discipline *a system of right that concealed its mechanisms and erased the element of domination and the techniques of domination involved in discipline*, and which, finally, guaranteed that everyone could exercise his or her own sovereign rights thanks to the sovereignty of the state.'[64] Without wishing to parse Foucault excessively, who is here only beginning his inquisition into the formation of the social, and without eliding the significance of the notion of disciplinary power (which will in fact be built on below), he here echoes a critical point of Pashukanis: that political sovereignty is linked with domination at work, but not in an homologous fashion. Whilst Pashukanis does not go so far as to suggest that the power over labouring bodies logically ought to have led to sovereignty's disappearance - this has been dealt with above - he and Foucault are at one in presenting sovereign power not as theological reproduction of domination, but as a kind of concealment. This is not concealment in the sense of a misdescription of some reality, but rather as an attractive pole of argumentation, which would lead the likes of Hobbes or Austin to prioritise *a priori* law as domination. In words that could have come from Pashukanis: 'we have to abandon the model of Leviathan, that model of an artificial man who is at once an automaton, a fabricated man, but also a unitary man who contains all real individuals, whose body is made up of citizens but whose soul is sovereignty. We have to study power outside the model of Leviathan, outside the field delineated by juridical sovereignty and the institution of the state.'[65] Foucault's criticism of Marx is, of course, significant, but one ought also be attentive to their points of resonance: Alan Hunt has been using the concept of regulation to try to 'get the two into bed with each other', but Pashukanis opens up another parallel around the question of sovereignty.[66] It is possible to think the relation of 'sovereignty' to 'work' as involving a parallel redefinition of the question of domination.

Unlike Foucault, the argument here wishes to retain the significance of the question of sovereignty: the question has not dissolved and, after Agamben, has on the contrary

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[63] Michel Foucault, "Society Must Be Defended: Lecture 2," in *Society Must Be Defended: Lectures at the Collège De France, 1975-76*, ed. Mauro Bertani and Alessandro Fontana, New York, Picador, 2003, 35-36.

[64] Ibid., 37. Emphasis added.

[65] Ibid., 34.

[66] Hunt, 'Getting Marx and Foucault into Bed Together!'.

moved back to centre stage. But with Foucault, the logic of sovereignty must be located as complementary to the logic of rule over labouring bodies. In this, Pashukanis' understanding of authority over labour was insightful but historically limited. The problem not made explicit by those who have followed Pashukanis is that none of the conceptual splits underpinning Pashukanis, between the realms of state, factory and neither state nor factory, is permanent. The question, for example, of whether capitalism ever required - or ever had - a completely 'doubly free' workforce is more complicated than theory might suggest, there remaining in various periods significant legal compulsions to work, as has been referred to in this thesis.[67] And the question of original accumulation is not merely foundational, but rather something to which capital continually returns, a point made above and which will be returned to below. Critically, much has happened since Pashukanis that ought make one question whether law, contract, authority and work are still arranged in the same constellation. The failure to understand this question, not as dialectical but as one in which *separation is required to be constantly remade*, can erroneously lead to an understanding of law in which the force of law is forever conceptually separated from the force of the factory.

Pashukanis identifies a border-zone and locates it wholly within civil society. Within this border-zone, coercion *within* the employment relationship is exercised by discrete people and is a function variously of contract or organisation, and *outside of* the employment relationship is exercised by no-one in particular, but exists as the abstract power of capital, the compulsion to sell labour power. However, this is, it is argued here, a zone contested by class struggle and whose location and borders as described by Pashukanis may be an accurate description only of a certain phase of capitalist development. To take but one example, not long after Pashukanis wrote of the power to terminate employment at will, European countries responded to the threat of revolution and to concerns about the reproduction of labour power by making dismissal from employment precisely a question of state coercion: unfair dismissal laws.[68] The state took over from civil society, especially the civil society of employment relations, as shall be argued in more detail in the next chapter. The non-legal foundation of authority shifts as the relation between public and private shifts. But by returning to its origins, with Marx,

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[67] See too Banaji, 'The Fictions of Free Labour: Contract, Coercion, and So-Called Unfree Labour'; Charles Post, 'Book Review: Coercion, Contract, and Free Labor in the Nineteenth Century ', *Historical Materialism*, 14, no. 3, 2006, 275-81; Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century*.

[68] Neumann, "Labor Law in Modern Society."

Foucault and Pashukanis, the separation itself appears as a question of force, not of logic or meaning, where law and authority stand in far more complex relationship.

This chapter has argued that although it is intimately linked with the exercise of force in and outside of law, the question of authority was nonetheless important for Marx and Pashukanis. The inquiry into Austin demonstrated why: to explain the right of the employer/sovereign to command, it is necessary to have recourse to the *auctor* who is able to (self-)authorise this command. From where does this authorisation come? The reading of Agamben confirmed what Hegel and Marx intimated: it derives from a command over labour that appears as something transmissible. This is not to say that command over labour is the only type of authorised command that can exist. Rather, it has been argued that the structure of authority detailed by Agamben, which relies on one authorising a commanded act performed by another, has as much to do with commands over labouring subjects as political subjects. Hence each time a justification is sought for authority, the political looks to the economic, and *vice versa*, as Arendt demonstrated. Pashukanis, it was argued, shows the importance for nascent capitalism of the structure of authority and its transmissibility: it is not just that the 'rule of law' is some smokescreen for material inequality, but rather if transmissibility is no longer limited to the dyadic exchange which requires one person to transmit authority to another and guarantee the authority that passes with the transaction, and is instead abstracted to an omnipresent third, then transactions can continue between two with the knowledge that they will be guaranteed by that third. Here it parallels the argument about the source of the force of law: authority, originally a question for two, now becomes a question for three, but the source of the authority was the two. As with the question of *Gewalt*, however, this also opens up a new way of examining the wage relation. For it now appears that the authority of the employer, and how that authority is said to relate to the force exercised within the relationship, is also intimately tied up with finding a ground outside of that relationship which will justify their authority. By paying attention to authority, it in fact becomes apparent that there are two sets of rapidly changing and deeply historicised configurations which mirror each other: within the employment relationship, the foundation of authority shifts, sometimes by gesturing to law, at other times not; within the political relationship, the foundation of authority shifts, sometimes by gesturing to work, sometimes not. It is the merit of Negri's work to have grasped this and conducted an analysis that purports to pick up where Pashukanis left off.

Chapter 6 - Pashukanis' Empire

> In the commodity form and the juridical form - that is, in the universe of commodities - the organization of labour power and command for the purpose of exploitation are necessarily bound together. The antagonism of the form is, above all else, that of their plaiting together: a binding that strives to represent itself as the concealment of exploitation and as negotiation of class struggle.
>
> Antonio Negri, *Reading Pashukanis*[1]

Pashukanis' study of law, authority, value and labour made him an important figure for a key contemporary thinker, Antonio Negri, and his later collaborator, Michael Hardt. Their work interrogates the relationship between authority and value, examines relevant developments in capitalism, labour and law throughout the twentieth century and sketches a schematic for the further Marxist study of law. There are two key themes in their work that correspond with the arguments being made in this thesis: methodologically, they place the labour relation at the centre of their analysis of law and the state-form, and ask how the command and organisation of labour find themselves refracted into the juridical; secondly, law thereby becomes not only a question of the exercise of force over labour and the organising of labour, but is caught in an historically shifting relationship with labour, its 'outside'. Their thought is thus an historical/theoretical inquiry into what this thesis has called the *Gewalt* of the control over labour as well as the authority behind relationships of work and of rule. Negri is not an Hegelian, drawing instead on Spinoza (amongst others), but nonetheless places theoretical primacy on the exercise of constituted power over constituent, labouring power.[2] There will be no attempt here to reconcile Marx's Hegel with Negri's Spinoza, but Negri is read as a writer in the same spirit as the argument of this thesis: one who explores the connections between work and rule, and refuses to treat Pashukanis as positing a hypostatised commodity form of law.

This chapter performs three tasks: in concluding the enquiry into authority and value, it reinforces Pashukanis as a key thinker - and authority as a key concept - for the contemporary Marxian critique of law. After considering Negri's reading of Pashukanis, it

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[1] Antonio Negri, 'Rileggendo PašUkanis: Note Di Discussione', *Materiali marxisti: La forma Stato Per la critica dell' economia politica della costituzione*, 12, 1977, 4.

[2] See Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, Minneapolis, University of Minnesota Press, 1999; Antonio Negri, *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics*, Minneapolis, University of Minnesota Press, 1991.

secondly conducts the 'heavy lifting' of the historical enquiries prompted by the argument thus far but only alluded to in previous chapters. That is, it uses an examination of Negri and Hardt's later work to apply the theoretical advances made in this thesis to the shifting grounds of law, *Gewalt*, authority and labour in the Western state-form in the time since Pashukanis wrote. This is obviously an enormous endeavour and can be but summarised in this chapter. Nonetheless, it illustrates the importance of understanding law and labour in the manner argued for, but also sets the scene for the final part of the thesis, Part IV Subject, which charts the fate of Pashukanis' legal subject over this period so as to then make some conclusions about the contemporary situation. Thirdly, some criticisms of Hardt and Negri, and their implicit assertion of the radical immanence of Empire with no 'outside' are considered in the course of concluding the inquiry into contemporary configurations of authority.

Negri's reading of Pashukanis

In 1973, Negri wrote an extended piece entitled *Reading Pashukanis*, which since has gone unnoticed in Anglophone texts, presumably because it remains untranslated into English.[3] The piece was, however, translated into German and published in 2000, and Negri wrote a foreword to this German translation, endorsing his earlier views and reaffirming Pashukanis as a key legal thinker in the Marxist tradition.[4] Negri reads Pashukanis by historicising both his contribution and his injunctions to the future Marxist study of law. Pashukanis' study of the legal form is not the study of the commodity form *per se*, but of the tendencies and conflicts that inhere the development of capital, of tendencies appearing in the present that gesture towards the future.[5] Negri argues that Marxist inquirers are only able 'to advance from the analysis of the tendency to the principles of law [if they] critically observe [these principles] as a function of a definite stage of production and circulation of surplus value.'[6] Negri levels related but separate criticisms at Pashukanis himself and at 'revisionist' readings of his work. The so-called 'revisionist' readings read Pashukanis as if he had permanently separated the economic

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[3] Negri, 'Rileggendo PašUkanis: Note Di Discussione'.

[4] Negri, "Paschukanis Lesen." The reading in this thesis will proceed from the German text, with all the problems attendant on 'double translation'. A freely accessible PDF of Negri's chapter in German has been made available by the publishers. Because of the better accessibility of the electronic version, page references in this thesis are to that version. PDF available at http://www.isf-freiburg.org/verlag/leseproben/negri-paschukanis.html. Last accessed 19 May 2008.

[5] Read notes that Negri elsewhere refers to 'tendency' as the 'viewing of the present in light of the future, or possible futures': Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 187.

[6] Negri, "Paschukanis Lesen," 31.

and the legal, and laid out a completed schema of the former on which there arose institutions of (forms of) law. These readings go in search of an essence of law and find its foundations in the private sphere; the Marxist analysis thus appears complete once the legal subject is understood as arising along with commodity exchange. As against Pashukanis himself, Negri's critique is more sympathetic: Pashukanis fails to pursue properly his insight into law as a question of tendency. Not uncommonly for a Marxist of his time, Pashukanis considered that capitalism had reached a stage where private property had become sufficiently socialised as to have laid the groundwork for a transition to communism. In that era of monopoly capitalism the apparently separate power of the state had concentrated and strengthened, a level of development of the relations of production which encouraged the likes of Austin to develop the theory of (public) law as sovereign command, all the while misunderstanding the (private) roots of law. The separate existence of public law was thus an effect of the advancing private: as has been argued, for Pashukanis, the transition to communism would of necessity reveal the incapacity of public law to stand alone and so the state would wither away. For Negri, on the contrary, public law cannot be assumed logically to be derivative of private law: it is not a question of deduction of one from the other, but rather a question of tendency. Here 'the content of [Pashukanis'] analysis is disappointing', for he has failed to pursue it fully as a historico-philosophical question.[7] Whilst Pashukanis cannot be faulted for failing to see that the events of the twentieth century meant the end of the dialectic, the development of the tendency demonstrates that public law does not attempt to continually 'define itself as the civil law's antithesis, turning to it as if it were the centre of attraction', but rather that 'public law [*Staatsrecht*] ... concedes a uniquely dialectical independence to civil law.'[8] There is thus a 'decline into normativism', into the state ordering of the economy, which Pashukanis appears unable to account for. It will be considered below in more detail how this insight of Negri's from 1977 is deployed in his later work to account for developments in the twentieth century. Of interest in this part of the chapter is Negri's sympathetic reading of Pashukanis, which rescues him from this failure to explain the rise of public law and from any 'revisionist' reading.

It is primarily Pashukanis' Marxian methodology that is attractive to Negri: the three fundamental concepts Pashukanis is said to draw from Marx are 'the determinate abstraction of the totality, the principle of dialectical determination, and finally the

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[7] Ibid., 18.

[8] Ibid., 18-19.

principle of the tendency.'[9] To analyse the question of the legal form of social relations is thus to delve immediately into an inquiry into the contingent, historical tendencies underlying the development of the forces and relations of production. For Marx, that tendency is necessarily contradictory: as it realises itself, these contradictions intensify and get resolved (or not) in certain ways. The question of law is intimately bound up with the realisation of the contradictions of the tendency to maximise extracted surplus value. This question of the creation of surplus value is a matter both of *command* over living labour and of the *organisation* of that labour and its reproduction. Negri thus tells a story with which this thesis is by now familiar: the time of original ('primitive') accumulation involves the violent creation of labourers through their separation from the means of production, but command over labour does not yet imply its social organisation, and the question of reproduction of labour is not yet a question for capital. This necessarily results in antagonism: the struggles over the length of the working day, for example, exemplify the tendency of capital to seek to increase absolute surplus value and the consequential effects on the reproduction of labour power.[10]

Following Marx, a distinction (crucial to the whole of Negri's endeavours) is drawn by Negri between *formal* subsumption and *real* subsumption.[11] Capital progresses through the phase of the formal subsumption of labour - where work takes place outside of the wage relation, but the final product (of the artisan or the peasant) is appropriated by capital - to real subsumption, where the labour process itself takes place under the supervision and control of capital. Real subsumption is necessary for the organisation of capital for extraction of increased relative surplus value. The capital relation not only reproduces surplus for capital, though, it reproduces the waged labourer too. The real subsumption of the labour process under capital thus later extends to the real subsumption of the *reproduction* of labour power. For Marx, this latter process was contested and incomplete as at the nineteenth century. The transition from formal to real subsumption is the expression of capital's need to seize hold of the conditions of productivity. As the relations between capital and labour begin to take on the characteristics of a contract, the legitimacy of the command of employer over worker becomes a function of the contractual relationship, of the latter's 'working for' the former.

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[9] Ibid., 16.

[10] Ibid., 22ff.

[11] Ibid., 22. See too Carlo Vercellone, 'From Formal Subsumption to General Intellect: Elements for a Marxist Reading of the Thesis of Cognitive Capitalism', *Historical Materialism*, 15, 2007, 13-36. Cf Marx, *Capital: A Critical Analysis of Capitalist Production*, Ch16.

At this stage, 'the force [*Gewalt*] of command is itself present in work' and law 'assumes its characteristic form as form of exchange, and that is, in the instance of the exchange between labour power and capital.'[12] However, questions of the organisation of work, above all the question of the organisation of *relative* surplus value, become social questions. Within the process of production itself, the necessity for co-operation begins to undermine the strictly contractual basis for command. Thus Marx:

> We also saw that at first, the subjection of labour to capital was only a formal result of the fact, that the labourer, instead of working for himself, works for and consequently under the capitalist. By the co-operation of numerous wage-labourers, the sway of capital develops into a requisite for carrying on the labour-process itself, into a real requisite of production. That a capitalist should command on the field of production, is now as indispensable as that a general should command on the field of battle.[13]

Command begins to transform itself into a necessity, and the expansion of capitalism brings with it 'like a real army, officers (managers), and sergeants (foremen, overseers), who, while the work is being done, command in the name of the capitalist. The work of supervision becomes their established and exclusive function.'[14]

As this transition proceeds, it has immediate consequences for law, Marx and Negri argue. At first, law plays a key role in the arrival of real subsumption: the binding together of contract and command in the labour contract is both the form of representation of the creation of surplus value and the means by which it is effected. A presumption of the exchange relation is that it is entered into with free will, and the consequence of command follows. *Potestas* justifies command. However, the extension of real subsumption over the conditions of reproduction of labour occurs hand in hand with an antagonism inherent in the production process. Increasing co-operation in production involves command over the production process appearing as inherent in this process itself, rather than merely following from the fact of the employer paying for control over labour.[15] Labour is organised to maximise surplus production, in particular relative surplus value. Here, for Negri, is where organisation and command 'returns to the factory and reproduces itself therein.'[16] Here is the *Gewalt* of the factory Lycurgus, a *Gewalt* undivided: this first move was charted in the previous Chapter 5. But then something further occurs: just as organisation (of the conditions of reproduction, of the

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[12] Negri, "Paschukanis Lesen," 22.

[13] Marx, *Capital: A Critical Analysis of Capitalist Production*, 313. From Chapter 13 'Co-operation'.

[14] Ibid., 399. From Chapter 15 'Machinery and Modern Industry'.

[15] Negri, "Paschukanis Lesen," 24. Cf Marx, *Capital: A Critical Analysis of Capitalist Production*, Chs13-15.

[16] Negri, "Paschukanis Lesen," 24.

extraction of surplus value) and command (over the direct production process) appear to have reached a final balance, the social relations foundational to the production process are themselves further transformed. Capitalist production not only produces surplus value, but also 'produces and reproduces the capitalist relation; on the one side the capitalist, on the other the wage-labourer.'[17] And if 'to accumulate, is to conquer the world of social wealth, ... to increase the mass of human beings exploited by him, and thus to extend both the direct and the indirect sway of the capitalist', then command over the direct production process must again inevitably break beyond the factory walls and become an 'impersonal' social force that even holds the individual capitalist in its sway.[18] In Marx's words:

> We have seen that the growing accumulation of capital implies its growing concentration. Thus grows the power of capital, the alienation of the conditions of social production personified in the capitalist from the real producers. Capital comes more and more to the fore as a social power, whose agent is the capitalist. This social power no longer stands in any possible relation to that which the labour of a single individual can create. It becomes an alienated, independent, social power, which stands opposed to society as an object, and as an object that is the capitalist's source of power. The contradiction between the general social power into which capital develops, on the one hand, and the private power of the individual capitalists over these social conditions of production, on the other, becomes ever more irreconcilable, and yet contains the solution of the problem.[19]

If this *social* object is the *source* of the capitalist's power, then the legal relation between individual worker and capitalist does not serve to validate subordination and nor does the merely co-operative nature of the production process. The legitimacy of such subordination thus becomes a *social* question. *Auctoritas* is no longer a question of law, the contract to which the parties are bound, nor simply of the employer's position in the production process, founded on the nature of the process in which worker and employer are engaged. And so 'this is the moment in which the form of surplus value loses every legitimate relationship to those functions that the form bears: if the legitimating function of the law of value is not in force, organisation and command must be self-evidently valid.'[20] If the law (of contract) or the cooperative nature of the production process previously united and legitimated this extraction of surplus value, a fracture now begins

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[17]Marx, *Capital: A Critical Analysis of Capitalist Production*, 542. From Chapter 23 'Simple Reproduction'. Negri, "Paschukanis Lesen," 26.

[18]Marx, *Capital: A Critical Analysis of Capitalist Production*, 555. From Chapter 24 'Conversion of Surplus-value into Capital'. Negri, "Paschukanis Lesen," 26.

[19]:Marx, *Capital: The Process of Circulation of Capital.*, 264. From Chapter 15 'Internal Contradictions of the Law'. Negri, "Paschukanis Lesen," 27.

[20] Negri, "Paschukanis Lesen," 28.

to re-appear, for it is now a 'general social power' that underpins command. If supervision is now an 'always readily obtainable' element of the totality of capital and capital appears as a social force, then command becomes social, and valid not because of some quasi-natural right validity of contract, but rather self-evidently so. This goes to the root of the legal form and hence to the heart of so-called 'revisionist' arguments which seek to develop a theory of law on the basis of some eternal, legal 'private' of equally exchanging individuals: the individual (employment) contract no longer tells the full story. To the extent that this abstract supervision is a social power carried out by means of law, history enters the realm of *public* law, of the state intervening to secure the conditions of production and reproduction.[21] This is not merely Negri's gloss on *Capital*, it is argued here, for Marx himself was prepared to be explicit about this: 'The revolution effected by machinery in the juridical relations between the buyer and seller of labour-power, causing the transaction as a whole to lose the appearance of a contract between free persons, afforded the English parliament an excuse, founded on juridical principles, for the interference of the state with factories.'[22] The argument advanced in this thesis finds no difficulty in accepting the public legal ordering of work; however, receptions of Pashukanis other than Negri pay no attention to this crucial historical development, for their concern with finding the Marxist 'nature of law' leads them to prioritise the private law of contract. What Negri's reading of Marx also argues, though, is that law belongs to the 'inner essence' of the production of surplus *value*, in particular relative surplus value. As the contradictions inherent in the capitalist production process play themselves out, law (at times in the form of the fictional contract of equals, at times as pure public command) is the form of the particular historical extraction of surplus value. Marx argued that capitalist development will tend towards the creation of command as an abstract, impersonal social force, an understanding Negri also ascribes to Pashukanis.[23] In so far as it makes command into an independent stand-alone function, 'capitalist development drives the symbiotic organisation of the organisation of work and the command over work to breaking point'.[24]

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[21] Ibid., 29ff.

[22] Marx, *Capital: A Critical Analysis of Capitalist Production*, 374-5. Chapter 15 'Machinery and Modern Industry.'

[23] Negri, "Paschukanis Lesen," 29.

[24] Ibid.

For Negri, law is the process of valorisation. Command, the sovereign state of Austin's jurisprudence, is thus correctly identified by Pashukanis as the 'juridical tendency of capitalism' at what was *for Pashukanis* 'capitalism in its "highest and final stage".'[25] What needs to be done, however, is to follow through, as an historical/philosophical question, the relationship between law and the extraction of surplus value in the time since Pashukanis. The latter's merit is to have pointed towards the creation of value as the site at which a Marxist analysis of law must begin. Thus 'the Marxist analysis only begins to develop when the essential contradiction of the commodity form is realised in the form of labour that has become a commodity and thus in the form of the commodity 'labour power'.'[26] This is also the argument advanced thus far in this thesis, but Negri makes a further historical claim. A Marxist analysis of law must then subscribe to the theoretical position that law is the authoritative form of the social relation the purpose of which is represented by the production of surplus value, but also to the historical claim that that the development of capital after Marx moves tendentially towards the symbiosis of the organisation of labour and command over labour. Thus law 'cannot be simply deduced from the world of commodities, but rather from the law of value, from the functioning of the law of value, from its tendencies as well as its results'.[27] However, even this is not yet enough for Negri: 'the task isn't complete by defining the juridical norm as a moment of the world of commodities, by analysing the commodity form, binding it with the form of surplus value and reconstructing the process of valorization, it is not sufficient to identify the antagonism within the tendency, nor is it enough politically to set on the path of dissolving the antagonism.'[28] If, with Pashukanis, the legal form poses no less difficulty for analysis than the commodity form, and if the two must be approached as questions of value, then it must be asked how labour is organised so as to extract surplus, and from there can be understood the relative roles of command and contract. The inquiry must be as historical as it is philosophical. This is now very far from any simple reading of the 'form' of law from any generic commodity form. Or, to put it another way, if the 'commodity form' theory of law is able to draw a link between commodity form and legal form, it is only by understanding the particular commodity that is exchanged in the wage relation. For Negri, Marx's analysis and Pashukanis' methodology take us thus far and,

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[25] Ibid., 19.

[26] Ibid., 3.

[27] Ibid., 15.

[28] Ibid., 30.

despite his criticisms, Negri believes the Soviet jurist has provided us with a sufficient framework to understand contemporary legal developments. In 1977, at the time of writing this article, Negri considered that the domination of capital had 'collapsed into one' with state and juridical techniques. At the end of this chapter, it will be seen how this approach plays itself out in Negri's subsequent works. But before concluding this chapter by considering what has been learned about the status of our *FabrikLykurge*, there is one aspect of Negri's reading of Pashukanis which needs to be questioned, that concerning whether the difficulty of separating law's authority from capital's authority implies some kind of identity between them.

Law's authority and capital's authority

Does Negri's analysis completely do away with Agamben's structural tension between *auctoritas* and *potestas*? That is, does Negri lead to a point where the employer exercises a general authority independent of law, where command and organisation of labour are self-evidently valid and law irrelevant? To ask it another way, is the 'general social power' of capital the same as the 'abstract authority' Pashukanis identified as the basis of the capitalist state? At times, Negri appears to insist they are, as if one could merely speak of 'command' in the abstract. He reads Pashukanis through a Marxism in which priority is given to the question of value: capitalism as a system of relations *organises* itself around the extraction of surplus value, which can only occur because it requires an initial (and continually reproduced) forcible (i.e. through *command*) supervision of living labour. The real subsumption of labour by capital is the beginning of the organisation proper of extraction of relative surplus value. As seen above, initially command over the production process is found only within the production process itself, and the employment contract justifies subordination to the command of the employer, but later the necessity for command begins to inhere less in the contractual relation (which begins to lose its 'freely contractual' appearance) and more as a necessity of the production process. This labouring process constantly reproduces waged labour, but also capital as well as value. But this value increasingly appears as the abstract, impersonal and above all social force of capital, which stands even behind the individual capitalist. Negri now performs an interesting move. He retrieves Pashukanis as a writer 'within the question of tendency' by quoting him thus: 'The main bulk of capital becomes an utterly impersonal class force.'

This comment is made by Pashukanis in the course of his chapter 'Commodity and the Subject'.[29] Here much of the heavy lifting of Pashukanis's commodity-form theory is performed: starting from a critique of Hegel's conception of personality, Pashukanis moves to the reading of Marx discussed above, and concludes with Marx's quotation reproduced there from *On the Jewish Question* regarding the abstraction of citizenship. But the import of Negri's quotation from Pashukanis is the recuperation of the latter for the identity between command exercised by capital and command exercised by public law. This is a significant question since it goes to the heart of Pashukanis' understanding of authority: Negri is enlisting Pashukanis in support of an argument that capital as social power is the *auctoritas* that also stands behind the *potestas* of law. It cannot be denied that Pashukanis speaks in almost identical terminology in this chapter of the 'abstract, impersonal legal subject' and its equivalent in the form of the 'impersonal abstraction of state power functioning with ideal stability and continuity in time and space', the latter arriving at a certain moment of development of productive forces.[30] However, returning to the question of the guarantee, Pashukanis does not identify the 'impersonal abstraction of state power functioning with ideal stability and continuity in time and space' with the abstract power of the basic mass of capital, but rather the rise of regulation at the expense of the armed individual who enforces transactions themselves. Thus the latter's 'personal energy is supplanted by the power of social, that is, of class organisation, whose highest form of expression is the state': it is this abstract ability to enforce which forms the basis of the state's 'impersonality'.[31] For this reason, Pashukanis then immediately draws the distinction between the practice of exchange, from whence law originates, and the development of abstract enforcement: 'before calling on the machinery of the state, the subject depends on the stability of organically-based relationships.'[32] He thus approvingly quotes 'Harirou, one of the most astute bourgeois jurists' as rightly emphasising 'reciprocity as the most effective security for property, which can be brought about with the minimum use of external force.'[33] Capital's development to a certain stage - its appearance as a social force - enables this external force, this abstract authority, but capital is not this abstract authority itself. *Contra* Negri, Pashukanis' abstract state

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[29] Pashukanis, *Law and Marxism: A General Theory*, 129.

[30] Ibid., 115, 19.

[31] Ibid., 115, 18.

[32] Ibid., 115, 19.

[33] Ibid., 115, 23.

authority exercises force not analogously to the force of capital, but to the armed individual who would resolve disputes through self-help.

In fact, Pashukanis' description of capital as 'utterly impersonal class force' relates to the development of the joint-stock company, and its ability to separate ownership from daily control of the production process. It is here that the juridical form of property 'no longer represents the real state of affairs' since now 'actual dominance extends far beyond the purely legal framework.'[34] Here is the realm of monopolies and combines, a kind of organisation prevalent before and during World War I 'when private capitalist and state organizations interlocked to form a powerful system of bourgeois state capital.'[35] This bulk of capital, referred to in Negri's quotation, whilst being an 'utterly impersonal class force' is nonetheless also 'in reality controlled by a relatively small group of the largest capitalists.'[36] Whilst their developments are coterminous, the 'bulk of capital' is not the abstract force of the state.

The context of the Pashukanis quotation excerpted by Negri is thus in fact capable of an alternative reading: Pashukanis draws a distinction between the economic force of developing capital, which manifests itself in production relations, greeting workers abstractly, and the abstraction of the state *qua* guarantor and decider of the lawsuit, in which the state appears as abstract enforceability of exchange relations. As the examination of Pashukanis' subsequent chapter *'Law and the State'* showed (Chapter 5 'The law-giving talent of the factory Lycurgus'), he squarely addresses this question of the relationship between the force of the state and that of the capitalist: law arises from the lawsuit, and also becomes the guarantee by which exchangers know that they will have secure title. In its capacity as organised force, the state and law only appear to keep the peace where contract has been breached. This is the impersonal force of the state, *which by definition cannot be exercised in 'free' civil society*. Pashukanis, in other words, reserves for himself something in the command of the legal form that exceeds the command of capital.

For Pashukanis, capital's 'utterly impersonal class force' comes at a stage of developed capitalism that contained the seeds of socialism, but more importantly for the argument here he also saw in it implications for legal subjectivity. If in 'the rosy dawn of its

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[34] Ibid., 115, 29.

[35] Ibid.

[36] Ibid.

evolution, industrial capitalism surrounded the principle of legal subjectivity with a halo', this new form of capitalism could lead bourgeois jurists to conclude later that the principle of legal personality was no more than a 'technical determinant' or a 'speculative hypothesis': in words that resonate with the contemporary debates, Pashukanis notes that legal subjectivity was being criticised from the standpoint of monopoly finance capital, and thus an American jurist could conclude in 1924 in an article titled *'Enemy Property in America'* that 'the individual's rights to life, freedom and property have no absolute or abstract existence.'[37] Although it must necessarily be historicised, it is important to hold on to the fact that Pashukanis attaches significance to the state issuing injunctions to an abstract citizenry *in the category as other than worker*. This is the import of *On the Jewish Question*, and the reason Pashukanis ends his excursus on *'Commodity and the Subject'* with the same quotation from Marx that formed the basis of the analysis early in this thesis.[38] The address of the state is not the address to the subject 'in his individual work'. There is something significant about being addressed by law, and being addressed as if it were a different address from that of the employer. Contrary to one possible reading of Negri, then, the argument in this thesis retains *for an analysis of subjectivity* in contemporary conditions the fracture between the constitution of command as command of law and as the command of work. The notion of 'the legal subject' is a motif of Pashukanis' work: for him, the contract isn't just the legal expression of capitalist relations, it creates the legal subject. Negri's critique of so-called revisionist readings of Pashukanis is apposite, but comes at the price of overlooking this one key contribution. This argument forms the basis of the analysis in the following two chapters. Before that argument can be pursued, it is necessary to map the various constellations of law and labour referred to so far in this thesis and then, through a reading of Hardt and Negri, consider developments during the course of the twentieth century.

Law, command, authority and value

The following table distils schematically what has been argued so far about the shifting relations between law and labour:

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[37] E.A. Harriman quoted in Ibid., 115, 30.

[38] 'Only when the real, individual man re-absorbs in himself the abstract citizen, and as an individual human being has become a *species-being* in his everyday life, in his individual work, and in his particular situation, only when man has recognized and organized his "own powers" as *social* powers, and, consequently, no longer separates social power from himself in the shape of *political* power, only then will human emancipation have been accomplished.' Marx, "On the Jewish Question," 234. Marx, 1992 #212@234}

Table 1

Mode of domination of labour	**Authority of domination of labour**	**Law's relation to domination of labour**	**Authority outside the domination of labour**
Master/slave	Authority is personal. Theological and legal justifications of authority.	Slavery as legally defined condition of subordination.	Theological/social justifications of authority.
Lord/bondsman	Authority remains personal. Theological and legal justifications of authority.	Domination as socially and legally defined condition of subordination.	Theological/social justifications of authority.
Formal subsumption I	Personal authority is weakened.	(Public) law enforces labour (e.g. vagrancy laws, laws mandating work). Direct force.	Development of non-theological justifications.
Formal subsumption II	Authority stems from payment for product.	Law of contract legitimates command necessary for extraction of surplus.	Guarantee of exchange coalesces as 'the state'.
Real subsumption I	Authority stems from payment for labour.	Law of contract legitimates command necessary for extraction of surplus.	The state and law embody guarantee of title and exchange and dominate the citizen/legal subject as 'abstract authority'.
Real subsumption II: simple cooperation	Authority stems from apparent need of employer to command production process.	Law of contract begins to lose legitimating function.	The state and law embody guarantee of title and exchange and dominate the citizen/legal subject as 'abstract authority'.
Real subsumption III: monopoly capitalism	Authority stems from the social power of capital that stands behind the individual capitalist.	Work loses appearance of legal relation and private law does not justify extraction of surplus.	The state and law embody guarantee of title and exchange and dominate the citizen/legal subject as 'abstract authority'. Beginning of decline of legal subjectivity.

There shouldn't be too much weight put on this heuristic attempt to summarise such vast historical and theoretical material. It is provided as an aid to guide the argument here, but also highlights something to which the Marxist study of law has often been blinded. It is immediately clear from this rudimentary summary that the cell-form of the labour contract represents only a particular moment at which the identity of command in the

labour process is located solely with the employer, and where the tendency to 'externalise' command is not yet fully developed. In this instance, private law legitimates surplus value: contract legitimates command. However, this is but a moment in the development of the tendency. Increasingly, as work becomes more co-operative and the command of the employer seems to arise from the production process itself, not from contract, as capital becomes an external, abstract social force, and as external command begins to be exercised over both the organisation of production of surplus value (e.g. by being concerned with reproduction of labour power) and in the form of intervention by the state into the production process itself, it becomes less tenable to legitimate command over labour purely by means of contract or the nature of production itself. Those who come after Pashukanis err not only because they see contracts in general, as opposed to the labour contract, as the basis of the legal form, but also because this moment where contract legitimised surplus only had a short-lived existence: they treat this snapshot of a tendency in motion as an event in which an institution is instantiated. The 'connection of organisation and force [*Gewalt*], of production and command,' hitherto achieved by private law can only hold together its fragile unity for so long.[39]

The point at which Pashukanis concludes is also one in which tensions are beginning to emerge: the rise of the authority of the state appears to coincides with the rise of the 'abstract social power' of capital and the decline of the personal authority of the capitalist. The contract cannot legitimate command. And this also heralds the beginning of the decline of the legal subject, a point which appears to escape most commentators, who write as if Pashukanis described a fully formed legal subject to correspond with advanced commodity development, and as if there were some tendency towards perfection of the legal subject under capitalism.[40] Not only has history surpassed the period of the labour contract as *Grundnorm*, but even the last entry on the above table is already hopelessly out of date, taking the analysis only to the start of the twentieth century. The events that have occurred during the twentieth century have involved radical reconfigurations of law, authority and value. Negri's later work, co-authored with Hardt, is expressly concerned with theorising these events. Seeking to understand the configurations of sovereignty under contemporary capitalism, they begin their best-known work, *Empire*, with an analysis of emerging national and supra-national legal

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[39] Negri, "Paschukanis Lesen," 21.

[40] Head is attentive to this point, but does not draw out its theoretical implications: Head, *Evgeny Pashukanis: A Critical Reappraisal*, 232ff.

forms. The rationale is straightforward, as foreshadowed in Chapter 3 above: 'Juridical concepts and juridical systems always refer to something other than themselves', that is, they gesture towards the 'material condition that defines their purchase on social reality.'[41] Prior to *Empire*, they had considered the question of legal forms and juridical theories in some detail in a collection of essays on the state-form.[42] *Labor* of *Dionysus: A critique of the state-form* announces in its title an acceptance of the refusal to think of the state as subject. Rather:

> law and the state can only be defined as a relationship, a constantly open horizon, that can certainly be overdetermined but the essence of which can always be, and is, brought back to the dynamic and the phenomenology of the relationship of force between social subjects. In the second place, there is nothing in the realm of law and the state that can be pulled away from the plane of the most absolute immanence - neither a first foundation, nor a table of natural rights, nor an ideological schema, nor even a constitutional paradigm. Just like money, law (which repeats in the capitalist system many of the figures assumed by money) carries no values that are proper to it, but only those that social conflicts and the necessities of the reproduction of capitalist society, its division of labor, and exploitation produce every day. The invariable element of the ideological function of law and the state is always less real than the variable elements that constitute its present consistency, its continual contingency. In this sense, it is completely unreal.[43]

Although mentioned very infrequently, Pashukanis remains present in Hardt and Negri. Indeed, they profess to be 'profoundly indebted' to him and 'adopt and develop [his] thought and his clear formula "right equals market".'[44]

Hardt and Negri's reading of Spinoza has them proceeding from an ontological divide between constituent and constituted power.[45] Constituent power is the Dionysian creative labour of humanity, the productive, generative activity of labouring humans:

> Labor appears simply as the power to act, which is at once singular and universal: singular insofar as labour has become the exclusive domain of the brain and body of the multitude; and universal insofar as the desire that the multitude expresses in the movement from the virtual to the possible is constantly constituted as a common thing . ... The common actions of labor, intelligence, passion and affect configure a constitutent power.[46]

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[41] Hardt and Negri, *Empire*, 22.

[42] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*.

[43] Ibid., 7.

[44] Ibid., 18.

[45] Negri's readings of Spinoza are elaborated further in Negri, *Insurgencies: Constituent Power and the Modern State*; Negri, *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics*; Antonio Negri, *Time for Revolution*, New York, London, Continuum, 2003.

[46] Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire*, Penguin Press, 2004, 358.

It is beyond measure, but continually subject to the attempts of constituted power to corral and assess it. Constituted power is thus that which attempts to deny, block or appropriate constituent power. Constituted power is parasitic in the way that Marx's capital is vampiric. However, constituent power is not merely labour bound within the factory walls, nor is it reducible to capital. One of their most significant breaks from orthodox Marxism is Hardt and Negri's refusal to distinguish on an ontological level between narrowly defined 'productive' and 'unproductive' labour, nor to reduce all labour to wage labour. They clearly intend to encompass within their understanding of creative labour all unpaid work associated with the reproduction of life. But this is then taken a step further: to the extent that power is exercised in common, constituent power encompasses the creative ways in which general social and political relationships are made and reproduced. 'Political' revolutions against the state, 'economic' revolutions in the modes of production and the struggles of the new social movements around questions of how life is to be reproduced are all capable of being understood as conflicts between constituent and constituted power.[47] The claim that the creative processes of labour exist outside the factory walls is, however, historically specific, and we have seen above the developments in this respect up to the start of the twentieth century. For Negri and Hardt, the history of the remainder of the twentieth century is a history of the total real subsumption of the labour process within capital, and the near-complete transition from the formal to the real subsumption of *reproduction of labour-power by* capital. Few spheres of life - work and 'outside of work' - are not in some way intimately bound up with valorisation. However, it is critical to understand how this has occurred, since only by so doing can one perform an analysis of law faithful to the spirit of Marx.

The steady real subsumption of the labour process within capital, towards the end of the eighteenth and the start of the nineteenth century, brought with it pressures associated with the reproduction of labour power.[48] Most notable was the growing strength of the working class and the real threat of revolution in Europe. Capital's response in part was to make reproducing labour power its own concern. Not something that could be done by any individual capitalists, the reproduction of labour power increasingly became a question for the state. (In the Australian context, the rationale behind the setting of the

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[47] Hardt and Negri, *Empire*, Ch1.

[48] See Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, Ch 2; Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*; William E. Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Berkeley, University of California Press, 1996.

minimum wage in the '*Harvester decision*' was to enable a worker to purchase sufficient basic commodities for him and his family to live in 'reasonable and frugal comfort'.[49] The state expressly acknowledged that wages should enable the proper reproduction of labour power.) As a result, class conflict about matters outside the labouring process began to become conflicts in and for the state. In Hardt and Negri's terminology, labour begins to appear in the constitution. This term 'constitution' encompasses the material constitution of society (in the sense that the constituent power is sought to be 'constituted' by constituted power at any given moment; the institutions and structures of rule) as well as the formal juridical structures of written constitutions and constitutional conventions and practices. In the early twentieth century, as Pashukanis was writing, many countries were faced with the threat of worker revolt. The response in some, such as Germany, was to concede some power to workers' movements. Importantly, this found expression not simply within specific pieces of legislation, but in the text of the written constitution itself. Thus the Weimar Constitution of 1919 provided that: 'The economy has to be organised based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured' (Article 151); 'Labour enjoys the special protection of the Reich. The Reich will provide uniform labour legislation.' (Art 157); 'The right to form unions and to improve conditions at work as well as in the economy is guaranteed to every individual and to all occupations. All agreements and measures limiting or obstructing this right are illegal' (Art 159); and 'The Reich advocates an international regulation of the rights of the workers, which strives to safeguard a minimum of social rights for humanity's working class' (Art 162).[50] Critically, the resolution of class conflict was a matter for the state: 'Workers and employees are called upon to participate, on an equal footing and in cooperation with the employers, in the regulation of wages and working conditions as well as in the economic development of productive forces. The organizations formed by both sides and their mutual agreements are recognized. ... The regulation of consistence and tasks of the workers' and economic councils, as well as their relation to other bodies of self-administration is exclusively a Reich matter.' (Art 165).

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[49] *Ex p McKay* (1907) 2 CAR 1

[50] Die Verfassung Des Deutschen Reichs ('Weimarer Reichsverfassung'), Reichsgesetzblatt, 1919, Nr 152, S. 1383-1418

The founding document of the Weimar Republic thus acknowledged collective subjectivity and manifestly *did not* reduce workers and capitalists to abstractly equal atomised citizens, nor did it absent itself from intervention in core questions of production and reproduction of capitalist social relations. Indeed, as Neumann and Kirchheimer noted, labour was a source of legitimacy for the Weimar Constitution.[51] However, as Benjamin observed in 1940, in his eleventh thesis on the philosophy of history, these social democratic pacts miss the fundamental point made by Marx in *Critique of the Gotha Programme* that labour is not the same as labour-power.[52] Although the Third Reich suspended significant elements of the Weimar constitution, at no stage did the state retreat from its claim to manage production directly.[53] Further, and this is Benjamin's point, at no stage did labour as such disappear as a source of legitimacy for the Third Reich. This echoes the argument made in Chapter 4 above.

In the inter-war period, a new state-form also developed in European non-fascist capitalist countries, one which nonetheless shared similarities with its fascist counterparts. As the external fact of worker revolution became an internal threat, the state was reconstructed on the basis of the inherent antagonism of the working class. For Hardt and Negri, this moment pivots around the development of the Keynesian programmes of the 1920s and 1930s, whereby 'working-class political revolution could only be avoided by recognizing and accepting the new relation of class forces, while making the working class function within an overall mechanism that would "sublimate" its continuous struggle for power into a dynamic element within the system'.[54] Capitalism recognised the working class as an autonomous - but necessary - moment in its own reproduction. This autonomy is acknowledged in the Keynesian theory of effective demand and in the new-found role of the state in managing the level of demand. The state thereby took on the role of attempting to maintain an equilibrium between supply and demand, pivoting around the question of wages: 'Thus the task of economic policy is to dictate a continual revolution of incomes and the propensity to consume, which will maintain global production and investment and will thus bring about the only form of political

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[51] See Kirchheimer, "State Structure and Law in the Third Reich."; Neumann, "Labor Law in Modern Society."

[52] Benjamin, "Über Den Begriff Der Geschichte," 147-8; Karl Marx and Friedrich Engels, *Selected Works*, Moscow, Progress Publishers, 1968, 315-35.

[53] See e.g. Cole, 'Corporative Organization of the Third Reich'.

[54] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 25, 28, 43 & 45.

equilibrium that is possible ... it assumes class struggle, and sets out to resolve it, on a day to day basis, in ways that are favourable to capitalist development.'[55]

However, this requires a shift beyond the *Rechtsstaat* model where the state maintains a distance from law (i.e. the rule of law) and guarantees the rights of citizens. Rather as the state becomes more concerned with questions of the reproduction of labour power, the contradictions of the factory are necessarily diffused throughout society. The despotism of the factory is now organised socially, for Hardt and Negri.[56] This requires a rethinking of the sources of legitimacy of the state, a state which now opens itself onto a terrain of perpetual class conflict. In so far as it is concerned with questions of legitimate foundation of the state, juridical thought has to be reordered. The imbrication of foundational legal documents with the material reality of the production process reflects this reordering. Negri thus reads the first article of the Italian constitution of 1948 - which announces that 'Italy is a democratic republic founded on labour' - as a continuation of this increasing presence of labour in the constitution. Labour 'provides an existential foundation for the order of power that can be juridically organized in the formal constitution, animate this constitution as a motor in its implementation (and as a limit to its revision), and give meaning and unity to this ordering.'[57] It is of course Marx's *abstract* labour that is recognised as the source of the formal and material constitution, but labour nonetheless. For Negri, the first half of the twentieth century is thus a history of the state moving from the *Rechtsstaat* which guarantees rights of individuals through to the planning state (or social state), which attempts to directly co-ordinate production and later legislates directly in the area of the reproduction of labour power. This overview of a long period of conflict within many nations necessarily does violence to history and to Negri's extended analysis.[58] However, it serves to underlie one fundamental point: almost as soon as the ink was dry on Pashukanis' work, law was already following Marx into production's hidden abode.

From the above, it is argued here, it now becomes necessary to revisit the movement Pashukanis considers essential to an understanding of law, namely that identified by Marx where the state abstracts itself from the process of production and law is presented as abstract formal equality. For Hardt and Negri, in a directly opposed movement, the

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[55] Ibid.

[56] Ibid., 44.

[57] Ibid., 55, 66.

[58] See Ibid., Chs 2-5.

social state no longer avoids class conflict nor does it shy away from recognising material inequality. This is because separation is not a movement completed 'once and for all' - nor does it result in a state with a separate autonomous essence. Rather, Pashukanis' was a specific historical event, subject to continual reproduction and one which does not necessarily persist throughout capitalism. The relation of law and production to abstraction is contingent. A key characteristic of this social state or planner state is that it intervenes into social relationships (of production and reproduction) and seeks to reconfigure them. In contrast to the *Rechtsstaat*, the social state is not merely a guarantor. Its stance in relation to legal subjects is not to guard them from abuse or preserve them through guarantee, but instead: 'Law, as a means of intervention, is restructured by the state's needs and configured as a "plan" of the construction of social order and the repartition of what is produced in society. Law is cast as a means toward the recomposition of contrasting interests.'[59]

The changing relationship of right to labour is seen in the case of labour law. Prior to the development of monopoly capitalism, labour law consisted of a series of potentially punitive sanctions against workers, attempts to outlaw workers' combinations and the wage relation as merely another contract.[60] Class struggle in the arena of the law took the form of restrictions over the length of the working day and rights to organise: '[R]epressive action on one side, preventative intervention on the other.'[61] The notion of right tied to the idea of labour - labour both as source of right and as requiring organisation by legislation - develops when capital and state institutions begin to take upon themselves the task of ordering production and relations of reproduction. The legal acknowledgement of collective bargaining, for example, under the guise of a superintending state authority, or the establishment of wages and conditions within industries, the granting of worker representation on factory works councils or the ability to dictate how an undertaking will be managed so as to meet certain minimum standards, are all typical of this kind of 'labour right' under the planner state. What characterises this notion, it is argued here, is the legitimacy of conflict. It is accepted by all participants in the labour arena that there will be differences of interest; it is also accepted that it is legitimate for this competition to be mediated and resolved by the state. Collective agreements, for example, become collective agreements recognised by the state. The

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[59] Ibid., 72.

[60] See Ch 3 above and also Macken et al., *The Law of Employment*, Ch1.

[61] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 81.

system of collective bargaining is enshrined and is then able to be repeated indefinitely, but so is its mediation and resolution: this is what the state is for. Labour is thus not only regulated by law, but is also a source of the normative foundation of law: recalling the arguments advanced in Part II, it is argued that the labour relationship now becomes a ground of law.

The first step in this new production of right lies in recognising the productive relations of capitalism as legitimately conflictual. But as the state increasingly concerns itself with questions of the reproduction of labour power, this conflict spreads into other spheres of life (e.g. housing, education). The second step then lies in creating a system of law adequate to this perpetual motion of conflict. Increasingly, a sophisticated procedure for temporarily resolving such conflicts - as well as the outcomes it produces - becomes a source of the legitimacy of the law and state. To return to the example of labour law, this reaches its apex when the conflicting subjects are recognised (e.g., trade unions, employer associations) and engage in a series of negotiations to determine wages (the price of labour power). What was routinely referred to as 'the IR club' in Australia - a system of labour organisations and peak bodies determining wages and conditions before an arm of the state, pursuant to legislative direction and subject to the overriding proviso of acting 'in the national interest' - epitomises the synthesis of the procedural character of right and the recognition of the legitimacy of conflict.[62] Of course, if anyone ever refused to act in 'the national interest' - exercising the violence of a strike, for example, or refusing to accept a 'just' offer - there remained coercive methods of keeping the machine functioning. Strikes could be broken by law: arbitrated outcomes would be imposed in the absence of agreement. However, these were exceptional measures that did not weaken or alter the system, but merely ensured its functioning.

If the argument advanced in previous chapters is right, then the *Gewalt* of the labour relationship *qua* ground of law will necessarily affect law's self-understanding. On the one hand, the acknowledgement of labour as foundation serves to resolve a number of problems for legal thought. If this question of providing a foundation for the exercise of transcendent sovereignty had been resolved hitherto by either contract or reason, labour instead offered an ontological and apparently immanent foundation for a rational system of legal ordering.[63] On the other hand, however, if Hegel and Kant were the 'guardian

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[62] On the denigration of this 'IR club', see Des Moore, "The Role of the CAI in the Regulation of Australia," in *HR Nicholls Society annual conference* (Sydney: 1990).

[63] Hardt and Negri, *Empire*, Ch2.1.

spirits' of the 'era of security' - where the social order outside the state could be securely presumed, with the question of the ordering of the state revolving around how to perfect this juridical order - the irruption of working class activity directed *inter alia* against the state ended this era and created a 'crisis of sources.'[64] Furthermore, the state now mediated class conflict, and its hitherto developed tools were not necessarily the most adequate: 'Law is general and abstract; the social management of labour-power imposes material and concrete measures. Law legislates over the immutable and typical continuity; sociality is a continuously mobile situation and requires commands that are adequate to this situation.'[65] To the extent that law and systems of juridical ordering previously necessitated a grounding in transcendentals or were merely systems of positivism without foundation, the founding of an order on labour had profound consequences, and the 'conditions of sovereignty of law' disappear.[66] Although the role of the social state as mediator and resolver of conflict means that the mechanisms of law are spread across society, law is increasingly judged by its ability to resolve conflict, its ability to keep in check conflicts in the hidden abode of production.

This period of the planner state/social state is also the period of the tendency towards the total real subsumption of labour by capital.[67] Capital 'really' subsumes labour by incorporating the reproduction of labour-power into circuits of valorisation, whether in production (e.g. work becoming increasingly immaterial and concerned with knowledge, affective and immaterial labour etc) or consumption (e.g. the commodification of communication).[68] From one perspective, this is remarkably 'similar to Deleuze's discovery in Foucault of the epoch of the 'society of control': indeed, the power that reproduces labour power is for Hardt and Negri *biopower*, 'a form of power that regulates social life from its interior, following it, interpreting it, absorbing it and rearticulating it. Power can achieve an effective command over the entire life of the population only when it becomes an integral, vital function that every individual

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[64] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 84. The Hegel of Negri and Hardt is the one that presumes the established control over labour underpinning the philosophy of the state. Unlike Hardt and Negri, this thesis poses this control as something always to be accomplished, not a *fait accompli*.

[65] Ibid., 90-91.

[66] Ibid., 91-92.

[67] See too Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State*, Aldershot E. Elgar, 1988; Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*.

[68] See further Nick Dyer-Witheford, 'Empire, Immaterial Labor, the New Combinations and the Global Worker', *Rethinking Marxism*, 13, no. 3and4, 2001, 70-80; Hardt and Negri, *Multitude: War and Democracy in the Age of Empire*, Ch2; Paolo Virno, 'General Intellect', *Historical Materialism*, 15, 2007, 3-8; Virno, "Notes on the General Intellect."

embraces and reactivates of his or her own accord ... Biopower thus refers to a situation in which what is directly at stake in power is the production and reproduction of life itself.'[69] And with Foucault: 'subjectivity must be grasped in terms of the social processes that animate the production of subjectivity. The subject, as Foucault clearly understood, is at the same time a product and productive, constituted in and constitutive of the vast networks of social labor. Labor is both subjection and subjectivation.'[70] More will be said on the adequacy of the concept 'biopower' in later chapters, but now it is important to register that what distinguishes this autonomist Marxist formulation from the Foucauldian conception is its place in the trajectory of the real subsumption by capital of life outside the workplace. This occurs under a mechanism of *command,* where the techniques of industrial management follow the spread of control over the reproduction of the relations of production. Conflicts with capital hitherto confined to the workplace are now refracted throughout life in the 'society of control'. If the term 'society of control' captures the techniques of power, the other used by Hardt and Negri, the 'factory society', conveys the dispersal outwards of factory logic. Thus the factory can no longer be conceived as the paradigmatic site for the concentration of labour and production: 'labouring processes have moved outside the factory walls to invest the entire society ... the apparent decline of the factory as the site of production does not mean a decline of the regime and discipline of factory and production, but means rather that it is no longer limited to a particular site in society.'[71] The Keynesian form is thus characterised by an increased concern the state with questions of reproduction of labour power, and an increasing diffusion of capitalist imperatives to produce and reproduce into spheres of life outside of work. Under the Keynesian apparatus, disciplinary power slowly gives way to *biopower*.

If capital let the beast of living labour into the system in the first two-thirds of twentieth century century, it spent the last third attempting to expel it. 'The political a history of capital', Mario Tronti wrote in the early 1960s, is 'a sequence of attempts by capital to withdraw from the class relationship, 'or more properly "attempts of the capitalist class to emancipate itself from the working class, through the medium of the various forms of capital's political domination over the working class".'[72] Despite its best attempts, capital

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[69] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 24.

[70] Ibid., 12.

[71] Ibid., 9.

[72] Quoted in Ibid., 16.

can never flee labour, but it can certainly begin to act as if productive labour is no longer necessary. Following the crises of the Keynesian arrangement in the 1960s and 1970s - when the trinity of Taylorism, Fordism and Keynesianism ceased to guarantee political order and economic development - this has been the hallmark of the neo-liberal project.[73] This can be characterised by four factors, it is argued here: (1) consumption is no longer regulated by Fordist norms, but instead reverts to the laws of the market and a renewed individualism 'strongly conditioned by the collective structures of the social organization of production and communication'; (2) regulation becomes increasingly internationalised, undermining a basis of Keynesianism; (3) labour becomes increasingly automated; and (4) labourers become increasingly segmented and labouring becomes increasingly immaterial (e.g. in service sectors).[74] This resonates with Hirsch's predictions considered in Chapter 2. Labour's place at the table ceases to be guaranteed and it increasingly appears as if capital itself - through technology - creates value: 'Mechanical activity has completely eclipsed human labour-power so that society appears to be a self-regulating automaton, beyond our control, fulfilling one of the perpetual dreams of capital.'[75] The arguments of Jameson and Baudrillard - that consumption has become a realm detached from production - are familiar enough.[76] What is novel in Hardt and Negri is that it is linked with questions of the reproduction of labour power and, thus, the importance of the question of real subsumption.

The method of Hardt and Negri's argument can be compared here with that of Pashukanis. The latter effectively offered a hermeneutics of the legal subject, beginning with its cell-form, then identifying the abstractions necessary to an understanding of its specificity, and then proceeding to disclose the material base of these abstractions. In this method, Pashukanis is indebted to Marx: 'What Marx says here [in the *Grundrisse*] about economic categories is directly applicable to juridical categories as well. In their apparent universality, they in fact express a particular aspect of a specific historical subject, bourgeois commodity producing society.'[77] His argument proceeds through the

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[73] Ibid., 240. See too Clarke, *Keynesianism, Monetarism, and the Crisis of the State*.

[74] Cf Dyer-Witheford, 'Empire, Immaterial Labor, the New Combinations and the Global Worker'; Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 273-74.

[75] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 234.

[76] See e.g. Jean Baudrillard, *The Consumer Society: Myths and Structures*, London, SAGE Publications, 1998; Jean Baudrillard, *The Mirror of Production*, St. Louis, Telos Press, 1975; Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*, Durham, Duke University Press, 1991; Fredric Jameson and Masao Miyoshi, *The Cultures of Globalization*, Durham, N.C., Duke University Press, 1998.

[77] Pashukanis, *Law and Marxism: A General Theory*, 70.

sphere of circulation of exchange value: the cell-form of legal subjectivity (capacity to be bearer of rights) is dependent on abstract conceptions of right, which is in turn dependent on widespread commodity exchange, which ultimately rests on a commodity producing society.[78] Attributes of exchange value - equality and interchangeablity - move outwards from that most enigmatic bundle of capitalist relations - the commodity - to return in the guise of legal subjectivity. Hardt and Negri conduct a similar argument, but follow the obverse side of the relation. Their 'cell-form' is the relationship of command inherent in capitalist production, the discipline by which capital (as constituted power) extracts surplus from creative constituent labour. Where previously this was conducted within spatially and temporally limited disciplinary boundaries (e.g. the factory), with the (now complete) development of capitalist intervention into the reproduction of labour power, this cell-form burst its banks and attained a level of universality: 'Capitalist relations of production appear in the postmodern era to be a sort of social transcendental. Capital seems to have no other. Social capital is no longer merely the orchestrator but actually appears as the producer on the terrain of social production.'[79] The critical point in Hardt & Negri's analysis is that 'real subsumption' means that the relationship of command inherent in the disciplinary technique of factory production - not the abstract equality of the exchange relation - leaves the factory walls, takes root in biopower and returns in forms of subjectivity and right. Hegel's law-founding act is repeated, this time encompassing not just the act of labour, but also its reproduction. This subsumption of reproduction of labour power by capital, together with the increasing tendency of the state-form to rule over life by command instead of mediation, is characteristic of the post-Keynesian juridical ordering, or what Hardt and Negri call 'Empire'.

A legacy of the era of the social state was the slow spread outwards of questions of production to general questions of life outside of work, and also the ordering of these conflicts as conflicts for the law. That is, as the state took it upon itself to order production/reproduction, and its mediating capacity spread across new arenas of social conflict, the ensuing conflicts came to be understood as conflicts to be mediated by the state. However:

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[78] Thus Ibid., 118. 'Historically ... it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim. Only in commodity production does the abstract legal form see the light; in other words, only there does the general capacity to possess a right become distinguished from concrete legal claim. Only the continual reshuffling of values in the market creates the idea of a fixed bearer of such rights.'

[79] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 16.

> When capitalist economics is no longer constrained to portray labor as the primary social producer, juridical theory is similarly no longer constrained to pose labor as the material source of normative production. This shift in juridical theory, however, cuts two ways: on one hand, neglecting labor as the source of social and normative production frees the system from the central locus of antagonism and instability, but on the other it also deprives the system of its fundamental material point of support. Labor, specifically abstract labor, had served as the hinge that linked the formal constitution and the material constitution; it functioned as the *Grundnorm* on which the entire system depended for its validity. Since juridical theory can no longer rely on labor, it must discover an alternative solution to the problem of the unity, articulation, and legitimation of the juridical arrangement.[80]

To the extent that the procedure became a machine, abstracted from any real conflict and dealing only with conflict in its own image, so it becomes a 'theory of android justice', 'confirming Marx's intuitions about the role of machines in capital's phase of real subsumption' and taking them to 'an apocalyptic extreme.'[81] It is unsurprising, then, that law and justice come to be understood as a system (Luhmann) or primarily concerned with the distribution of rights (Rawls). Thus in the United States, the period under Reagan saw strikes met 'not with negotiations but a silent show of force and replacement workers'. Corporatist representation of labour suffered a decline and the clear message was sent: 'the social contract will not be founded on collective bargaining or any mediated balance between capital and labour typical of the Fordist political equilibrium.'[82]

Hardt and Negri recall that trade unions were critical both to Hegelian civil society and to the ordering and perfection of the state.[83] What is notable in their new postmodern configuration is that there is no 'civil society' to mediate. 'The state no longer has a need for mediatory mechanisms of legitimation and discipline: antagonisms are absent (or invisible) and legitimation has become a tautology.'[84] Without legitimate conflict, there is no need to resolve or mediate and, hence, no requirement to engage with mediatory institutions: 'Not the state, but civil society has withered away!'[85] To the extent that institutions of civil society exist they have been subsumed within the state. That is, they are images of conflict made by and suitable to the state: real (class or other social) conflict is excluded from the system. It is not mediation of conflict that characterises the

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[80] Ibid., 226-7.

[81] Ibid., 234.

[82] Ibid., 241.

[83] Cf Michael Hardt, 'The Withering of Civil Society', *Social Text*, 45, 1995, 27-44.

[84] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 239.

[85] Ibid., 29. See too Hardt, 'The Withering of Civil Society'.

postmodern state, but rather the separation of the state from the content of conflicts. While the postmodern conception of law may deal with the absence of its *Grundnorm* by treating law as a machine, with the machine's effectivity being its sole legitimating criterion, this machine works only if conflict is rendered illegitimate and absent. The state is not connected to conflict by the institutions of civil society, but separated from it and deals with it by *command*.

Saskia Sassen, echoing Hardt and Negri's analysis, charts with concern the rise of the executive as against the judiciary and of emergency powers over rational law as core elements of neoliberalism, as well as the subsequent invasion of privacy rights.[86] This thesis, however, broadly adopts Hardt and Negri's historical analysis and thus argues that it is a mistake to see the strong state of neoliberalism, with its rise of executive power, simply as a decline in the 'rule of law'.[87] On what basis, then, is legitimacy claimed for the juridical ordering of postmodern law? This separation itself becomes the *Grundnorm*: 'the postmodern state organises the separation of the state from society, pretending that this separation does not exist.'[88] The state's relationship to production then becomes one of command: it is concerned to ensure that production continues but without necessarily resolving any underlying class conflict. Hardt and Negri suggest that the question of

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[86] Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Ch4.

[87] Such critiques of the rise of the executive and the prominence of the emergency can at times appear to parallel debates taking place in 1920s and 1930s Germany, where Neumann and Kirchheimer were engaged in a complex oppositional relationship with Schmitt: See Neumann and Kirchheimer's contributions reproduced in Parts I and II of Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*. As Schmitt developed a jurisprudence that justified the authoritarian overriding of the legislature and indeed the constitution, the Frankfurt school theorists sought instead to retain the crucial elements of the rule of law. Kirchheimer accepted Schmitt's charge that, *pace* Weber, growing *ad hoc* state intervention posed challenges to the universal character of the liberal rule of law, but challenged the assumption that rational legality was incompatible with the modern parliamentary state. Neumann defended constitutionalism of equal rights with a twofold move: first, the equality extended to substantive social and economic equality; secondly, this principle bound not just those who apply the law, but the legislature that makes it. The 'rule of law', that is, therefore embodied a radical equality that was threatened by an overweening state that saw itself as above that rule. For Neumann and Kirchheimer, their supremacy of the legislature in the Weimar republic was thus simultaneously a rejection of fascism and the development of a 'social rule of law' that justified radical social-democratic state intervention into the economy. It is precisely this factor, however, that means one must approach with caution those attempts (like Scheuerman's) to recuperate Neumann and Kirchheimer for an analysis of today's situation, to believe that one can ahistorically assert 'human rights' or the 'rule of law' against the strong executive state of neo-liberalism: cf Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, Introduction, Conclusion. Theirs was in fact a defence of a strong state that would intervene in all spheres of society under the rule of social equality. It has been set out above, though, which route ultimately was taken out of that impasse, *viz* the strengthening of state ordering of the reproduction of labour power and the subsequent reseparations of the state from labour. More useful than following Scheuerman's suggestion of attempting to reclaim Neumann and Kirchheimer in defence of an abstract 'rule of law' is assessing their critique of the period of the welfare state, which will be done in the next chapter. For the rise of the executive power of the state charted by Sassen and Hardt and Negri, it is argued here, is not aimed at incorporating labour and grounding itself there, as in the opening decades of the twentieth century, but expelling it.

[88] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 297.

sources - put into crisis during the transition to the planner state - is no longer in issue in the new schema: if the social dialectic is presented as transcended, then the question of the state's relationship to it disappears. In the Weberian sense, questions of legitimacy appear as 'an extreme figure of the rationalization of power.'[89] In *Empire*, this thesis is developed further at the supra-national level. Empire's system of juridical ordering: a) presumes the continued functioning of capitalism; (b) has the capacity to intervene in exceptional circumstances when the machine breaks down; and (c) is legitimate if its interventions are effective.[90]

This provides the proper framework for understanding the resurgent interest in 'emergency'. Agamben locates exceptionality at the heart of sovereign power, and current state practice is simply power revealing its essence. Head (above) rightly notes that Pashukanis saw emergency rule as a necessary element of the bourgeois state, but he fails to provide any explanation as to why it has made a reappearance. Naomi Klein correctly notes that capitalism uses emergencies to break apart existing entitlements and create new markets, yet does not attempt to theorise this.[91] Jacqueline Best importantly begins to reintroduce Agamben's work to neo-liberalism, but to argue that 'the economy often works as an exception to politics as usual' is to unhelpfully maintain a distinction between the two spheres and fail to recognize their complicity form the beginning.[92] And Chapter 5 considered the problems with Ziarek's attempts to connect these spheres *via* Agamben. Bonefeld begins to draw the connections between capital and emergency, arguing that the rise of the repressive apparatus of the state under the guise of emergency rule is a necessary element of currently functioning markets.[93] But this thesis argues more than this: emergency is the appropriate form of government for a state that is in the process of separating itself from labour:

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[89] Thus the 'juridical obligation, which in the history of political thought is always formed as a mediation of consensus and authority, no longer constitutes the problem: postmodern democratic legitimation is the perfect synthesis of consensus and authority. If deviant or antagonistic social practices emerge, they are included in the notion of criminality. Outside of the law of the pacified society, they are only pathology and terror. As for power, it can only be defined in a democratic sense, simply, democratic; nothing exceeds, nothing can exceed the democratic rationality.' Ibid., 270.

[90] See too Wendy Brown, 'American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization', *Political Theory*, 34, no. 6, 2006, 690-714; Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics*, Princeton and Oxford, Princeton University Press, 2005, Ch3; Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire*, Princeton, N.J., Princeton University Press, 2006, Ch4.

[91] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*, Camberwell, Vic., Allen Lane, 2007.

[92] Best, 'Why the Economy Is Often the Exception to Politics as Usual', 99.

[93] Werner Bonefeld, 'Democracy and Dictatorship: Means and Ends of the State', *Critique*, 34, no. 3, 2006, 237-52.

> the juridical innovations of the Keynesian state, from the recognition of social subjects as immediately agentic subjects on the juridical level to the proceduralization of normative relationships, are eclipsed and suspended through the crushing blows of the emergency policies and the exceptional interventions that effectively transfer the procedural techniques of the formation and execution of the law from the social and contractual terrain to the administrative, state terrain. The weakening of social subjects goes hand in hand with the reinforcement of an administrative arrangement of society that while presenting itself as procedural is really systemic. In social law the postmodern state appears increasingly as a true and proper police state while the police appear as the supreme administrative system.[94]

This thus returns full circle to the primacy of Benjaminian and Derridean police power. The nexus between social accumulation and legitimation is shattered.[95] The new juridical order assumes that no conflict is legitimate and presents itself as if conflict doesn't exist, but because conflict never actually disappears policing is necessary to keep it from disrupting the system. The effectiveness of the policing itself becomes a source of legitimacy. To continue the schematic understanding, the continuation of the above table is represented thus:

Table 2

Mode of domination of labour	**Authority of domination of labour**	**Law's relation to domination of labour**	**Authority and guarantee outside the domination of labour**
Real subsumption IV: The social/ planner state	Abstract labour is foundation for material constitution.	Public law justifies command over labour whilst simultaneously ordering its performance.	State guarantees entitlements of labouring (and non-labouring) subjects.
Real subsumption V: The strong state of neoliberalism/ the 'postmodern' state	Necessity of capitalism.	Public law retreats from ordering of labour process.	Law guarantees continued existence of capitalism.

This is now quite some distance from the simple suggestion that the legal form can be read directly off the commodity form. When considering the above table, it must be stressed that there is no absolute progression from one stage to the next, and these are distinctions that are required to be remade. But this thesis 'updates' what has been missing in Marxist legal theory. The thread which ties together the investigation is the rethinking of the separation between the command of work and command outside of

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[94] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 299.

[95] Ibid., 202.

work, and the interrogation the relationship between law, authority, guarantee and value. In so doing, Marxist legal enquiry has been brought it into a position where it can properly engage with the questions occupying contemporary political and legal thought. Indeed, by taking this route, it has returned to the very question of emergency, and the relationship between force and the rule of law.[96]

Inside/Outside

By way of conclusion to this Part III, it is useful to summarise the argument advanced here and consider some of the criticisms levelled at Hardt and Negri. This chapter has argued that whilst it would be unfair and unhelpful to follow Negri and call them 'revisionist', it cannot be doubted that certain readings of Pashukanis, epitomised by Miéville, have embarked on a critique of law on the basis of hypostatisation of both surplus value and the law of contract, as if there is one fixed method of extracting the former that results in one distinct structure of the latter. This approach tends to carry with it an unproblematic separation of private law from state law, of force within the relations of production from force external to it, an approach which leads Miéville into the difficulty of locating 'force' in relation to law, a dilemma which mirrors that of Austin when he tries to locate the source of authority in relation to the command of the employer. This thesis thus far has dismantled this apparatus and reassembled it around questions of *Gewalt*, authority and value, thereby taking seriously the question of the factory Lycurgus and beginning to lay the foundations for a new Marxist analysis of law that does not devolve to notions of base and superstructure. The ability to *guarantee* a transaction in the face of challenge has been seen to be a key element of authority. Prior to the development of a systematic recognition of title, the author themselves would be called in personally to guarantee. This authority of the *mancipio dans* is precisely what Pashukanis refers to when he says that an initial sense of authority becomes fully separated into its public and private components when guarantee of title, in the absence of the ability to call the *mancipio dans* in aid, becomes an essential element of production. This is why, for Pashukanis, the morphological equivalent of the abstract force of the state is the armed individual who secures their own transactions, not the 'abstract' social force of capital. Pashukanis and Agamben argue the same point with

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[96] Indeed, if *pace* De Angelis law is the act following an enclosure of commons, or often enclosure itself, a verb ripe with territoriality, what better technique for enclosure is there than the fluid topologies of exceptionality? Massimo De Angelis, *The Beginning of History: Value Struggles and Global Capital*, London, Pluto, 2007, 80.

respect to guarantee: it is not 'originally' something belonging to either public or private realms, but rather something that stands in an original relation to law, which relation is then itself refracted into 'public' and 'private' components. This is in fact the key insight of Pashukanis' insistence on the close proximity of self-help to law, of robbery to trade, of the violent state to the *Rechtsstaat*: it is not a banal claim that law can be violent, but rather an insistence that guarantee is always a foundational element of authority and, as there is an expansion of the institutions of economic relations requiring guarantee, so too does the configuration of authority change.

This and the preceding chapter thus have demonstrated that the question of the force of law is not merely a question of coercion, but of *authority*. Philosophically, authority is not reducible to law but, on the contrary, exceeds it and is able to authorise legal acts. An author's authority appears to stem in part from their person, but just as often it is because they have been authorised by another author obliged to guarantee the first author's authority. This relation of authority to law is not confined to the sphere of 'public' law: on the contrary, its structure pervades authority and law as such. The machinery of authority and law is capable of numerous configurations. So, if with Negri law is the authoritative form of the social relation whose end is the production of surplus value, then, rather than start from a presumed separation between employer and state, what becomes interesting for the Marxist analysis of law is to study how authority and law are configured in regards to the wage relation, and to then tease out the connections between 'private' and 'public' authority.

As to *law*, Part III thus has continued to argue that there cannot be posited some simple boundary between commodity form and legal form. Rather, the enquiry must proceed in the following order: first, it is necessary to understand the particular historical method of organisation of the relations and conditions of production. Second, understand the manner by which these relations are authoritatively represented and guaranteed, something which may or may not involve law. Third, to the extent that law exists in this sphere of authority, discern the particular relationship between law and authority, recognising the possibility that (a) authority's foundation may be economic, having nothing to do with law, and (b) law's foundation can have a contingent relation to authority, but (c) although the operation of law and authority may coincide, this does not mean they are the same: the address from the author is not the same as being addressed by the law. Within this dynamic framework, Pashukanis is seen not as insisting upon a 'once and for all' relation between the commodity form and private law, but rather

expressing a snapshot of an unfolding system of production, law, guarantee and authority.

So, in today's situation, what is now the foundation for authority of domination over labour? It is something like the era of simple co-operation, where the authority for command over labour appears to spring merely from the need for such a vast process to be commanded. But herein lies the dilemma for a coherent system of labour law: on the one hand, as affective labour becomes more prominent and as domination becomes a question of control and biopower, it becomes increasingly apparent to the labourer that the source of value is located within themselves; on the other, precisely because domination has become networks of control, perceived differences between the inside and the outside of the system diminish. Law itself only offers a minimal justification for the exercise of domination. None of the previous justifications are sufficient, so the foundation becomes the social system of production itself. A logical consequence of Hardt and Negri's approach is thus the assertion that there is no longer an 'outside' which can act as the ground of the postmodern legal system. Whereas labour used to be an important external social referent that could ground formal and material constitutions, the shift to postmodernism includes the bringing of (predominantly affective) labour inside the system of interchangeable values. Negri is explicit on this point: he chastises critical legal studies for failing to understand the radical challenge this poses to 'oppositional' legal theory, and calls for the development of a new jurisprudence that is able to grasp the collapse of production into exchange value.[97] Agamben's reversion to use is likewise criticised for its lack of understanding that '[i]f there are only exchange values, it is with them that we must reconstruct the world.'[98] There is no return to any use outside of exchange; rather, we must break through the other side of Empire, submitting the world of exchange values to production, using our creative labours within this 'world of commodities, or reified things and bodies' to construct a new commons.[99]

Some criticisms of Hardt and Negri's approach must be addressed before proceeding to examine these questions further in the next chapter. Fitzpatrick turns Hardt and Negri's argument back on themselves: if Empire's new system of labouring, production and circulation admits of no 'outside', then what is the ground of any new system of right

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[97]Antonio Negri, 'Postmodern Global Governance and the Critical Legal Project', *Law and Critique*, 16, 2005, 27-45.

[98]Negri, "Giorgio Agamben: The Discreet Taste of the Dialectic," 124.

[99]Ibid.

produced by immanent constituent power?[100] Constituent power may be something like Benjaminian divine violence (a comparison that Hardt and Negri themselves draw), but immanent violence is not mythic and does not lend itself to establishment as constituted power.[101] And for Fitzpatrick, the very example Hardt and Negri take to exemplify boundless constituent power - the formation of the American constitution - is anything but radical immanence: it relied for its instantiation on the creation of a firmly demarcated people, the subjugation of others and reliance on transcendent authority.[102] Fitzpatrick is right: ultimately, despite its promise, *Empire* does not provide the same level of analysis of the juridical form as *Labor of Dionysus*. And for Fitzpatrick, the consequences are damning: despite Negri's indications elsewhere that the multitude is able to develop a law and jurisprudence of constituent power, the promise of immanence in fact turns out to be illusory. 'Empire and the multitude join their other manifestations as transcendent, constituted entities extending appropriately in the name of the constituent, making all immanent to them - a classic imperial combination. There is no awakening here.'[103] It is perhaps a little harsh to criticize Hardt and Negri for their recourse to a politics of rights claims (e.g. the right to universal citizenship, the right to a social minimum wage). Mobilisation in the language of rights hardly implies a *de facto* commitment to a *de jure* resolution of such claims, and Hardt and Negri themselves only offer these as tentative political strategies.[104] However, putting aside these criticisms and the wider indictment that there is a failure to develop an immanent jurisprudence for the multitude, there is also confronted here a more fundamental point: if *pace* Agamben, Schmitt and Derrida sovereignty definitionally *requires* a grounding outside itself, then can one properly talk of sovereignty in Empire? For Paul Passavant, Hardt and Negri neglect 'Schmitt's insight that law and its social situation must always exist in relation to each other. If we accept the latter's analytic ... the law and its social subjects will be seen as existing in a mutually articulated relationship until the end of their joint time.'[105] The criticism runs thus: if the state is completely separated from society, and relates to it only

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[100]Peter Fitzpatrick, "The Immanence of Empire," in *Empire's New Clothes: Reading Hardt and Negri*, ed. Paul A. Passavant and Jodi Dean, New York, Routledge, 2004.

[101]Ibid., 54; Hardt and Negri, *Empire*, 295.

[102] Fitzpatrick, "The Immanence of Empire," 47ff.

[103] Ibid., 52.

[104] Ibid., 32.

[105] Paul A. Passavant, "From Empire's Law to the Multitude's Rights: Law, Representation, Revolution," in *Empire's New Clothes: Reading Hardt and Negri*, ed. Paul A. Passavant and Jodi Dean, New York, Routledge, 2004, 105-06.

through command, then the state cannot maintain the grounding in society necessary to exercise the sovereign exceptional decision. One must first be able to appropriate what is to be excluded.

These critiques proceed from an *a priori* distinction between the force of law and the force of capital that this thesis has been at pains to blur and problematise. They fail to grasp that the 'exceptional' acts of the state stand in a Schmittian relationship not to the 'normal' operation of the state, but rather the 'normal' operation of the *market*. Neo-liberalism brings about a shift in certain kinds of authority and guarantee from the state to capital. This is a point made by Foucault in his analyses of neo-liberalism: once the market is understood as a 'domain of autonomous rules and laws by a concept of "economic order" (Foucault uses the original German term "*Wirtschaftsordnung*") as an object of social intervention and political regulation' then there is necessarily 'the redefinition of law.'[106] The implications of these insights are unpacked further in the final chapters, but it is critical to understand here that if the 'ground' of the state is the effective operation of the market, then it is logically consistent to posit a mode of sovereignty which operates in 'normal' times by extracting itself from society and forcefully ensuring the market's continuation. This foundation thus also justifies exceptionality: if the sovereign must stoop to a-legal intervention to keep the machine running, then so be it. In Thomas Lemke's words, it is 'a form of legitimation that founds a state: the economic liberty produces the legitimacy for a form of sovereignty limited to guaranteeing economic activity.'[107] Once the right to exercise sovereign command is no longer exclusively thought of in narrow political/legal terms, but sovereignty is instead understood as always already imbricated with command over labour, Hardt and Negri's argument coheres.

Nonetheless, there is truth in the allegation that Hardt and Negri tend towards presenting a world in which all life is subsumed within capital and where there is no 'outside'. Here, instead of Fitzpatrick's dismissal, a more nuanced engagement with Hardt and Negri is useful. For Massimo De Angelis, capitalism is primarily an ethical system.[108] It forms subjects through the continual insistence that subjects act in 'good' or 'bad' ways, according to systems of value. Like Žižekian subjects produced by ideology working from

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[106] Thomas Lemke, '"The Birth of Bio-Politics": Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality', *Economy and Society*, 30, no. 2, 2001, 190-207, 194, 95.

[107] Ibid., 196.

[108] De Angelis, *The Beginning of History: Value Struggles and Global Capital*.

the outside in, through action rather than (mis)belief, De Angelis's capitalism works by engaging us in a repetitive series of practices. As social force, capital is relentless: its need to reproduce drives it to continually capture new areas of life within circuits of accumulation. The reproduction of life itself is not immune from capital's reach. However, none of this is to say that there is no 'outside.' Indeed, the 'problematic of the outside has always been ambiguous in the Marxist Literature that has addressed it, whether implicitly or explicitly.'[109] Once perceived as a primarily ethical system, then those value practices not yet incorporated into circuits of accumulation are the outside to capital. Capital as social force may seek to subsume all aspects of life, but capital as system has not yet done so. External value practices are often simply the not-yet-subsumed: capital as social force is yet to work out how to make money out of them. But they may also be those consciously constructed in opposition to capital as value system. Here is the place from which to build an opposition. *Contra* Hardt and Negri, there is still an outside. What seems like a simple argument - capital is social force, and capital-ism an ethical system - insists and persists. For what it reveals is a perpetual struggle over the very social relations that constitute subjectivity.

Hardt and Negri do portray a relatively unidirectional subsumption of all of life through biopower, a consequence of the continually expanding universe of capital, where the only exit is through capital: if there is only exchange value, then it is with exchange value that subjects will build tools to break through, not by finding a new use for use. De Angelis pulls up one stop short of this teleology to instead locate the *beginning* of history: not in newly socialised affective/immaterial labour that is supposed to enable the transition from capitalism to communism, but instead in those subjective practices that refuse valorisation. Subjects are important because they produce and reproduce, but not *qua* for/within capital, but rather against/outside of it. De Angelis remains close to Hardt and Negri, however, in his assertion that the paradigm of capital is thus the enclosure of the commons.[110] Marx's analyses of 'primitive accumulation' are therefore critical for De Angelis, for it is here that we see the admixture of force and profit (the social force of capital) acquiring physical areas and reordering temporal patterns of life into its own cycles. De Angelis usefully directs the analysis to the question of the human *qua* subject. For what Hardt and Negri often overlook is that whilst Pashukanis' enquiry concerned authority and force, the theory of legal subjectivity was its centrepiece. But having

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[109] Ibid., 229.

[110] Ibid., 146.

dismantled and reassembled the Marxist legal inquiry, it follows that Pashukanis' theory of legal subjectivity requires an overhaul, for the various charted separations and reseparations take effect by acting on subjects. This argument has served as a backdrop to Parts II and III of this thesis, such as in the enquiry into Agamben's theory of the legal subject of *homo sacer*. It is necessary now to confront the question of how these separations, and the changing relationships between law and labour, impact on the legal subject of Marx and Pashukanis.

PART IV

SUBJECT

Chapter 7 - Abstraction, Equality and the Legal Subject

> Industrial capitalism, the declaration of human rights, the political economy of Ricardo, and the system of imprisonment for a stipulated term are phenomena peculiar to one and the same epoch.
>
> Evgeny Pashukanis, *General Theory of Law and Marxism*[1]

The insights contained in this one quote from Pashukanis are penetrating and underappreciated. Pashukanis both historicises his own endeavour but also points to a deeper connection between disparate phenomena. He is describing a certain mode of production, where that term is understood in the expansive Marxian sense as 'inseparable from the production of a particular social relation, and a particular subjectivity, which it needs to reproduce itself', akin to the Foucauldian *dispositif* which emphasises the 'articulation of relations between disparate elements'.[2] Pashukanis, with his theory of the legal subject arising from the commodity exchange, demonstrated that abstract legal subjectivity was critical for a certain phase of capitalism. But what would his legal subject look like in the current era?

In the preceding parts, the underpinning methodology urged in this thesis - that Marxist legal analysis ought interrogate the separation between the legal and the economic, with a primary focus on the organisation of and domination over labour - was applied to *Gewalt* (Part II) and authority (Part III). The two chapters that make up this Part IV apply the same approach at the level of the subject. Consistent with the argument thus far advanced it is contended that this separation works its effects on the legal subject in such a way as to render Pashukanis' insights important but historically confined. However, by placing labour at the centre of the analysis again – especially the Marxian notion of abstract labour – elements of a contemporary legal subjectivity can be sketched in the spirit of Marx and Pashukanis. This chapter first examines points of difference between Marx and Agamben, ultimately siding with the former, then moves to consider abstract labour. As with *Gewalt* and authority, the Hegelian question of control over labour proves to be a central one. The chapter also charts the decline of abstract labour, a tendency fundamental for the contemporary analysis of legal subjectivity.

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[1] Pashukanis, *Law and Marxism: A General Theory*, 181.

[2] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 55, 81.

Separation in Marx

It has been argued above that Marxist legal theory has neglected a key theoretical element already present in Marx's work: the critique of separation. The Open Marxists asserted that the separation of the economic and the political is in fact the epitome of commodity fetishism. Marx's *Capital* is indeed a tale of various separations, of the separation of product of labour from self, of producers from ownership, of intellectual from manual labour:

> The separation of labour from its product, of subjective labour-power from the objective conditions of labour, was therefore the real foundation in fact, and the starting-point of capitalist production. But that which at first was but a starting-point, becomes, by the mere continuity of the process, by simple reproduction, the peculiar result, constantly renewed and perpetuated, of capitalist production. ... Capitalist production, therefore, of itself reproduces the separation between labour-power and the means of labour. ... [It] produces and reproduces the capitalist relation: on the one side the capitalist, on the other the wage-labourer.[3]

It is only through the continual separation and re-separation of human labour that capital reaches its apotheosis: 'The separation of the intellectual powers of production from the manual labour, and the conversion of those powers into the might of capital over labour, is, as we have already shown, finally completed by modern industry erected on the foundation of machinery.'[4] At the root of the *Gewalt* that will be fractured into work and into rule lies separation, and this will become a biopolitics: '[M]anufacture carries this social separation of branches of labour much further, and also, by its peculiar division, attacks the individual at the very roots of his life ... "To subdivide a man is to execute him, if he deserves the sentence, to assassinate him if he does not... The subdivision of labour is the assassination of a people."'[5]

But even before his developed works on the commodity and capital, separation was a key question for Marx. In feudal society the directly political character of relationships within civil society 'defined the relationship of the single individual to the *state as a whole*, i.e. his *political* relationship, his relationship of separation and exclusion from the other components of society.'[6] Whereas feudalism was characterised by directly political relations of domination and production, the transition to capitalism reconfigures these relations. The 'political' human is separated from 'natural' human, which is

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[3] Marx, *Capital: A Critical Analysis of Capitalist Production*, 535, 41-2. Chapter on Simple Reproduction.

[4] Ibid., 399. Chapter on Machinery and Modern Industry

[5] Ibid., 343, quoting D Urquhart.

[6] Marx, "On the Jewish Question," 232.

accomplished by the same act that establishes the independent political state. Agamben's endeavour considered in Chapter 3 is indebted to this analysis. Marx's theorisation of an independent state power that exists only as the polar counterpart to a 'political' human simultaneously separated from her 'natural' being is the obvious (though unacknowledged) backdrop to *Homo Sacer*.

Underpinning Marx's argument is the concept of *Gattungswesen*, usually translated as 'species-being'. Nick Dyer-Witheford traces the history of *Gattungswesen* from the *1844 Manuscripts* onwards. The 'estrangements' from *Gattungswesen* that mark alienated man are fourfold: 'estrangement from the products of their own labour; from co-operative relations with fellow beings; from the nature that is transformed through their activity; and, from their own historical possibilities of self-development, or "species-being [Gattungswesen]".'[7] Like Agamben, to talk of species-being is not to posit some originary essence, but rather to conceive of a project of abolishing these estrangements. For Joseph Margolis, '*nothing* determinate – based on the supposedly essential, transhistorically invariant nature of man – permits us to interpret what serves the function of the Gattungswesen; *all that man's awareness of his distinction from the animals* entails is that his *praxis* transform itself *in accord with that function*, that it overcome self-alienation.'[8] To the extent that Margolis' expression of species-being may seem to open itself up to the Agambenian critique of any politics that grounds itself in the uniqueness of the human, it must be remembered that this is not an Aristotelian attempt to strive to match the human's alienated nature with some eternal proper form of being the human animal. Rather there are '*no* determinate powers that form man's essential nature – to be actualised, for instance, ... in the way in which "human rights" provide for such actualisation.'[9] Species-being is not the 'human', because the 'human' is only a contingent stage in the working through of a new politics of creative labour, one brought about by the development of the universalising world market. Still echoing Agamben, Dyer-Witheford can thus proceed from species-being to assert that:

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[7] Nick Dyer-Witheford, '1844/2004/2044: The Return of Species-Being', *Historical Materialism*, 12, no. 4, 2004, 3-25, 4.

[8] Joseph Margolis, "Praxis and Meaning: Marx's Species Being and Aristotle's Political Animal," in *Marx and Aristotle: Nineteenth-Century German Social Theory and Classical Antiquity*, ed. George E. McCarthy, Savage, Rowman & Littlefield Publishers, 1992, 343.

[9] Ibid., 339.

> It is tempting to speak of a mission to 'save the human'. But this would be a flight departing too late. The human is an historical creature whose material and ontological grounds are already well and truly subverted.[10]

'Species-being' is aware that it can produce, it has the power to (re)produce the conditions of life *and* reflect on the historical manner in which this is done *and* then alter its activity accordingly: this is the conception of *praxis* appropriate to species-being, it is argued here. 'Thus, 'alienation' of species-being, the central problematic of the *1844 Manuscripts*, is not an issue of estrangement from a normative, natural condition, but, rather, of who or what controls and limits the processes of ceaseless species self-development.'[11] This is an issue of labouring together to develop a new commons where the creative potential of labouring subjects are no longer separated. Such a commons is not to be 'conceived as maintenance of or reversion to any primordial, natural state, but only as an egalitarian order to be achieved.'[12]

Also asserting that separation marks the point of departure for Marxist analysis, De Angelis identifies a very similar set of 'separations' at work in Marx. De Angelis advances three points as essential to properly understanding Marx: first, the separation of workers from their means of production is characteristic of both accumulation and primitive accumulation; secondly, 'This *separation* is a central category (if not *the* central category) of Marx's critique of political economy'; thirdly, as primitive accumulation and ongoing accumulation are different in degree but not in kind, important are the 'conditions and forms in which this *separation* is implemented'.[13] Echoing the argument being advanced in this thesis, De Angelis thus understands enclosure by Act of parliament as the archetype of capitalist separation, and is perhaps the first to elevate 'separation' to the place of a 'central' Marxian category.[14]

What De Angelis does in his work with respect to the means of production, this thesis seeks to do with respect to the question of law and the state. The various Marxian usages of 'separation' outlined above can be grouped into three categories:

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[10] Dyer-Witheford, '1844/2004/2044: The Return of Species-Being', 22.

[11] Ibid., 7.

[12] Ibid., 18.

[13] De Angelis, *The Beginning of History: Value Struggles and Global Capital*, 137, 38. Emphasis in original.

[14] Ibid., 146.

1. The separation of *Gattungswesen*, or more accurately, those separations that stand in the way of *Gattungswesen*.
2. The separation through *Gewalt*, by force and law, of workers from their land, their means of production and the products of their labour.
3. The separation of the state from (civil) society.

Can these various Marxian usages of separations be collapsed into diverse forms of the one separation, asserting perhaps that *Gattungswesen* wasn't a concept created by the young Marx yet abandoned by the later once, but rather something distilled and matured over time? Humanist Marxism proceeds from an identification of categories 1 and 2, as does the 'biopolitical' argument (e.g. of Dyer-Witheford and DeAngelis). However, the latter argument makes the distinct advance of treating the 'human' merely as a stage in the struggle to remove separation from species-being. Indeed, in the era of the service sector and genome technology, of commodifying life and even turning life into commodity, the human is always already separated from itself. As such, this argument is both resolutely anti-structuralist and anti-humanist. And as to categories 2 and 3, in Hardt and Negri's version they are conflated. This is most clearly illustrated in Negri's reading of Pashukanis, where the abstract impersonal force of capital is read as the force of law.

But what of the relationship between category 3 and category 1? As to category 3, the Negrian separation of state from society continues but reverses Marx. As seen above, since the 'original' time of capitalist state formation, the state first took control of civil society, only to later separate the connective tissues that tied the two together. Command replaced control. However, it must be emphasised that this very separation is effected through the *subject*, through the separating of social forces from the subject and then making those forces appear *extrinsic* to them. Charting the fate after Marx of *Gattungswesen*, Dyer-Witheford justifiably moves through Fromm and critical theory to Althusser: within Marxism, the debate oscillated between humanist and anti-humanist poles. But interestingly, this debate rarely linked species-being to the specific question of the state: its topics were more likely to be culture, labour and life. Symptomatically, Dyer-Witheford locates the birth of *Gattungswesen* in the *1844 Manuscripts*.[15] However, *On the Jewish Question* - replete with references to species-being - was written in 1843. What is found in this text where *Gattungswesen* is introduced, compared with *1844 Manuscripts* onwards, is an express concern with the legal documents that found the

[15] Dyer-Witheford, '1844/2004/2044: The Return of Species-Being', 4.

political, and a preference for the use of 'separation' over 'alienation'. And here civil society is only separable from an independent state because directly political relations of domination within labour have now been replaced by the legal contract. Although the various separations usually connoted by alienation and reification are critical for Marxist analysis, they have their genesis in something more fundamental, something intimately concerned with the operation of sovereignty. The retrieval of species-being goes half-way towards identifying this more fundamental connection: it identifies the inadequacy of the 'human' as a ground for politics, and of capital's role as a machine that separates the subject from themselves - category 1 and category 2 is the same 'separation'. What this analysis fails to do, however, is link this with the fundamental law-founding moments of these separations, of the transferral of subjective social forces to the forces of law and command. How this occurs is the subject of Marx's *On the Jewish Question*.

Agamben, Marx and the 'Jewish Question'

The structure of law/decision/violence is, of course, an instance of separation. Consider the concept of the sacred encountered so far in both Freud's *Totem and Taboo* as well as Agamben's ancient Roman *homo sacer*. Freud commented on the sacredness of the totem rendering it in normal times both untouchable and exalted. The performing of certain ceremonies on the totem animal would move the same animal from the religious sphere to the profane, and *vice versa*. Similarly, the same human being can, by virtue of legal judgment/ceremony, be placed in a situation where they can be killed without it offending against any prohibition, and yet still be *sacer*.[16] Consecration has its counterpart in their reversal, profanation, the placing of an object back from the sphere of the holy to that of the profane world. These are acts of separation because they separate and then place the same object in a distinct sphere, beyond ordinary use: much like the post-parricidal splitting and rejoining of the original power of the *Totem and Taboo* father, the structure of law/force of law/force of ~~law~~ bears the same marks of separation. There is posited a mythical original unity which is separated and then brought back together, only for some part of it to remain ever out of reach. Agamben, discussing Benjamin's *'Capitalism as Religion'*, tells us that capitalism too has everything to with separation. Lest it be thought that this is taking liberties, wrongly putting Agamben to a new use, consider his own words:

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[16] For a critique of Agamben's use of 'homo sacer' see Fitzpatrick, 'Bare Sovereignty: Homo Sacer and the Insistence of Law'.

> We could say that capitalism, in pushing to an extreme tendency already present in Christianity, generalises in every domain the structure of separation that defines religion. ... In its extreme form, the capitalist religion realises a pure form of separation, to the point that there is nothing left to separate. In the commodity, separation inheres in the very form of the object, which splits into use-value and exchange-value and is transformed into an ungraspable fetish. The same is true for everything that is done, produced or experienced – even the human body, even sexuality, even language.[17]

Agamben's analysis of separation takes Marx's analysis of commodity fetishism as one of its points of departure.[18] But Agamben also owes a debt to Marx in developing the concept of separation that underpins his concern with both the natural and political life of the human. Marx's concern in *On the Jewish Question* is with what happens to the human when the state is constructed through the separation of the state from capital, and of species-being from the political human. When Marx writes that 'The relationship of the political state to civil society is just as spiritual as the relationship of heaven to earth'[19] and that only under Christianity's dominance, 'which makes *all* national, natural, moral, and theoretical relationships *external* to man, could civil society separate itself completely from political life',[20] he presages Agamben's critique of the structure of separation that defines religion. Marx argues further that 'the state stands in the same opposition to civil society and overcomes it in the same way as religion prevails over the restrictions of the profane world, i.e. it has to acknowledge it again, reinstate it, and allow itself to be dominated by it' (and this thesis has been exploring thus far the mechanisms by which the second half of the sentence is effected).[21] The promise of political emancipation, of the proclamation of the 'rights of man' was the recognition of inalienable, enduring rights that inhere universally in all humans. Yet, Marx notes, the replacement of the partial feudal state with the universal democratic state immediately relegates political associations to the status of means: the state exists to secure the rights of man.[22] This theoretical subjugation is immediately at odds with the practice of the state. 'While, for example, security is declared to be one of the rights of man, the

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[17] Giorgio Agamben, *Profanations*, New York, Cambridge, Zone Books 2007, 81; Walter Benjamin, "Capitalism as Religion," in *Selected Writings*, ed. Marcus Paul Bullock and Michael William Jennings, Cambridge, Mass., Belknap Press, 1996.

[18] See too Giorgio Agamben, *Stanzas: Word and Phantasm in Western Culture*, Minneapolis, University of Minnesota Press, 1993, Ch7.

[19] Marx, "On the Jewish Question," 220.

[20] Ibid., 240.

[21] Ibid., 220.

[22] Ibid., 231.

violation of the privacy of letters openly becomes the order of the day.'[23] How is it that supposedly universal rights which found the state can be subjected to the exercise of state power, so that 'the end appears as the means and the means as the end'?[24] The answer to this is straightforward: 'Political emancipation is at the same time the dissolution of the old [feudal] society on which there rested the power of the sovereign, the political system as estranged from the people. The political revolution is the revolution of civil society.'[25] The bourgeois state reconfigures the old society, which had 'a *directly political* character, i.e. the elements of civil life such as property, family and **the mode and manner of work** were elevated ... to the level of elements of political life', such that these concerns now appear as the *private* matters of humans existing in civil society, whereas the abstract equal human now exists in the political realm.[26] In short, the subjugation of 'foundational' human rights to the dictates of the state is possible because the instantiation of both is brought about by the simultaneous reconfiguration of the political into separate public and private components. The construction of the private as natural is a contingent one and, critically for the argument here, the private contains the sphere of work.

What does it mean for Marx to say that this structure of separation (of the state from civil society, of the religious from the profane) is common to both, and why is it that this separation works its effects on the human subject? Marx continues and binds these elements together even tighter: 'Man' in civil society is 'a profane being. Here, where he regards himself and is regarded by others, he is an illusory phenomenon. In the state, on the other hand, where he is considered to be a species-being, he is the imaginary member of a fictitious sovereignty, he is divested of his real individual life and filled with an unreal universality.'[27] To borrow Schmitt's language considered above, this is the 'theologised conception of sovereignty' that must be subject to criticism. The critique is not merely that sovereignty claims a divine grounding, but rather that essential to the structure of rule is that the state designates subjects as imaginary members of fictitious sovereignties by *separating* this particular kind of subjectivity from a profane being, and

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[23] Ibid.

[24] Ibid., 232.

[25] Ibid., 231.

[26] Ibid. Bold emphasis added; italics in original.

[27] Ibid., 220.

then continually acknowledging this distinction, continually reinstating it, so as to operate power.

Agamben elsewhere agrees with Marx that it is with Hegel and capitalism that labour and vocation begin to separate, that they bring to light 'the split produced by the division of labor between the personal life of each individual and the life of that same individual in asmuchas it is subsumed to a certain condition of labor and the profession'.[28] However, Agamben's emancipatory subjects are not labouring subjects. Or more accurately, Agamben does not see 'productive' labour as capable of grounding a politics that can depose sovereignty. Whereas Benjamin and Hamacher's deposing and afformative politics are effected by labouring subjects, Agamben's suspension does not involve such subjects. On the question of separation and *Gattungswesen*, Agamben thus sympathetically distances himself from Marx. For Agamben, Aristotle's legacy is the definition of politics as a particular kind of work, of activity over inactivity, 'of the act and not of potentiality'; and whatever activity this kind of political work is, its particularity lies at least in more than simply being alive, the latter being the *zoe* excluded from the *polis*.[29] Therefore Marx's 'realization of man as a generic being (*Gattungswesen*) represents a renewal and a radicalisation of the Aristitotelian project' and thus subject to the critique outlined in Chapter 4.[30] Recognising that Agamben Marx's formulation is necessarily doubly aporetic – it requires the assigning of this particular work to a subject (the proletariat) that must destroy itself, and 'work' becomes difficult to define in a classless society – is not sufficient for Agamben, but leads to an equivocal criticism that echoes his critique of Heidegger considered above: perhaps the right idea for a time before the totalisation of biopolitics, but now no longer pursuable in good faith. For in the current moment, having realised that there are no longer historical tasks that can be assigned to nation-states, politics has become 'a question of taking on life itself as the last and decisive historical task'.[31] Although these alleged aporia in the Marxian project might appear to be precisely the vehicles which can lead to a new politics based around the removal of coercion from work, nonetheless Agamben stresses inoperability in place of operability and thus distances himself from Marx over the place and role of work.

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[28] Giorgio Agamben, *The Time That Remains: A Commentary on the Letter to the Romans*, Stanford, California, Stanford University Press, 2005, 29-30.

[29] Giorgio Agamben, "The Work of Man," in *Giorgio Agamben: Sovereignty and Life*, ed. Matthew Calarco and Steven DeCaroli, Stanford, California, Stanford University Press, 2007, 5-6.

[30] Ibid., 6.

[31] Ibid.

If work never inheres in the subject without always already being colonised by the machines of sovereignty, and thus separated from the subject, perhaps alienation and estrangement are closer to Agamben's separation than is generally recognised. This is certainly the nub of Negri's critique of Agamben as a writer melancholically longing for a world of use. Negri locates Agamben in a trajectory from the 'young' Marx to the Frankfurt school to Guy Debord, one in which the reified world of commodities and bodies is despairingly ontologised. Negri thus favours subjecting the reified world of bodies and commodities to the productive activity of constituent power and dismisses Agamben's political tactic of the deposition of reification.[32] Here is not the place to pursue the difficult task of constructing from Agamben's *ouvre* the politics that can 'jam the anthropological machine'.[33] Indeed, it is now so commonplace to point out that Agamben offers no obvious emancipatory politics, that the 'Agamben effect' appears to be the scramble to generate one.[34] It is, however, insisted that the 'aporia' Agamben identifies gesture directly at the link between labour and law: that Marx found work under communism difficult to define, and that such work had to contend with the 'right to laziness claimed by Lafargue and Malevich,' point directly to the political project Pashukanis called the 'disappearance of the coercive nature of labour ... the basic economic premise for the process of withering away' of law.[35]

Agamben, who introduced Pashukanis and Benjamin to each other, remains concerned with the connection between law and economy. So when seeking a method of profanation, of returning things from the sacred to general use, it should not surprise when Agamben shifts suddenly from separation to class, asking:

> But is a society without separation possible? The question is perhaps poorly formulated. For to profane means not simply to abolish and erase separations but to learn to put them to a new use, to play with them. The classless society is not a society that has abolished and lost all memory of class differences but a society that has learned to deactivate the apparatuses of those differences in order to make a new use possible, in order to transform them into pure means.[36]

If the society without separation is the society without classes, this is not because of something like the overcoming of class 'division' in the name of some kind of social

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[32] Antonio Negri, "Giorgio Agamben: The Discreet Taste of the Dialectic," Ibid., 124.

[33] Cf Matthew Calarco, "Jamming the Anthropological Machine," Ibid.

[34] Cf Alison Ross, 'Introduction', *South Atlantic Quarterly*, 107, no. 1, 2008, 1-13.; Ziarek, 'Bare Life on Strike: Notes on the Biopolitics of Race and Gender', 93.

[35] Agamben, "The Work of Man," 6.; Pashukanis, "State and Law under Socialism," 351.

[36] Agamben, *Profanations*, 87.

unity. Rather, he understands the question of value as necessarily a question of separation. However, despite his talk of the disappearance of class, Agamben performs a move that merits closer examination, and from which the argument in this thesis distinguishes itself. For Agamben, it is argued, if the 'political, as the work of man as man, is drawn out of the living being through the exclusion – as unpolitical – of a part of its vital activity',[37] then labour is unable to ground the coming community because labour was never an excluded 'vital activity', only ever aligned with the political work of nations. Marx's idea of separation initially works in the same way as Agamben's: the 'generic' political subject appears within an illusory community only because the subject has been split and part of it seized and removed outside of that community. For Marx, however, political subjectivity is foundationally possible because *labouring* subjectivity is relegated to take place in the domain of the private. 'The *sophistry of the political state* itself' continues to work its effects on subjectivity, and begins to give political effect to divisions of labour: 'The difference between the religious man and the citizen is the difference between the tradesman and the citizen, between the day-labourer and the citizen, between the land-owner and the citizen, between the living individual and the citizen.'[38] Marx's 'natural' world produced by this sophistry isn't merely a world of (non-labouring, non-productive) *zoe*: rather it is 'the world of needs, **of labour**, of private interests and of civil law, as the *foundation of its existence*, as a *presupposition* which needs no further grounding, and therefore as its *natural basis*.'[39] One of the effects of this particular separation is the allocation of work (albeit as abstract labour) to the sphere of the natural, the separation of previously 'directly political' relationship of property, family and labour into a private sphere.[40] But as learned from the discussion of Hegel, domination returns from here to found sovereignty. This is why this private world of labour is also the world of civil law *and* a presupposition of the state. (It turns the orthodox Marxian base/superstructure economy/law relation on its head, but it is the key point of Pashukanis: dyadic relations of production between atomised individuals can be

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[37] Agamben, "The Work of Man," 6.

[38] Marx, "On the Jewish Question," 220-1.

[39] Ibid., 234. Bold emphasis added; italics in original.

[40] Ibid., 231.

legally constituted *before* the appearance of the state and law, a point even Marx was prepared to accept.[41])

Given labour's strong link to law, it is untenable now to seek to expel it from the means by which sovereignty separates its subjects. For Agamben, labour as political figure never had a private quality: only bare life was ever excluded from the political. If bareness is an 'aftereffect' of the operation of sovereignty, then Agamben, as Andrew Benjamin notes, does not appear to permit of the grounding of identity in the space of the excluded.[42] Power and authority do not exist within Agamben's realm of the excluded, only in the relation between the included and the excluded. However, recall the insight discussed above: the structure of authority/law/guarantee is also contained within private law, in control over labour. The argument in this thesis insists that the separation of the social forces of the species-being, a separation that externalises the 'private' qualities of the subject from the *bios* that participates in political life, also thereby authorises the private law exercise of command over the labouring subject. Of course, this separation is historically/politically remade and this thesis is studying the remaking of this separation. However, Agamben's move to ontologically align labour with law through the conflation of the two under the category of the 'work of man' gives cause for concern. Instead, this thesis argues for the usefulness of non-humanist understandings of *Gattungswesen* as the collective labouring subject upon which separating machines work their effects. This is the homology between capital and law. Not the 'form' of the commodity, nor merely the reification of social relations common to both the legal and the economic. Instead, law, like capital, is a force that acts to separate *Gattungswesen*. Like capital, law operates by splitting the subject and placing a part of the subject extrinsic to itself.

At the most fundamental level, therefore, the subject is split because it can sell its labour, and secondly because it externalises 'non-generic' conditions so as to be able to act as a fictitious member of an illusory sovereignty. As to the first splitting of the subject's natural life, *pace* Agamben this has proceeded historically to the point where almost any activity can be externalised, any bodily process or genetic building block sold. As to the externalising of particular conditions, however, an even more troublesome course has

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[41] 'This juridical relation, which thus expresses itself in a contract, *whether such contract be part of a developed legal system or not*, is a relation between two wills, and is but the reflex of the real economic relation between the two.' Marx, *Capital: A Critical Analysis of Capitalist Production*, 88. Chapter 2 Exchange. Emphasis added.

[42] Andrew Benjamin, 'Particularity and Exceptions: On Jews and Animals', *South Atlantic Quarterly*, 107, no. 1, 2008, 71-87, 82.

been charted as various separations intersect and get remade. Unlike Agamben, this thesis understands labour as also 'initially' separated into the private sphere, yet then subjected to an historical reworking of this separation. This takes Marxist legal criticism away from the assertion that capitalism tends towards the perfection of the legal subject, and thus distinguishes it from Miéville's reading of Pashukanis, and instead draws attention to the historical development of the subject's necessary fracturing. In the same way that the 'human' is only conceivable as a ground for politics once the world market has reached a certain stage, so too is the legal subject a fictive unity that represented but a stage in the development of capitalism, a stage intimately linked with a certain understanding of value and labour. 'Why is life, as such, managed and controlled? The answer is absolutely clear: because it acts as the substratum, of a mere faculty, labor-power, which has taken on the consistency of a commodity. ... By the mere fact that [the potential to work] can be bought and sold, this potential calls into question the repository from which it is indistinguishable, that is, the living body.'[43]

Equality and abstract labour

In the quotation that headed this chapter, why did Pashukanis insert 'human rights' in his catalogue of the epoch? Human rights have persisted as a key rhetorical and political trope throughout the twentieth century and beyond, and indeed some might say that they are more characteristic of the second half the twentieth century than the first. Debate continues to occur over the adequacy of 'human rights' as an organising principle for politics. In addition to Agamben's critique discussed above, Žižek also argues against the false universalism of human rights.[44] Jacques Rancière, by contrast, sees the gap between actuality and the unrealised potential of human rights as the oxygen of politics.[45] Costas Douzinas' extensive treatments of the topic are animated by a combination of these spirits: on the one hand, a critique of the politics of imperial(ist) rule in the name of human rights; on the other, an understanding that the struggles for recognition and satisfaction of desire are inherently political, and that human rights at least offers some

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[43] Paolo Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, Cambridge, London, Semiotext(e), 2003, 83.

[44] See e.g. Slavoj Žižek, "Class Struggle or Postmodernism? Yes Please!," in *Contingency, Hegemony, Universality*, ed. Judith Butler, Ernesto Laclau, and Slavoj Zizek, London, Verso, 2000; Slavoj Žižek, *The Ticklish Subject: An Essay in Political Ontology*, New York, Verso, 1999; Slavoj Žižek, *Human Rights and Its Discontents: A Lecture* (1999 [cited); available from http://www.egs.edu/faculty/Žižek/Žižek-human-rights-and-its-discontents.html.

[45] Jacques Rancière, 'Who Is the Subject of the Rights of Man?', *South Atlantic Quarterly* 103, no. 2/3, Spring/Summer, 2004, 297-310.

formal, minimal promise of equality.[46] Marx's *On the Jewish Question* is sometimes resurrected in these debates to show his early understanding that the formally equal subject of capitalism stands in contrast to material inequality,[47] or that the formal promises of equality and dignity were always 'Janus-faced' and contained within them the promise of an alternative future at the same time as such future was repressed.[48] Without seeking to do violence to these debates, this thesis moves along a different tangent and offers the suggestion that the Marxian lineage can contribute something further to the historical connection between 'human rights' and the political economy of Ricardo, a contribution which in turn links human rights back with contemporary questions of labour and emergency.

It may well be, to quote Wendy Brown in a slightly different context, that the liberal notion of human rights achieves a 'détente between the universal and the particular.'[49] However, what usually is overlooked in the receptions of Marx and Pashukanis is the figure of *abstract labour*, necessary for striking any such balance. To understand the nature of the 'abstract' equal individual created in the separation of the political state from citizen, an enquiry Marx began in *On the Jewish Question*, it is necessary to grasp again the central point of that text: the form of universality and equality that underpins this separation is intimately bound up with new relations of production, with production now initially taking place in the private. Pashukanis does not derive the abstraction and generality of the legal subject merely from the growth in the spread of commodity exchange: this misunderstands Pashukanis' grasp of Marx's theory of commodity fetishism. Critical to the latter is the reduction of concrete labours to abstract labour, a movement part of which is grasped by the 'political economy of Ricardo', to refer again to this chapter's opening quotation. Where Ricardo locates the source of value in 'labour as such', Marx sees this as an incomplete theoretical advance.[50] Labour is indeed the source of value, but abstract labour arises with both the specifically capitalist development of the rendering equivalent of different labours together and the ability to

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[46] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, London, New York, Routledge-Cavendish, 2007; Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*.

[47] This appears to be the main point Douzinas draws from Marx: see Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, 158-65.

[48] Brown, *Edgework: Critical Essays on Knowledge and Politics*, 46.

[49] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*, Princeton, N.J., Princeton University Press, 1995, 57.

[50] Cf Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 63.

'average' labour to function as a measure of the source of value. 'Abstract labour' is not merely a mental generalisation of labour in general, labour as such. It is this, but only when understood as a specifically capitalist phenomenon, one which is not trans-historical. Thus 'equality of entirely different kinds of labour can be arrived at only by an abstraction from their real inequality, by a reduction to the characteristic they have in common, that of being the expenditure of human labour-power, of human labour in the abstract,' but also 'in this quality of being equal human labour or abstract human labour, it forms the value of commodities' and for commodity exchanging subjects, 'by equating, in the exchange, the different *products to each other as values*, they equate their own different labours as human labour. They do this without knowing it.'[51] As discussed above, this is what lurks in the hidden abode of production and explains the fetishism of the commodity. Pashukanis was well aware of this:

> Just as in the commodity, the multiplicity of use values natural to a product appears simply as the shell of value, and the concrete types of human labour are dissolved into abstract human labour as the creator of value, so also the concrete multiplicity of the relations between man and objects manifests itself as the abstract will of the owner. All concrete peculiarities which distinguish one representative of the *genus homo sapiens* from another dissolve into the abstraction of man in general, man as a legal subject.[52]

The place of money in Pashukanis' thought, though central to thus analysis, has likewise gone unconsidered.

> In a society where there is money, *and hence individual private labour becomes social labour only through the mediation of a universal equivalent*, the conditions for a legal form with its antitheses between the subjective and the objective, between the private and the public, are already given. Only in a society of this kind does political power have the possibility of setting itself up in opposition to purely economic power, whose most profound manifestation is the power of money.[53]

To return to the Pashukanis quote that began this chapter, *abstract labour* and the wage facilitate labour becoming the measure of value for industrial capitalism, the generic subject of human rights critiqued by Marx in *On the Jewish Question*, the political economy of Ricardo that locates labour as the source of value yet naturalises the extraction of surplus, and the hyper-equivalence of the criminal law system that rolls money, crime and time into a flat system of exchangeability. 'Abstract labor is not only a precondition of exchange in that it provides a standard to measure the diverse

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[51] Marx, *Capital: A Critical Analysis of Capitalist Production*, Ch16.

[52] Pashukanis, *Law and Marxism: A General Theory*, 113.

[53] Ibid., 42-3. Emphasis added

commodities and products of labor ... [but also] the valorization process. For there to be surplus value ... there must first be a standard, a norm of production [and it thus] serves as a "spontaneous" ideology.'[54] It is not just that capitalism needs legal subjectivity to turn relations between people into relations between things and thereby make commodities that are equivalent. Capitalism is the special treatment of a particular commodity, labour power, which was made a commodity through the wage relation. This not only renders labour exchangeable for money, but renders diverse labours able to be measured according to a common standard. But it was only once personality could be alienated for periods of time, to borrow Hegel's phrase, that the fictive equality of the contract could govern work. Subjects meet each other not just in the world of the equality of commodities – thereby calling into being the legal subject – but they enter into productive relations that not only produce a fictive subjective equality, but also an equalisation of labour as such. The worker is forced to stand before the capitalist and say: "I am equal because I can sell my labour to you in a contract of equals. I can do this because (a) labour as such is a saleable commodity and (b) I am now a subject that stands in an equal relationship to you, the buyer of my labour." This thesis has not focussed on Pashukanis' critique of criminal law to any great extent, but it should be made clear that Pashukanis himself sees abstract labour as playing a pivotal role here too: indeed, preceding the quote set out at the start of this chapter, Pashukanis asserts that a 'necessary condition for the appearance of the notion that payment for a crime should be by a previously determined amount of abstract freedom, it was necessary for all concrete forms of social wealth to be reduced to the most abstract and simple form - to human labour measured in time.'[55] Alienability of labour, and abstraction of labour and the equivalence it embodies, are necessary components of the fictive equality of legal subjectivity.

Jay Bernstein's analysis of *On the Jewish Question* commences with what appears to be a clear understanding of the importance of abstract labour, for he asserts that Marx's critique was aimed at 'the reign of equal right that makes human activity exchangeable; and crossing the "narrow horizon of bourgeois right" ... requires the institution of a new principle of right erected on the communist mode of production.'[56] However, in striving to elaborate a Marxian concept of right where the political would not be reduced to the

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[54] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 83.

[55] Pashukanis, *Law and Marxism: A General Theory*, 181.

[56] Bernstein, "Right, Revolution and Community: Marx's 'on the Jewish Question'," 95. Quoting Marx.

status of instrumental means to support the economic, the role of abstract labour leaves Bernstein's analysis, and though he rightly concludes that 'contemporary defences of civil society as a refuge from the state never move beyond the origin of the capitalist state,' this ultimately becomes not a question of labour specifically but of exchange relations in general: 'Abstract exchange relations are mutual recognitions that disavow themselves, that reduce ethical substantiality to the formality of abstract law.'[57] Douzinas, in a similar vein and continuing this analysis, notes that Marx's endeavour in *On the Jewish Question* is connected with Marx's own critique of the abstraction inherent in Hegel's conception of work, yet he reads Marx's contribution as moving straight from slave to citizen without deviating through abstract labour.[58] Marx's analysis is not essential for Douzinas elaboration of the connection of rights with desire, though Bernstein does dovetail the two. Nonetheless, what characterises both is an understanding the labouring realm as one of inherent inequality, contrasted with the formal equality of the political sphere. Bernstein makes this explicit, rendering Marx's article in two-column 'tabular form': this thesis agrees with the thrust of Bernstein's summary, but not the allocation of 'equality' to the column headed 'State' and 'inequality' to that of 'Civil Society.'[59] From such a perspective, the reading of Marx will necessarily stress the negative consequences of 'distilling' material inequality to formal equality. However, as Žižek has made clear, the labour relation, which in this reading of Marx only exists in civil society and is not yet a question for the state, must of necessity embody an equality that is simultaneously an inequality, and here lies universality.[60] The splitting of the subject that creates the state marks the subject as 'equal' not just in the political sphere, but in civil society too, and requires the subject to conduct its labour relations there through principles of equivalence. For Marx, the sphere 'within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. ... Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for

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[57] Ibid., 117.

[58] Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, 272.

[59] The full set of entries reads: 'State: mind; species-life; citizen; rights of citizen; universal; reason; public; freedom; community; equality; general interest; essence; abstract; idealism; deontology; heaven. Civil Society: body; individual life; bourgeois; rights of man; particular; need; private; necessity; egoism; inequality; private interest; existence; concrete; materialism; teleology; earth.' Bernstein, "Right, Revolution and Community: Marx's 'on the Jewish Question'," 100.

[60] Žižek, *The Sublime Object of Ideology*, Ch1.

equivalent.'[61] And in this labour process, 'the laws of appropriation or of private property, laws that are based on the production and circulation of commodities, become by their own inner and inexorable dialectic changed into their opposite. The exchange of equivalents, the original operation with which we started, has now become turned around in such a way that only the mere semblance of exchange remains'.[62]

This is not a conclusion to which Agamben would have been able to come, as the first part of this chapter argued. The analysis of Agamben's separation of work into the sphere of the *polis* was refuted and Marx's analysis preferred. This was the first essential point to make: labour is separated to the private with the creation of the 'independent' force of the state. The second point now has also been added: equality is at work in this sphere of labour too, not just in the illusory sovereignty of the *polis*. Indeed, it is equality that enables the first separation to work: in the declarations analysed by Marx, the equality of the natural labouring human is the legal foundation of the equal human of the *polis*. In Pashukanis' words 'the social relation which is rooted *in production* presents itself simultaneously in two absurd forms: as the value of commodities, and as man's capacity to be the subject of rights.'[63]

To return again to the significance of Pashukanis' reference to Ricardo and draw further conclusions from the argument advanced thus far, Read (as already noted) makes the prescient observation that Marx inherits a double problematic from Hegel and Ricardo: Hegel only considers labour as abstract labour, but nonetheless correctly poses the question of the ordering of the state as a question of how to order, discipline and equalise this labour; Ricardo is likewise stuck in his generalisation of labour, but correctly locates there the source of production of value.[64] Corresponding to two different sides of the problem of the abstract, the names '"Hegel" and "Ricardo" indicate two different complementary examinations: one into the power relations imposed on bodies and individuals to standardize and regularize their productivity to given ends; the other into the productivity of bodies and individuals – their super-adequacy to their own self-

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[61] Marx, *Capital: A Critical Analysis of Capitalist Production*, 172. Chapter 6 'The Buying and Selling of Labour Power.'

[62] Ibid., 547.

[63] Pashukanis, *Law and Marxism: A General Theory*, 112-13. Emphasis added.

[64] On the relation between Hegel, Marx and value, see too Robert Albritton, "Marx's Value Theory and Subjectivity," in *Value and the World Economy Today: Production, Finance and Globalization*, ed. Richard Westra and Alan Zuege, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003.

maintenance.'[65] It Part II it was argued that inherent in the abstraction of state force, and thereby the labouring citizenry, is the movement of *Gewalt* from the production relation into the form of law and its return to greet the worker.[66] This chapter returns to this argument to assert that the abstraction of labour underpins the abstract equality of the legal subject. Capitalism is the deterritorialisation of the relations of domination previously inherent in labour: 'the old guarantees that limited production, tying it to a determinate sphere of reproduction, political and social, have disappeared.'[67] Labour is now 'free' but only to sell itself *through the abstracting equivalent of the wage and the labour contract*, and abstract labour becomes 'a homogenization and standardization that is the precondition for surplus value'.[68] 'It is just as pious as it is stupid to wish that exchange value would not develop into capital, nor labour which produces exchange value into wage labour.'[69] If the legal subject arises because of the plethora of exchange relations, it is because one of these relations is the sale of labour power, a precondition of which is abstract labour. But this reconfigures questions of domination, and hence the problematic inherited from Ricardo: living labour is now a source of value that must enter into and be tamed by this abstraction. Living labour, in its particularity and creativity, exceeds this abstract equality, but nonetheless it is only through the legal subjectivity inherent in the labour contract that labour can be brought to market.

These questions of value and the disciplining of value are necessarily questions of the subject. Although the question of subjectivity is correctly described as the 'limit of Marx's thought', nonetheless it is clear after Marx and Pashukanis that modes of production cannot exist without appropriately separated subjects to reproduce those modes.[70] But this is where this thesis must insist on the radical historicity of the quote that opened this chapter. For what both Marx and Pashukanis elsewhere glimpse is the decline of the very configuration appropriate to 'industrial capitalism.' Pashukanis sees the beginning of the end of the legal subject arising in the United States, where the suspension of legal rights was taking root. For Marx, the concept of 'real subsumption' begins to change the nature of work and the relationship between production and reproduction. An examination of

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[65] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 76.

[66] On this point, see too Macnair, 'Law and State as Holes in Marxist Theory'.

[67] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 83.

[68] Ibid.

[69] Marx, *Grundrisse: Foundations of the Critique of Political Economy* 249.

[70] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 104.

these changes to the equal, private abstract labouring subject concludes this chapter and forms the basis for the final chapter of this thesis.

The decline of abstract labour

Whereas capitalism begins with labour as the measure of value, social development brings with it increasing scientific and technical knowledge. The development of these systems of knowledge often takes place outside of the production process, and they are developed through human co-operation and large-scale collective, co-operative endeavours. 'General social knowledge', Marx writes in the *Grundrisse*, becomes a '*direct force of production*', and to that degree 'the conditions of the process of social life itself have come under the control of the general intellect and been transformed in accordance with it.'[71] For Marx, this social knowledge became fixed capital primarily in the form of new production processes, in 'knowledge incorporated into machinery'.[72] Virno, however, identifies in Marx another method of incorporation of fixed capital: in the human.[73] That is, Marx's 'general intellect', the accreted social knowledge of production, is embodied in the worker prior to/outside of them coming to the 'workplace.' Time outside of the workplace in the phase of 'formal subsumption' was merely time for bare consumption and the reproduction of labour power, the unpaid work – predominantly of women – upon which capital depended to have a worker return to the factory healthy and able. However, in 'real subsumption' this becomes the time for the worker to also add value by incorporating the fixed capital of the general intellect, species-being becoming productive. For Marx, this must necessarily alter the subject, and the relation between production and reproduction.[74] This poses a potential quandary for capital: on the one hand, socially necessary labour time within the production process had hitherto been the measure of value; on the other, an increasingly greater share of the source of value comes from productive human labour developed *outside of* the production process. This can lead to an assertion of the end of the law of value: society itself has become an 'archive' of value, of stored-up labour.[75]

But if capital faces this self-generated challenge to its desire to 'use labour time as the measuring rod for the giant social forces thereby created', there is likewise a

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[71] Marx, *Grundrisse: Foundations of the Critique of Political Economy* 706.

[72] Cf Ibid. Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 120.

[73] Virno, 'General Intellect'.

[74] Marx, *Grundrisse: Foundations of the Critique of Political Economy* 712.

[75] Cf Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 131.

consequence for the subject who understands themselves as an equal individual that creates value.[76] One could disagree over the Marxian definition of value.[77] For DeAngelis's Marx, for example, value is primarily an ethical measure. One may accept the death of the law of value, or instead merely see it as a field of contest between powerful tendencies. However, whatever position is taken, what must immediately be registered is the beginning of the erosion of equivalence. Even if it is not accepted that the factory that creates value is now the social factory spreading beyond the factory walls, nonetheless the indisputable rise of technology, 'human capital' theories and the insistence on state resources (such as education) being used to generate a productive citizenry all gesture towards institutions outside of work not being mere disciplinary or ideological sites, but places where value is created. As such, capital extracts a surplus that hasn't solely been created during the labouring process. For Read, it is thus 'still possible for labor time, for the exchange value of labor, to live on as a measure, as a political standard, long after it has ceased to function as a measure of productivity.'[78] For Virno, 'Labor time is the unit of measure *in force*, but it is no longer the *true* unit'.[79] For the endeavour here in this thesis, what is the significance of labour time, in the form of the wage, remaining politically in force but losing its significance as measure of value? It is the development of a fissure between abstract labour and the legal subject. At a societal level, the effects of this split in the decline of abstract labour as *Grundnorm* were seen in Chapter 6. But if it is accepted that abstract labour underpins Pashukanis' analysis of legal subjectivity, then it ought be accepted also that the declining role of the *equivalence* inherent in abstract labour will affect the abstraction of legal subjectivity.

Before beginning the exploration into how it is so affected, one final observation about value: irrespective of whether one pronounces the death of value, Marx was certainly unable to foresee that relations of 'service' were not feudal remnants that would become extinct, but rather would become thriving sectors of the capitalist economy.[80] Such relations are now directly productive of surplus value, and from child carers to advertising executives to financial economists, the machines upon which these people

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[76] Marx, *Grundrisse: Foundations of the Critique of Political Economy* 706.

[77] For a defence of the relevance of value as measure, see articles collected in Richard Westra and Alan Zuege, eds., *Value and the World Economy Today: Production, Finance and Globalization*, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003.

[78] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 120.

[79] Virno, "Notes on the General Intellect," 268.

[80] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 126.

work range from the most basic affects to the most sophisticated parts of the general intellect, yet do not need to produce physical objects that embody surplus. Recognising the rise of the service economy does not thereby consign industrial production to history, but as 'the object of production is no longer a commodity, a thing, but a social relation' it certainly poses another challenge for measures of equivalence.[81] As the machine disappears into the general intellect and thus back into the labourer, it becomes more difficult to find a fixed standard of labour time that is the source of value. This is not to say that this kind of labour is 'unproductive'. On the contrary: it is to say that it is directly productive, but in the absence of a product and in the presence of a labourer whose capacity comes from capital from 'outside' the labour process, merely more difficult to measure.[82]

It is formal subsumption that generates the subject of abstract labour. What is of concern is that the worker fronts for work able to sell their labour power for money; how they reproduce it is not a concern for capital, just that they do. The subject can be particular and individual in the private world of reproduction, as long as they submit to equivalence and the wage when they work. However as the time outside of work also becomes a time of production, as all are exhorted to 'become subjects', the techniques of control previously only exercised within the workplace are now refracted into the subject themselves, the conflicts displaced and interiorised.[83] *'In formal subsumption the production of subjectivity is linked primarily to reproduction, while in real subsumption the production of subjectivity itself becomes productive for capital.'*[84] The distinction between formal and real subsumption here becomes complicated: unlike Hardt and Negri, who consider real subsumption to have been well under way in the first half of the twentieth century, Read understands Althusser's works of the late 1960s as located within

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[81] Virno, "Notes on the General Intellect."

[82] A public relations campaign of teachers' unions seeking a pay rise recently asked 'How do we value teachers?', and compared their pay with that of lawyers and accountants: this highlights both the crises for 'socially necessary labour time' as measure of value, and the extent to which politically the wage remains in force as measure. As will be seen in the analysis of Australian labour law in the next chapter, the trend is towards a measure of value that does not detour through the equality of abstract labour, of a uniform standard. Whereas previously the tight binding together of labour and subjectivity might justify a (male) worker in claiming a wage on the basis of the cost of raising a family or on the basis of the similarity of their work with another trade, now the (often female) labouring subject in the service sector is left without either standard.

[83] Maurizio Lazzarato, "Immaterial Labor," in *Radical Thought in Italy: A Potential Politics*, ed. Paolo Virno and Michael Hardt, Minneapolis, University of Minnesota Press, 1996, 135.

[84] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 136.

the 'factual' transitional period between formal and real subsumption.[85] Read is aware of the distinction between this transition as tendency and as historical event, but nonetheless the difficulty of pinpointing if/when this transition has occurred suggests that the argument might be better reframed. Where Read writes that 'in real subsumption, social conflict no longer passes between the singular and the abstract, rather, conflict is immediately over the singular and the common,' it is argued here instead that the role of abstract (labour) is currently a contested site, and that capital is engaged in a project of attempting to keep abstract labour in force without application, of dismantling the apparatuses that required it to detour through abstract labour to resolve conflict.[86]

Abstract labour was also bound together with a certain notion of time: the time of the factory. 'It is with the assertion of the authority of the factory system that time becomes the measure of labour and the time of labour emerges as a socially central factor.'[87] Pashukanis' equation of the equivalence of time in punishment and in labour is to be read in this light. Time as a measure of labour takes place through the wage relationship: payment for daily (and then hourly) rates of pay and the regulation of the length of the working day. This is then extended through 'successive forms of the economy of time that forge the logic of technical progress which, on the basis of the association of the principles of Taylorism and of mechanisation, will flow into Fordism.' [88] Negri notes the subsequent slow eclipsing of these distinctions as production increasingly takes place under the dominance of money rather than the command of the production relationship.[89] Time as measure – an integral component of abstract labour – recedes, a situation foreseen by Marx.[90] Time was a standard by which individual labours – and thus labourers – could be assessed, and despite the material inequality of the labour(ers), nonetheless there was claimed a certain equality, albeit an abstract one. But in the face of the rise of value created outside of the workplace, the directly personal qualities of work and strategies such as the resurgence of the 'putting out' system, whereby production

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[85] Ibid., 137.

[86] Ibid., 150. See to Vercellone on the question of formal and real subsumption: Vercellone, 'From Formal Subsumption to General Intellect: Elements for a Marxist Reading of the Thesis of Cognitive Capitalism'.

[87] Vercellone, 'From Formal Subsumption to General Intellect: Elements for a Marxist Reading of the Thesis of Cognitive Capitalism', 24.

[88] Ibid.

[89] Antonio Negri, "Interpretation of the Class Situation Today: Methodological Aspects," in *Open Marxism: Vol 2 Theory and Practice*, ed. Werner Bonefeld, Richard Gunn, and Kosmas Psychopaidåes, London, Boulder, Pluto Press, 1992. See too Negri, *Time for Revolution*.

[90] Marx, *Grundrisse: Foundations of the Critique of Political Economy* 705ff.

takes place under the M-C relationship and the producer is required to simply furnish goods, no matter how many hours it took them to make, measure by time remains in force but is not necessarily the real measure. When the wage – which bound together the real abstractions of money and time – was the primary measure of value, then equivalence was an essential part of the subjectivity of the labourer who fronts for work. '"Real abstraction" is above all money, which represents the commensurability of labor, of products, of subjects.'[91] As argued above, however, when Marx's insights are verified by capitalist development, and the general intellect, the 'complex of cognitive paradigms, artificial languages, and conceptual clusters which animate social communication and forms of life' becomes itself productive force, it must be noted that:

> the *general intellect* has nothing to do with the principle of equivalence. The models of social knowledge are not units of measurement ... Techno-scientific codes and paradigms present themselves as an "immediate productive force". ... One could say that while money is the ... exchangeability itself of products[,] life, instead, takes the place of productive potential, of the invisible *dynamis*.[92]

What is purchased in the wage relation is no longer a quantum of labour to produce a quantum of value, but rather the productive potential of life itself, of subjectivity. The subject now stands before the employer (or their head contractor, or their client) and offers not just to bring their mental and physical capacities to the workplace for a defined period of time, but instead sells the affective capacities that have been developed outside of the workplace that increasingly operate at the level of language and productive potential itself: "I sell you my presence to be at your command, but I may not produce an identifiable product at the end of the working day and there may be no distinction between the most basic of my human qualities and the tools I use while engaged in this common affective endeavour. It is not clear exactly where the 'qualities' I am alienating to you end and my subjectivity begins, and most of what you are purchasing is not something given only to you but replicates what I do outside of work regularly, so I am not sure how (apart from the fact that contracts are said to be between equals) what we are doing is an equal exchange. I may not even be called an employee any more. But nonetheless through my activity you will generate a surplus."

It is important to be clear about this point: this is not an assertion that industrial factory work no longer takes place. But it is an argument that the workers in such factories often are expected to share the same traits as those in the call centre: the ability to work as a

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[91] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 87.

[92] Ibid., 87, 83.

team, the capacity to adapt to flexible new technologies, to work on a 'just in time' basis, and so on.[93] In short, the affective capabilities of species-being are now embodied in the general intellect and are now put to work in all forms (manual, intellectual, etc) of work. Here in this thesis these points are not taken as far as Virno sometimes does, namely to say that this new 'form of life' is hegemonic. But nor does this thesis go to the other extreme and argue that nothing fundamental has changed because workers are still exploited, or that the money form of the wage relation was only ever a cover for bare relations of domination. Instead, this thesis argues that there is something significant in the manner in which work is legally authorised and understood - whether as a contract (and for what) or as the exercise of command grounded in the nature of the employer or the production process – but that rather than having arrived in a new epoch, a contest is underway, one in which the principle of equivalence is at stake. This is not a struggle limited to the workplace: instead, following the general argument in this thesis, it is a struggle that infects law too. The method of rule over labour is recasting the distinctions between worker and citizen, and over the meaning of equality. To put the position boldly to make the point: if the abstractly equal legal subject of Pashukanis was tethered to the wage, the legal subject now is connected with the contingency of the M-C relation which, once labour has no recognised place in the material constitution of society, has no necessary link to the fictive equality of the *polis*. Of course, despite the rise of 'non-traditional' forms of employment, wages still get paid. Virno offers two related explanations for this: first, as Marx noted, the law of value can remain in force even though it is not the real measure – it becomes instead a means of discipline over labour; but secondly, capitalism is being remade but with the tools currently available to it: '*The surpassing of the society of labor occurs in the forms prescribed by the social system based on wage labor.*'[94] Labour time is thus not completely consigned to history, but 'continues to be valid as a parameter of social development and social wealth.'[95] To wealth and development can be added the tussles over legal subjectivity. Indeed, and

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[93] The 'principal requirements of dependent workers today' are 'to be accustomed to mobility, to keep up with the most sudden conversions, to be able to adapt to various enterprises, to be flexible in switching from one set of rules to another, to have an aptitude for a kind of linguistic interaction as banalized as it is unilateral.' These attributes 'are the result of a socialization that has its centre of gravity *outside of the workplace*. ... Only one who is experienced in the haphazard changing nature of the forms of urban life knows how to behave in the *just in time* factories.' Ibid., 84-85.

[94] Cleaver asks whether the wage was ever anything other than this, and cautions against predicting the early demise of value: Harry Cleaver, "Work, Value and Domination: On the Continuing Relevance of the Marxian Labor Theory of Value in the Crisis of the Keynesian Planner State," (1989). Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 101.

[95] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 101.

perhaps paradoxically, this may result in an empirical *increase* in the prevalence of the wage-form: Vercellone argues that the 'historical meaning' of the current 'precariousness of the conditions of remuneration and employment that characterise cognitive capitalism' lies in 'forcefully making reemerge the primary nature of the wage relation: that of being a monetary bond which makes wage-labour the condition of access to money.'[96] However one discerns these contemporary trends, all circle around the decline of the equivalence of the wage as an organising, structuring principle for a new politics and subjectivity.

It is worth recalling Marx's critique of Lasalle's 'Gotha Programme'. Lasalle sought to elevate labour to a central political principle, arguing that labour was the source of all wealth and that all ought be entitled to an 'equal' share of its products. Marx famously critiqued Lasalle by counterposing the material inequality of workers to their formal equality, and instead proposed 'from each according to their ability, to each according to their needs.' What cannot be lost sight of here is that this is not merely a formal equality vs. material inequality distinction. Yes, 'right instead of being equal would have to be unequal.'[97] But the source of the problem lies not in questions of just distributions of product, *but whether the production process itself remains subject to measure*. As noted above, Benjamin understood that the import of Marx's critique was the refusal to glorify labour in the manner Lasalle sought, namely as 'the source of all wealth and all culture', for so long as labour remained subject to measure one could not properly talk of 'equality.' For Marx, the 'narrow horizon of bourgeois right' could only be crossed in a higher phase of communist society, where access to goods was not related to any measure of labour, which could occur only 'after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life's prime want; after the productive forces have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly.'[98] It is not the spread of the exchange of commodities under capitalism that sees right identified with 'equality', but rather the particular relations of production. And to return to the question of species-being, Lasalle also erred in that he considered 'labour'

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[96] Vercellone, 'From Formal Subsumption to General Intellect: Elements for a Marxist Reading of the Thesis of Cognitive Capitalism', 31.

[97] Karl Marx, "Critique of the Gotha Programme," in *Karl Marx and Frederick Engels: Selected Works*, ed. Progress Publishers, Moscow, Progress Publishers, 1968, 324-5.

[98] Ibid., 325.

as a transhistorical feature of human activity, mistaken not merely in 'supposing that man *has* an invariant nature – a real nature that may be read off to yield moral rules or principles [but because] Lasalle confuses (by premature assignment) what he wrongly takes to be the universal (classless) concerns of man.'[99] That is, Lasalle misunderstands labour within the current methods of organising labour as something attributable to human activity itself.

This supports the argument insisted upon in this thesis: a Marxist critique of law must move work and relations of production back to centre stage in any analysis of legal subjectivity. Yet as soon as this has been done, history catches up. For if, as Benjamin said, Marx sensed trouble with this Lasallian elevation of labour, nonetheless this elevation characterised the first half of the twentieth century.[100] In its willingness to accept (albeit under duress) that 'one man is superior to another physically or mentally ... one worker is married, another not; one has more children than another, and so on and so forth', right *was* unequal as management of labour-power became a political concern.[101] And aren't the advances stipulated by Marx - the dissolution of mental and physical labour, the deepened co-operative nature of work, the erosion of the distinction between work as a means of life and life itself - now the same denoted by Virno, Hardt, Negri and Vercellone as characteristic of the current production process? In a way they are, but the domination inherent in the wage relation has not been usurped. Virno thus calls Post-Fordism the 'communism of capital'.[102] Hamacher, commenting on the fate of history since the Marx of *On the Jewish Question*, puts it more starkly, asserting that:

> all Hegelian-Christian prognoses concerning the course of history are further than ever from their fulfilment, that political systems still have not become socialized, that international capital is being put to use for a select few, that thus democratic state "societies" have not become human societies, not national, international, or global ones.[103]

Where Lasalle sought to graft a nascent social equality onto a (misunderstood) system of production as equal exchange, now there exists waning social equality with an equally declining support of equal abstraction.

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[99] Margolis, "Praxis and Meaning: Marx's Species Being and Aristotle's Political Animal," 351.

[100] Benjamin, "Über Den Begriff Der Geschichte," 148.

[101] Marx, "Critique of the Gotha Programme," 324.

[102] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 110.

[103] Hamacher, 'The Right to Have Rights (Four-and-a-Half Remarks)', 349.

To conclude by way of summary, the separations chartered in *On the Jewish Question* are of a piece with the Pashukanis quote that begins this section of this chapter. That is, abstract labour is part of the same mode of production (industrial capitalism) that ushers in 'human rights' *because abstract labour is premised on a separation of labour into the sphere of the atomised and equal private individual.* However, the twentieth century spent most of its time socialising labour, and reconfiguring these separations. The idea of abstract labour embodied both *equivalence*, which morphed from the individual labouring subject to the corporatist equality (with capital and the state) of the legalised working class, and *labour as such*, which grounded constitutions.[104] Earlier chapters examined how the collective subject of the working class was removed from the material constitution of society. Here is stressed the importance of the change in the method of abstraction:

> [S]ince the general intellect comprises knowledge, information and epistemological paradigms, it also sharply differs from the 'real abstractions' typical of modernity, that is those which embody the principle of equivalence. ... The principle of equivalence used to be the foundation of the most rigid hierarchies and ferocious inequalities, yet it ensured a sort of visibility for the social nexus as well as a simulacrum of universality meant that, albeit in an ideological and contradictory manner, the prospect of unconstrained mutual recognition, the ideal of egalitarian communication and sundry 'theories of justice' all clung to it.[105]

Today, however, because the subject understands the 'immediately productive' nature of their social forces, there is witnessed a decline in even the individual legal subject's formal abstract egalitarianism: 'The demise of the principle of equivalence manifests itself in the cynic's conduct as the impatient abandonment of the demand for equality.'[106] This demise of equivalence, the latter concept explained by Pashukanis and Virno as being intimately linked with abstract labour, tells the other side of Hardt and Negri's rise of emergency powers. This conclusion can only be reached if it is accepted, *contra* Agamben, that the relegation of labour to the sphere of the private was a key moment in the founding the *polis*. But with Agamben, once one starts to examine the separations being effected on/within the subject as it enters the era of more prevalent emergency rule, an enquiry into subjectivity in the spirit of Pashukanis can be advanced. If then was the epoch of nascent 'industrial capitalism, the declaration of human rights, the political economy of Ricardo, and the system of imprisonment for a stipulated term', now is

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[104] Hardt and Negri, *Labor of Dionysus: A Critique of the State-Form*, 66. See too Bernard Edelman, 'The Legalisation of the Working Class', *Economy and Society*, 9, no. 1, 1980, 50 - 64.

[105] Virno, 'General Intellect', 6-7.

[106] Ibid., 7.

advanced capitalism, rule by human rights, the political economy of neo-liberalism and indefinite detention. The abstract legal subject of abstract labour is beginning to give way to the legal subject of neo-liberalism. How these separations are being effected, and what else this means for the *Gattungswesen* of Marx's *On the Jewish Question*, will be seen in the next chapter.

Chapter 8 - Subjects without entitlements

This final chapter continues the argument of Part IV by examining how the decline of abstract labour accompanying neo-liberalism dismantles various assemblages that characterised the legal subject of the Keynesian welfare state. Throughout this thesis the pivotal role played by labour law in questions of social ordering has been asserted; a consideration in this chapter of recent changes in Australian labour law illustrates and continues this argument. In returning full circle to Pashukanis' abstract legal subject, the chapter concludes by examining the effects of the separations wrought upon this subject, the bringer of goods to market that enabled commodity exchange to take place. Consistent with the methodology of this thesis, by continuing to take the command over and organisation of labour as the starting point, this chapter links the rise of emergency measures and the decline of the guarantee of rights to the decline in abstract labour, paralleling the arguments advanced in Chapter 6 but considering the situation this time from the side of the subject. These elements are drawn together so as to advance some propositions about the legal subject of neoliberalism.

Neoliberalism

Neoliberalism involves the privatisation of profitable public goods, the organising of society according to principles of the market, the fiscal and monetary reforms of the 1970s and 1980s and various forms of deregulation. But whilst one can point to these trends, there is no consensus on the nature of the 'neo-liberal' economic order that we now inhabit: 'we still have to ascertain the contours of the new social compromise that has yet to be established.'[1] Following the Open Marxists, perhaps it is questionable whether it can be asserted that a new epoch ever arrives. And even if it does, it may not bear the hallmarks of 'compromise'. Indeed, this is what characterises the ongoing role of the state: less the broker of compromise, and more the enforcer of discipline within a territory. Without necessarily accepting her version of 'empire' or the necessity of capital acting in any particular way, Ellen Meiksins Wood correctly identifies an ongoing role for the state:

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[1] Suzanne De Brunhoff, "Value, Finance and Social Classes," in *Value and the World Economy Today: Production, Finance and Globalization*, ed. Richard Westra and Alan Zuege, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003, 55.

> The boundless expansion of capital is possible because of its unique ability to detach itself from 'extra-economic' power, while that same detachment makes it both possible and necessary for capital to rely on the support of 'extra-economic' powers external to itself, in the form of territorially-limited legal, political and military organisations. Global capital is served not by a global state but by a global system of multiple territorial states; and the 'new imperialism' is not about an ever-expanding political structure to match the scope of capital accumulation but about the complex relation between the economic reach of capital and the territorial states which organise and enforce its global hegemony.[2]

One can immediately jump to the opposite pole, as Hardt and Negri do, and delineate the supra- and de-nationalised institutions of law and right that are developing. Or one can take something of a more nuanced sociological position, as Sassen does, and suggest that as with the transition from feudalism to capitalism, there exist in incipient form a variety of social capabilities which are being reconfigured into different assemblages: one would not have seen the form of sovereignty of the Capetian kings, for example, as 'dominant' in the tenth to fourteenth centuries, yet their ability to align territorial rule with city states generated the capacities for the sovereign nation-state of nascent capitalism.[3] As such, it is possible now only to identify tendencies in the formation of new juridical orderings, for the era is one in the midst of a range of contingent forces that may yet take a variety of shapes.

A version of the stories (both positive and critical) of neoliberalism speak of the decline of the nation state.[4] The rise of supra-national institutions and global capitalism are said to herald the end of sovereignty over territory exercised on a national basis. This is not the argument advanced here. Not only do such narratives tend to ignore the extent to which the Wetsphalian state was always organised on a semi-international basis, or the extent to which significant multilateral institutions require sovereign states as their foundational units, but they misapprehend the relevance of the changes taking place.[5] Neoliberalism is associated with a strong state. An attack by capital on certain of the redistributive functions of the state does not signal its end. It is the return of state power to its 'nature', *pace* Edelman, rather than a decline. Sovereignty is not something that can be 'taken over

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[2] Ellen Meiksins Wood, 'Logics of Power: A Conversation with David Harvey', *Historical Materialism*, 14, 2006, 9-34, 12.

[3] Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Ch2.

[4] The role of the state is one of the points of difference between David Harvey and Ellen Meiskins Wood: see e.g. David Harvey, 'In What Ways Is 'the New Imperialism' Really New?', *Historical Materialism*, 15, 2007, 57-70; Wood, 'Logics of Power: A Conversation with David Harvey'. See also David Harvey, *The New Imperialism*, Oxford, Oxford University Press, 2003; Laffey and Weldes, "Representing the International: Sovereignty after Modernity?."; Ellen Meiksins Wood, *Empire of Capital*, New York, Verso, 2003.

[5] See Laffey and Weldes, "Representing the International: Sovereignty after Modernity?." for a discussion of the history of the globalised state.

by global capital'.[6] Here the argument insists on the ongoing role of the sovereign nation-state, even if accompanied by a remaking (from both the inside and the outside) of what it means to be 'national'. In particular, while Hardt and Negri's analysis captures the shift from the social state to the strong state, it then unjustifiably removes the nation state from the circuits of subjectivity necessary to create the legal subject.

Significant changes in world political economy have taken place since the 1970s (even if there might be disagreement on the extent of each of those changes) but neoliberalism is more than just a suite of economic policies: it is a system (albeit contested) of political rationality, as Brown and Foucault have argued. In Brown's words, 'neo-liberalism carries a social analysis which, when deployed as a form of governmentality, reaches from the soul of the citizen-subject to education policy to practices of empire'.[7] As a system of social ordering, it is not simply a question of the primacy of the market over the state, or the implementation of economic rationalist social policy. Rather, as Foucault's analysis of the German *Ordo* school of neo-liberal economists demonstrates, there is a denaturalisation of the market: where liberalism presumes the market is natural, *neo*liberalism understands that 'this fundamental economic mechanism can function only if support is forthcoming to bolster a series of conditions, and adherence to the latter must consistently be guaranteed by legal measures.'[8] Whereas civil society was previously the natural human excluded from the *polis*, now the central political/economic task becomes the management of this separation and then reintegration of the economic and the political.

Foucault rightly concludes that for the *Ordo* and Chicago neoliberals, 'law is no longer a superstructural phenomenon, but itself becomes an essential part of the (economic-institutional) base and thus an indispensible instrument for creating entrepreneurial forms within society.'[9] However, this does not justify the elevation of 'governmentality' to the status of central theoretical concept *in lieu of* political economy. Instead, *pace* De Angelis and Hardt and Negri, this tension between what Foucault terms the 'complementarity and conflicts between techniques which assure coercion and process through which the self is constructed or modified by himself' is precisely the point where Marxism insists on

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[6] Connolly, "The Complexities of Sovereignty," 23.

[7] Brown, *Edgework: Critical Essays on Knowledge and Politics*, 39.

[8] Lemke, '"The Birth of Bio-Politics": Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality', 194.

[9] Ibid., 196.

the importance of understanding the remaking of the legal subject in political-economic terms.[10] Indeed, if the argument in this thesis has succeeded, then Foucault's rejection of the neat distinction between base and superstructure not only fails to justify a departure from political economy, but indeed embodies a certain Marxian spirit. The *Ordo* school interests Foucault because of the constitutive role of law in establishing the market. In reversing the historical/theoretical priority given to the market over the state and law, *Ordo* neo-liberalism instead takes the question of guarantee as the central political problem. The health and growth of the market thus become the basis of state legitimacy. This is a similar argument to that in previous chapters, but the trajectory of Foucault's inquiry, as taken up by Brown, leads in a slightly different direction, to the question: what becomes of the subject when the organisation of state/subjectivity relations are organised according to a market rationality?

Entitlement

Prior to neoliberalism, it is argued here, the notion of *entitlement* bound together law, authority, guarantee and value for the Keynesian subject. Provided one worked for one's employer in accordance with the arrangements negotiated between labour and capital, then the state would guarantee certain minimum entitlements. And the collective Keynesian subject of the working class (through its institutional representation) was guaranteed a place at the table. As a result of the compacts there reached, a working subject was acknowledged as producer of value and could consider themselves entitled to a range of benefits both inside (in the sphere of production) and outside (reproduction) of work. The practices of neoliberalism, however, radically reconfigure this relationship between value, authority, guarantee and subjectivity. Indeed neoliberalism can even be described as a project of the enclosure of entitlements.[11]

Certainly 'entitlement' captures the notion of a 'right to' something, and is an apt term for an era when an individualistic politics turns 'the expression of wish, the "I want X" into "I have a right to X".'[12] But it isn't just about a claim: it reflects an historical pattern of having that claim met and satisfied. And a particular kind of claim: one about the work and the reproduction of the conditions of work. And one might assert or claim a right, but one additionally *receives* an entitlement. It is thus a useful term to examine because it

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[10] Ibid., 204.

[11] Cf De Angelis, *The Beginning of History: Value Struggles and Global Capital*, 143.

[12] Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, 129.

melds the positivity and arbitrariness of state decree (e.g. 'Your entitlement is $X per week') with both the extra-judicial status of natural right ('I am entitled to this') and the historicity of the post-Keynesian enterprise ('The government is taking away our entitlements.')

As referred to in previous chapters, anticipating the strengthening of the welfare state and the juridification of social relations, in the 1920s and 1930s Neumann and Kirchheimer sought to develop a 'social rule of law' (to which capitalism was a barrier) which would extend formal principles of equivalence to include substantive equality.[13] Kirchheimer's analysis of the growing Keynesian state apparatus from the 1930s to the 1960s is of use to the argument advanced here about entitlement. For Kirchheimer, rule by decree was a legal form corresponding to a monopoly capitalism struggling to incorporate a combatative labour into its constitution. In contrast to Herbert Marcuse, who announces in 1965 that the post-fascist period is one of 'an emergency situation, and that it has become the normal state of affairs,' Kirchheimer sees this later period as one of a proliferation not of emergency rule itself, but of the ambiguities that led to the rise of emergency rule.[14] On the one hand, widespread bureaucratisation and the spread of social rights kept alive the flame of substantive equality; on the other, it opened the way for exercise by administrative power unable to be effectively overseen by parliament. In the 1960s, there is then a crucial shift correctly perceived by Kirchheimer: the 'most striking and most ambiguous facet of postwar legal development' was the creation of a universe of legal *claims*.[15] The substantive and participatory qualities of these widespread social 'rights' now becomes an entitlement to have one's claim heard and tested by an appropriate state authority. Kirchheimer's criticism of such a universe is its conversion of substantive social equality into:

> a rule of law, resting only on the theoretical availability of legal remedies, somehow resembling a modern house whose glass wall, the major attraction for all visitors, already stands, but whose wooden utility walls no one has so far bothered to build.[16]

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[13] Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*; Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Ch8.

[14] Quoted in Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 220.

[15] Otto Kirchheimer, "The Rechtstaat as Magic Wall," in *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer*, ed. William E. Scheuerman, Berkeley, University of California Press, 1996; Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 224.

[16] Kirchheimer, "The Rechtstaat as Magic Wall," 253.

Kirchheimer's argument is not a simple 'formal equality vs substantive inequality' exegesis. Rather, a universe of enforceable claims 'threatens to generate highly ambivalent relations of dependency.'[17] Kirchheimer was right to be anxious about this development. For here the 'entitlement' of the welfare state begins to fracture into a substantive right (administered executively) and a procedural right (enjoyed by the private citizen and delivered by a (quasi-)judiciary). A right to housing provided by the state becomes a right to appear before a tenancy tribunal to appeal against forcible eviction by a landlord, a right to guaranteed living income becomes the right to an allowance and to appeal if the bureaucrat pays the wrong allowance, and so on. The 'relations of dependency' increasingly get transferred to the procedural part of the right, and equality of opportunity replaces substantive equality. This is a precursor to the split being witnessed now, where even these relations of dependency are being undone, but it is critical to understand the history. Two shifts are underway within the legal subject, one of which by the twenty-first century is more complete than the other: first, substantive entitlements are divorced from procedural entitlements, and secondly the state steps in as guarantor of procedural right, but then begins to withdraw from same. To modify and update Kirchheimer slightly, relations of dependency are no longer growing, but instead a greater distance is being placed between the state and the subject as even procedural entitlements are now being removed.[18] Guarantee, a central concept from Pashukanis to Negri to Agamben, as argued above, is reconfigured.

Further separations are being wrought upon the labouring subject. If capitalism deterritorialised authority, nonetheless it remained operative through the nation state and through circuits of production that took place within one country. Indeed, the constellations of 'territory, authority, rights' upon which almost all Marxist legal analysis proceeds is one where the legal subject is produced within the one jurisdiction. Entitlement was similarly inherently linked with jurisdiction, with the nation state the organising site for post-war labour compacts.[19] To the extent that conflicts over labour power were displaced, they were at least displaced onto an identifiable territorially bound sovereign. As Sassen argues, the configuration of 'territory, authority, rights' that

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[17] Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 242.

[18] The concept of 'distance' between the subject and the State is Sassen's: see Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*; Saskia Sassen, "The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics," in *Empire's New Clothes: Reading Hardt and Negri*, ed. Paul A. Passavant and Jodi Dean, New York, Routledge, 2004.

[19] On the importance of jurisdiction, see too the second part of Fitzpatrick, *Modernism and the Grounds of Law*.

bound the labouring subject to a national sovereign were tightened into a more coherent assemblage towards the start of the twentieth century.[20] As her research finds: 'Many of the dynamics that built economies, polities, and societies in the nineteenth and twentieth centuries contained an articulation between the national scale and the growth of entitlements for citizens. ... During industrialisation, class formation, class struggles, and the advantages of employers or workers tended to scale at the national level and became identified with state-produced legislation and regulations, entitlements and obligations.'[21] Now, however, this relationship is increasingly fractured.

Unlike previous eras of globalisation, the command inherent in the employment relationship is exercised through trade. Profit may appear to arise from capital itself in the circuit M-C-M' because something is purchased and then sold at a greater price, yet Marx famously insisted on the production process ...P... that inserts itself into this relation. This was where command was exercised. However, globalised and international production relations offer capital the opportunity to externalise many of the costs of production, and the production process takes place itself under the guise of an M-C relation. A prime example is the phenomenon of 'contracting-out,' a practice that can take place as part of highly sophisticated contracting chains, where capital retains control of the specifications of goods yet bears none of the responsibilities that the social state may have attached to the wage relationship.[22] Legal subjectivity had effects on capital accumulation strategies: it bound capital to internalise some of the external costs of production, including some of the costs of reproduction of labour. Capital has spent a large part of the last twenty years fleeing this imposition. We thus now have the rise of what De Angelis terms 'disciplinary trade', where 'the continuing process of trading is not simply ancillary to the accumulation needs of capital, but is one of the constituent moments of *capitalist*

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[20] Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, 150.

[21] Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996, 284.

[22] See e.g. L. E. Alonso Benito, "Fordism and the Genesis of the Post-Fordist Society: Assessing the Post-Fordist Paradigm," in *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, ed. L. E. Alonso Benito and Miguel Martinez Lucio, Houndmills, New York, Palgrave Macmillan, 2006; Ian Greenwood and Mark Stuart, "Employability and the Flexible Economy: Some Considerations of the Politics and Contradictions of the European Employment Strategy " in *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, ed. L. E. Alonso Benito and Miguel Martinez Lucio, Houndmills, Basingstoke, Hampshire ; New York, Palgrave Macmillan, 2006; Jose Manuel Lasierra, "Flexible Enterprises: An Analysis of Their Institutional Standing," in *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, ed. L. E. Alonso Benito and Miguel Martinez Lucio, Houndmills, Palgrave Macmillan, 2006; Paul Stewart, "Individualism and Collectivism in the Sociology of the Collective Worker," in *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, ed. L. E. Alonso Benito and Miguel Martinez Lucio, Houndmills, Palgrave Macmillan, 2006.

relations of production ... [and exercises a] regulatory function of social antagonism at the global level.'[23] This is a critical moment for legal subjectivity, it is argued here, for now the producer reappears as a private egoistic subject of civil society, now in possession of their *forces propres*, but under the guise of an entrepreneurial, decollectivised, contracting subject, where the legal employment contract/ wage relation ceases to be the justification for command.

Further, much of this trade is international. Whilst there was always a global division of labour, this was historically largely organised around access to (cheap or plundered) resources, the pillaging of the global South.[24] Now, however, with the significant reduction of transport costs, it is often merely cheaper labour that drives international divisions of labour. Global divisions of labour are no longer neatly organised and certainly not solely based on access to resources, but rather are disciplinary devices. What becomes of the factory Lycurgus now? 'International trade is becoming an impersonal foreman, since it constitutes an important element of command over labour.'[25] Discipline is interiorised by the threat of mobility of capital and of labour. There is thus something like the Benjaminian uncertainty about whether law will be applied, or what De Angelis calls the *ex ante* threat of capital to adopt its edicts lest it take its business overseas. But the internationality of this threat, combined with the neo-liberal reordering of the state as keeper of the market, means that there is no sovereign who steps forward to secure entitlements in the face of this threat. The primary impact of the so-called decline of the nation state is thus not found in its alleged subservience to capital or to multi-lateral institutions; rather, it is to be found in the state's relationship to its own subjects. Indeed, the narratives of nation-state decline are arguably intended primarily for internal consumption: after all, if the state has ceded power to a globalised world, then surely that justifies the dismantling of entitlement? The real crisis of sovereignty is not explained by the decline in 'power' of the nation state *vis a vis* capital (because this fails to understand the real restructuring that is taking place) but rather by the *subject* vis a vis the nation state. The rise of command as international trade and of finance capital over the production process are primarily about removing the state's ability to act as guarantor of such entitlements of its subjects *qua* labourers. Here is the

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[23] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 119.

[24] De Angelis, *The Beginning of History: Value Struggles and Global Capital*, 121.

[25] Ibid.

proper international legal relation that forms the basis for analysis of law, not Miéville's analysis of law between nations.

Additionally, privatisation radically alters the sovereign's relation to the legal subject. Not only are state owned goods and services privatised on a massive scale, but there is also considerable growth in sources of private authority.[26] Sassen identifies five such sources: the proliferation of private agents who originate rules and norms for erstwhile government domains; marketising of existing public functions; private agents exercising international political authority; the representation of private norms as public norms (e.g. the primacy of the market); and the shift of public regulatory functions to the private sector.[27] At the level of international commerce it is most easy to discern the formation of systems of private law, often established by companies or economic associations, which bear all the features of enforceable law. Many of these rules (e.g. from the World Trade Organisation) come to be enacted by governments and find their way back into obligations that bind citizens.[28] But also relevantly for the argument here, the Keynesian state embodied its philosophy in its employment practices; privatisation now delivers new tranches of employees over to market logic. The main effect of privatisation on the legal subject, however, is to reorder the distinction between public and private. Armed with a certain understanding of Althusser, Edelman began to chart the re-separation of the individual's social forces from their political forces. For Edelman, the problem of the split legal subject bears every relation to the problem of the State's separation from the private:

> As soon as the State apparatus is 'privatised', we see an ever sharper contradiction between an apparatus claiming to be the sole political being and which none the less is transmitted into the private – by definition 'apolitical' for that being. It is this in particular that makes even more ineffective the notion of the public subject in law or private subject in law, since the very nature of the State weakens this category.[29]

The loss of entitlement that accompanies the privatisation of social services is 'lengthening the distance between the state and the citizen, a move away from what was the signal contribution of the French and American revolutions: the notion that the people are the state, and the state is the people.'[30]

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[26] Cf Hardt and Negri, *Multitude: War and Democracy in the Age of Empire*, 169ff.

[27] Sassen, *Losing Control? Sovereignty in an Age of Globalization*, Ch2; Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, 192.

[28] See e.g. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, 203.

[29] Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, 133-34.

[30] Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, 413.

In addition to trade, international commerce and privatisation, there is debt. The decline of state spending on social entitlements and the privatisation of same has shifted components of the erstwhile social wage into the private spheres. The costs to individuals for services such as health, education, energy and childcare rises. And as effective wages go down, debt goes up.[31] This 'financial compensation of wage moderation ... through access to finance' easily becomes subordination to a new private power.[32] Indeed for Deleuze, we are no longer enclosed in the factory by the wage, but rather 'the operation of the market is now the instrument of social control and forms the impudent breed of our masters. ... Man is no longer man enclosed, but man in debt.'[33] De Angelis replies:

> But debt of course is at the same time a form of enclosure, not in terms of physical confinment, but in the original sense of separation from social wealth, a separation that acts as a material force to turn activity into abstract labour and therefore accumulation.[34]

While Deleuzian control of flow may operate at the level of organisation of and between these various systems (of work, debt, prisons etc), nonetheless it is still an internalising ethic of discipline that makes each of them work, makes them effective. Debt disciplines, and importantly it is a *private* force that is threatened to be exercised.

Although the juridical question of neoliberalism is usually understood as a colonisation of ever more spheres of subjectivity, this ought not obscure that it is also a *retreat* of the sovereign from the subject and an abandonment to the market. If 'new rationales are developed for cutting down on ... entitlements, which in turn weakens the reciprocal relationship between the citizen and the state,' then what is the new relationship between labour and citizenship within the one territory?[35] The more overtly political work of Agamben rightly focuses on the 'less than full citizen', the human upon whom the separating machine of sovereignty has worked its effects, emblematic amongst whom are those 'stateless' people who lack fixed citizenship and arrive in countries where they are accorded less than 'full' rights.[36] However, the lack of attention to labour blinds him o a correlative tendency: the formally full citizen who is unable to assert rights against a

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[31] De Angelis, *The Beginning of History: Value Struggles and Global Capital*, 72.

[32] De Brunhoff, "Value, Finance and Social Classes," 56. See too Albritton, "Marx's Value Theory and Subjectivity."

[33] Giles Deleuze, 'Postscript on the Societies of Control', *October*, 59, no. Winter, 1992, 3-7.

[34] De Angelis, *The Beginning of History: Value Struggles and Global Capital*, 221.

[35] Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, 284.

[36] See e.g. Agamben, *Means without End: Notes on Politics*.

sovereign. The withdrawal of the state does not necessarily result in subjects becoming post-national (Sassen's term) or newly cosmopolitan (Douzinas'), but may also give rise to a tendency of what Sassen calls 'denationalisation', where the neoliberal transformations that occur inside the nation state, such as privatisation and the reduction of entitlements that have been considered, create subjects with full citizenship status yet less than full political recognition *vis a vis* the state.[37] Sassen defines this as a tentative trend still unfolding, and identifies subjects such as Japanese housewives as emblematic. However, where for Agamben the exercise of power is captured in the figure of the 'recognised yet unauthorised' abandoned by sovereignty, the analysis here focuses attention on the 'authorised yet unrecognised' subject who is captured within the territory of a redefined nation-state.[38]

Authorised yet unrecognised

The state's role is no longer to entitle the subject, but to create the space for the neo-liberal subject to organise their own desires, and it is presumed that such desires will be organised according to a market logic.[39] This is perhaps the site where living labour, the rise of the market and the strength of the state intersect. The subject is exhorted to make themselves, within the limits set by the state, and using the mechanisms offered by the market. 'The crisis of Keynesianism and the reduction in forms of welfare-state intervention therefore leads less to the state losing powers of regulation and control' and can instead 'be construed as a reorganisation or restructuring of government techniques, shifting the regulatory competence of the state onto "responsible" and "rational" individuals,' with the neo-liberal subject expected to act entrepreneurially, 'calculating rather than rule-abiding, a Benthamite rather than a Hobbesian.'[40] '[R]ational economic action suffused throughout society replaces express state rule or provision.'[41] But here is

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[37] See Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Ch6; Sassen, "The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics."

[38] The terms are Sassen's, here put to a slightly different use: Sassen, "The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics," 186, 88.

[39] Pashukanis' observation about the equivalence of money and time incarcerated is thus taken to its limit by Chicago neo-liberals who treat criminality as a market question. Unlike their treatment by early liberal refomers, criminals are understood as rational individuals who will engage in a profit and risk analysis, and society should thus always expect a certain level of criminality. 'Neo-liberal penal policy is therefore action that impacts on the balance of profit and loss and seeks to apply leverage to the cost-benefit ratio.' Lemke, '"The Birth of Bio-Politics": Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality', 199-200.

[40] Brown, *Edgework: Critical Essays on Knowledge and Politics*, 43; Lemke, '"The Birth of Bio-Politics": Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality', 201-02.

[41] Brown, *Edgework: Critical Essays on Knowledge and Politics*, 44.

the conundrum for the subject. If economic action replaces state rule or provision, then the division between public and private has been completely remade. Marx's vision has arrived, but perversely: the social forces of species being that were separated to form the state now have returned to the individual, but only to the individual in her form as 'private citizen'. Critically, though, these forces have returned without having to go through the various apparatuses of abstract labour that at least guaranteed some minimal formal equality. As such, there is a 'personalisation of subjection' which is 'personal in two respects: first, one is dependent on a person rather than on rules invested with an anonymous and coercive power; second, what is subdued is the whole person, the very disposition to thought and action, in other words, each person's 'generic existence' (to use Marx's expression...).'[42] Although he erred in seeing them as outdated remnants which capitalism would sweep aside, Marx was perhaps correct in his insight (above) that jobs in the 'service' sector bore feudal characteristics.

Negri's reading of Pashukanis and Marx highlighted an important transition: once production takes on a cooperative character, the source of authority for command over labour shifts from a simply private law contractual footing and begins to inhere in the labour process itself. The more recent developments to which Virno drew attention in the previous chapter signal a warped replaying of this transition under altered conditions: it is now the erstwhile public authority for the ordering of labour that recedes before the co-operative nature of the productive process. But this new co-operation is no longer that between discrete individuals, but rather is intersubjectivity itself, the social that allows the individual to differentiate itself. The basic features of language that one uses to individuate – its pre-individual sociality to which one can continually return – characterises the general intellect and is the feature that is now put to work by capital.[43] This is a significant collapse between authority (over work) and action (of work). There is thus an '*immediate connection* between production and ethicality, "structure" and "superstructure."'[44] It is an argument that resonates with Agamben's collapsing of law into life, but with the marked difference that subjectivity is here inherently productive, that 'rule' is a question of rule over labouring subjects, not bare life.

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[42] Virno, 'General Intellect', 8.

[43] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 75ff.

[44] Ibid., 84-5.

The 'work to rule' industrial tactic is thus no longer available to workers, because the supplement that used to exist outside the rule-book – the worker's creative labour – moves to centre stage and is the subject itself of the wage relation. Further, not only is there a decline of state-sanctioned regulation of the work process, but the source of the regulation over how the work is done increasingly moves to the subject themselves. Work is commanded by a command to put oneself to work, to exercise autonomy, one's problem solving skills, etc. A lecturer at a technical college advised in a personal communication that changes to their work from the 1980's onwards resulted in a proliferation of 'quality assurance' manuals and documents relating to how teachers performed their work, but whereas a syllabus from the 1970s would detail what would be taught in a particular subject and how it was to be done, now 'competency based training' 'unit manuals' list only generic competencies expected of the student and give virtually no direction as to the content of their daily work. Virno would argue that such a story is representative, not merely anecdotal. What would it mean in this instance to just 'follow the rules'? Here a fundamental connection being decoupled: the lack of external 'rule' to which one's work must conform – the tendency towards having to rule one's work oneself – coincides with a decline in the erstwhile abstractly equivalent measures of work, namely money and time.

A slightly more contentious point also is advanced here. Although labouring and consumption become 'private' affairs, they nonetheless take place within boundaries regulated by the state, boundaries set to ensure the efficient functioning of the market. As seen above, the 'legitimation' crisis is resolved when the state's goals are set as the functioning of the market.[45] This means that labour becomes again in part a common political endeavour, but only in so far as rule is concerned with the functioning of the market. Subjective labouring activity becomes tied to the renewed political task of the nation to compete efficiently in the global market. This has some similarities with the social state configuration (see last chapter), but with crucial differences: the expulsion of abstract labour ties the labouring subject's activities directly to the political task of the nation without any mediation through the figure of abstract equality. This second point is sometimes overlooked by autonomist Marxists who rush to posit the direct connection between labour conflict and the social commons. Whilst it may be true that this conflict no longer passes through the 'abstract', this does not mean that the nation state plays no

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[45] See too Brown, *Edgework: Critical Essays on Knowledge and Politics*, 41.

role in constructing the labouring subject.

The circuit of legal subjectivity that granted entitlements to the labouring citizen necessarily went through the state: indeed, following Edelman, it was law's role to represent this. *Pace* Althusser, the nation state was necessarily the big 'O'ther in the circuit of the citizen subject. But this entailed a correlative entitlement to hail the state: indeed, it effectively displaced all questions of the political onto the state. However, it is being made clear now that these questions of entitlement *qua* citizen do not have to go necessarily through the same circuit. The State will not respond necessarily to the articulation of desire for rights, the "I have an entitlement to X". In Douzinas' reading, the circuit will always be unfulfilled, thus giving an ongoing space for political desire. But what happens when the State/Other simply refuses to respond? The sovereign is now making it clear it will no longer guarantee entitlements. As such, it is the 'public' quality of the labouring subject themselves that is required to guarantee their own rights, where one's erstwhile private labours now map directly onto the market without passing through the formal equality of abstract labour. If the legal subject is akin to a Lacanian *point de capiton*, then the symbolic to which they are quilted no longer necessarily involves the 'S'tate as the possessor of the *objet a* of rights.[46] Perhaps, then, the proper trope to borrow from psychoanalysis is in fact melancholy.[47]

It is beyond the scope of this thesis to engage fully with the contributions of psychoanalytic theory to law. However, it must be noted that a consequence of a certain theorising of subjectivity mirrors the argument in this thesis and points to law's role in constituting subjects. In Douzinas' analysis, for example, hungry, driven, recognition-seeking individuals reappear as subjects addressing themselves towards, and being addressed by, law and the 'S'tate, a psychoanalytic perspective that overlaps with both the argument in this thesis and those theories that root the source of right(s) in recognition. Bernstein suggests Marx himself understood the complex relationship between 'love and law' in *On the Jewish Question*: the antagonism between civil society

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[46] Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, 233. Cf Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, Ch2.

[47] '... to have lost, on the one hand, the very prospect of replacing capitalism with another social and economic form—if we really believe our critiques of capitalism are right, if we really do believe capitalism is fundamentally without the prospect for either equality or freedom for human beings—that is some loss. On the other hand ... if we are also losing liberal democracy to neo-liberal political rationality, that's yet another kind of loss. It may not mean the same kind of devastation for the left. It's more like the loss of the hated but needed father. Whereas the former is the loss of the beloved one. Together those losses mean we are one disoriented melancholy left.' Wendy Brown et al., "Learning to Love Again: An Interview with Wendy Brown " in *Contretemps* (Sydney: University of Sydney, 2006), 31-32.

and community is productive of communitarian right.[48] In the future, it would be productive for Marxism to engage further with the interrelationship of desire, labour and right, for if the twentieth-century capitalist reordering of labour is also a question of capital's refoundation in desire, and if the boundaries between work and non-work are being reconfigured, then the argument in this thesis would necessitate Marxism examining these complex interconnections. For the moment, however, one insight of Pierre Legendre's bears brief discussion. Legendre is concerned with the role of law in subject formation, the way that law 'institutes life', but he argues that psychoanalysis requires this to be understood as a process also happening at the level of the unconscious.[49] One asks, then, 'what is it that leads a subject to love the social representation, the living image or emblem of the law?'[50] Questions of authority immediately come to the fore, of the paternal address of Law, 'not only a modern Freudian image of authority but also a classical legal reference.'[51] Peter Goodrich's 'Introduction' to Legendre summarises the potential figures of such authority as 'God, the emperor, the sovereign, the people, or the head of the family', or later as 'God, nature, reason, sovereign or king' and further 'the law-giver or sovereign, ... God, emperor, legislature or even something as unconscious as the "rule of recognition" or "basic norm"' as the sites where law engenders subjective belief in authority.[52] These 'point[s] of transition between the public sphere and the private space of subjectivity' – why does not the authority of the employer figure here, the law-giving talent of the factory Lycurgus?[53]

Legendre's argument is that the structure of authority in Western law is deeply embedded in a certain relation to text and language, one which can only be understood psychoanalytically and which allows for connections between disparate forms of command. If indeed 'law functions to "capture" the subject, to generate a submission to authority, and to instigate a love of political power, in the specific form of the Western institution', and the 'Freudian construction of the social in terms of a family governed by a series of paternal sources of law is, for Legendre, the founding metaphor of paternal sources' because the structures and patterns of formal law mimic external structures of

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[48] Bernstein, "Right, Revolution and Community: Marx's 'on the Jewish Question'," 120.

[49] Peter Goodrich, "Introduction: Psychoanalysis and Law," in *Law and the Unconscious: A Legendre Reader*, ed. Peter Goodrich, New York, St. Martin's Press, 1997, 7.

[50] Ibid.

[51] Ibid., 9.

[52] Ibid., 9, 10, 13, 19.

[53] Ibid., 19.

regulation, then there can be no excuse for the systematic forgetting of labour as a site of domination.[54] As the discussion earlier in this thesis demonstrated, the figure of *auctor* was also called on to explain control over labour, and in particular the peculiar legal/nonlegal classification of the command of the employer. Goodrich's forgetting of labour is symptomatic of the perspective critiqued in this thesis, namely the treatment of the force/violence at work within the sphere of production as being of a fundamentally different kind to that associated with 'law.' With Legendre, this thesis argues that 'a State ought to be treated as a constitutive metaphor', an instance of the 'Text without subject' instantiating itself in a particular form.[55] If, still with Legendre, the 'fundamental point is this: *How does one fall in love with the political message?*', then after Marx this must also be a question of how the political is constituted in its separation from civil society.[56] These points are made not by way of full engagement with the rich legal/psychoanalytic endeavour, but rather to illustrate the broader argument that questions of *Gewalt*, law and authority do not stop at the office door. These points also support the narrower contention being advanced here: as the characteristics formerly associated with political activity increasingly permeate the sphere of labour, and as the state-form is transformed, one must ask whether the subject is now being made to fall in love with something other than a paternal, 'caring' State, and whether the message now is to address such desires to someone other than the hitherto usual addressee.

Public but not political

The Marxian legal orthodoxy, it has been argued throughout this thesis, proceeds by counterposing a certain public sphere (of state law and violence and the *polis)* with the private sphere (of work and the civil law of contract). However, this has been shown to be a historically contingent separation that Marx himself subjected to rigorous criticism. The formation of private wage labour and the polar separation of state and subject confirm Virno's assertion that 'the public-private dyad itself, before becoming something indisputable, had been forged through tears and blood during a thousand theoretical and practical disputes.'[57] In this context, it is interesting to note that in response to the Weimar politicisation of labour and other spheres of social life, Schmitt made an interesting move: whilst vociferously opposing the dilution of the properly political and

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[54] Ibid., 29, 30.

[55] Pierre Legendre, "The Masters of Law: A Study of the Dogmatic Function," Ibid., 69.

[56] Ibid., 90.

[57] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 23.

the concomitant weakening of the state, he suggested that state theorists have been labouring under a misapprehension. In his 'Strong State, Sound Economy', in addition to the arguments considered in earlier chapters, he asserts that the nineteenth-century principles of liberal forefathers, who counterposed the public state to the private free individual, no longer suffice.[58] Whilst there is still a sphere of freedom of the individual, one can no longer directly oppose the state to that of the individual and their private undertakings. In the 'modern' state, one must introduce a third realm between the private individual and the public state: there are those state undertakings which can be said to be economic, but also, from the side of the individual, labours which can no longer be said to be strictly private. Here is the realm of the 'public but not political': '*öffentlich aber nicht staatlich*'.[59] The devious creation of this realm allows Schmitt to dismiss those (like Neumann and Kirchheimer) who call for economic equality, for they improperly mix the political with the economic. For Schmitt, state activity as economic actor deserves to be clarified so that it is clear what the state 'is', but such activity does not by its mere identification thereby become political, in the sense of being subject to the usual rights accorded to citizens who participate in the *polis*. It offers also the future prospect of a clear return to the economic of that which had been taken over by the state. But it requires also a strong state to enforce this separation. For how does one get to this realm? '*Only the strong state can depoliticise.* [*Nur ein starker Staat kann entpolitisieren.*]'[60]

A third realm of *öffentlich aber nicht staatlich* to be occupied by labour and economy: is this not something like the reworking of the Marxian separations experienced today? The 'public' component directly acknowledges the common and productive capacities of labour, yet also allows it to be subject to political ordering; the 'not political' justifies the emergency measures of the state unmediated by constitutional or parliamentary institutions, but also unmediated by any 'confusing' ideas of economic equality. The freedom of the economic gives way to the political - unless the 'autonomy of the economic' is understood as being compatible with this new middle sphere 'a really new social order is hardly conceivable'[61] - but only in the name of ultimately saving the economic from encroachment by the political and clearly delimiting the priority of the economic in this middle 'public yet not political' sphere. Schmitt is not being advanced

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[58] Schmitt, 'Starker Staat Und Gesunde Wirtschaft', 9.

[59] Ibid., 13.

[60] Ibid., 10.

[61] Ibid., 9.

here as 'political realist' who understood the essential nature of power, but instead as theorist of the use of emergency to both order labour and be the source of authority for ordering labour.[62] Further, he did so precisely so as to remove the 'political' quality of erstwhile purely 'economic' relations, to dejuridify the social, to dismantle entitlement. And finally, he made clear that this didn't involve a withering of the state, but its strengthening, so as to be able to depoliticise labour and have the state relate to it through its forcible ordering. This is not to say that the configurations then and now are the same: labour no longer forms the source of authority. But using the state to achieve a 'public yet not political' sphere through techniques of suspension aligns Schmitt with the strong state of neoliberalism (and against any emancipatory political project). Only the strong state can depoliticise.

This sphere of the *öffentlich aber nicht staatlich* now reappears, but with some significant historical/philosophical alterations. Virno's reading of Arendt argues that the affective qualities of the political – argument, language – are now returned to labour and characterise it. If there once was some solidity to the Arendtian distinction between labour, political action and intellect, this relied on allocating 'the generically human experience of beginning something again, an intimate relationship with contingency and the unforeseen, being in the presence of others' to the sphere of the political.[63] Now, according to Virno, these are the affective qualities that characterise post-Fordist labour. It is not that politics has become a question of work (Arendt) but that work has become colonised by the qualities that used to distinguish the political. Virno echoes Schmitt in suggesting that 'there is already too much politics in the world of wage labor ... in order for it to continue to enjoy an autonomous dignity' and unwittingly replicates the latter – almost verbatim – when he talks of '*a publicness without a public sphere*' and a '*non-state public sphere.*'[64] For Schmitt, of course, this was the sphere to which labour would be condemned by a strong state that would disentangle the political from social; this is, however, a prescient description of the task being undertaken in the current era, the primary point of difference being that labour now takes on a quality that is somewhat public, in that it embodies Arendtian non-private affects, but is not political in the sense of embodying a *polis* in which one can participate. For Virno, this is an ambivalent

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[62] Cf Chantal Mouffe, *The Challenge of Carl Schmitt*, London ; New York, Verso, 1999; Paul Piccone and Gary Ulmen, 'Uses and Abuses of Carl Schmitt', *Telos*, 122, 2002, 3-32.

[63] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 51.

[64] Ibid., 40, 41, 51.

proposition: on the one hand, labour is here recognised as collective, productive, shared; on the other, forms of intersubjectivity are thrown to the market and the rhythms of capitalist production. Unless the general intellect becomes a republic, creates its own public sphere, it will foster 'personal dependence' and the 'unchecked proliferation of hierarchies.'[65] Equality must urgently be introduced into this sphere, but it ought not go through the formal equality of the erstwhile 'public'. Indeed, as work now adopts the traits that Arendt may have held to be solely the sphere of the political, there is a 'blurring of borders, even the two categories of *citizen* and *producer* fail us', and the terms public-private 'can no longer stand up on their own.'[66]

This is, in Bernstein's paraphrasing of Marx, 'the idea of individual man resuming the abstract citizen into himself ... individual man taking on in the world of civil society the attributes characterizing the present political community.'[67] But it is an equivocal resumption, and as has been argued, it is an endowment of the capacities of the species-being in a manner that does not detour through principles of equivalence. Labour thus stands at a cross-roads: as the basic productive capacities of all aspects of life, from physical attributes to the most fundamental of cognitive capacities, become 'real abstractions' which are deployed in the production process, labour has the potential to once again become a source of constitutional ordering in a new manner that is democratic (without necessarily embodying formal equivalence) and republican – it can refound a new public sphere. Alternatively, it can submit itself to the worst hierarchies of the erstwhile private sphere, something akin to a return to feudalism whereby the whole person (*viz* all the personal qualities that are now purchased in the wage relation) is

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[65] Ibid., 41.

[66] Ibid., 24. With respect to this question of labourer and citizen, Alison Ross, noting that Agamben offers a rethinking and elaboration of 'biopolitics' as an answer to contemporary political exigencies, counterposes pure violence to the category of worker in ambiguous way: 'Whereas Nancy wishes to draw attention to the sources of meaning that are, on account of the prevailing operations of capitalism, for the first time seen to be made rather than given, Agamben offers something distinctly different: the need to think a new vocabulary for politics now that the categories of the citizen and the worker and the very understanding of political contestation have lost their original meanings. Hence, he refers to "pure means," "pure violence," and "the gesture" as the terms from which the new understanding of politics may be developed.' (Ross, 'Introduction', 9.) But wasn't the category of worker precisely what lay at heart of Benjamin's argument from whence Agamben derives these latter terms? If Ross means to suggest that the category of 'worker' (which rarely appears in Agamben) has a meaning that is now somehow differently related to questions of sovereignty and exceptionality, then that is at one with the argument advanced here. However, if the categories are meant to be counterposed so that Agamben's 'pure violence' steps in as something to be practiced (by whom?) in substitution for whatever political action could have been taken by the erstwhile 'worker', then this can be done only at the cost of decoupling Benjamin's connection of labour with *Gewalt*. It is argued here instead that it is the changing configurations of 'worker' and 'citizen,' their *new* connections, that shed light on the 'prevailing operations of capitalism' and the place of *Gewalt*.

[67] Bernstein, "Right, Revolution and Community: Marx's 'on the Jewish Question'," 110.

dominated by another entity, and continue to allow an 'inverted' image of its co-operation to be reflected back to it in the strong state that commands and organises labour. Virno poses and answers the 'crucial question' thus:

> Is it possible to split that which today is united, that is, the Intellect (the *general intellect*) and (wage) Labor, and to unite that which today is divided, that is, Intellect and political Action? ... [The] subversion of capitalistic relations of production can manifest itself ... only with the institution of a *non-state run public sphere*, of a political community that hinges on the *general intellect*.[68]

When he advances this proposition, Virno is not Schmitt. For the former, the task is for labour to be done with the question of the state for once and for all. The current configuration offers this opportunity. However, whilst this is the optimistic and programmatic tone of his argument, in a broad sense the world Virno sees existing now corresponds to Schmitt's solution. For Virno, there exists a sphere in which people work, and over which the state exercises control, and although it is political insofar as it involves an affective subjectivity, it does not thereby entitle those subject to it to democratic participation in the state, and this state of affairs was brought about in part by a strong, depoliticising state. Whilst Schmitt might cavil at the blurring of boundaries between public and private tolerated by the strong state of neoliberalism, nonetheless the goal to which his 'Strong State, Sound Economy' aspired has been realised: the mere fact that the state is involved in managing life does not thereby entail the right of the subject to any kind of (especially material) equality that derives from status as citizen.

Is this management of life 'biopolitics'? There is a tendency, exemplified by Agamben, to speak of biopolitics without speaking of labour. The Marxian notions of state reproduction of labour-power and of state command over work are rarely reconciled with the notion of the 'biopolitical'. As discussed above, Agamben and Foucault have divergent understandings, but Foucault, even though he did not elaborate a meaning of the term, at least has the merit of locating its ascendance in connection with a nascent bourgeoisie that began to require the control of bodies. Hardt and Negri use 'biopolitics' to describe the current strategy of both command over and organisation of labouring constituent power. This all leads to the apt description of biopolitics as 'an equivocal concept'.[69] With Virno, and maintaining a slight distance from Hardt and Negri, it is argued here that 'biopolitics' is only properly understood in the movement of the potential of the labourer to produce, which exists at the core of the production relation

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[68] Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, 68.

[69] Ibid., 81.

and is what is bought by the employer, moves to the fore as a question of state management:

> The living body becomes an object to be governed not for its intrinsic value, but because it is the substratum of what really matters: labor-power as the aggregate of the most diverse human faculties (the potential for speaking, for thinking, for remembering, for acting etc.). Life lies at the centre of politics when the prize to be won is immaterial (and itself non-present) labor-power. For this reason, and this reason alone, it is legitimate to talk about "biopolitics." The living body which is a concern of the administration of the apparatus of the State, is the tangible sign of an unyet realised potential, the semblance of labour not yet objectified; as Marx says eloquently, of "labor as subjectivity."' [70]

The point made in this thesis is that these various usages of 'biopolitics', with their different connotations, can blur what is in fact a distinct and important movement: an erstwhile 'private' labour came to take on an abstractly political hue when it moved to the centre of the material constitution, but now the labouring process itself takes on political qualities. To generalise for the purposes of accentuating the point, if - to Arendt's chagrin - politics previously became work (of the nation), now work is becoming politics, and the imprecision of 'biopolitics' ought not be allowed to obscure this movement. But while work may be taking on the characteristics of the general intellect hitherto associated with Arendtian action, it nonetheless does so in a way that has increasingly less to do with the real abstraction of political quality that was embodied in the principle of the equivalence of labour. The political may be folded back into work, labourers may be receiving back some of their social forces, but under circumstances where it is no longer marked by the equality that once characterised work's participation in the public sphere. Any talk of biopolitical subjects must not be allowed to conflate these separations and reseparations of work and rule.

Labour law

Given these significant reseparations of production/reproduction, public/private and abstract/particular, it is no wonder that labour law finds itself slightly bewildered. It is commonplace for theorists of labour law to announce that significant changes are taking place in the nature of work, and that labor law's traditional subject matter – the law of the employment contract and the institutions that sprung up around it – no longer exhausts the field of the law of work. Whereas 'for a short while, it was easy to assume that the law of employment was standardized and settled', now it is faced with diverse regulatory practices from the legal fields of commercial law, social security law and

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[70] Ibid.

taxation law, together with proliferations of systems of regulation.[71] Though correctly understanding that markets are also constituted by state practices, this research nonetheless prefers 'recent regulatory theory' as a method of understanding current changes, for 'it is not profitable to search labour laws for a singular purpose'.[72] Labour law research is thus to embark on a new direction and 'embrace the new regulation that eschews substantive rules, categorical entitlements and coercive sanctions' (such sanctions presumably only non-coercive against employers).[73] Labour lawyers are witnessing the transition to 'post-Fordism' as a breaking down of the old system of 'universality of entitlement' that was based on a kind of 'social citizenship.'[74] The argument advanced in this thesis agrees that the separation of ownership and control that began with Fordism is now refracted through the prism of international trade, that the boundaries between 'work' and non-work' are more porous and that capitalist production and consumption is now based around desire in a way that began after the Second World War and has developed in ways that would be scarcely recognizable by Marx.[75] And there is justifiably a twofold attack on the figure of the free employment contract: retrospectively, the research now finds that the 'free' wage labourer was often forced by law, not just economic relations, to sell their labour; but to the extent that century from 1875 to 1975 was a century where the wage relation of abstract labour was a constitutional organising principle, capital is now attempting to flee the burdens that were imposed on it through the figure of the employment relationship. Yet what characterizes these emerging jurisprudential analyses is a concern with descriptively and definitively mapping the contours of this neo-liberal post-Fordism and 'breaking the boundaries' of traditional law scholarship by considering the interaction between labour

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[71] Christopher Arup, "Labour Law and Labour Market Regulation: Current Varieties, New Possibilities," in *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, ed. Christopher Arup, et al., Annandale, N.S.W., Federation Press, 2006, 720.

[72] Richard Mitchell and Christopher Arup, "Labour Law and Labour Market Regulation," Ibid., 11. See too Hugh Collins, *Employment Law*, Oxford, Oxford University Press, 2003; Hugh Collins, Paul L. Davies, and Roger W. Rideout, *Legal Regulation of the Employment Relation*, London, Kluwer Law International, 2000; Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context*, Aldershot, England ; Burlington, VT, Ashgate, 2007.

[73] Arup, "Labour Law and Labour Market Regulation: Current Varieties, New Possibilities," 719.

[74] See Alonso Benito, "Fordism and the Genesis of the Post-Fordist Society: Assessing the Post-Fordist Paradigm."; Miguel Martinez Lucio, "Introduction: Employment Relations in a Changing Society," in *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, ed. L. E. Alonso Benito and Miguel Martinez Lucio, Houndmills, Palgrave Macmillan, 2006.

[75] Alonso Benito, "Fordism and the Genesis of the Post-Fordist Society: Assessing the Post-Fordist Paradigm," 122-24; Martinez Lucio, "Introduction: Employment Relations in a Changing Society," 23.

law and non-labour law. This is important but not sufficient. Often left out of this scholarship is a recognition that this is not a case of bringing together various concepts – work, labour law, non-labour law – that stand in an accidental relation to one another, and then seeking to draw the connections between them. Robert MacKenzie and Chris Forde make the important point that the talk of organisational theory and risk management ought not obscure the fact that changing subcontracting and agency arrangements:

> represent mechanisms that mediate the relationship between capital and labour, and regardless of the terms and specificities of the arrangement, they reflect alternative approaches to the same fundamental issues: ensuring that the production process is supplied with the requisite quantity and quality of labour; and within the production process, establishing the means to secure the contribution of that labour.[76]

This is a useful insight, but it still does not allow consideration as to whether a broader juridical transformation is taking place, one where changes to other systems of law (such as terror laws, or migration laws) aren't simply new data to add to a system of regulation but expressions of an emergent system of right. Investigating the interaction between the command of the state and the command of labour discloses the elements necessary for an understanding of our contemporary situation. The argument advanced throughout this thesis enables considerably more light to be shed on the process taking place. Transformations are being undertaken in the structures of command, authority and value, and this is reflected in law. Analysing global changes in labour law is beyond the scope of this thesis, but an examination of the case of Australian labour law and the recent significant 'WorkChoices' changes bears this out, betrays similarities with other legal reforms, and illustrates some critical continuities that the 'regulationists' fail to grasp.

The Commonwealth Constitution has always recognised class conflict. Section 51(35) gave the federal parliament to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes', with the added rider that the disputes must extend beyond the limits of any one State. The power was not expressed to allow for the legislation in advance of a set of minimum conditions across the board that would apply to all employers in an industry. Rather, the power was given to intervene in and manage particular disputes and resolve them. The method of resolution – conciliation and then if necessary arbitration – only makes sense if one starts from the

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[76] Robert MacKenzie and Chris Forde, "The Myth of Decentralization and the New Labour Market," in *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, ed. L. E. Alonso Benito and Miguel Martinez Lucio, Houndmills, Palgrave Macmillan, 2006, 81.

position that that employees and employers will have different legitimate interests that must be reconciled. The law would encourage deals to be done, but if no deal could be done, one would be imposed. As representatives of the always more numerous employees, unions were recognised by the law as integral components of this deal-making machine.

This way of framing the federal parliament's law-making power allowed for a great deal of flexibility on the part of the state. It offered a number of ways for the state to relate to class conflict. The parliament was able to establish a hybrid creature containing both executive and quasi-judicial powers – the Australian Industrial Relations Commission (AIRC) and its predecessors – that was able to simultaneously respond to conflicts and also implement national economic policy. For a large part of last century, wage setting was implemented with a degree of uniformity throughout the country by the prescription of wages and conditions in instruments with legislative force – awards – which would set take home pay on the basis of what was needed to sustain and reproduce an employee's own labour power (and, for the working men of the Harvester Judgment era, to sustain their wives and three children in a degree of 'frugal comfort', setting the scene for women's wages to be paid at a permissibly lower rate for decades).[77] Although it is now commonplace to talk about enterprise bargaining, EBAs and certified agreements, in fact these instruments only found their way into legislation as recently as 1993. Prior to that, there was no similar legislatively recognised mechanism for contracting out of an award.

During the middle 50 years of the last century – when Keynesian economic policy and variants of social democracy were near hegemonic – this system served governments, business and organised labour well. But more than this: as seen above, the ability of the state to harness the productive capacity of its populace, resolve the conflicts in the name of a national interest and direct labour towards a particular end was a source of *legitimacy* of the state. Labour thus had a seat at the national political economic table, together with government and business. This fundamental structure endured – despite attacks and together with the suppression of radical union and worker activity – up until the Accord of the 1980s, when unions and government entered into a pact to limit wage rises and industrial disputation and assist the process of neo-liberal economic reform in return for increases in the social wage. A speech given to the right-wing HR Nicholls society in the early 1990s lamented that:

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[77] The 'Harvester Judgement' is *Ex p McKay (1907) 2 CAR 1.*

> [c]ertainly, the ACTU obtained a veto on key government decisions which it deemed to be within its sphere of interest. Because the legitimacy of the government was based upon the Accord, which symbolised industrial peace and economic rationality, the legitimacy of the ACTU was linked with the success of the government.[78]

A key element of the subsequent neo-liberal assault of the end of the last century was to break open this nexus and undermine this ability for the government to legitimate itself by being the manager and resolver of such industrial conflict. The recent legislative reforms of the former Government – 'WorkChoices' – must be understood as a continuation of this assault.[79]

In legislating WorkChoices, the Government restumped the whole of the industrial relations house. The legislative underpinning is no longer section 51(35) of the Constitution. Instead, almost the whole of the new laws are based on s51(20), the power to make laws with respect to the activities of corporations. The new laws will apply to all those entities directly or indirectly under Commonwealth control – such as universities – and to corporations.[80] The shift away from the 'disputes power' and to the 'corporations power' is more than cosmetic or of technical and legal relevance only. Instead, it represents a fundamental tenet of the new form of the state: the existence of class conflict is not to be admitted and then resolved. Instead, it is treated as absent from the system, and class relations instead become questions of economic management. By treating questions of employment law as questions of how best to run a corporation, employees and their collective interests don't appear on the radar. Within the new schema of industrial relations law, as far as the recognition of legitimacy of interests is concerned, the state has extracted itself from any mediating and resolving role in the conflict. The state acts as if class conflict is not something to be resolved by it, by a deal or otherwise. The government legitimates itself by its ability to ensure a resolution of conflict and direct productive labour to national ends.

Thus for example minimum wages used to be set by an adversarial hearing in front of the AIRC, where unions, employers and governments would present their positions, and the

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[78] Moore Des The Role of the CAI in the Regulation of Australia, paper presented to HR Nicholls Society annual conference, Sydney, 9 March 1990. Text available at http://www.hrnicholls.com.au/nicholls/nichvol8/vol810th.htm

[79] The Act amending the *Workplace Relations Act 1996 (Cth)* ('the WRA') is the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*. Except where otherwise indicated, references to the WRA are references to the WRA as amended. The *Building and Construction Industry Improvement Act 2005 (Cth)* and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005 (Cth)* also operate in relation to the building and construction industry in conjunction with the WRA. The recently elected Rudd Labor Government has committed itself to keeping almost all of the reforms discussed here.

[80] See the definition of 'employer' in s6 WRA.

AIRC would determine a point of compromise. The change to a leading award would then be flowed through to other awards. Now, however, this job has been given to the new Fair Pay Commission. Significantly, there will be no formal hearings in front of this new body. No right to present evidence or challenge arguments.[81] This is a conscious and explicit decision. And this Fair Pay Commission is modelled on the far more accurately named British beast, the Low Pay Commission. Labour law is no longer available as a tool to spread gains made in one dispute or conflict to others: the law doesn't recognise this treatment of conflict. Instead, the minimum wage will be set by a government appointee implementing government policy without any reference to the position of organised labour, and instead of treating it as a question of resolving conflicting interests, it is a question of managing the affairs of a corporation.

Similarly, the AIRC will no longer have any power to make new awards, and all existing awards will be abolished over a period of about two years.[82] Statutory instruments that represented wages and conditions as the outcome of a dispute will no longer be permissible. And as a further example, when it comes to resolving disputes over certified agreements, it is no longer permissible to give the AIRC the power to make orders.[83] That is, even if the parties so agree, the Act prohibits the AIRC exercising government-sanctioned coercive powers to resolve disputes over wages, conditions and entitlements. This is no longer the role of law.

Conflict cannot be wished away. It requires constant and increased vigilance to stop conflict from appearing, or at least appearing as such. Smooth procedural systems that limit the language within which conflict can be expressed inevitably have an obscene underside. And so it is with these laws. The laws relating to industrial action have been massively strengthened. Except for a brief period from 1993 onwards, industrial action has always been unlawful. Every unionist and industrial lawyer knows that common law courts understand decisions to engage in industrial action as unlawful conspiracies, giving rise to damages under any number of torts, from interference with contractual relations to the tort of watching and besetting (the outrageous misfeasance of looking at someone in a menacing manner). Such action exposes unionists and workers to

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[81] See Part 2 WRA, especially sections 20 – 24 and 27.

[82] Part 10 Division 4 WRA sets out a dual process for the 'rationalisation' and 'simplification' of all existing awards, a process currently underway. Section 540 WRA prohibits the making of any new award other than a 'rationalised' award.

[83] Section 711(2) WRA.

injunctions and claims for damages. This action has been unlawful at common law for as long as capitalism has existed. However, sitting on top of this at various times have been statutory modifications. Thus while AIRC has traditionally been a place for giving employers cheaper and quicker options than the common law courts for stopping industrial action, the AIRC's brief has by and large been to try and resolve the underlying dispute before proceeding to exercise coercive powers. And the AIRC was always left with residual discretion as to whether to make orders.[84] Now, however, the laws require the AIRC to order that industrial action cease. The discretion has been removed: 'may' has been replaced with a 'must.'[85] Employees and the union still have a right to defend themselves in a hearing, but strict time limits have been imposed, so that if a hearing hasn't concluded by a certain point, then the AIRC must issue an interim order stopping the industrial action.[86] And there are now quasi-criminal consequences for not complying with an AIRC order.[87] And under the new laws, corporations other than the employer are able to step in and ask that industrial action cease because it is affecting their business.[88] These remedies are in addition to any options they may have at common law; indeed, the WorkChoices amendments now expressly remove any ability of the AIRC to stand in the way of employer access to the courts.[89]

The role of the Federal Workplace Relations Minister is worth mentioning here too. In certain areas, the Minister is able to declare that any industrial action is unlawful, and to issue directions about how parties will behave.[90] If the Minister is satisfied, for example, that it is probable that some industrial action may occur in the future that might affect public safety, then the Minister can simply declare the industrial action unlawful *without a hearing*. That is, unlike the current situation, unions and employees would not even have a chance to defend their actions: the first a worker would find out about it is when an officer of the Government serves them with an order demanding that industrial action cease under pain of a penalty. And it is not just that the executive arm of the government

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[84] See e.g. sections 127 and 166A WRA prior to the WorkChoices amendments.

[85] See sub-section 496(1) WRA and compare with section 127(1) of the WRA prior to the WorkChoices amendments.

[86] Sub-sections 496(5) to 496(8) WRA.

[87] Sub-sections 496(10) to 496(12) WRA.

[88] Sub-sections 496(4) WRA.

[89] Compare with removal of section 166A of the WRA prior to the WorkChoices amendments. See too s693 WRA which provides that the process of resolution of a dispute by the AIRC does not affect any party's right to commence or continue court proceedings.

[90] See Part 9 Division 7 WRA.

has more formal powers. There has been massive increase in spending on the policing functions of the executive government. In the building industry, for example – which has exceptional legislation set up just for it – inspectors regularly write to workers demanding they attend for interviews. At these interviews, inspectors ask them about union meetings, about who suggested industrial action take place, about whether they participated in these meetings etc. The law has removed the right to silence for people being questioned by an inspector: one has to answer.[91]

So, the state is not withering away in the face of 'globalisation'. Instead, these laws help bring about the 'strong state of neo-liberalism'. Thus, on the one hand, the new laws will effectively abolish all awards, but on the other, new minimum wages can be set in the absence of hearing from unions. Parties can't ask the AIRC to resolve industrial disputes by striking a deal, but the AIRC must order that employees' industrial action stops. An employee cannot ask the government to be paid the same wage as the person next to them in the office or the factory performing exactly the same work, but the ABCC can demand that an employee answer questions and name names. The rendering invisible of conflict from the system of right comes at a price: conflict is prohibited and criminalised. Conflict is not to be resolved, but to be policed. And unlike previous eras, the state does not seek legitimacy in its ability harness conflict, but merely to prohibit and police it. And it is in this dual motion – of withdrawal from acknowledged conflict and increased coercion and prohibition – that we can see most clearly the parallels with other practices like the terror laws and start to understand the contours of the strong state of neo-liberalism. The terror laws redefine legitimate political conflict. The definition of sedition has always been broad – recall the definition inserted in 1920 into s24A(1)(g) of the *Crimes Act 1914* (Cth) for example which prohibited the promotion of 'feelings of ill-will and hostility between different classes of His Majesty's subjects', and the subsequent and still extant amendment to section 30A(1) in 1926 that responded to strikes and the rise of the Communist Party of Australia (CPA) by making unlawful those organisations that advocated the carrying out of such seditious intentions.[92] Whilst the prosecutions under these provisions were mainly against CPA members, the organisation itself was not named in the legislation; rather, the Act proscribed certain activities and intentions

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[91] As to the powers of the Australian Building and Construction Commissioner and Inspectors, see Divisions 1 and 2 respectively of Chapter 7 Part 2 *Building and Construction Industry Improvement Act 2005 (Cth)*. Section 53 of that Act concerns the privilege against self-incrimination.

[92] Ray Jordan, "In Good Faith: Sedition Law in Australia," (Canberra: Australian Parliamentary Library, 2006).

carried out by organisations in general.[93] What is novel in the most recent legislation is the Minister's practice of prohibiting and proscribing organisations by executive fiat. The successful High Court challenge to the legislative banning of the Communist Party in 1951 (justified then by the government's defence powers) stands in contrast to the banning by ministerial declaration in December 2005 in Australia (and in many other countries worldwide) of the Kurdish Workers Party.[94] The age of accepting the premise that non-state actors could engage in legitimate political conflict against states appears to be over. And in this respect, it is no coincidence that a key plank of WorkChoices is to remove the place of unions from the system, to begin the demise of their recognised existence as collective political subjects.[95] And as if to drive home Hardt and Negri's point that conflict is made in the image of the state, a new provision has been inserted into the WRA that allows employers to make 'agreements' *with themselves* that will apply to any new (i.e. greenfields) business that they start, the provision being entitled 'Employer greenfield agreements', apparently without any hint of irony.[96]

A second parallel can be drawn that illustrates the crucial role played by the death of abstract labour. A significant element of the WorkChoices model is to create a situation where the same people will be doing the same work but be paid differently. There are myriad ways this can happen under the new laws, but the most obvious is getting someone to sign onto an Australian Workplace Agreement (AWA) that is allowed to be both below the current award and below any collective agreement in force at the workplace.[97] And the awards – which hitherto operated as a law of general application that linked wages to the kind of work one did - will be effectively abolished over a period of about two years. A worker's relationship to the law is thus no longer one of a presumption of equal treatment and entitlement; instead, everything is radically contingent on the employer. In many respects, there will be no equal rights before labour law, and certainly no fundamental rights. This dovetails with the operation of the terror laws, where the ability of the individual to assert rights against the law is now also

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[93] As above.

[94] For the 'Communist Party' case, see *Australian Communist Party v. The Commonwealth (1951) 83 CLR 1.* For the listing of the PKK and the report of the subsequent parliamentary review, see the text at http://www.aph.gov.au/house/committee/pjcis/pkk/report.htm.

[95] Cf Edelman, 'The Legalisation of the Working Class'.

[96] See section 330 WRA.

[97] An AWA must now only be 'more generous' than a reduced set of 5 minimum standards set by the Australian Fair Pay Commission (Part 7 WRA) and, in certain situations, some identified and limited award provisions (Part 10 Div 3 WRA).The Labor government has vowed to allow new forms of individual employment arrangement.

increasingly reduced to a question of fact. This is all only registered by labour lawyers as a new system of regulation that 'eschews substantive rules and categorical entitlements', yet the significance of this is profound – abstract labour *qua* the material underpinning of the abstract equality of rights is steadily being eroded.

Thirdly, in both terror laws and labour laws there is increased power in the hands of the executive government. Ministers, for example, can now proscribe what can be asked for by unions and employees, as well as declare an organisation to be proscribed. The Workplace Relations Minister can make industrial action unlawful at the stroke of a pen. Both departments can now haul individuals in and force them to answer questions. In some (albeit limited) parts of the labour legislation, the Minister even has the power to make regulations that override the operation of the Act.[98]

In addition to the assault on any understanding of entitlement as universal and guaranteed by law, and a reconfiguring of legitimacy as less about redistribution and more about policing to ensure the continuing operation of the machine, what is also at stake is what is permissible to be demanded. For the first time in Australian labour law, for example, it will now be an offence to demand a 'prohibited matter' be included in a workplace agreement. 'Prohibited matters' include anything that gives a union rights such as access to the workplace, clauses designed to regulate the use of casual employment *and anything that restricts the use of contractors* (i.e. M-C in lieu of ...P...). The list of such matters is determined by the Minister by regulation. Merely asking for any such matter is punishable by a fine of up to $33,000.[99] The laws have as their express concern what people may ask for and can agree on. The importance of this cannot be underestimated, for what is now at stake is the industrial imaginary. Here is a clear illustration of the state is playing an active role in redefining what is a legitimate demand and attempting to redirect questions of labour away from abstract equality and towards the functioning of the system. Here is work being ordered by the state, yet the 'right' to speak and demand is restricted: public yet not political.

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[98] See for example Schedule 4 to the amending Act.

[99] Section 365 WRA provides that demanding a prohibited matter is a contravention of the Act and civil remedy provision, allowing for the imposition by the court an a union of a penalty of up to 300 penalty units. See too section 407 WRA. As to the definition of 'prohibited matters', see section 365 WRA and Chapter 2 Part 8 Div 7.1 of the *Workplace Relations Regulations 2006 (Cth)*.

Social forces, public but not political subjects

It has been argued here that Pashukanis' era can be distinguished from the current times by examining how the figures of law, authority and value operate on the labouring subject. Recalling the arguments advanced in the previous chapters, the following propositions can be advanced about the subject as characteristic of the early eras of capitalism that has not yet consumed reproduction of labour power. The social forces of the subject are split as the subject is split into the private labouring subject and the public generic citizen. The *Gewalt* that previously characterised legal relations between private subjects returns to the subject publicly as the independent, autonomous power of state and law, and privately as the command of the employment relationship. The sovereign power of the state is justified by its abstraction from 'direct' force; the authority of the employer initially derives from the law of contract itself, an exchange between generic equals. As Edelman remarks, at times it appears as if this whole process takes place within law, by converting production to alienability and circulation. These subjective loops take place primarily within one territory, under one sovereign. Read is right to assert that legal subjectivity through the labour contract becomes productive for capital, part of the mode of production, by excluding the collective and co-operative aspect of labour.[100] But this is only the case for so long.

By the era of the social state, the configuration has changed. The 'independent' power of the abstract state now begins to return to the subject, not as reappropriation of this power by the subject, but rather as intervention into the reproduction of labour and the labour process itself. So what is the source of authority of the state's command of the subject as it ceases to be the autonomous *Rechtsstaat*? It shifts to abstract labour. This has consequences for the authority of the commands of the employer over the labouring subject, especially as the production process itself becomes juridified. Increasingly, the authority of the employer's command aligns with that of the sovereign, and their common source is the (abstract) productive capacity of the nation. In the limit case, the source of authority of each converge, and both society and factory become a community led by a leader. With the social state, ushering the transition to real subsumption, private labours become public concerns, and while the subject 'privately' remains a formal equal subject, it is not the formal legal contract of the wage relation that authorises the exercise of command, but rather the public ordering of their erstwhile private endeavours. It is the

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[100] Read, *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, 100-01.

subject's political labouring connection with the nation state that grounds entitlement, and the ties connecting the abstract, formal private individual to the state recede. Production, authority and sovereignty all take place within the one territory, and the nation state remains a primary force for organising each. Labour is represented at the national political table as labour (albeit abstract labour) and as a collective political subject.[101]

In formal subsumption, labour was private as was the abstract labour of abstractly equal individuals – politics was public and grounded on the abstract equality of the private legal subject. That was Pashukanis' era. In the social state, the abstract legal subject, who previously brought their goods to market in the capital exchange relation, begins to take on less importance, and it is the social and political ordering of production itself that is the source of authority. Pashukanis discerned the beginning of this change, and saw in it the decline of the abstract legal subject of Marx's *Capital*. Indeed, there is also the beginnings of a reversal of the legal subject of *On the Jewish Question*: whilst there certainly has been no reappropriation of its own social forces as envisaged by Marx, nonetheless the private conditions of the subject are increasingly not excluded from the *polis*, but instead become central questions for participation in the political.

And what of the constellation of authority, law, value and subject now? What can be said about the various separations of species-being that are operative under the neo-liberal state? It has been argued that an important first recognition is that the abstract legal subject corresponding to a simple commodity form is no longer the point of departure. Not because it wasn't the correct analysis to be drawn by Pashukanis from Marx, but because they both knew that even the *Rechtsstaat* involved the immediate suspension of the liberties of individuals. And as we stand on the other side of the Keynesian hill, the form of legal subjectivity derives not from the individual labour contract, nor the social ordering of labour but the basic relation of exchange per se, the M-C instead of the ...P... . This is, of course, to caricature the situation somewhat. Perhaps it is better to say that there is now a flattening out of the legitimacy of command over work and an increasing equivalence of the wage relation and other forms of commercial exchanges (such as contracting out, disciplinary trade etc). When the private labouring individual was merely a human separated from other humans, the authority of the employment relationship could derive from the private legal contract. As production became co-

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[101] Cf Edelman, 'The Legalisation of the Working Class'.

operative, though, the authority appeared to derive from the production process itself, but this was all nonetheless taking place in the private sphere. The twentieth century gave this authority a public character. But the current constellation of 'law, labour and right' is not simply a return to the abstract equality of the free private individual of *On the Jewish Question*. It is a perverse return to *On the Jewish Question*: Neoliberalism now returns this social force back to the 'private' human, with the foundation of authority again the nature of the production process itself. But this time the formal equality of the labourer is not found in their participation in the wage relation, nor in their relation to the political. Instead, with regards to both, the formal equality is only that of the exchange relation. In the neo-liberal state, the social forces of the labouring subject are returned to 'natural man', but in privatised form. Full formal citizenship within the political is granted on the proviso that the subject only reappropriate their social forces through the exchange relation, and no longer through the abstract equality of the political. Collective subjectivity is once more unrecognised in the *polis*, and the rights of the individual subject morph back into desires, but this time for a different range of permissible objects. The distinction between public and private has not collapsed, as Hardt and Negri (and sometimes Virno) argue, but is in the process of being remade.

In *On the Jewish Question*, the constructed atomised individual of private civil society found its reflection in the abstract individual of the political community; there is a reversed image under neoliberalism, where the administrative/executive state appears as 'the point of fusion between knowledge and command and the inverted image of social cooperation.'[102] 'Man' is no longer species-being through the state. The labouring acts in the 'private' sphere have a social quality - the general intellect, the increasing production in common through affective labour - yet although they are common, they are not equal. Their commonality springs not just from their shared productivity, but also crucially from their common endeavour in a *national* project of participating in a global economy. This last point is often overlooked and explains why it is the nation state that still projects this 'inverted image'. If private subjects are engaged in common, post-equal endeavours of a social labour only possible in a post-Keynesian state, then the state mirrors this not so much with 'global laws' as with subjectivation in a post-equal *polis* where the political task is the internal and external strength of the nation.

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[102] Virno, 'General Intellect', 7.

The state has created the space for the subject to act as entrepreneur, and will increasingly only recognise it as such. To quote a labour law theorist: 'Increasingly, the status distinctions will be bypassed, each piece of regulation reconstituting the subject ... [T]he platform will not simply be the worker but rather, more comprehensively, the active labour market participant [with] the market as a social sphere in which those participants who are "activated" should enjoy social rights as citizens too.'[103] The insistence on linking abstract labour to a certain form of equality highlights the real change taking place, a change that is obscured if abstract legal subjectivity is only ever thought of as deriving from exchange. What is at stake now is the reconfiguration of production within subjectivity to an empty form of exchange that makes the labour exchange equivalent to the commercial exchange. And this doesn't occur *pace* Edelman simply through the private law of contract, but now also through the systems of public law that previously bound the subject to the state. 'Activation' replaces 'entitlement'. The labour law scholars, the theorists of neoliberalisation and the autonomist Marxists who threaten the law of value thus all circle around the same point: the diminution of the abstract equality of labour and the abstract equality of the legal subject, and the decoupling of both from the nation state.

Hence emergency, exception and suspension of 'fundamental' rights as an emergent area of concern. As has been argued in this thesis, Marx, Schmitt, Benjamin and Pahsukanis all knew that labour, sovereignty and emergency were intertwined from the beginning. In each of these writers, mention of the exceptional character of state rule is often swiftly followed up by a discussion of the coercive nature of labour. And despite its recent resurgence in the sphere of civil liberties, emergency legislation has persisted as a standard feature of labour law more or less since its inception. Indeed, as seen in previous chapters, an analysis of law as a question of tendency and value leads back now to the question of emergency. Agamben's few gestures towards these questions are going largely unnoticed. But he mentions Pashukanis and Benjamin in the same sentence precisely for this reason: he understands a complicity between legal coercion and the economic. To read him as theorist of an over-dominant state is to miss the point: his state is only a subject in the way that the symbolic order can be represented as a 'capital 'S'' Subject in Žižek's thought, *viz* a necessary element of 'small 's'' subject formation. The Benjaminian/Schmittian/Marxian emergencies, though, were populated with *real*

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[103] Arup, "Labour Law and Labour Market Regulation: Current Varieties, New Possibilities," 720-21.

subjects, collective agencies which could (re)found the political. Contemporary discussions, by contrast, often only recognize the 'S'tate as subject. But while this is partly due to a neoliberal forgetting of constituent power, it also recognises a certain reality of the slow death of alternative subjects. And this is the apparent paradox of the contemporary situation: the technique of emergency seems to be prevalent at the same time as the subjects of constitutent power seem to be at their weakest and the least likely to provoke a 'real' state of emergency. And also at the same time begins the death of the individual legal subject, not because of a withering away of exchange relations, but because of their intensification. Exceptionality is appropriate for a new system of right based around end of abstract labour as the rule of the social forces unleashed. It is the form of rule over private subjects who are public yet not political, whose labour immerses them in common endeavours wherein principles of equivalence are decoupled from labour.

If authority *guarantees* transactions, the neoliberal state only guarantees to enforce the transactions one has within the market. What is guaranteed is value, not rights. If there ever was a 'social rule of law' that could guarantee substantive equality, then the creation of a universe of legal claims elevated procedural guarantee over its substantive counterpart, and now even the former is under attack. And who and where is the authority that could guarantee? Marx's 'illusory sovereignty' of which citizens become members is less determinate than ever. As the state declines as the legitimate recipient of demands, the question for future research is: what becomes of the legal subject if there is noone upon whom it can place guaranteeable demands? What is the legal subject without state? If all this correctly identifies an emerging trend, then it is indeed worrying. Meiksins Wood is correct to write:

> Many aspects of social life have been placed outside the reach of political power and subjected to the economic dominance of capital; and, in modern 'democracies', this means their removal from the reach of democratic accountability. ... The autonomous 'economic' sphere has, in other words, created new forms of domination. In capitalism, both appropriators and producers are dependent on the market for the basic conditions of their self-reproduction; and the relation between them is mediated by the market.[104]

But the point is that it is not just 'democratic accountability' or public control that is at stake. Rather, something more fundamental is happening at the level of subjectivity that supposedly grounds 'the political' in the first place. Many of the theories of the decline of

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[104] Wood, 'Logics of Power: A Conversation with David Harvey', 16-17.

value centre around the rise of immaterial labour and the general intellect. The ensuing debates often concern whether this form of work has 'eclipsed' industrial production, or whether on instead ought use terms such as the 'global worker'. This chapter has placed a different emphasis on this transition. Without taking sides, it has highlighted that value was dependent on abstract labour, which was in turn dependent on the fictive equality of the legal subject. Hence the central role of a productive legal subjectivity in Pashukanis. What the various sides of the debate all highlight is the erosion of this foundation, of the real abstractions typical of modernity that embody the principle of equivalence.

Conclusion

By defenders and critics alike, it was argued in Part I, Pashukanis is usually read as having theorised the abstractly equal legal subject, a subject that exchanges and hence enables the commodity-form. These readings take their cue from those passages in Pashukanis where he asserts first that the embryonic form of the legal subject develops from the subject bringing goods to market and thus assists in the fetishistic transformation of the relations between people into relations between things, and secondly that the perfection of the legal subject only arises with widespread commodity relations. The 'abstraction' that is then considered an attribute of the subject is its 'distilled' equivalence, distilled because it reduces materially unequal people to formally equal subjects. Marxism is then said to offer a critique of the formally equal legal subject. This approach is insufficient. It has led Marxist legal theory down any number of dead-ends, and as was demonstrated Marxist legal theory as conventionally understood is now almost non-existent.

Marxist legal theory has misunderstood *abstraction*, and has failed to place *labour* at the centre of its concerns. Abstraction is misunderstood in two respects: firstly, one does not get from contracting individuals to an 'essence' of law merely by taking generic characteristics of the former and identifying it with the latter. It was argued in Chapter 3 that for Hegel, the basic contract is in fact the least suitable foundation for right. Instead, the activities of contracting individuals and the force necessary to make those contracts effective - especially the contract for the sale of labour, which is in effect another development of control over labour - are *aufgehoben* and then returned to subjects in the impersonal form of the force of law; secondly, because the primary commodity exchange of concern to Marx is the equal/unequal labour relation, when this is taken as the model exchange that grounds subjectivity, one finds that the 'real abstraction' (to use Marx's phrase) operative here is the specifically capitalist development of abstract labour. The latter embodies equivalence not only in the sense of the exchangeability of labours, but in the exchangeability of labour for money through the wage. Labour can thereby begin to function as a measure of value for capital, arguments that Pashukanis made but which appear to have gone unexplored.

When Pashukanis and Marx are correctly understood, the analysis of law thus takes as its point of departure the question of command over labour, and then asks how law, *Gewalt*, authority and command over labour are configured and represented as either unified or

separate. (The Open Marxists understood the importance of separation for Marx, a point that was then further developed throughout the thesis.) The state loses its monopoly on legitimate *Gewalt*. To illustrate this methodological point, Chapter 3 concluded with the polemical assertion that 'the (labour) contract is a constitution'. It was asserted that Marxism needs to grasp with both hands the fact that the distinction between the 'force of law' and the *Regierungsgewalt* of the employer is not an *a priori* assumption, that these are not distinct concepts to be brought together in accidental, contingent relationships. From the obverse perspective, it was seen that law's historical and rhetorical 'foundations' are never free of labour, and it was argued that critical legal theory ought cease treating violence as something only ever appropriable by law.

What can be done with these new tools? By way of commencing such an inquiry, Chapter 4 of this thesis advanced a reading of Benjamin, Agamben and Schmitt that moves questions of labour back to centre stage. With much current debate centering around these writers' conceptions of 'decision' and 'emergency', there is an overwhelming tendency to treat 'the state' or 'the sovereign' as the only active subject. This unfairly empties the original debates of a key theoretical and practical concern: how to exercise control over labour. As such, the distillation of concepts such as 'exceptionality' reappear as 'ontopolitical' questions, to use Catherine Mills' description, where a bare, non-labouring life is thereby produced.[1] Orthodox receptions of Pashukanis could only say that questions of emergency show the 'other face' of the state, acting as a coercive apparatus as distinct from the abstract rule of law, a contribution that offers little to contemporary debate. By contrast, the reading advanced here shows that the parallels between command over labour and command over the citizenry operative in the 'limit' situation are more than coincidental: they stem from the common question of the exercise of *Gewalt* to order labour, which is Benjamin's 'violence indirectly exercised' from which the striking employees were escaping in the first place.

By placing *labour* at the centre of the analysis, Chapter 5 also demonstrated that light is shone on another essential element of the study of law: authority. Pashukanis criticised Austin for his reduction to 'law as norm', but a re-reading of the latter unveiled riches in the former that have hitherto been unnoticed. For it is not just that the most taxonomic jurisprude is unable to make a distinction between the nature of the command of the sovereign and that of the employer. It also became apparent that at the very place where

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[1] Mills, 'Playing with Law: Agamben and Derrida on Postjuridical Justice', 17.

Austin's enquiry stops, Pashukanis and Marx conduct an enquiry into the structure of authority (one which in many respects presages Agamben's) that poses a certain identity between the authority of the internally legislating 'factory Lycurgus' and the political sovereign. Austin's difficulties reflected a real quandary: how does one authorise control over labour? The labour relationship is seen to make fraught any clear deliniation of the political. Pashukanis' understanding of the structure and changing nature of authority thus gestures towards the Hegelian identification of the control over labour with the origin of the force of the state, as it appears that the philosophical search for an authoritative foundation of the exercise of legal force is imbricated with the attempt to justify ongoing control over labour.

Dislodging Pashukanis from an understanding that hypostatises 'law', 'the commodity form' and 'the legal subject' certainly sheds new light on labour, *Gewalt* and authority, but more must be done. For the premises of the enquiry conducted in this thesis necessitate an historical perspective. Negri was the first (and perhaps only) to read Pashukanis in this manner. The analysis of Negri's text in Chapter 6, a text hitherto unpublished in English, demonstrated that Marx himself was fully aware of the changing place of law and authority. The simple commodity production described at the opening of *Capital*, upon which other readings of Pashukanis base their analysis, is only ever the opening act. Marx himself already realised that the increasingly co-operative nature of the production process, and the impersonal power of capital exercised by its supervisors and overseers, immediately affected the relationship of law and authority. And even the 'monopoly capitalism' of Pashukanis, which he saw as assisting the withering away of law, instead begat the *rise* of *public* law as a means of organising labour. Negri forgives Pashukanis these false predictions, for Pashukanis' method was in fact not one of attempting to 'derive' some eternal nature of law, but instead to understand law's place in the creation of value, the latter requiring both the organisation of labour and its subordination. This reading, developed in Negri's later works, both his own and with Hardt, explains the rise and decline of labour and public law in the twentieth century, and vindicates the predictions made in Chapter 4 that emergency can only properly be understood in connection with control over labour. For Hardt and Negri explain the separation of state from civil society and the decline of abstract principles such as the 'rule of law' as strategies of capital to extract itself from its erstwhile role as mediator of 'civil society's' conflicts. Techniques of policing and emergency, rather than accepting (conflictual) labour as a source of legitimacy, characterise the new era. This thesis

ultimately pulls up one step short of Hardt and Negri's conclusions, seeing ongoing struggle where they see *fait accompli*.

The analysis of law that Hardt and Negri perform is incredibly valuable. However, it did not attempt to rejoin Pashukanis at the latter's key theoretical site: that of the legal subject. This thesis thus concluded by returning to the question of legal subjectivity. The new method of analysis developed here focussed on the principle - that Marx developed and that Pashukanis built upon – whereby the legal subject is located not as epiphenomenon of commodity transaction, but as the polar counterpart to the 'abstract' force of the state. In this respect, although *On the Jewish Question* is at one level a staunch critique of a certain Hegelian political programmatic, at another it shares a fundamental affinity with Hegel's binding together of the reconfiguration of force and law entailed with the 'freeing' of labour from directly political relations of domination. This point was elaborated at the level of law and origin in Chapter 3, and law and authority in Chapter 5; in Chapter 7, it was considered at the level of the subject. Law is seen to operate in Marx at the level of the separation of 'species-being'. By yet again placing the question of labour at the centre of the analysis, an important distinction between Marx and Agamben emerges over whether the subject excluded from the *polis* is a labouring subject. This is a key question, for Marx argues that the 'natural' subject is a labouring subject. The contention was thus advanced in Chapter 7 that this subject encounters other labouring subjects through *abstract labour*. This is a 'real abstraction,' a standard of measure that forms an integral part of the fictive (but nonetheless effective) equality of 'natural man' that in turn forms the foundation of the formal equality of the political. But when examined as an historical question, as the analysis in this thesis urges, it becomes apparent that abstract labour is under attack, if not in crisis. Abstract labour relied on a separation of worker from instrument of production from product; the *polis* was by contrast the (ideal) space where the rhetorical and affective skills of persons could meet and form some kind of intersubjectivity. It is not simply that the *polis* became instrumentalised and understood as a question of work, but that work began to reabsorb the qualities that Marx argued capitalism had separated into the sphere of the political.

While Hardt and Negri explore the consequences thereby generated at a global and national level, Virno explores its implications at the level of the subject. In Chapter 8, this thesis brought these strands together and sought to advance some propositions about the legal subject of neo-liberalism arising out of the particular enquiry conducted in the preceding chapters. If the state offered the Keynesian subject guarantees, under neo-

liberalism there arise 'subjects without entitlements'. What orthodox receptions of Pashukanis fail to see is that the legal subject is not perfected, but instead further split, and is 'given back' its social forces but in privatised form. This necessarily has consequences for authority and law. Chapter 8 began to explore two developments that would greatly benefit from further research: the first is the resurgence of the 'public yet not political', a sinister category advanced by Schmitt whose potentially emancipatory side is highlighted by Virno, where state management of labour power and its reproduction no longer correlates with representation and political participation; secondly, flowing from this development is the 'authorised yet unrecognised' subject, the obverse of Agamben's excluded yet included.

In summary, three themes that pervade contemporary critiques of law - *Gewalt*, authority and subjectivity – each were opened up to new readings. In considering each of these three themes, the fundamental focus of interrogation was the configuration of the relationship between labour and the economic, on the one hand, and law, the state and the political on the other. Hegel enabled this interrogation for he examined not just the use to which the force of law could be put, but its source. He found it to be not a mythical contract, nor a natural right to command, but control over labour. The critique of *Gewalt* thereby became one of demonstrating that the force inherent in the labour relation is neither a-legal nor reducible to state sanctioned force, and as such, because it is a ground of law, is imbricated in law's complex relationship with force/violence. This also showed that the 'taking of emergency measures' was a question of meeting the potentially law-founding violence of withdrawn labour. As to *authority*, labour was seen to dissolve distinctions between sovereign and employer command, and Agamben's structure of authority that permeates both private and public law was seen to be intimately linked – as Marx and Pashukanis knew - with the question of value and guarantee. The *subject*, as the site of the separation of citizen and labour, was treated as an historical and theoretical enquiry in the tradition of Marx's *On the Jewish Question*: the various separations of public/private were interrogated. The subject reduced to 'bare life' was found to be premised on an unacknowledged separation of labour, a misrendering of subjects as unproductive. Examining these three themes shed new light on Marxist legal theory, but also enabled labour to be moved back into view in contemporary debates over law, sovereignty and exceptionality: the rise of emergency measures and the decline of the guarantee of rights was linked to the decline in abstract labour, a 'real abstraction' of modernity essential to the fictive equality of the legal subject.

Consider Guantanamo Bay and the United States' inventive application to its inhabitants of 'human rights' and treaties like the Geneva Convention. An obvious site for the exploration of critiques drawing on Agamben, it has generated debates about whether the camp can really be said to be a site of bare life, a zone where law does not apply or where it merges with life.[2] The idea of 'human rights' is examined as normative standard: is it an emancipatory ideal, or technique of rule that presumes the perpetual suspension of these rights? But the trajectories of these debates often bypass a relatively simple question: why is this happening *now*? Whether, with Agamben and Žižek one posits exclusion as a necessary element of sovereignty, or whether, with Rancière and Derrida, one condemns contemporary techniques of rule yet gestures towards the inherently ambiguous - if not emancipatory - character of political universals, one can be left searching for an explanation that draws out the particular historical configuration that connects Guantanamo Bay and exceptionality with the decline of the welfare state and changes in the nature of work.

The approach advanced here, however, takes the question of command and control over work as its starting point, and thus argues that the legal subject of human rights, Pashukanis' 'natural' individual who brought goods to market, was a creature of an era of abstract labour. Subjectivity is productive of value for capitalism, and the force of law and the bloody battles that created the modern worker produced a subject marked by a certain understanding of equivalence: one that *inter alia* was premised on an abstractly equal worker bringing a particular commodity – labour power – to market via the wage relation. This was never a case of base generating superstructure: coercive force helped create this relationship; the private law of contract, dependent on the subjectivities Marx sketched in *On the Jewish Question*, explained it. The authority of the independent state and of the private legal form, also explained by Marx and later developed by Pashukanis, grounded the law *qua* exercise of command over labour. But this configuration was dissolving almost as soon as it was described, and the public and private roles of labour were being remade. For not only was the equivalence of abstract labour a source of measure of value by capital, but it was also a constitutional organising principle. The *authority* of command over labour shifted to the nature of the production process itself. At a social level, abstract labour was a *foundation* of a certain method of legal ordering, for it was a social force that existed outside of law but whose management, through the

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[2] Judith Butler, *Precarious Life: The Powers of Mourning and Violence*, London, New York, Verso, 2003. Cf Fitzpatrick and Joyce, 'The Normality of the Exception in Democracy's Empire'.

lens of the fictive equivalence of labour and capital, provided a justification for law. But this combination between authority and foundation had consequences for the individual labouring subject: as the private law foundation of command of labour receded, so too did its conceptions of (abstractly equal legal) subjectivity. At the start of the twenty-first century, as capital solidifies its flight from the remaining impositions that the welfare state imposed on it, a key nexus to be broken is one that asserts the equivalence of labour. The techniques of emergency are a key vehicle by which the state effects its separation from fictive civil society: the strong state of neo-liberalism will police conflicts, and to the extent that all legal orders necessarily gesture towards something else (to borrow Hardt and Negri's phrase) as their foundation, the tendency is now to keep the order going by whatever means necessary. At the level of the subject, the neo-liberal subject is certainly understood as a calculating individual, now in (re)possession of their social forces, but the relationship between the state and the individual is no longer premised on the fictive equality of the individual that hitherto bound together state, civil society and subject. Membership of the *polis* does not guarantee state entitlement of the reproduction of one's labour power nor a wage at work that allows one to live in the 'frugal comfort' of the *Harvester* labourer.[3]

Or at least, these are the tendencies that are being witnessed. But this explains why one week in Australian politics sees both the 'terror laws' and WorkChoices forced through parliament. Because necessary to capital's new methods of control over labour is the dismantling of the tightly knit apparatus of entitlement that bound together law, politics and work, a central part of which is the *equality of the legal subject*. Guantanamo Bay, therefore, is not hidden away, it is not some foreclosed excluded that is unacknowledged yet haunting. On the contrary: it is a spectacle that announces to all subjects that the relationship between state and individual will henceforth be contingent. The state is no longer the site to which you should address your desire for 'equal' treatment. This obviously strikes at the formal principles usually embodied in the rule of law: the right to a trial, the right to silence, freedom from torture, and so on. All of this has been commented upon at great length. But if the potential seen by Neumann and Kirchheimer for a 'social rule of law' epitomises the social democratic desire to have the state further some kind of material equality, then this desire is also being addressed by Guantanamo Bay. Law wasn't just a guarantor of formal rights. Often lost in all the clamour about the

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[3] The reference is to the Australian legal decision, considered above, that granted to (male) wage workers the right to an income that was sufficient to reproduce the labour power of themselves and their families.

decline of 'basic legal principles' is the fact that only 50 years ago the legitimacy of the state was party dependent on how well it *itself*, in the name of a national interest that was said to coincide with the interests of its citizens, could order, resolve and regulate the conditions under which work took place and labour power was reproduced. Yes, David Hicks was heinously denied a trial and subjected to torture, but he was purposefully kept alive. In Michael Moore's film *Sicko*, there is a moment where he takes a group of ill 9/11 rescuers to Guantanamo Bay, for he has heard the military announce that the inmates there receive free, universal health care while US citizens suffer. It is offered as an ironic commentary on patriotism, but isn't this a key the point of Guantanamo? To register that the conditions of civil life formerly associated with membership of the *polis* are now subject to exceptionality rather than entitlement, and are private concerns for the authorised yet unrecognised subject that have nothing *qua* substantive right to do with law?

Had capitalism's nascent (enforced) liberalism not been then overtaken by the *public* ordering of work, these questions would not arise in this way. Perhaps the legal subject of Pahsukanis' era would still reign. This is, of course, a foolish hypothetical, but it illustrates the need to read Pashukanis as a writer in the question of tendency. For had labour, and control over it, not been moved to centre stage in this thesis' inquiry, these conclusions would not have been reached. To date, orthodox Marxism's intervention has been to point out the 'dual nature' of the state, an approach that does not assist in answering the issues Pashukanis posed to Engels, namely why *this* form of state and why *now*.

Other readings of Pashukanis have not been able to shed light on these dynamics. With few exceptions, the reception of Pashukanis' work (both positive and critical) have understood him as positing a 'commodity form' theory of law, but one where the similarities amongst commodities was more important than the exceptional – and thus universal – exchange of the commodity 'labour power.' Hegel, Marx and Pashukanis were always clear that living labor was the source of the coercive authority emanating from the state. However, because readings of Pashukanis failed to take labour and the *Gewalt* that organizes it as the starting point, they thereby hypostatised the state and law, leading to ignorance of what were fundamental concepts for Pashukanis' notion of subjectivity: force and authority, and with them, value. Because these concepts went unnoticed in subsequent commentary, the richness of Pashukanis' potential contribution has been ignored.

Where might Marxist legal scholarship go from here? The approach advanced in this thesis opens up significant new lines of inquiry. A re-reading of the classical theorists of the state to unearth their conceptions of labour, and their justifications for control over it, would deepen the connections between work and rule advanced in this thesis. A genealogy of exception within labour law that also accounts for the contemporary proliferation of 'free trade zones', those centres of productive labour where many state restrictions on economic activity are suspended, would also be a welcome counterpart to the continual identification of the exception with the camp. The elevation of the reproduction of labour power to a central theoretical place also now necessitates bringing the gendering of these relations into contact with law and all the questions of the separations wrought upon subjects. Further, the debates over the changing nature of work – from the Marxist tradition to the 'recognition' centred approach of Critical Theory – regularly fail to intersect with labour law: this would be a productive collaboration. Labour law itself is also in urgent need of engagement with critical legal theory, for the former is mired in a relatively uncritical 'systems theory' approach, and *vice versa*, for the latter typically understands force only as a question of the state and sanction: the 'decline' of labour law would be a profitable place to begin dialogue. These suggestions gesture towards the broader project in which many are engaged, namely the tracing of the contours of the system of right emerging at national and global levels. What these proposals all have in common is the conviction that critiques of capitalism ought not be retrofitted to critiques of law, or law subsumed to some secondary place in the study of political economy.

Ultimately, in any future inquiries, it ought not be forgotten that Benjamin's seminal *Critique of Violence*, a key point of reference in any discussion on states of emergency, was concerned with a general strike, with the complicated effects of a withdrawal of labour. If in the twentieth century the sovereign ability to suspend law had a connection with preventing strikes, managing labour and assisting accumulation proceeding unhindered, those of us who follow Benjamin must address this legacy. For in the current century, it may be that these perfected techniques are assisting in the destruction of one form of law and political economy and the creation of something new.

BIBLIOGRAPHY

Agamben, Giorgio. *The Coming Community*, Minneapolis, University of Minnesota Press, 1993.

———. *Stanzas: Word and Phantasm in Western Culture*, Minneapolis, University of Minnesota Press, 1993.

———. *Homo Sacer: Sovereign Power and Bare Life*, Stanford, California, Stanford University Press, 1998.

———. *Potentialities: Collected Essays in Philosophy*, Stanford, Stanford University Press, 1999.

———. *Means without End: Notes on Politics*, Translated by Cesare Casarino and Vincenzo Binetti, Minneapolis, London, University of Minnesota Press, 2000.

———. *The Open: Man and Animal*, Stanford, California, Stanford University Press, 2004.

———. *State of Exception*, Translated by Kevin Attell, Chicago, London, University of Chicago Press, 2005.

———. *The Time That Remains: A Commentary on the Letter to the Romans*, Stanford, California, Stanford University Press, 2005.

———. *Profanierungen*, Translated by Marianne Schneider, Frankfurt am Main, Suhrkamp, 2005.

———. *Profanations*, New York, Cambridge, Zone Books 2007.

———. "The Work of Man." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 1-10.

Agger, Ben, ed. *Western Marxism: An Introduction. Classical and Contemporary Sources*, Santa Monica, California, Goodyear Pub. Co., 1979.

Albritton, Robert. "Marx's Value Theory and Subjectivity." In Richard Westra and Alan Zuege, eds. *Value and the World Economy Today: Production, Finance and Globalization*, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003, 40-56.

Alonso Benito, L. E. "Fordism and the Genesis of the Post-Fordist Society: Assessing the Post-Fordist Paradigm." In L. E. Alonso Benito and Miguel Martinez Lucio, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, Houndmills, New York, Palgrave Macmillan, 2006, 18-33.

Alonso Benito, L. E., and Martinez-Lucio, Miguel, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, Houndmills, Palgrave Macmillan, 2006.

Althusser, Louis. *Lenin and Philosophy, and Other Essays*, London, NLB, 1971.

———. "On the Reproduction of the Conditions of Production." In Louis Althusser, ed. *Lenin and Philosophy, and Other Essays*, London, NLB, 1971, 229p.

Althusser, Louis, and Balibar, Etienne. *Reading "Capital"*. 2nd ed, London, NLB, 1977.

Altvater, Elmer. "Some Problems of State Interventionism." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 40-42.

Anderson, Nancy, and Greenberg, David F. "Formalist Theories in Marxist Analyses of Law", *Conference paper*, 1981.

Arato, Andrew. "A Reconstruction of Hegel's Theory of Civil Society." In Drucilla Cornell, Michel Rosenfeld and David Carlson, eds. *Hegel and Legal Theory*, New York, Routledge, 1991.

Arendt, Hannah, ed. *Illuminations*. Translated by H Zohn, London, Fontana, 1992.

———. "What Is Authority?" In Peter Baehr, ed. *The Portable Hannah Arendt*, London, Penguin Books, 2000, 462-508.

———. "The Perplexeties of the Rights of Man." In Peter Baehr, ed. *The Portable Hannah Arendt*, London, Penguin Books, 2000, 462-508.

Arthur, C. J. "Towards a Materialist Theory of Law", *Critique*, 7, 1976, 31-46.

———. "Introduction." In E. B. Pashukanis, ed. *Law and Marxism: A General Theory*, Translated by B Einhorn, London, Ink Links, 1978.

Arup, Christopher. "Labour Law and Labour Market Regulation: Current Varieties, New Possibilities." In

Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell, eds. *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Annandale, N.S.W., Federation Press, 2006, 717-31.

Arup, Christopher, Gahan, Peter, Howe, John, Johnstone, Richard, Mitchell, Richard, and O'donnell, Anthony, eds. *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Annandale, N.S.W., Federation Press, 2006.

Austin, John. *The Province of Jurisprudence Determined*, Brookfield, Vt., Dartmouth, 1996.

Badiou, Alain. *Ethics: An Essay on the Understanding of Evil*, Translated by Peter Hallward, London ; New York, Verso, 2001.

———. "Highly Speculative Reasoning Concerning the Concept of Democracy." Last Update Date 2002 [cited Access Date Access 2002]. Available from www.lacan.com.

———. *Saint Paul: The Foundation of Universalism*, Stanford, California, Stanford University Press, 2003.

———. *Metapolitics*, London ; New York, Verso, 2005.

Badiou, Alain, Brassier, Ray, and Toscano, Alberto. *Theoretical Writings*, London, New York, Continuum, 2004.

Baehr, Peter, ed. *The Portable Hannah Arendt*, London, Penguin Books, 2000.

Balibar, Etienne. "Gewalt." In Wolfgang Fritz Haug, ed. *Historisch-Kritisches Wörterbuch Des Marxismus, Bd5, Gegenöffentlichkeit Bis Hegemonialapparat*, Argument, 2002, 694-96, 1270-308.

Banaji, Jairus. "The Fictions of Free Labour: Contract, Coercion, and So-Called Unfree Labour", *Historical Materialism*, 11, 2003, 69-95.

Bandt, Adam. "The Wages of Fear: Labour Laws and Terror Laws", *Australian Feminist Law Journal*, 24, 2006, 39-46.

Barrett, Michèle. *The Politics of Truth: Form Marx to Foucault*, London, Polity Press, 1991.

Bates, David. "Constitutional Violence", *Journal of Law and Society*, 34, no. 1, 2007, 14-30.

Baudrillard, Jean. *The Mirror of Production*, St. Louis, Telos Press, 1975.

———. *The Consumer Society: Myths and Structures*, London, SAGE Publications, 1998.

Beirne, Piers, and Sharlet, Robert, eds. *Pashukanis, Selected Writings on Marxism and Law*, London, New York, Academic Press, 1980.

———. "Editors' Introduction." In Piers Beirne and Robert Sharlet, eds. *Pashukanis, Selected Writings on Marxism and Law*, London, New York, Academic Press, 1980, xvii, 374 p.

Benjamin, Andrew. *What Is Abstraction?*, London, Academy Editions, 1996.

———. *Walter Benjamin and History*, London ; New York, Continuum, 2005.

———. "Particularity and Exceptions: On Jews and Animals", *South Atlantic Quarterly*, 107, no. 1, 2008, 71-87.

Benjamin, Andrew, and Osborne, Peter, eds. *Walter Benjamin's Philosophy: Destruction and Experience*, London, New York, Routledge, 1994.

Benjamin, Walter. "Theses on the Philosophy of History." In Hannah Arendt, ed. *Illuminations*, Translated by H Zohn, London, Fontana, 1992, 245-55.

———. "Über Den Begriff Der Geschichte." In Rolf Tiedemann, ed. *Walter Benjamin: Sprache Und Geschichte*, Translated by H Zohn, Tuttgart, Philipp Reclam jun., 1992, 141-55.

———. "Critique of Violence." In Marcus Paul Bullock and Michael William Jennings, eds. *Selected Writings*, Cambridge, Belknap Press, 1996, 236-52.

———. "Capitalism as Religion." In Marcus Paul Bullock and Michael William Jennings, eds. *Selected Writings*, Cambridge, Mass., Belknap Press, 1996, 288-91.

———. "The Right to Use Force." In Marcus Paul Bullock and Michael William Jennings, eds. *Selected Writings*, Cambridge, Belknap Press, 1996, 236-52.

Bennett, Laura Eleanor. *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Sydney, Law

Book Co., 1994.

Berman, Harold J. "Soviet Legal Philosophy", *The Annals Of The American Academy Of Political And Social Science*, 281, no. 1, 1952, 249.

Bernstein, Jay. "Right, Revolution and Community: Marx's 'on the Jewish Question'." In Peter Osborne, ed. *Socialism and the Limits of Liberalism*, London, New York, Verso, 1991, 91-120.

———. "Constitutional Patriotism and the Problem of Violence", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 97-109.

Bertani, Mauro, and Fontana, Alessandro, eds. *Society Must Be Defended: Lectures at the Collège De France, 1975-76*. Translated by David Macey. 1st ed, New York, Picador, 2003.

Bertozzi, Alberto. "Thoughts in Potentiality: Provisional Reflections on Agamben's Understanding of Potentiality and Its Relevance for Theology and Politics", *Philosophy Today*, 51, no. 3, 2007, 290(13).

Best, Jacqueline. "Why the Economy Is Often the Exception to Politics as Usual", *Theory, Culture & Society*, 24, no. 4, 2007, 87-109.

Bjarup, Jes. "Continental Perspectives on Natural Law Theory and Legal Positivism." In Martin Philip Golding and William A. Edmundson, eds. *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Oxford, Blackwell, 2005, ix, 355 p.

Blackledge, Paul. "Symposium on Ellen Meiksins Wood's Empire of Capital: Editorial Introduction", *Historical Materialism*, 15, 2007, 45-55.

Blanke, B, Jürgens, U, and Kastendiek, H. "On the Current Marxist Discussion on the Analysis of Form and Function of the Bourgeois State." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 108-47.

Bohman, James F. "Hegel's Political Anti-Cosmopolitanism: On the Limits of Modern Political Communities", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 65-92.

Bonefeld, Werner. "The Reformulation of State Theory " In Werner Bonefeld and John Holloway, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 35-68.

———. *The Recomposition of the British State During the 1980s*, Aldershot, Hants, England ; Brookfield, Vt., USA, Dartmouth, 1993.

———. *Politics of Change: Globalization, Ideology and Critique*, Basingstoke, Palgrave, 2000.

———. "Democracy and Dictatorship: Means and Ends of the State", *Critique*, 34, no. 3, 2006, 237-52.

Bonefeld, Werner, Gunn, Richard, Holloway, John, and Psychopaidåes, Kosmas, eds. *Open Marxism: Vol 3 Emancipating Marxism*, London; Boulder, Pluto Press, 1995.

Bonefeld, Werner, Gunn, Richard, and Psychopaidåes, Kosmas, eds. *Open Marxism: Vol 1 Dialectics and History*, London; Boulder, Pluto Press, 1992.

———, eds. *Open Marxism: Vol 2 Theory and Practice*, London; Boulder, Pluto Press, 1992.

Bonefeld, Werner, and Holloway, John, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991.

———. "Introduction: Post-Fordism and Social Form." In Werner Bonefeld and John Holloway, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 1-7.

Borkowski, J. A., and Plessis, Paul J. Du. *Textbook on Roman Law*. 3rd ed, Oxford, Oxford University Press, 2005.

Bose, Prasenjit. "'New' Imperialism? On Globalisation and Nation-States", *Historical Materialism*, 15, 2007, 95-120.

Box, Steven. *Power, Crime, and Mystification*, London, New York, Tavistock Publications, 1983.

Braithwaite, J. "The Political Economy of Punishment." In Ted Wheelwirght and P Buckley, eds. *Essays in the Political Economy of Australian Capitalism*, Sydney, Australia and New Zealand Book Co, 1980.

Brenner, Robert. "What Is, and What Is Not, Imperialism?", *Historical Materialism*, 14, 2006, 79-105.

Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity*, Princeton, N.J., Princeton University

Press, 1995.

———. *Politics out of History*, Princeton, Princeton University Press, 2001.

———. *Edgework: Critical Essays on Knowledge and Politics*, Princeton and Oxford, Princeton University Press, 2005.

———. "American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization", *Political Theory*, 34, no. 6, 2006, 690-714.

———. *Regulating Aversion: Tolerance in the Age of Identity and Empire*, Princeton, N.J., Princeton University Press, 2006.

Brown, Wendy, Colegate, Christina, Dalton, John, Rayner, Timothy, and Thill, Cate. "Learning to Love Again: An Interview with Wendy Brown" University of Sydney, Last Update Date 2006 [cited Access Date Access 2006]. Available from http://www.usyd.edu.au/contretemps/6January2006/brown.pdf.

Bruhn, Joachim, Dahlmann, Manfred, and Nachtmann, Clemens, eds. *Kritik Der Politik: Johannes Agnoli Zum 75. Geburtstag*, Freiburg, Ca ira, 2000.

Buchanan, Ruth, and Pahuja, Sundhya. "Legal Imperialism: *Empire's* Inviisble Hand?" In Paul A. Passavant and Jodi Dean, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004, 31-56.

———. "Legal Imperialism: *Empire's* Inviisble Hand?" In Paul A. Passavant and Jodi Dean, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004, 31-56.

Bull, Malcolm. "Vectors of the Biopolitical", *New Left Review*, 45, 2007, 7-25.

Bullock, Marcus Paul, and Jennings, Michael William, eds. *Walter Benjamin: Selected Writings*, Cambridge, Mass., Belknap Press, 1996.

Burnham, Peter. "Marx, International Political Economy and Globalisation", *Capital and Class*, 75, no. Autumn, 2001, 103-12.

Butler, Judith. *Precarious Life: The Powers of Mourning and Violence*, London, New York, Verso, 2003.

Butler, Judith, Laclau, Ernesto, and Žižek, Slavoj. *Contingency, Hegemony, Universality : Contemporary Dialogues on the Left*, London ; New York, Verso, 2000.

Butler, Rex, and Stephens, Scott, eds. *Slavoj Žižek: The Universal Exception. Selected Writings, Volume Two*, London, New York, Continuum, 2006.

Cain, Maureen. "Gramsci, the State and the Place of Law." In David Sugarman, ed. *Legality, Ideology, and the State*, London, New York, Academic Press, 1983, xiv, 304 p.

———. "Realism, Feminism, Methodology, and Law", *International Journal of the Sociology of Law*, 14, no. 3-4, 1986, 255-67.

Cain, Maureen, and Harrington, Christine B. *Lawyers in a Postmodern World : Translation and Transgression*, New York, New York University Press, 1994.

Cain, Maureen, and Hunt, Alan, eds. *Marx and Engels on Law*, London, New York, Academic Press, 1979.

Calarco, Matthew. "On the Borders of Language and Death: Agamben and the Question of the Animal' ", *Philosophy Today* 44, 2000, 91-97.

———. "Jamming the Anthropological Machine." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 163-79.

Calarco, Matthew, and Decaroli, Steven, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007.

Campbell, Janet. *An Analysis of Law in the Marxist Tradition*, Lewiston, N.Y., E. Mellen Press, 2003.

Carlen, Pat, and Collison, Mike, eds. *Radical Issues in Criminology*, Oxford, Martin Robertson, 1980.

Caudill, David Stanley. *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory*, Atlantic Highlands, Humanities Press, 1997.

Caudill, David Stanley, and Gold, Steven Jay, eds. *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*, Atlantic Highlands, N.J., Humanities Press, 1995.

Chesnais, Francois. "The Economic Foundations of Contemporary Imperialism", *Historical Materialism*, 15, 2007, 121-42.

Clarke, Simon. *Keynesianism, Monetarism, and the Crisis of the State*, Aldershot E. Elgar, 1988.

———. *Marx's Theory of Crisis*, New York, Scholarly and Reference Division, St. Martin's Press, 1991.

———. *The State Debate*, New York, St. Martin's Press, 1991.

———. "The State Debate." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 1-69.

———. "Marxism, Sociology and Poulantzas's Theory of Class." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 70-108.

———. "State, Class Struggle and Reproduction of Capital." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 183-203.

———. "Overaccumulation, Class Struggle and the Regulation Approach." In Werner Bonefeld and John Holloway, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 103-34.

———. *From Enlightenment to Risk: Social Theory and Contemporary Society*, New York, Palgrave Macmillan, 2006.

Cleaver, Harry. "Work, Value and Domination: On the Continuing Relevance of the Marxian Labor Theory of Value in the Crisis of the Keynesian Planner State." Last Update Date 1989 [cited Access Date Access 1989]. Available from http://www.eco.utexas.edu/~hmcleave/offenegri.html.

Cohen, G. A. *Karl Marx's Theory of History: A Defence*, Princeton, Princeton University Press, 1978.

———. *Self-Ownership, Freedom, and Equality*, Cambridge, Cambridge University Press, 1995.

Cohen, Gerald A, and Acton, H B. "Symposium: On Some Criticisms of Historical Materialism", *Proceedings of the Aristotelian Society, Supplementary Volumes*, 44, 1970, 121-41 and 43-56.

Cole, Taylor. "Corporative Organization of the Third Reich", *Review of Politics*, 2, 1940, 438.

———. "National Socialism and the German Labour Courts", *Review of Politics*, 3, no. 2, 1941, 169-97.

Colebrook, Clare. "Agamben: Aesthetics, Potentiality, and Life", *South Atlantic Quarterly*, 107, no. 1, 2008, 107-20.

Collins, Hugh. *Marxism and Law*, Oxford, New York, Clarendon Press, Oxford University Press, 1982.

———. *Employment Law*, Oxford, Oxford University Press, 2003.

Collins, Hugh, Davies, Paul L., and Rideout, Roger W. *Legal Regulation of the Employment Relation*, London, Kluwer Law International, 2000.

Comaroff, John. "Re-Marx on Repression and the Rule of Law. (Debate: Marxism and the Rule of Law)", *Law and Social Inquiry*, 15, no. n4, 1990, 671-78.

Connolly, William E. "The Complexities of Sovereignty." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 23-42.

Constable, Marianne. "The Silence of the Law: Justice in Cover's 'Field of Pain and Death'." In Austin Sarat, ed. *Law, Violence, and the Possiblity of Justice*, Princeton, N.J.; Oxford, Princeton University Press, 2001, 49-84.

Copjec, Joan, ed. *Supposing the Subject*, London, Verso, 1994.

Cornell, Drucilla, Rosenfeld, Michel, and Carlson, David, eds. *Hegel and Legal Theory*, New York, Routledge, 1991.

Cornell, Drucilla, Rosenfeld, Michel, Carlson, David, and Benjamin N. Cardozo School of Law. *Deconstruction and the Possibility of Justice*, New York, Routledge, 1992.

Cotterrell, Roger. *The Politics of Jurisprudence*, London & Edinburgh, Butterworths, 1989.

Countouris, Nicola. *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context*, Aldershot, England ; Burlington, VT, Ashgate, 2007.

Cover, Robert M. "Violence and the Word", *Yale Law Journal*, 95, 1986, 1601.

Cutler, A. Claire. "Gramsci, Law, and the Culture of Global Capitalism", *Critical Review of International Social and Political Philosophy*, 8, no. 4, 2005, 527-42.

De Angelis, Massimo. *The Beginning of History: Value Struggles and Global Capital*, London, Pluto, 2007.

De Brunhoff, Suzanne. "Value, Finance and Social Classes." In Richard Westra and Alan Zuege, eds. *Value*

and the World Economy Today: Production, Finance and Globalization, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003, 40-56.

De Sousa Santos, Boaventura. "Law and Community: The Changing Nature of State Power in Late Capitalism", *International Journal of the Sociology of Law*, 8, no. 4, 1980, 379-97.

Decaroli, Steven. "Boundary Stones: Giorgio Agamben and the Field of Sovereignty." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 43-69.

Deleuze, Giles. "Postscript on the Societies of Control", *October*, 59, no. Winter, 1992, 3-7.

Deleuze, Giles, and Guattari, Félix. *A Thousand Plateaus*, Translated by Brian Massumi, London, New York, Continuum, 2004.

Deranty, Jean-Philippe. "Repressed Materiality: Retrieving the Materialism in Axel Honneth's Theory of Recognition." In Jean-Philippe Deranty, Daniel Petherbridge, John Rundell and Robert Sinnerbrink, eds. *Recognition, Work, Politics: New Directions in French Critical Theory*, Leiden, Boston, Brill, 2007, 137-64.

———. "Witnessing the Inhuman: Agamben or Merleau-Ponty", *South Atlantic Quarterly*, 107, no. 1, 2008, 165-86.

Deranty, Jean-Philippe, Petherbridge, Daniel, Rundell, John, and Sinnerbrink, Robert, eds. *Recognition, Work, Politics: New Directions in French Critical Theory*, Leiden, Boston, Brill, 2007.

Derrida, Jacques. *Limited Inc*, Evanston, IL, Northwestern University Press, 1988.

———. "Force of Law: 'the Mystical Foundation of Authority'." In Drucilla Cornell and Michael Rosenfeld, ed. *Deconstruction and the Possibility of Justice*, New York, Routledge, 1992.

———. *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International*, New York, Routledge, 1994.

———. *Rogues: Two Essays on Reason*, Translated by Pascale-Anne Brault and Michael Naas, Stanford, California, Stanford University Press, 2005.

Deustcher, Penelope. "The Inversion of Exceptionality: Foucault, Agamben, And "Reproductive Rights"", *South Atlantic Quarterly*, 107, no. 1, 2008, 55-70.

Dickey, Laurence, and Nisbet, Hugh Barr, eds. *Hegel: Political Writings*. Translated by Hugh Barr Nisbet, Cambridge, Cambridge University Press, 1999.

Douzinas, Costas. *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent*, Hoboken, Routledge, 1994.

———. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, Oxford, Hart, 2000.

———. *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, London, New York, Routledge-Cavendish, 2007.

Douzinas, Costas, and Gearey, Adam. *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford, Hart Publishing, 2005.

Dove, Patrick. "Living Labour, History and the Signifier: Bare Life and Sovereignty in Eltit's Mano De Obra", *Journal of Latin American Cultural Studies*, 15, no. 1, 2006, 77-91.

Düttman, Alexander Garcia. "Never before, Always Already: Notes on Agamben and the Category of Relation", *Angelaki*, 6, no. 3, 2001, 3-6.

Dyer-Witheford, Nick. "Empire, Immaterial Labor, the New Combinations and the Global Worker", *Rethinking Marxism*, 13, no. 3and4, 2001, 70-80.

———. "1844/2004/2044: The Return of Species-Being", *Historical Materialism*, 12, no. 4, 2004, 3-25.

Edelman, Bernard. *Ownership of the Image: Elements for a Marxist Theory of Law*, Translated by Elizabeth Kingdom, London, Routledge & Kegan Paul, 1979.

———. "The Legalisation of the Working Class", *Economy and Society*, 9, no. 1, 1980, 50 - 64.

Edkins, Jenny. "Humanitarianism, Humanity, Human", *Journal of Human Rights*, 2, no. 2, 2003, 253-58.

Ehrbar, Hans G. "Das Kapital: Vol 1." University of Utah, Last Update Date 2002. Available from http://www.econ.utah.edu/~ehrbar/akmc.htm.

Esmeir, Samera. "The Violence of Non-Violence: Law and War in Iraq", *Journal of Law and Society*, 34, no. 1, 2007, 99-115.

Ferrajoli, Luigi, and Zolo, Danilo. "Marxism and the Criminal Question", *Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy*, 4, no. April, 1985, 71-100.

Fine, Bob, ed. *Capitalism and the Rule of Law: From Deviancy Theory to Marxism*, London, Hutchinson, 1979.

———. "Law and Class." In Bob Fine, ed. *Capitalism and the Rule of Law: From Deviancy Theory to Marxism*, London, Hutchinson, 1979, 200 p.

———. *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques*, London, Pluto, 1984.

———. *Democracy and the Rule of Law: Marx's Critique of the Legal Form*, New Jersey, The Blackburn Press, 2002.

Fine, Ben. "Value Theory and the Study of Contremporary Capitalism: A Continuing Commitment." In Richard Westra and Alan Zuege, eds. *Value and the World Economy Today: Production, Finance and Globalization*, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003, 3-22.

Fine, Robert. *Political Investigations*, Hoboken, Routledge, 2001.

Fitzpatrick, Peter. *Modernism and the Grounds of Law*, Cambridge, Melbourne, Cambridge University Press, 2001.

———. "Bare Sovereignty: Homo Sacer and the Insistence of Law", *Theory and Event*, 5, no. 2, 2001.

———. "The Immanence of Empire." In Paul A. Passavant and Jodi Dean, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004, 31-56.

Fitzpatrick, Peter, and Joyce, Richard. "The Normality of the Exception in Democracy's Empire", *Journal of Law and Society*, 34, no. 1, 2007, 65-76.

Fletcher, Ruth. "Legal Forms and Reproductive Norms", *Social & Legal Studies*, 12, no. 2, 2003, 217-41.

Foucault, Michel. "Society Must Be Defended: Lecture 2." In Mauro Bertani and Alessandro Fontana, eds. *Society Must Be Defended: Lectures at the Collège De France, 1975-76*, Translated by David Macey. 1st ed, New York, Picador, 2003, 1-22.

———. "Society Must Be Defended: Lecture 3." In Mauro Bertani and Alessandro Fontana, eds. *Society Must Be Defended: Lectures at the Collège De France, 1975-76*, Translated by David Macey. 1st ed, New York, Picador, 2003, 43-64.

Frankel, Boris. "Identifying Dominant Misconceptions of States", *Thesis Eleven*, 4, no. 1, 1982, 97-123.

Freedland, M. R. *The Personal Employment Contract*, Oxford, Oxford University Press, 2003.

Freeman, M. D. A., and Lloyd of Hampstead, Dennis Lloyd. *Lloyd's Introduction to Jurisprudence*. 7th ed, London, Sweet & Maxwell, 2001.

Freud, Sigmund. *Group Psychology and the Analysis of the Ego*, New York, WW Norton & Co, 1959.

———. "Totem and Taboo." In James Strachey and Anna Freud, eds. *The Standard Edition of the Complete Psychological Works of Sigmund Freud: Vol xiii 1913-1914 Totem and Taboo and Other Works*, Translated by James Strachey, London, Vintage and The Hogarth Press, 2001.

Freud, Sigmund, and Freud, Anna, eds. *The Standard Edition of the Complete Psychological Works of Sigmund Freud: Vol Xiii 1913-1914 Totem and Taboo and Other Works*. Translated by James Strachey, London, Vintage and The Hogarth Press, 2001.

Fuller, L. L. "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory", *Michigan Law Review*, 47, 1949, 1157-66.

Gerstenberger, Heide. "Class Conflict, Competition and State Functions." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 148-59.

Gilbert, Felix, ed. *The Historical Essays of Otto Hintze*, New York, Oxford University Press, 1975.

Golding, Martin Philip, and Edmundson, William A., eds. *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Oxford, Blackwell, 2005.

Goodrich, Peter, ed. *Law and the Unconscious: A Legendre Reader*. Translated by Peter Goodrich with Alain Pottage and Anton Schütz, New York, St. Martin's Press, 1997.

———. "Introduction: Psychoanalysis and Law." In Peter Goodrich, ed. *Law and the Unconscious: A Legendre Reader,* Translated by Peter Goodrich with Alain Pottage and Anton Schütz, New York, St. Martin's Press, 1997, 1-38.

Gramsci, Antonio. *Prison Notebooks,* London, Lawrence & Wishart, 1971.

Greenwood, Ian, and Stuart, Mark. "Employability and the Flexible Economy: Some Considerations of the Politics and Contradictions of the European Employment Strategy " In L. E. Alonso Benito and Miguel Martinez Lucio, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm,* Houndmills, Basingstoke, Hampshire ; New York, Palgrave Macmillan, 2006, 35-51.

Guardiola-Rivera, Oscar. "Return of the Fetish: A Plea for a New Materialism", *Law and Critique,* 18, no. 3, 2007, 275-307.

Gulli, Bruno. "The Ontology and Politics of Exception: Reflections on the Work of Giorgio Agamben." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life,* Stanford, California, Stanford University Press, 2007, 219-41.

Habermas, Jürgen. *Legitimation Crisis,* Boston, Beacon Press, 1975.

Hamacher, Werner. "Afformative, Strike: Benjamin's 'Critique of Violence'." In Andrew E. Benjamin and Peter Osborne, eds. *Walter Benjamin's Philosophy: Destruction and Experience,* London, New York, Routledge, 1994.

———. "The Right to Have Rights (Four-and-a-Half Remarks)", *South Atlantic Quarterly,* 103, no. 2-3, 2004, 343-56.

Hanlon, Christopher "Psychoanalysis and the Post-Political: An Interview with Slavoj Žižek", *New Literary History,* 32, 2001, 1-21.

Hardt, Michael. "The Withering of Civil Society", *Social Text,* 45, 1995, 27-44.

———. "The Global Society of Control", *Discourse,* 20, no. 3, 1998, 139-52.

Hardt, Michael, and Negri, Antonio. *Labor of Dionysus: A Critique of the State-Form,* Minneapolis, University of Minnesota Press, 1994.

———. *Empire,* Harvard University Press, 2000.

———. *Multitude: War and Democracy in the Age of Empire,* Penguin Press, 2004.

Hart, H. L. A. *The Concept of Law,* Birmingham, Alabama, Legal Classics Library, 1990.

Harvey, David. *The Limits to Capital,* Oxford, B. Blackwell, 1982.

———. *The New Imperialism,* Oxford, Oxford University Press, 2003.

———. *A Brief History of Neoliberalism,* New York, Oxford University Press, 2005.

———. "In What Ways Is 'the New Imperialism' Really New?", *Historical Materialism,* 15, 2007, 57-70.

Haug, Wolfgang Fritz, ed. *Historisch-Kritisches Wörterbuch Des Marxismus, Bd.5, Gegenöffentlichkeit Bis Hegemonialapparat,* Argument, 2002.

Hazard, John N. *Soviet Law and Western Legal Systems : A Manual for Comparison.* Rev. 2d ed, New York, Columbia University, Parker School of Foreign and Comparative Law, 1970.

———. *Managing Change in the U.S.S.R.: The Politico-Legal Role of the Soviet Jurist,* Cambridge, New York, Cambridge University Press, 1983.

Head, Michael. *Evgeny Pashukanis: A Critical Reappraisal,* Abingdon, New York, Routledge-Cavendish, 2008.

Hegel, G W F. *Hegel's Philosophy of Right,* Translated by T. M. Knox, Oxford, Clarendon Press, 1952.

———. "The German Constitution." In Laurence Dickey and Hugh Barr Nisbet, eds. *Hegel: Political Writings,* Translated by Hugh Barr Nisbet, Cambridge, Cambridge University Press, 1999, l, 357 p.

Heidegger, Martin. *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude,* Bloomington, Indiana University Press, 1995.

Heller, Agnes. *A Theory of Modernity,* Malden, Blackwell Publishers, 1999.

Hirsch, Joachim. "The State Apparatus and Social Reproduction: Elements of a Theory of the Bourgeois State." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate,* London, E. Arnold, 1978, 57-107.

———. "Fordism and Post Fordism." In Werner Bonefeld and John Holloway, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 8-34.

———. "The Fordist Security State and New Social Movements." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 142-56.

Hirst, Paul Q. "Marx and Engels on Law, Crime and Morality." In Ian R. Taylor, Paul Walton and Jock Young, eds. *Critical Criminology*, London ; Boston, Routledge and Kegan Paul, 1975, xii, 268 p.

———. "Radical Deviancy Theory and Marxism." In Ian R. Taylor, Paul Walton and Jock Young, eds. *Critical Criminology*, London ; Boston, Routledge and Kegan Paul, 1975, xii, 268 p.

———. "Althusser and the Theory of Ideology", *Economy and Society*, 5, no. 4, 1975, 385-412.

———. *On Law and Ideology*, London, Macmillan, 1979.

———. *Marxism and Historical Writing*, London, Boston, Routledge & Kegan Paul, 1985.

———. "The Necessity of Theory." In Paul Q. Hirst, ed. *Marxism and Historical Writing*, London ; Boston, Routledge & Kegan Paul, 1985, x, 184 p.

———. *Law, Socialism, and Democracy*, London ; Boston, Allen & Unwin, 1986.

Hoffheimer, Michael H. "Hegel, Race, Genocide", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 35-62.

Hoffheimer, Michael H., and Gans, Eduard. *Eduard Gans and the Hegelian Philosophy of Law*, Dordrecht ; Boston, Kluwer Academic Publishers, 1995.

Holloway, John. "The State and Everyday Struggle." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 225-59.

———. "The Great Bear: Post-Fordism and Class Struggle." In Werner Bonefeld and John Holloway, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 1-69-91.

Holloway, John, and Picciotto, Sol, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978.

———. "Introduction: Towards a Materialist Theory of the State." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 1-31.

———. "Capital, Crisis and the State." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 109-41.

Honneth, Axel. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. 1st MIT Press ed, Cambridge, Mass., MIT Press, 1996.

Hunt, Alan. "Law, State and Class Struggle", *Marxism Today*, 20, no. 6, 1976, 178-87.

———. *The Sociological Movement in Law*, Philadelphia, Temple University Press, 1978.

———. "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law", *Law and Society Review*, 19, 1985, 11-37.

———. *Explorations in Law and Society: Towards a Constitutive Theory of Law*, New York, Routledge, 1993.

———. "Getting Marx and Foucault into Bed Together!", *Journal of Law and Society, vol 31, no 4, pp 592-609, Dec 2004*, 31, no. 4, 2004, 592-609.

Hunt, Alan, and Wickham, Gary, eds. *Foucault and Law: Towards a Sociology of Law as Governance*, London, Boulder, Pluto, 1994.

Hunt, Geoffrey. "The Development of the Concept of Civil Society in Marx", *History of Political Thought*, 8, no. Summer, 1987, 263-76.

Institut Für Marxismus-Leninismus beim ZK Der SED, ed. *Marx Engels Werke*, Berlin, Dietz Verlag, 1983.

———, ed. *Marx Engels Werke - Ergänzungsband*, Vol. 1. Teil, Berlin, Dietz Verlag, 1983.

Jacobson, Arthur. "Hegel's Legal Plenum." In Drucilla Cornell, Michel Rosenfeld and David Carlson, eds. *Hegel and Legal Theory*, New York, Routledge, 1991.

Jameson, Fredric. *Postmodernism, or, the Cultural Logic of Late Capitalism*, Durham, Duke University Press, 1991.

Jameson, Fredric, and Miyoshi, Masao. *The Cultures of Globalization*, Durham, N.C., Duke University Press, 1998.

Jessop, Bob. "Accumulation Strategies, State Forms and Hegemonic Projects." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 157-82.

———. "Regulation Theory, Post-Fordism and the State: More Than a Reply to Werner Bonefeld." In Werner Bonefeld and John Holloway, eds. *Post-Fordism and Social Form: A Marxist Debate on the Post-Fordist State*, Houndmills, Basingstoke, Hampshire, Macmillan Academic and Professional, 1991, 1-69-91.

Johns, Fleur. "Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order", *Journal of Law and Society*, 34, no. 1, 2007, 116-38.

Jordan, Ray. "In Good Faith: Sedition Law in Australia." Australian Parliamentary Library, Date Accessed 20 August 2006. Available from www.aph.gov.au/library/intguide/LAW/sedition.htm.

Kaehler, Klaus Erich. "The Right of the Particular and the Power of the Universal", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 147-62.

Kafka, Franz. "A Country Doctor." In Willa & Edwin Muir, ed. *The Penal Colony, Stories and Short Pieces*, Translated by Willa & Edwin Muir, New York, Schocken Books, 1948.

Kamenka, E. "A Marxist Theory of Law?" In Csaba Varga, ed. *Marxian Legal Theory*, Aldershot, Dartmouth, 1993, 530 p.

Kaufman, Eleanor. "The Saturday of Messianic Time (Agamben and Badiou on the Apostle Paul)", *South Atlantic Quarterly*, 107, no. 1, 2008, 37-54.

Kay, Sarah. *Žižek: A Critical Introduction*, Cambridge, Polity, 2003.

Kelsen, Hans. *General Theory of Law and State*, Cambridge, Harvard U.P., 1946.

———. *The Communist Theory of Law*, N.Y., Praeger, 1955.

———. *Pure Theory of Law*, Berkeley, University of California Press, 1967.

———. "God and the State." In Otto Weinberger, ed. *Hans Kelsen: Essays in Legal and Moral Philosophy*, Dordrecht, D Reichel, 1973.

Kerr, Derek. "Administering Civil Society: Towards a Theory of State Power.", *Capital & Class*, no. 66, 1998, 181(3).

Kerruish, Valerie. "Epistemology and General Legal Theory." In Gary Wickham, ed. *Social Theory & Legal Politics*, Sydney, Legal Consumption Publications, 1987.

———. *Jurisprudence as Ideology*, London, New York, Routledge, 1992.

Kinsey, Richard. "Marxism and the Law: Preliminary Analyses", *British Journal of Law and Society*, 5, no. 2, 1978, 202-27.

Kirchheimer, Otto. *Politics, Law, and Social Change; Selected Essays*, New York,, Columbia University Press, 1969.

———. "State Structure and Law in the Third Reich." In William E. Scheuerman, ed. *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer*, Berkeley, University of California Press, 1996.

———. "The Rechtstaat as Magic Wall." In William E. Scheuerman, ed. *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer*, Berkeley, University of California Press, 1996, 243-64.

Kirchheimer, Otto, and Neumann, Franz L. *Social Democracy and the Rule of Law*, London, Boston, Allen & Unwin, 1987.

Klein, Naomi. *The Shock Doctrine: The Rise of Disaster Capitalism*, Camberwell, Vic., Allen Lane, 2007.

Knowles, Dudley. *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right*, London, New York, Routledge, 2002.

Kovacevic, Filip "Lacanians and the Fate of Critical Theory", *Angelaki*, 8, no. 3, 2003, 109-31.

Kramer, Matthew H. "Legal and Moral Obligation." In Martin Philip Golding and William A. Edmundson, eds. *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Oxford, Blackwell, 2005.

Kristeva, Julia. *Strangers to Ourselves*, New York, W W Norton, 1994.

Lacan, Jacques. "R.S.I.?", *Ornicar?*, 4, 1975.

Lacan, Jacques *The Seminar of Jacques Lacan: Book Ii*, New York, W W Norton & Co, 1991.

Laffey, Mark, and Weldes, Jutta. "Representing the International: Sovereignty after Modernity?" In Paul A. Passavant and Jodi Dean, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004, 121-42.

Lasierra, Jose Manuel. "Flexible Enterprises: An Analysis of Their Institutional Standing." In L. E. Alonso Benito and Miguel Martinez Lucio, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, Houndmills, Palgrave Macmillan, 2006, 35-51.

Latiolais, Chris. "On the Limits of Modern Political Communities", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 93-96.

Lazzarato, Maurizio. "Immaterial Labor." In Paolo Virno and Michael Hardt, eds. *Radical Thought in Italy: A Potential Politics*, Minneapolis, University of Minnesota Press, 1996.

Le Baron, Bentley. "What Is Law - Beyond Scholasticism", *Logique et Analyse*, 14, no. March-June, 1971, 77-83.

Legendre, Pierre. "The Masters of Law: A Study of the Dogmatic Function." In Peter Goodrich, ed. *Law and the Unconscious: A Legendre Reader*, Translated by Peter Goodrich with Alain Pottage and Anton Schütz, New York, St. Martin's Press, 1997, Ch 5.

Lemke, Thomas. ""The Birth of Bio-Politics": Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality", *Economy and Society*, 30, no. 2, 2001, 190-207.

Levine, Norman. "The German Historical School of Law and the Origins of Historical Materialism", *Journal of the History of Ideas*, v48, no. n3, 1987, p431(21).

Ludwikowski, Rett R. "Socialistic Legal Theory in the Post-Pashukanis Era", *Boston College International and Comparative Law Review*, 10, no. 2, 1987, 323.

Lukács, György. *History and Class Consciousness: Studies in Marxist Dialects*, London,, Merlin Press, 1971.

Lumsden, Simon. "Beyond an Ontological Foundation for the Philosophy of Right", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 139-45.

Macken, J. J., O'Grady, Paul, Sappideen, Carolyn, Warburton, Geoff, Ronalds, Chris, and Bourke, Juliet. *The Law of Employment*. 5th ed, Sydney, Lawbook Co., 2002.

Mackenzie, Robert, and Forde, Chris. "The Myth of Decentralization and the New Labour Market." In L. E. Alonso Benito and Miguel Martinez Lucio, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, Houndmills, Palgrave Macmillan, 2006, 69-87.

Macnair, Mike. "Law and State as Holes in Marxist Theory", *Critique*, 34, no. 3, 2006, 211-36.

Madlingozi, Tshepo. "Post-Apartheid Social Movements and the Quest for the Elusive 'New' South Africa", *Journal of Law and Society*, 34, no. 1, 2007, 77-98.

Mahlmann, Matthias "Law and Force: 20th Century Radical Legal Philosophy, Post-Modernism and the Foundations of Law", *Res Publica*, 9, 2003, 19-37.

Makdisi, Saree, Casarino, Cesare, and Karl, Rebecca E., eds. *Marxism Beyond Marxism*, New York, Routledge, 1996.

Margolis, Joseph. "Praxis and Meaning: Marx's Species Being and Aristotle's Political Animal." In George E. McCarthy, ed. *Marx and Aristotle: Nineteenth-Century German Social Theory and Classical Antiquity*, Savage, Rowman & Littlefield Publishers, 1992, x, 379 p.

Marks, Susan. "International Judicial Activism and the Commodity-Form Theory of International Law", *European Journal of International Law*, 18, no. 1, 2007, 199-211.

Martinez Lucio, Miguel. "Introduction: Employment Relations in a Changing Society." In L. E. Alonso Benito and Miguel Martinez Lucio, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, Houndmills, Palgrave Macmillan, 2006, xiii, 232 p.

Marx, Karl. *Das Kapital: Kritik Der Politischen Ökonomie*, Vol. 1, Stuttgart, Berlin, JHW Dietz, 1922.

———. *Capital: A Critical Analysis of Capitalist Production*, Translated by Samuel Moore and Edward Aveling, Vol. 1, Moscow, Progress Publishers, 1954.

———. *Capital: The Process of Capitalist Production as a Whole*, Translated by Samuel Moore and Edward Aveling, Vol. 3, Moscow, Progress Publishers, 1956.

———. *Capital: The Process of Circulation of Capital.*, Translated by Samuel Moore and Edward Aveling, Vol. 2, Moscow, Progress Publishers, 1956.

———. "Critique of the Gotha Programme." In Progress Publishers, ed. *Karl Marx and Frederick Engels: Selected Works*, Moscow, Progress Publishers, 1968, 319-35.

———. *A Contribution to the Critique of Political Economy*, Moscow, Progress Press, 1970.

———. *Grundrisse: Foundations of the Critique of Political Economy* Translated by Martin Nicolaus, Harmondsworth, Penguin Books, 1973.

———. *Economic and Philosophic Manuscripts of 1844*, Moscow, Progress Press, 1977.

———. "Einleitung Zu Den „Grundrissen Der Kritik Der Politischen ÖKonomie"." In Institut für Marxismus-Leninismus beim ZK Der SED, ed. *Marx Engels Werke*, Berlin, Dietz Verlag, 1983, 19-62.

———. "Die Ökonomische-Philosophische Manuskripte Aus Dem Jahr 1844." In Institut für Marxismus-Leninismus beim ZK Der SED, ed. *Marx Engels Werke - Ergänzungsband*, Vol. 1. Teil, Berlin, Dietz Verlag, 1983, 465-588.

———. *Early Writings*, London, Penguin, 1992.

———. "On the Jewish Question." *Early Writings*, London, Penguin, 1992, 211-42.

———. *The Poverty of Philosophy*, Amherst, Prometheus Books, 1995.

Marx, Karl, and Engels, Friedrich. *Selected Works*, Moscow, Progress Publishers, 1968.

———. *The Communist Manifesto*, London, New York, Verso, 1998.

Maslan, Susan. "The Anti-Human: Man and Citizen before the Declaration of the Rights of Man and of the Citizen", *South Atlantic Quarterly*, 103, no. 2/3, 2004, 357-54.

McCarthy, George E., ed. *Marx and Aristotle: Nineteenth-Century German Social Theory and Classical Antiquity*, Savage, Rowman & Littlefield Publishers, 1992.

McVeigh, Shaun, Rush, Peter, and Young, Alison. "A Judgment Dwelling in Law: Violence and the Relations of Legal Thought " In Austin Sarat, ed. *Law, Violence, and the Possibility of Justice*, Princeton, N.J.; Oxford, Princeton University Press, 2001, 101-41.

Mepham, John, and Ruben, David-Hillel. *Issues in Marxist Philosophy*, Brighton (Sussex), Harvester Press, 1979.

Miéville, China. *Between Equal Rights: A Marxist Theory of International Law*, Leiden, Brill, 2004.

———. "The Commodity-Form Theory of International Law: An Introduction", *Leiden Journal of International Law*, 17, no. 2, 2004, 271-302.

Miliband, Ralph. "Marx and the State." In G Duncan, ed. *Democracy and the Capitalist State*, Cambridge, Cambridge University Press, 1989.

Mills, Catherine. "Biopolitics, Liberal Eugenics and Nihilism." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 180-202.

———. "Playing with Law: Agamben and Derrida on Postjuridical Justice", *South Atlantic Quarterly*, 107, no. 1, 2008, 15-36.

Milovanovic, Dragan. *Weberian and Marxian Analysis of Law: Development and Functions of Law in a Capitalist Mode of Production*, Aldershot, Brookfield, Avebury, 1989.

———. "Postmodern Law and Subjectivity: Lacan and the Linguistic Turn." In David Stanley Caudill and Steven Jay Gold, eds. *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*, Atlantic Highlands, N.J., Humanities Press, 1995, xi, 336 p.

Minow, Martha, Ryan, Michael, and Sarat, Austin, eds. *Narrative, Violence, and the Law: The Essays of Robert Cover*, Ann Arbor, University of Michigan Press, 1992.

Mitchell, Richard, and Arup, Christopher. "Labour Law and Labour Market Regulation." In Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell, eds. *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Annandale, N.S.W., Federation Press, 2006, 3-18.

Moore, Des. "The Role of the CAI in the Regulation of Australia." In *HR Nicholls Society annual conference*. Sydney, 1990.

Morgan, Benjamin. "Undoing Legal Violence: Walter Benjamin's and Giorgio Agamben's Aesthetics of Pure Means", *Journal of Law and Society*, 34, no. 1, 2007, 46-64.

Morgan, Jamie. "Interview with Michael Hardt", *Theory, Culture & Society*, 23, no. 5, 2006, 93(21).

Motha, Stewart. "Democracy's Empire: Sovereignty, Law, and Violence", *Journal of Law and Society*, 34, no. 1, 2007, 1-2.

Mouffe, Chantal. *The Challenge of Carl Schmitt*, London, New York, Verso, 1999.

Mulheron, Rachel. "*Maritime Union of Australia (MUA) V Patrick Stevedores Pty Ltd*: Marrying Injunctive Relief and Labour Supply Contracts", *James Cook University Law Review*, 6, 1999, 152-64.

Müller, Wolfgang, and Neusüss, Christel. "The 'Welfare State Illusion' and the Contradiction between Wage Labour and Capital." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 32-39.

Murphy, Mark C. "Natural Law Theory." In Martin Philip Golding and William A. Edmundson, eds. *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Oxford, Blackwell, 2005, ix, 355 p.

Nancy, Jean-Luc. "Church, State, Resistance", *Journal of Law and Society*, 34, no. 1, 2007, 3-13.

Negri, Antonio. "Rileggendo Pašukanis: Note di Discussione", *Materiali marxisti: La forma Stato Per la critica dell' economia politica della costituzione*, 12, 1977.

———. *Marx Beyond Marx: Lessons on the Grundrisse*, South Hadley, Mass., Bergin & Garvey, 1984.

———. *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics*, Minneapolis, University of Minnesota Press, 1991.

———. "Interpretation of the Class Situation Today: Methodological Aspects." In Werner Bonefeld, Richard Gunn and Kosmas Psychopaidåes, eds. *Open Marxism: Vol 2 Theory and Practice*, London, Boulder, Pluto Press, 1992.

———. *Insurgencies: Constituent Power and the Modern State*, Minneapolis, University of Minnesota Press, 1999.

———. "Paschukanis Lesen." In Joachim Bruhn, Manfred Dahlmann and Clemens Nachtmann, eds. *Kritik der Politik: Johannes Agnoli zum 75 Geburtstag*, Freiburg, Ça ira, 2000.

———. *Time for Revolution*, New York, London, Continuum, 2003.

———. "Postmodern Global Governance and the Critical Legal Project", *Law and Critique*, 16, 2005, 27-45.

———. *The Political Descartes: Reason, Ideology, and the Bourgeois Project*, Translated by Matteo Mandarini and Alberto Toscano, London, New York, Verso, 2006.

———. "Giorgio Agamben: The Discreet Taste of the Dialectic." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 109-25.

Negri, Antonio, and Dufourmantelle, Anne. *Negri on Negri*, New York, Routledge, 2004.

Negri, Antonio, and Hardt, Michael. "Value and Affect", *boundary 2*, 26, no. 2, 1999, 77(12).

Nenon, Thomas. "On Hegel and Institutional Rationality", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 27-33.

Neocleous, Mark. "From Civil Society to the Social", *The British Journal of Sociology*, v46, no. n3, 1995, p395(14).

———. "Staging Power: Marx, Hobbes and the Personification of Capital", *Law and Critique*, 14, no. 2, 2003, 147-65.

———. "The Problem with Normality: Taking Exception To "Permanent Emergency"", *Alternatives: Global, Local, Political*, 31, no. 2, 2006, 191(23).

Neumann, Franz. *The Democratic and the Authoritarian State: Essays in Political and Legal Theory*, Glencoe, Free Press, 1957.

———. *Behemoth: The Structure and Practice of National Socialism, 1933-1944*. 2d ed, New York, Harper &

Row, 1966.

———. *The Rule of Law: Political Theory and the Legal System in Modern Society*, Leamington Spa, Berg, 1986.

———. "Labor Law in Modern Society." In William E. Scheuerman, ed. *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer*, Berkeley, University of California Press, 1996.

Norrie, Alan. "Pashukanis and the 'Commodity Form Theory': A Reply to Warrington", *International Journal of the Sociology of Law*, 10, no. 4, 1982, 419-37.

———. "Locating the Socialist Rechtsstaat: Underdevelopment and Criminal Justice in the Soviet Union", *International Journal of the Sociology of Law*, 18, no. 3, 1990, 343-59.

Norris, Andrew, ed. *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer*, Durham, London, Duke University Press, 2005.

———. "Sovereignty, Exception, and Norm", *Journal of Law and Society*, 34, no. 1, 2007, 31-45.

Novitz, Tonia. *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, Oxford, Oxford University Press, 2003.

Nuzzo, Angelica. "Which Particulars Can Have a Right? Which Universal Can Exercise Power?", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 163-69.

Nys, Ernest, ed. *Francisci De Victoria: De Indis Et De Iure Belli Relectiones*, Buffalo, N.Y., William S. Hein, 1995.

Ojakangas, Mika. "Philosophies of 'Concrete' Life: From Carl Schmitt to Jean-Luc Nancy", *Telos*, 132, 2005, 25-45.

Osborne, Peter, ed. *Socialism and the Limits of Liberalism*, London, New York, Verso, 1991.

Osborne, Peter, and Benjamin, Andrew E., eds. *Walter Benjamin's Philosophy*, Manchester, Clinamen, 2000.

Pagden, Anthony, and Lawrance, Jeremy, eds. *Francisco De Vitoria: Political Writings*, Cambridge; New York, Cambridge University Press, 1991.

Pashukanis, Evgeny. *Law and Marxism: A General Theory*, Translated by B Einhorn, London, Ink Links, 1978.

———. "Selections from the Encyclopaedia of State and Law: 'International Law'." In Piers Beirne and Robert Sharlet, eds. *Pashukanis, Selected Writings on Marxism and Law*, London; New York, Academic Press, 1980, 168-83.

———. "State and Law under Socialism." In Piers Beirne and Robert Sharlet, eds. *Pashukanis, Selected Writings on Marxism and Law*, London; New York, Academic Press, 1980, 346-61.

———. "The Marxist Theory of Law and the Construction of Socialism." In Piers Beirne and Robert Sharlet, eds. *Pashukanis, Selected Writings on Marxism and Law*, London; New York, Academic Press, 1980, 186-99.

———. "A General Theory of Law and Marxism." In Piers Beirne and Robert Sharlet, eds. *Pashukanis, Selected Writings on Marxism and Law*, London; New York, Academic Press, 1980, 37-131.

Passavant, Paul A. "From Empire's Law to the Multitude's Rights: Law, Representation, Revolution." In Paul A. Passavant and Jodi Dean, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004, 95-120.

———. "The Contradictory State of Giorgio Agamben", *Political Theory*, 35, no. 2, 2007, 147(28).

Passavant, Paul A., and Dean, Jodi, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004.

Patton, Paul. "Agamben and Foucault on Biopower and Politics." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 203-18.

Paye, Jean-Claude. "Dictatorship as the Empire's Mode of Governance?", *Telos*, 139, 2007, 152-69.

Pearce, F. *Crimes of the Powerful: Marxism, Crime and Deviance*, London, Pluto Press, 1978.

Phillips, Paul. *Marx and Engels on Law and Laws*, Oxford, M. Robertson, 1980.

Picciotto, Sol. "The Internationalisation of Capital and the International State System." In Simon Clarke, ed. *The State Debate*, New York, St. Martin's Press, 1991, 214-24.

Piccone, Paul, and Ulmen, Gary. "Uses and Abuses of Carl Schmitt", *Telos*, 122, 2002, 3-32.

Pippin, Robert B. "Hegel and Institutional Rationality", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 1-25.

Poggi, Gianfranco. "Einfuhrung in Die Materialistische Staatsanalyse", 1978.

Post, Charles. "Book Review: Coercion, Contract, and Free Labor in the Nineteenth Century ", *Historical Materialism*, 14, no. 3, 2006, 275-81.

Poulantzas, Nicos. *Political Power and Social Classes*, London, New Left Books, 1973.

———. "On Social Classes", *New Left Review*, No 78, 1973, 27-54.

———. "The Capitalist State: A Reply to Miliband and Laclau", *New Left Review*, No 95, 1976, 63-83.

Quinney, Richard. "Crime Control in Capitalist Society: A Critical Philosophy of Legal Order." In Ian R. Taylor, Paul Walton and Jock Young, eds. *Critical Criminology*, London ; Boston, Routledge and Kegan Paul, 1975.

Rabaté, Jean-Michel, ed. *The Cambridge Companion to Lacan*, Cambridge, New York, Cambridge University Press, 2003.

Rabaté, Jean-Michel, and Lambert, Gregg "Conversations on the Future of Theory", *Symploke*, 11, no. 1-2, 2003, 39-53.

Rancière, Jacques. "On the Theory of Ideology (the Politics of Althusser)", *Radical philosophy*, 7, 1974, 2-15.

———. "Who Is the Subject of the Rights of Man?", *South Atlantic Quarterly* 103, no. 2/3, 2004, 297-310.

Rasch, William. "Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy", *Cultural Critique*, 54, 2003, 120-47.

———. *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*, London, Birkbeck Law, 2004.

———. "From Sovereign Ban to Banning Sovereignty." In Matthew Calarco and Steven DeCaroli, eds. *Giorgio Agamben: Sovereignty and Life*, Stanford, California, Stanford University Press, 2007, 92-107.

Rasmussen, David M. "Questions for Hoffheimer", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 63-64.

Read, Jason. *The Micro-Politics of Capital: Marx and the Prehistory of the Present*, Albany, State University of New York Press, 2003.

Redhead, Steve. "The Discrete Charm of Bourgeois Law: A Note on Pashukanis", *Critique*, 9, 1978, 113-20.

Reichelt, Helmut. "Some Comments on Flatow and Huisken's Essay 'on the Problem of the Derivation of the Bourgeois State'." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 43-56.

———. "Some Comments on Flatow and Huisken's Essay 'on the Problem of the Derivation of the Bourgeois State'." In John Holloway and Sol Picciotto, eds. *State and Capital: A Marxist Debate*, London, E. Arnold, 1978, 43-56.

Renner, Karl. *The Institutions of Private Law and Their Social Functions*, London, Routledge and Kegan Paul, 1949.

Rix, Brian. "Positivism." In Martin Philip Golding and William A. Edmundson, eds. *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Oxford, Blackwell, 2005, ix, 355 p.

Robertshaw, Paul. "Judicial Politics within the State", *International Journal of the Sociology of Law*, 9, no. 2, 1981, 201-24.

Robinson, William I. "The Pitfalls of Realist Analysis of Global Capitalism: A Critique of Ellen Meiksins Wood's Empire of Capital", *Historical Materialism*, 15, 2007, 71-93.

Rosenfeld, Michel. "Hegel and the Dialectics of Contract." In Drucilla Cornell, Michel Rosenfeld and David Carlson, eds. *Hegel and Legal Theory*, New York, Routledge, 1991.

Ross, Alison. "Introduction", *South Atlantic Quarterly*, 107, no. 1, 2008, 1-13.

Rubin, G. R., and Sugarman, David, eds. *Law, Economy and Society, 1750-1914: Essays in the History of*

English Law, Abingdon, Oxon., Professional Books Ltd., 1984.

Rühle, Otto. *Karl Marx: His Life and Work*, New York, New Home Library, 1943.

Salecl, Renata. *(Per)Versions of Love and Hate* London, Verso, 1998.

Sarat, Austin, ed. *Law, Violence, and the Possiblity of Justice*, Princeton, Oxford, Princeton University Press, 2001.

———. "Situating Law between the Realities of Violence and the Claims of Justice: An Introduction." In Austin Sarat, ed. *Law, Violence, and the Possiblity of Justice*, Princeton, N.J.; Oxford, Princeton University Press, 2001, 3-16.

Sarat, Austin, and Kearns, Thomas R. *Law's Violence*, Ann Arbor, University of Michigan Press, 1992.

———. "Making Peace with Violence: Robert Cover on Law and Legal Theory." In Austin Sarat, ed. *Law, Violence, and the Possiblity of Justice*, Princeton, N.J.; Oxford, Princeton University Press, 2001, 49-84.

Sassen, Saskia. *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996.

———. "The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics." In Paul A. Passavant and Jodi Dean, eds. *Empire's New Clothes: Reading Hardt and Negri*, New York, Routledge, 2004, 175-98.

———. *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton, Princeton University Press, 2006.

Sassen, Saskia, and Appiah, Anthony, eds. *Globalization and Its Discontents*, New York, New Press, 1998.

Sayer, Derek. *The Violence of Abstraction: The Analytic Foundations of Historical Materialism*, Oxford, New York, B. Blackwell, 1987.

Scheuerman, William E. *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, Cambridge, Mass., MIT Press, 1994.

———, ed. *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Berkeley, University of California Press, 1996.

———. "Franz Neumann - Legal Theorist of Globalization?", *Kritische Justiz*, 126, 2002, 79-89.

Schmitt, Carl. *Der Begriff Des Politischen*, Hamburg, Hanseatische Verlagsanstalt, 1933.

———. "Starker Staat Und Gesunde Wirtschaft", *Volk und Reich Politische Monatshefte*, 2, 1933.

———. *Political Theology: Four Chapters on the Concept of Sovereignty*, Translated by George Schwab, Cambridge, Mass., MIT Press, 1985.

———. *The Concept of the Political*, Translated by George Schwab, Chicago, University of Chicago Press, 1996.

Sedgwick, Sally. "The State as Organism: The Metaphysical Basis of Hegel's Philosophy of Right", *Southern Journal of Philosophy*, no. 39 (suppl.), 2001, 171-88.

Simmonds, Nigel. "Pashukanis and Liberal Jurisprudence", *Journal of Law and Society*, 12, no. 2, 1985, 135-51.

Simon, Jonathon. "The Vicissitudes of Law's Violence." In Austin Sarat, ed. *Law, Violence, and the Possiblity of Justice*, Princeton, N.J.; Oxford, Princeton University Press, 2001, 17-48.

Sinnerbrink, Robert. "Deconstructive Justice and the 'Critique of Violence': On Derrida and Benjamin.", *Social Semiotics*, 16, no. 3, 2006, 485-97.

Sohn-Rethel, Alfred. *Intellectual and Manual Labour: A Critique of Epistemology*, London, Macmillan, 1978.

Soon, Alice Tay Erh, and Kamenka, E. "Karl Marx's Analysis of Law", *Indian Journal of Philosophy*, 1, no. August, 1959, 17-38.

Steinfeld, Robert J. *Coercion, Contract, and Free Labor in the Nineteenth Century*, Cambridge, New York, Cambridge University Press, 2001.

Stewart, Paul. "Individualism and Collectivism in the Sociology of the Collective Worker." In L. E. Alonso Benito and Miguel Martinez Lucio, eds. *Employment Relations in a Changing Society: Assessing the Post-Fordist Paradigm*, Houndmills, Palgrave Macmillan, 2006, 18-33.

Stillman, Peter. "Property, Contract and Ethical Life." In Drucilla Cornell, Michel Rosenfeld and David Carlson, eds. *Hegel and Legal Theory*, New York, Routledge, 1991.

Stoetzler, Marcel. "Postone's Marx: A Theorist of Modern Society, Its Social Movements and Its Imprisonment by Abstract Labour", *Historical Materialism*, 12, no. 3, 2004, 261-83.

Stolleis, Michael. *The Law under the Swastika: Studies on Legal History in Nazi Germany*, Chicago, London, University of Chicago Press, 1998.

Stone, Alan. "The Place of Law in the Marxian Structure-Superstructure Archetype", *Law and Society Review*, 19, 1985, 39-67.

Suchting, Wal. "Marx on the Dialectics of Production and Consumption in the Introduction to The "Grundrisse"", *Social Praxis*, 3, no. 4, 1975, 291-313.

———. "On a Criticism of Marx on Law and Relations of Production", *Philosophy and Phenomenological Research*, 38, no. 2, 1977, 200-08.

———. "'Productive Forces' and 'Relations of Production' in Marx", *Analyse und Kritik*, 4, no. 2, 1982, 159.

Sugarman, David, ed. *Legality, Ideology, and the State*, London, New York, Academic Press, 1983.

———. *Law in History: Histories of Law and Society*, New York, New York University Press, 1996.

Sumner, Colin. *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, London, New York, Academic Press, 1979.

———. "Pashukanis and The "Jurisprudence of Terror"", *The Insurgent Sociologist*, 10, no. 4, 1981, 99-106.

———. *Censure, Politics, and Criminal Justice*, Milton Keynes, Open University Press, 1990.

———. *The Sociology of Deviance: An Obituary*, Buckingham, Open University Press, 1994.

Tabak, Mehmet. "Marxian Considerations on Morality, Justice, and Rights", *Rethinking Marxism*, 15, no. 4, 2003, 523-40.

Taiwo, Olufemi. *Legal Naturalism: A Marxist Theory of Law*, Ithaca, Cornell University Press, 1996.

Taylor, Ian R, Walton, Paul, and Young, Jock, eds. *Critical Criminology*, London, Boston, Routledge and Kegan Paul, 1975.

Thompson, E. P. *The Making of the English Working Class*, Harmondsworth, Penguin, 1968.

———. *Whigs and Hunters: The Origin of the Black Act*, London, Allen Lane, 1975.

———. *The Poverty of Theory & Other Essays*, New York, Monthly Review Press, 1978.

Thompson, E. P., and Thompson, Dorothy. *The Essential E.P. Thompson*, New York, New Press Distributed by W.W. Norton & Co., 2001.

Thompson, John B. *Studies in the Theory of Ideology*, Cambridge, Polity, 1984.

Thompson, Paul. "Foundation and Empire: A Critique of Hardt and Negri", *Capital & Class*, no. 86, 2005, 73(26).

Thornhill, Chris. *German Political Philosophy: The Metaphysics of Law*, Taylor & Francis, 2006.

Tomasic, Roman. "The Quest for Theory in the Sociology of Law", *Current Sociology*, 33, no. 1, 1985, 2-29.

Toscano, Alberto. "Factory, Territory, Metropolis, Empire", *Angelaki*, 9, no. 2, 2004, 197 - 216.

———. "Can Violence Be Thought? Notes on Badiou and the Possibility of (Marxist) Politics", *Identities: Journal for Politics, Gender and Culture*, no. 10, 2006, 9-38.

———. "The Open Secret of Real Abstraction", *Rethinking Marxism*, 20, no. 2, 2008, 273 - 87.

Tunstead Burtchaell, James "Unpersons", *The Review of Politics*, 62, no. 3, 2000, 625-27.

Valente, Joe. "Lacan's Marxism, Marxism's Lacan (from Zizek to Althusser)." In Jean-Michel Rabaté, ed. *The Cambridge Companion to Lacan*, Cambridge, New York, Cambridge University Press, 2003, 153-72.

Van Minster, Rens. "Between the Human and the Inhuman", *Leiden Journal of International Law* 17, 2004, 833-47.

Varga, Csaba. *The Place of Law in Lukâcs' World Concept*. Rev. and enl. ed, Budapest, Akadâemiai Kiadâo, 1985.

———. *Marxian Legal Theory*, Aldershot, Dartmouth, 1993.

Vercellone, Carlo. "From Formal Subsumption to General Intellect: Elements for a Marxist Reading of the Thesis of Cognitive Capitalism", *Historical Materialism*, 15, 2007, 13-36.

Vighi, Fabio. "Pasolini and Exclusion: Žižek, Agamben and the Modern Sub-Proletariat", *Theory, Culture & Society*, 20, no. 5, 2003, 99-122.

Vincent, Andrew. "Marx and Law", *Journal of Law and Society*, 20, no. n4, 1993, 371-97.

Virno, Paolo. "Notes on the General Intellect." In Saree Makdisi, Cesare Casarino and Rebecca E. Karl, eds. *Marxism Beyond Marxism*, New York, Routledge, 1996.

———. *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, Cambridge, London, Semiotext(e), 2003.

———. "General Intellect", *Historical Materialism*, 15, 2007, 3-8.

Virno, Paolo, and Hardt, Michael, eds. *Radical Thought in Italy: A Potential Politics*, Minneapolis, University of Minnesota Press, 1996.

Warrington, Ronnie. "Pashukanis and the Commodity Form Theory", *International Journal of the Sociology of Law*, 9, no. 1, 1981, 1-22.

———. "Pashukanis and the Commodity Form Theory." In David Sugarman, ed. *Legality, Ideology, and the State*, London, New York, Academic Press, 1983, 43-67.

———. "Standing Pashukanis on His Head", *Capital and Class*, 12, 1984, 102.

Weber, Max. *Economy and Society: Vol 2*, New York, Bedminster Press, 1968.

Weigel, Sigrid. "The Critique of Violence: Or, the Challenge to Political Theology of Just Wars and Terrorism with a Religious Face", *Telos*, 135, 2006, 61-76.

Weinberger, Ota, ed. *Hans Kelsen: Essays in Legal and Moral Philosophy*. Translated by Peter Heath, Dordrecht, D Reichel, 1973.

Westra, Richard. "Globalization: The Retreat of Capital to the 'Interstices' of the World?" In Richard Westra and Alan Zuege, eds. *Value and the World Economy Today: Production, Finance and Globalization*, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003, xiii, 246 p.

Westra, Richard, and Zuege, Alan, eds. *Value and the World Economy Today: Production, Finance and Globalization*, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2003.

Wickham, Gary, ed. *Social Theory & Legal Politics*, Sydney, Legal Consumption Publications, 1987.

———. "Turning the Law into Laws for Political Analysis." In Gary Wickham, ed. *Social Theory & Legal Politics*, Sydney, Legal Consumption Publications, 1987.

Williams, Raymond. "Base and Superstructure in Marxist Cultural Theory", *New Left Review*, 82, no. 3-17, 1973.

Wood, Ellen Meiksins. *Empire of Capital*, New York, Verso, 2003.

———. "Logics of Power: A Conversation with David Harvey", *Historical Materialism*, 14, 2006, 9-34.

———. "A Reply to Critics", *Historical Materialism*, 15, 2007, 143-70.

Zarembka, Paul, and Soederberg, Susanne. *Neoliberalism in Crisis, Accumulation, and Rosa Luxemburg's Legacy*, Amsterdam, Elsevier JAI, 2004.

Zartaloudis, Thanos. "The Case of the Hypocritical", *Law and Critique*, 16, 2005, 387.

Ziarek, Ewa Plonowska. "Bare Life on Strike: Notes on the Biopolitics of Race and Gender", *South Atlantic Quarterly*, 107, no. 1, 2008, 89-105.

Žižek, Slavoj. *The Sublime Object of Ideology*, London, Verso, 1989.

———. *For They Know Not What They Do: Enjoyment as a Political Factor*, London, New York, Verso, 1991.

———. *Looking Awry: An Introduction to Jacques Lacan through Popular Culture*, Cambridge, Mass., MIT Press, 1991.

———. *Tarrying with the Negative: Kant, Hegel, and the Critique of Ideology*, Durham, Duke University Press, 1993.

———, ed. *Mapping Ideology* Verso, 1994.

———. *The Metastases of Enjoyment: Six Essays on Woman and Causality*, London, New York, Verso, 1994.

———. "Is There a Cause of the Subject?" In Joan Copjec, ed. *Supposing the Subject*, London, Verso, 1994.

———, ed. *Cogito and the Unconscious*, Durham and London, Duke University Press, 1998.

———. "Four Discourses, Four Subjects' " In Slavoj Žižek, ed. *Cogito and the Unconscious*, Durham and London, Duke University Press, 1998.

———. *The Ticklish Subject: An Essay in Political Ontology*, New York, Verso, 1999.

———. *Human Rights and Its Discontents: A Lecture*, 1999. Available from http://www.egs.edu/faculty/Žižek/Žižek-human-rights-and-its-discontents.html.

———. "Class Struggle or Postmodernism? Yes Please!" In Judith Butler, Ernesto Laclau and Slavoj Zizek, eds. *Contingency, Hegemony, Universality*, London, Verso, 2000.

———. *Welcome to the Desert of the Real*, London, Verso, 2002.

———. "The Secret Clauses of the Liberal Utopia", *Law and Critique*, 19, no. 1, 2008, 1-18.

TABLE OF CASES AND LEGISLATION

German

Die Verfassung Des Deutschen Reichs ('Weimarer Reichsverfassung'), Reichsgesetzblatt, 1919, Nr 152, S. 1383-1418.

Verordnung Des Reichspräsidenten Zum Schutz Von Volk Und Staat, Reichsgesetzblatt, 1933, S. 83.

Gesetz Zur Ordnung Der Nationalen Arbeit (20.01.1934), 1934. Available at http://www.documentarchiv.de/ns/nat-arbeit.html

Australian

Ex p McKay (1907) 2 CAR 1

Australian Communist Party v. The Commonwealth (1951) 83 CLR 1

Workplace Relations Act 1996 (Cth)

Amendment (Work Choices) Act 2005 (Cth)

Building and Construction Industry Improvement Act 2005 (Cth)

Building and Construction Industry Improvement (Consequential and Transitional) Act 2005 (Cth)