

4. State Fetishism

The *Cartographers' Fable* speaks of an empire of excellent map-makers who, in their effort to make increasingly more accurate maps, ended up covering the whole country with a 1:1 scale chart. Suppose that the drawing of the map was obscured by history. The cartographers' guild began to insist that they were mere stewards and the map must have been there before the empire. Otherwise, how could the empire have articulated that it existed? If the imperial lawyers began repeating this argument and interpreting Kant to agree with them, we should ask why and when.

In the second half of the 20th century, West Germany was the site of the state derivation debate.¹⁴¹ The essential question was posed by Soviet jurist Evgeny Pashukanis in 1929: if class domination is constituted in the realm of private relations, why does it not remain private but instead assumes the form of domination through official state power?¹⁴² The historical entity known as the state is not neutral vis-a-vis social relations but neither is it a simple extension of them.¹⁴³ As those who rehabilitated Pashukanis into the Western Marxist canon argued, the

141 Elmar Altvater and Jürgen Hoffman, 'The West German State Derivation Debate: The Relation Between Economy and Politics as a Problem of Marxist State Theory' (1990) 24 *Social Text* 134.

142 Altvater and Hoffman (n 141) 141.

143 Altvater and Hoffman (n 141) 141; see also Gregory Albo and Jane Jenson, 'A Contested Concept: the Relative Autonomy of the State' in Wallace Clement and Glen Williams (eds), *The New Canadian Political Economy* (McGill-Queen's University Press 1989) 205–206.

state is a separate ontological entity and not a straightforward manifestation of class relations. On the contrary, what defines the state is precisely its claimed neutrality and universality.¹⁴⁴

But the character of this universalisation is not monolithic amongst classical theories of statehood. One form of state universalisation is that which occurs in international law and which I explored in the first part: the claim that the elements of statehood — most importantly territory — are ontologically hardwired to the world and that the state follows as a necessity. This is clearly not the same as the universalisation immanent in Kantian statehood. As I have shown, Kantian statehood — or, rather, government — follows only from the necessity of citizenship and civil authority, the latter following from the necessity of harmonising the external freedom of individuals. So long as one does not presuppose land ownership — and there seems to be no good reason for doing so — the universal necessity of government does not lead to a universalisation of the state in reality. It thus seems unsatisfactory to settle for the reductive materialist reading which sees all normative state theory as false universalisation without distinction.

Thus my claim in this last chapter is two-fold. First, that Marxist theory correctly attributes the ontological confusion surrounding much of Modern statehood to an ideological sleight of hand. Second, that Kantian government should be exempted from this critique or at least treated with more charity. I show this difference by considering the difference between Kantian government and Hegelian statehood; the former neglected by Marxist theory,¹⁴⁵ the latter heavily critiqued.

I reconstruct the Marxist critique of the emergence of statehood especially in the context of the turn of the 19th century and emergence of early capitalism, relying on Marx and Pashukanis but focusing not on their social critique but specifically on what they have to say on state ontology. Marx's critique recognises that this "speculative" concept re-

144 See John Holloway, 'State and capital: the state of the debate on the derivation of the state' (2025) 16(1) *Revista Direito e Práxis* <<https://doi.org/10.1590/2179-8966/2025/88992>> accessed 10 September 2025.

145 Suzanne M Love, 'Kant After Marx' (2017) 22(4) *Kantian Review* 579, 580.

verses the conditions of statehood. Instead of treating civil society as a good thing that we need states to protect, the protective mandate of the state comes to justify the claim of ontological priority. Essentially, because the state protects civil society, civil society would be impossible without the state, therefore the state came first. As Marx points out in reference to commodity fetishism, this is the religious moment in which relations between men are made to appear as relations between things. Consequently, relations are naturalised and the political imaginary shrinks. Pashukanis notes that this is what law does to economic relations, we can reconstruct Marx to say that this is what the 19th century state did to the economy as a whole.

Historicisation achieves two things. First, it situates reversal as distortion of the Kantian account. This is omitted by both Marx and Pashukanis. It is seemingly omitted by Marx because of a general disinterest in reacting to Kant,¹⁴⁶ by Pashukanis presumably due to the latter's overt focus on Kantian ethics rather than jurisprudence. But this historicisation is important because it ties the reversal precisely to that moment in which, as Marx says, the bourgeoisie ceases to be an estate and becomes a class.¹⁴⁷ This is the moment where the liberal state can draw on official history rather than mythology to justify itself but also when it must expropriate property in order to represent the collective interests of the owning class.

I argue that there is a conceptual break in state theory at the bourgeois revolutions, between the contractarians and the positivists or, put simply: between Kant and Hegel. Essentially, the concept of the state becomes the fetish of the state.

Marx identifies in Hegel a mystification of the state and its relationship to civil society which he explains through the material needs of the bourgeoisie. This mystification takes the form of fetishism. After laying out the historical argument, I consider the Marxist perspective on legal fetishism in the work of Evgeny Pashukanis. I argue that the internal logic of fetishism as illuminated by Pashukanis explains neatly

146 Love (n 145).

147 Marx, *The German Ideology* (1845–6).

the ontological disconnect between the Kantian *civitas* and the 19th century Leviathan, but I claim that Pashukanis himself uncharitably misapplies this logic in his consideration of Kant.

The historical argument that follows is highly schematic, offered in service to a conceptual claim. These events could hardly be compressed into the French Revolution, nor is this historical period without a plethora of nuances and contradictions which entirely escape the scope of this book. The point is only to illustrate the course of historical processes and the tendencies behind a theoretical development.

A. When the State was Fetishised

Classical contractarian reasoning — the broad idea that legislation is the result of a normative act of consent by the governed — is today both persistent and surpassed. Folk versions are still routine in politics; for instance in the idea that convicts should not have voting rights because they breached the social contract.¹⁴⁸ The core logic persists also in contemporary normative theory in the idea of self-legislation; that people should be subject to such limits on their freedom that they themselves choose or could choose as rational agents. What has however been surpassed is the historical fiction of an original act and the preceding state of nature from which humanity emerged.

It is no accident that the production of notable accounts of the State of Nature ceases after the turn of the 18th century, with Kant and Paine representing some of the last theorists to offer examples. Rather, it is evidence of a rupture in state theory accompanied by other material and ideological developments, notably the revision and mystification of the concept of the state. Kant's state is replaced by Hegel's state, rooted no longer in an act of will but in totalising and historical necessity, emerging not out of a counterfactual State of Nature but from the progressive force of history. This state must, above all, preserve proper-

148 See e.g. Jonathan Young, *Electoral (Disqualification of Sentenced Prisoners) Amendment Bill — Third Reading* (8 December 2010) 669 Hansard 15977 (New Zealand).

ty rights. To do so, it must preserve itself. Self-preservation by force and ideology becomes the state's first imperative, generating, producing and justifying an ontological circularity. Thus is born a paradoxically circular account in which the state is ontologically prior to the things it secures. After the bourgeois revolutions, the emancipatory idea that the State of Nature gives way to civil society with a state as the guarantor of rights is replaced by a theory of the state as a historical totality, the pre-existing frame that made society possible.

(i) The demise of contractarian mythology

State of nature accounts are liberal mythologies. They have not only theological origins and logics, but a discernible function as a bourgeois counter-history.

As for mythological origins of pre-historical State of Nature accounts, this is perhaps most clear in the narratives of the *communio primaeva* considered in the previous part: the idea that at one time human beings held the Earth as common property before a rupture event that caused their dispersal across the planet. The parallel is obvious and has been drawn by others: “*Ius gentium* itself rests on the following paradox: after the Tower of Babel, humankind dispersed into many languages and cultures.”¹⁴⁹ Theological roots were of direct significance for the early questions of *ius gentium*, for instance: was Christ's Kingdom, taken as the basis for the authority of the Holy Roman Emperor, temporal or only spiritual?¹⁵⁰ But the more important point is that even when theology is explicitly discarded, its logic persists in these accounts. Consider for instance, Rousseau's State of Nature in which human beings were innocent and devoid of the knowledge of good and evil.¹⁵¹ It was only after original sin (for Rousseau, the

149 Francesca Iurlaro, *Unpuzzling Customary International Law (CIL)* (PhD thesis, European University Institute, 2018), 82.

150 Vitoria (n 93) 256.

151 Jean-Jacques Rousseau, *Discourse on the Origins of Inequality* (GDH Cole tr, JM Dent & Sons Ltd 1913) [1754] 11–12.

first enclosure of land!)¹⁵² that humans are cast out of the Garden, into civil society, and gain such knowledge.¹⁵³ Massimi credits Kant with the secularisation of these ideas¹⁵⁴ but this misses the fact that *inter alia* Rousseau already presents them as ahistorical; “Let us begin by laying the facts aside as they have no bearing upon the question.”¹⁵⁵

Rather, by severing the claim to theological and historical fact, these accounts are able to function as counter-historical mythologies that legitimise the Modern state. Why they do so is explored at length by Michel Foucault in his consideration of mythology. In short, Foucault argues that the bourgeoisie had a disadvantage in historical argument because the production of history was controlled by the clergy and nobility, with Louis XIV even centralising historiography under a dedicated cabinet minister.¹⁵⁶ This is not to say that members of the Third Estate did not make historical arguments, but they relied on Rousseauan mythology precisely because produced historical fact often favoured the Church and aristocracy.¹⁵⁷ “Mythology” in this sense refers not to untruth but to the status of these accounts as alternatives to pedigreed historical fact.¹⁵⁸

It is no coincidence then that no further State of Nature accounts are produced after the economic-political ascendance of the bourgeoisie at the beginning of the 19th century. From then on in historiography, “All the past is given over to war and the economy of conquest; from now on, however, with the overthrow of the Ancien régime, the world is dedicated to peace and the economy of exchange.”¹⁵⁹ The history-producing institutions were seized and the evolutionist theory

152 Rousseau (n 151) 13–14.

153 Rousseau (n 151) 29–30.

154 Massimi (n 92).

155 Rousseau (n 151) 12; Graeber and Wengrow (n 18) 11.

156 Michel Foucault, *Society Must be Defended: Lectures at the Collège de France 1975–76* (David Macey tr, Picador 2003) 66–67 and 177–178.

157 Foucault (n 156).

158 Foucault (n 156); Graeber and Wengrow (n 18) 11–12.

159 Lionel Gossman, ‘The Privilege of Continuity: Bourgeois History as the Mediator Between Chronicle History and Philosophical History’ (1976) 15(4) *History and Theory* 37, 38.

of progress was elevated from mythology to history.¹⁶⁰ By the time Marx deals with history, the linear advancement of society from small egalitarian bands into increasingly complex civil states is treated as history. To echo Graeber and Wengrow: these conceptions — prevalent until today — share the logic of the State of Nature account but present it as fact.¹⁶¹

If then such a rupture point occurs shortly after Kant and Paine write the last of these accounts, the pertinent question is what other shifts in state theory accompanied it.

(ii) The mystification of the state

The early 19th century state is hardly a *civitas*. As it manifests in the institutionalisation of the first secret police forces in Europe and the domination of the Other abroad, it is no longer a liberal concept but a real totality.¹⁶² As Wallerstein observed, the international system became an interstate system, citizenship became a metric of exclusion rather than inclusion, and the state began to support the social sciences¹⁶³ — the latter point echoing Foucault’s observation about the seizing of epistemic institutions.

There is an accompanying political-theoretical shift, perhaps best reflected in the state theory shift between Kant and Hegel.¹⁶⁴ The first conceptualisation of the 19th century Leviathan is commonly ascribed to Hegel. “Already in 1821 Hegel referred to states as ‘completely au-

160 Foucault (n 156) 129–130.

161 Graeber and Wengrow (n 18) 446.

162 See George Steinmetz, ‘A Liberal Leviathan: the Creation of the Strong State in Nineteenth Century Europe’ (2012) 41(1) *Contemporary Sociology* 23; It is ill-spirited and Popperian to associate Hegel’s state with secret police forces and it is not my intention to imply this, see also Knox (n 12) 63. What the 19th century police state and the Hegelian universalising state have in common is not their actions but their ontological character.

163 Steinmetz (n 162) 24.

164 I stress again that this is an abridged argument the function of which is only to demonstrate the theoretical origin points of state ontology.

onomous totalities in themselves’ and as ‘the absolute power on earth (in which the world spirit unfolds itself)’”.¹⁶⁵

The logic of this mystification lies in Hegel’s reaction to Kant’s theory of the state. Hegel agrees with Kant that the family and civil society are *cognitively* prior to the state; that is, one should first *explain* civil society, then the state. But *ontologically*, Hegel argues that the “state is the foundation of both of these institutions.”¹⁶⁶ Essentially, Hegel does not agree with Kant that (property) rights can follow from the unification of the “arbitrary” will of individuals prior to statehood.¹⁶⁷ To enable the realisation of freedom, the state must “curb the self-interested interactions of civil society” that would otherwise tear it apart.¹⁶⁸ State institutions universalise and mediate social forces and in doing so, make civil society possible.¹⁶⁹ The state transcends civil society and is not a mere extension of the self-determination of citizens.¹⁷⁰ In both cases, the state might be said to be “necessary” to civil society. But in Kant’s case this is because it makes possible the acquisition and exercise of rights in a way that does not limit the freedom of others, not because the alternative would be necessarily unsustainable but because it would be immoral. The necessity of entering into a civil state is

165 Catherine Brölmann and Jane Nijman, ‘Legal Personality as a Fundamental Concept for International Law’ (2016) Amsterdam Law School Legal Studies Research Paper No 2016–43 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845222> accessed 6 August 2025, 5; Hegel, *Grundlinien der Philosophie des Rechts* (1821 – Knox translation of 1952, Suhrkamp 1986), §§260–269, §330 and §331.

166 Jiří Chotaš, ‘Justification of the State: Kant and Hegel’ in Christian Krijnen (ed), *Concepts of Normativity: Kant and Hegel, Critical Studies in German Idealism vol. 24* (Brill 2019) 164. Fully engaging with Hegel’s argument would be far beyond the scope of this thesis. I note here that treating them through the prism of Marxian critique is indeed reductive. I nevertheless do it because it facilitates my general argument about the problem of how the nineteenth-century state conceives of itself, for which Hegel is an apt example.

167 Chotaš (n 166) 164.

168 SP Tijsterman, ‘Generating Freedom: Hegel’s Conception of the Political Order’ (Leiden University 2024) 194 <<https://hdl.handle.net/1887/3736094>> accessed 20 August 2025.

169 Tijsterman (n 168) 194.

170 Shlomo Avineri, *Hegel’s Theory of the Modern State* (Cambridge University Press 2012) esp 138.

simply that we *ought to* find a way to harmonise our freedoms because this follows from the postulate of right. On the contrary, the Hegelian necessity is rather practical in that our external freedom could not only not be exercised in a moral way, it arguably could not be exercised at all. Submission to civil authority is thus an ontological necessity rather than a moral obligation.

Yet this argument contains the essence of the ontological problem addressed in part 1. The territorial state is said to be realising itself in landed property while simultaneously being its precondition. Ontological priority is inseparable from practical necessity or origins. This is what Robert Pippin calls Hegel's "organicist" view of the state wherein "the individual parts of this ethical organism had no more claim to individual standing and intelligibility as proper ontological actualities than a severed hand, a kidney, or a lung might have."¹⁷¹

But it seems one might define nearly anything as a totality and show thereby that all its components are merely anatomical parts to be mediated and subsumed. If I define my debating society as the totality underpinning my social life, I can show that all parts of social life are only intelligible when interpreted through it. Clearly, it would be incorrect to conclude that my debating society *is* the totality of social life or, by substitution, that it is a state. Perhaps less outlandishly, conservative thinkers sometimes claim, with a pseudo-Aristotelian turn, the reverse of Hegel: that the family is the totality of social life and its other phenomena are either parts to be mediated or the products of an interaction of families; a multiplied geopolitics. Thus, the position that the state occupies a position of totality analytically seems unsatisfactory.

If, however, the state's position as a totality follows from an empirical judgment, then this is a historically particular judgment, since such a totality did not obtain for most societies across most of history.¹⁷² And historically, the state could not have come to be from the things that constitute it. On the contrary, the organics of the state bear out that

171 Robert Pippin, *Hegel's Practical Philosophy* (Cambridge University Press 2008) 93.

172 See Graeber and Wengrow (n 18)

civil society *does* precede it. This is why Marx takes issue with Hegel's state:

The Idea is given the status of a subject, and the actual relationship of family and civil society to the state is conceived to be its inner imaginary activity. Family and civil society are the presuppositions of the state; they are the really active things; but in speculative philosophy it is reversed. But if the Idea is made subject, then the real subjects – civil society, family, circumstances, caprice, etc. – become unreal, and take on the different meaning of objective moments of the Idea.¹⁷³

Leaving aside for now the great significance of this passage for my overall argument, the direct consequence here is the elevation of the state from a meta-owner, steward of civil society into civil society's condition of possibility. The state as the "march of God through the World"¹⁷⁴ is emblematic of the 19th century reduction of the whole of international law to the law of states, encapsulated in the idea that *only* states have international legal personality, effectively the idea that the state is the only real thing.¹⁷⁵ One must, in response to this, point out that the international law on personality is part of international law and that states would not legally exist without it. Thus, states must have, again, produced the condition of their own possibility. This is the mystifying reversal which I pointed to in the relationship of territory and government in part one. Marx's critique of Hegel is "that [the] schema of rationality comes in advance and is glued to particular institutions which then only appear as rational".¹⁷⁶ That is, the institutional frame was already presupposed and is merely rationalised.

I began this chapter with the hypothesis that this theoretical reversal is the result of contemporary transformations of the political economy and class relations. Both Kant and Hegel are bourgeois theorists. But the bourgeoisie of which they are theorists is not the same. For around the time of the transition from Kantian theory to Hegelian theory, the

173 Marx, *Critique of Hegel's Philosophy of Right* (1843) s 261 2.

174 Hegel (n 165) §258ad.

175 See Brölmann and Nijman (n 165).

176 Michal Lipták, 'Alienated Citizens: Marx and Hegel on Civil Society' (2023) 78(9) *Filozofia* 760, 764.

European bourgeoisie changed, in very broad terms, from a subaltern class to a dominant one.

Kantian state theory is emancipatory because it is the product of the pre-revolutionary bourgeoisie whereas 19th century state theory is the product of a reigning bourgeoisie. Marx, having observed the reversal in Hegel's response to Kant, offers a supporting diagnosis in *The German Ideology*:

By the mere fact that it is a class and no longer an estate, the bourgeoisie is forced to organise itself no longer locally, but nationally, and to give a general form to its mean average interest. *Through the emancipation of private property from the community*, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organisation which the bourgeois necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests.¹⁷⁷

Two of Marx's claims here are important. First, the idea that the transformation of the bourgeoisie results in the transformation of the state. Rather than a steward, it must now be a separate entity *so that* it can properly represent the bourgeoisie constituted as a class. "The Revolution did not begin as a class struggle, except for the peasantry, but it became a class struggle, just as it became a national struggle."¹⁷⁸ The class structure comes into being proper with this nationalisation — that is, generalisation — of the political-economic relation. Per Hobsbawm: bourgeois democracy characteristically transforms the political structure by instituting representative assemblies in which the entities represented are not estates but groups of individuals of equal legal status.¹⁷⁹ From this equality of status arises the mean average interest, which we might also call the collective interest that leads to the constitution of a state outside civil society.

The state in this moment becomes the institutionalisation of the market economy. The internal/external distinction follows from its

177 Marx, *The German Ideology* (1845–6). Italics added.

178 Michael Mann, *Sources of Social Power*, vol II, *The Rise of Classes and Nation-states, 1760–1914* (Cambridge University Press 1993) 167.

179 Eric Hobsbawm, *Age of Capital* (Abacus 1977) 123.

manifestation internally as the institutional frame that maintains economic relations and externally as a manifestation of the totality of the economy vis-a-vis other economies.

The second key point is that this happens through the “emancipation of private property from the community”. In other words, the state must be able to act as an owner rather than a meta-owner in order to represent the collective interest of the bourgeoisie. As I have shown, a territory-agnostic, governance-grounded Kantian state does not inherently proscribe unauthorised land transfers. But such transfers would be incompatible with the Hegelian state which has a right to territory preceding and superior to the rights of its citizens. The Hegelian state must mediate and protect the mean average interest of the property owners, not merely their individual rights. Thus, land is expropriated, the Original Community of Land abolished even as a suspended possibility because this is in the interest of the owning class.

The transformation of the class structure results not only in a surpassing of the State of Nature account, but also of the Original Community of Land. The theory of the bourgeoisie as an estate sought to secure property rights *against* the state and thus saw them as prior to the state. Having secured these rights, the theory of the bourgeoisie as a dominant class must secure rights *for* the state;¹⁸⁰ for the bourgeoisie as a class rather than for the individual property owner and again for the subject as a property owner rather than as citizen. The emancipatory, rebellious attitude toward political authority is discarded and the Original Community of Land along with it. The abolition is naturalised through the ideological transformation of the concept of government into the fetish of the state. There is difficulty in showing why governments as associations of people should have any claim to land independently of their citizens. But the state as a totality pre-dating all rights can explain this easily.

180 See also Reidar Maliks, ‘Kant and the French Revolution’ (2023) 12(2) *Las Torres de Lucca. Revista internacional de filosofía política* 113, 118; Daniel Lee, ‘The Legacy of Mediaeval Constitutionalism in the “Philosophy of Right”: Hegel and the Prussian Reform Movement’ (2008) 29(4) *History of Political Thought* 601, 633–634.

Marx's broad notion of commodity fetishism, already poised for emancipation from economics, explains the ideological chassis of this transformation:

There it is a definite social relation between men, that assumes, in their eyes, the fantastic form of a relation between things. In order, therefore, to find an analogy, we must have recourse to the mist-enveloped regions of the religious world. In that world the productions of the human brain appear as independent beings endowed with life, and entering into relation both with one another and the human race.¹⁸¹

This turn with regard to the state occurs through the state's transformation into an independent being (a total legal person). The specific operation of fetishism in law is the subject of Evgeny Pashukanis, to whose work I turn next to explore whether the concept can shed light on the ontological problem of statehood.

B. The State as a Fetish and a Defence of Government

In this part I (i) apply Pashukanis' theory of the legal form to reconsider the emergence of the state as a legal subject but (ii) argue that Pashukanis himself reads Kant uncharitably, missing the point that the Marxist critique of Hegel is compatible with a Kantian view of government.

Pashukanis sees Modern law as a fetish-distortion of economics and argues that the legal subject as the fixed bearer of rights is constituted through the logic of fetishism identified by Marx, also in the latter's critique of Hegel. Pashukanis' application of this critique to the constitution of the state as the *international* legal subject is effective and shows how, unlike the Kantian government-state, the state as fetish comes to suffer from the ontological shortcomings identified in the first part of this thesis.

In the second subsection, I argue that Pashukanis dismisses the emancipatory potential of Kant's theory too readily. I ultimately argue that this is because Pashukanis' engagement with Kant, though

181 Marx, *Capital*, vol 1, 1:4.

assertive, is highly superficial. By showing what Pashukanis misses, I reinforce the point that Kantian government retains an emancipatory potential precisely because it rejects the idea that the state is the sole source of norms and rights.

(i) The fixed bearer of rights

When in the 19th century the state becomes increasingly an agent of the bourgeoisie rather than of the nobility and clergy, when the former seizes the epistemic institutions, the emancipatory idea of government is replaced by the speculative totality of the police state. But the question is not merely whether necessity is produced but how:¹⁸² saying that the state is an ideological construct without further explanation risks mystifying it further. Rather, supposing that ideological entities have an existence as “real illusions”, the point is to clarify their inner logic. The term fetish is not used here as a buzzword. If Marx correctly critiques the reversal in state theory at the hands of speculative theory, then Marxist theory might illuminate not only *that* this happened, but also the anatomy of the reversal, i.e., *how* this happened. In this part I first lay out Pashukanis’ extension of the logic of commodity fetishism to law, then apply it specifically to the state and land relationship.

Pashukanis argues that the legal form is itself a fetish, a stabilising reversal of economic relations. Building on Marx’s insight that in commodity fetishism, a relation between people is made to appear as a relation between things, he argues that the economic relation is made to appear as relation of right: “[t]he legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities.”¹⁸³ The legal form elevates relations from contingency to fixity:

182 Susan Marks, ‘False Contingency’ (2009) 62(1) *Current Legal Problems* 1, 20.

183 Evgeny Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2002) [1924] 85.

It is not hard to see that the possibility of taking up a legal standpoint is linked with the fact that, under commodity production, the most diverse relations approximate the prototype commercial relation and hence assume legal form. Similarly, it is a matter of course for bourgeois jurists to infer the universality of the legal form, either from eternal and absolute characteristics of human nature, or from the fact that official decrees can be arbitrarily applied to any subject.¹⁸⁴

Fetishism, also of the law,¹⁸⁵ functions not as a lie but as a material distortion of the underlying social relation. The product of this distortion is not merely the legal obligation but, perhaps more importantly, legal subjectivity itself:

Historically, however, it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim. [...] Only the continual re-shuffling of values in the market creates the idea of a fixed bearer of such rights.¹⁸⁶

Abstracting from this, I contend that the problem with the legal subject is that it presents itself as the premise of interaction rather than its product. In doing so, it puts the real forces that constitute it beyond dispute. Reasoning from subjectivity, one must already presuppose the things that create it; specifically, the commercial intercourse of the market economy. The subject is not merely mystified or mysterious, its essence is the reversal of the order of priority between exchange and subjectivity.

Consider now by analogy the status of the state, the international legal person, as the bearer of rights. The state is not only the *fixed* bearer of rights; per doctrine, it “possesses the *totality* of international rights and duties recognized by international law”.¹⁸⁷ Thus within the sphere of international law, the position of the state as a fixed bearer of rights is arguably stronger than that of the individual in municipal law. Suppose then that we apply Pashukanis to explain also the broad reason for this; the distortion of the economic relation. This then quite

184 Pashukanis (n 183) 82.

185 Pashukanis (n 183) 87.

186 Pashukanis 119.

187 *Reparations (Advisory Opinion)* [1949] ICJ Rep 174, 180. Italics added.

naturally leads to Pashukanis' own conclusion about the state, namely that:

The state, that is, the organisation of political class dominance, stems from the given relations of production or property relations. The production relations and their legal expression form that which Marx, following in Hegel's footsteps, called civil society. The political superstructure, particularly official statedom, is a secondary derived element.¹⁸⁸

Pashukanis thus adopts Marx's critique and formulates it in the detail necessary here; state subjectivity is produced by civil society. Quoting Marx, he argues that "political superstition" reverses this point into the argument that the state is necessary for civil life.¹⁸⁹ The state thus imagined maintains but does not create injustice, the latter being a product of civil property relations. The state is part of the legal form's self-mystification and operates by the latter's logic.¹⁹⁰

Yet the logic of the relations of dominance and subservience can only be partially accommodated within the system of juridical concepts. That is why the juridical conception of the state can never become a theory but remains always an ideological distortion of the facts.¹⁹¹

How the distortion operates is a metaphysical question about the transformation of the product of the social relation into the premise of the legal relation. Here, moving from the broad notion of civil society to the specific notion of territory is useful. The land-property relation between individuals is a private relation. Kant's argument is that for this to be a rightful relation, that is one ultimately compatible with the UPR, individuals must enter into a civil condition with one another. Territory as the sum of parcels possessed by the citizens of such a government, comes into existence through the constitutive act of civil society. But in Hegel's state this relation is reversed. Not only is the state the precondition for property — as opposed to a necessary construction for the non-provisional, rightful possession of property — but territory is

188 Pashukanis (n 183) 91.

189 Pashukanis (n 183) 91–92.

190 See Dan Swain, 'Justice as Fetish: Marx, Pashukanis and the Form of Justice' (2018) 2(2) *Contradictions: A Journal of Critical Thought* 13, esp 21.

191 Pashukanis (n 183) 96.

the precondition for the state. In just this way, the territorial parcelling of the surface of the Earth, being itself a second-order outcome of the civil association of people into governments is transformed into the ultimate precondition for such association.

Not only is this ahistorical but it amounts to the complete destruction of human agency. If the Kantian acquisition of territory is an act of will, it must be possible for humans to decline to exercise their will in such a way. That is, humans must have the option of *not* occupying territory. But the total state cannot conceive of this as a possibility, it must see land as always and necessarily already parcelled. Hence the only unoccupied places are *terra nullius* which despite not containing (European) people are already parcels. Now, one could support the necessity of occupation with the necessity of agriculture. But here a key new insight from anthropology comes in: as Graeber and Wengrow point out, there is now evidence that many pre-historical societies were aware of agriculture and consciously decided not to adopt it.¹⁹² Presupposing that this is the case, one can make an even firmer case for the Kantian view of occupation as an act of will, that is, non-occupation of land external to oneself is also a possibility.

The Kantian account maintains emancipatory potential, but classical Marxist jurisprudence consistently denies this. I turn finally to why this is the case.

(ii) Pashukanis' Kant

Pashukanis identifies, following in Marx's footsteps, that Hegel's state reverses the relation between civil society and the state in a way that makes the state inescapable and positioned to maintain existing relations. What Pashukanis would not agree with is my claim that this is not only a reversal of reality but also a reversal of Kant. Pashukanis treats Kant as an embodiment of bourgeois jurisprudence and certainly not as an emancipatory theorist.

192 Graeber and Wengrow (n 18) 210–217.

Reviewing Pashukanis' engagement with Kant thoroughly, I argue that this is superficial and unfair. I reconstruct the best case of Pashukanis' argument against Kant but claim nevertheless that it is possible to read Pashukanis' indictment of Hegel as a defence of Kant.

Hegel's treatment of the ontological relation between the civil society and the state is in explicit response to Kant.¹⁹³ Its transformation of territory from a consequence to a premise was so thorough that even neo-Kantians end up hedging their bets between the two. Weber's given territory is an example of this¹⁹⁴ but it also happens in Kelsen: "The order constituting the community must be effective for a certain territory, or, more exactly, for the individuals living in a clearly demarcated territory".¹⁹⁵ Kelsen treats these definitions as effectively equivalent. But the first is broadly Hegelian in that it treats territory as structural while the second is broadly Kantian in that it treats it as a thing intersubjectively constituted.

As for Pashukanis, he acknowledges the distinction between Kant and Hegel in their theories of international relations, but he does not see Kant's philosophy of the state as emancipatory. In a piece written on the centenary of Hegel's death, Pashukanis identifies a state-theoretical shift from Kant to Hegel in bourgeois philosophy.¹⁹⁶ Indeed he goes on to say that Hegel is the philosopher of early capitalism following the period of feudalism, and that, prioritising the self-preservation of the state, he rejects Kant's internationalism.¹⁹⁷ From all this, one might

193 Chotaš (n 166).

194 cf Jonathon Allen Lee, 'Max Weber', *The Stanford Encyclopedia of Philosophy* (21 September 2022) para 46 <<https://plato.stanford.edu/entries/weber/>> accessed 20 August 2025. Allen Lee points to Weber's departure from Kant on this point but argues that it is also a departure from Hegel because for the latter the state had the normative aim of realising freedom. This ignores the distinction that for Kant territory manifests only through statehood, which is not the case for Weber who presupposes territory.

195 Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1940) 35(4) *American Journal of International Law* 605, 608.

196 Evgeny Pashukanis, *Hegel. State and Law (On the Centenary of His Death)* (1931) <<https://www.historicalmaterialism.org/article/hegel-state-and-law-on-the-centenary-of-his-death/>> accessed 12 August 2025.

197 Pashukanis (n 183).

piece together the narrative presented in this chapter: Kantian theory as pre-revolutionary emancipatory doctrine, Hegelian mystification of the state in service to nascent capitalism and the preservation of the state. But that is not Pashukanis' view of Kant.

As Suzanne Love notes, a persistent lack of attention to the *Metaphysics of Morals* has resulted in Marxist theory understanding Kant almost exclusively through his ethics.¹⁹⁸ This is very true of Pashukanis' engagement with Kant. Of the six explicit references to Kant in the *General Theory*, four are to the categorical imperative.¹⁹⁹ The Kantian ethic, for Pashukanis, "typifies the commodity producing society" by conceiving of the atomised individual liberated from feudal or familial bonds.²⁰⁰ In Lon Fuller's words: "[According to Pashukanis,] Kant's conception that every man should be treated as an end in himself implies a trading economy [...]" since only in such an economy does Adam Smith's self-interested baker nevertheless contribute to the general welfare.²⁰¹ Why treating people as ends results in a surrender to self-interest rather than a commitment to liberation is unclear.²⁰² Marx himself speaks of the "categoric imperative to overthrow all relations in which man is debased".²⁰³

But this question is less relevant to the discussion than the remaining two references to Kant in the *General Theory*, which appear to address the *Doctrine of Right*. First, Pashukanis points out that on the battlefield of class struggle, law bears little resemblance to Kant's definition as "a minimal limitation of the freedom of the personality indispensable to human coexistence."²⁰⁴ Quoting Gumpłowicz, Pashukanis notes that the measure of people's freedom is directly proportional to their

198 Suzanne M Love, 'Kant After Marx' (2017) 22(4) *Kantian Review* 579, 580.

199 Pashukanis (n 183) 154–155.

200 Pashukanis (n 183) 154–155.

201 Lon Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory' (1949) 47(9) *Michigan Law Review* 1157, 1162.

202 Bill Martin, *Ethical Marxism: The Categorical Imperative of Liberation* (Open Court 2008).

203 Marx, *Critique of Hegel's Philosophy of Right* (1843) Introduction; Martin (n 202) 45.

204 Pashukanis (n 183) 150.

domination by others. This might be interpreted as the juxtaposition of positive and negative freedom, which has been argued for but also reconsidered: as Byrd and Hruschka point out, the obligation to enter into the civil condition follows precisely from the necessity of making possible the positive exercise of freedom in a way compatible with the freedom of others.²⁰⁵ With regard to the *General Theory's* final Kant reference, it is unclear whether it is aimed at his ethics or jurisprudence. There, Pashukanis credits Kant with a significant advancement of the notion of equality of personality.²⁰⁶ But while again he claims that Kant reconceptualises the individual as no longer defined by feudal or familial relations, this is said to only cement the legal form.

But regardless of the various forms this idea may have assumed it expresses nothing but the fact that as soon as the products of labour are exchanged as commodities, the different concrete types of socially useful labour are reduced to labour in the abstract.²⁰⁷

Essentially, the notion of equality constitutes the anonymous, Modern legal subject as the abstract reversal of real economic relations. On one hand, questions of ethics should be separated here from questions of law. As with law, Pashukanis believes that “when communism is finally achieved all moral duties will disappear.”²⁰⁸ But there is an ambiguity in that Kant's conception of the free individual is also the cornerstone of his legal doctrine.

Without engaging with the Kantian subject generally, it suffices to argue here that the objections Pashukanis raises against the subject of private law — its distortion of the dynamism of market relations into a fixed subjectivity — do not apply to Kant's construction of the state. The state as subject, as has been argued, is not fixed. Defined by

205 Byrd and Hruschka (n 71) 77 et seq.; see Nuria Sanchez Madrid, ‘Kant on poverty and welfare: the conflict between social demands and juridical goals in the Doctrine of Right’ in Larry Krasnoff, Nuria Sanchez Madrid and Paula Satne (eds), *Kant's Doctrine of Right in the Twenty-first Century* (University of Wales Press 2018); Edward Demenchonok, ‘Learning from Kant’ (2019) 75(1) *Revista Portuguesa de Filosofia* 191.

206 Pashukanis (n 183) 153.

207 Pashukanis (n 183) 153.

208 Lon Fuller, *The Morality of Law: Revised Edition* (Yale University Press 1964) 26.

its citizens and with only a second-order ownership of property, the Kantian government understood in light of contemporary readings is altogether innocent of the charge of fetishism. Treating Kant almost exclusively through the prism of his ethics, Pashukanis misses that the pre-revolutionary notion of civil authority, despite its origins and limitations, does not naturalise the state and holds back its collapse into ideological mirage.

Thus, if one accepts Pashukanis' extension of Marx's critique of Hegel, then one might as well say that Pashukanis takes the side of Kant against Hegel. Whatever the historical-political origins of the emancipation of property and distortion of the relation between civil society and the state, one can mount exactly the same critique as Marxists from a Kantian position: the state is a false totality. Marxism here is necessary only to supply an explanation, but not for the observation of falsity itself. Besides offering a reconsideration of Pashukanis' engagement with Kant, this also indicates that the critique is a fair one since one can arrive at the same reconstruction through Marxist critiques as through Kantian ones.

The point then is this: that Kant's theory of government is a dynamic and emancipatory one but must be contrasted to the ideological distortion in which the state is defined by the misrepresentation of its real dimension — territory especially — as its circular premise rather than product.

C. Partial Conclusions

Without historicisation, the mystification of the state becomes itself mystified. The double move of this part has been to excavate the idea of the state as an ideological entity produced by the capitalist economy and to situate its birth in the emergence of early capitalism. It is no doubt reductive to equate the mystified state with the Hegelian state. But Hegel's reversal of the Kantian account does track with the historical transformation of economic structure observed here. Kant's account, being in a sense "pre-revolutionary" is because of this also

emancipatory. This is not contradicted by Marxist critiques of Hegelian statehood, but it is neglected by them. Yet if the issue is that ideology makes relations between men appear as relations between things, then this is precisely what Kant's account avoids. For Kant, the basic structure is government over people rather than things. In Marx's theory of democracy, elections constitute an immediate and direct relation between civil society and state institutions. In the moment of democratic control, the mystified relation between the economy and the state is dissolved into a real relation²⁰⁹ and the primacy of citizenship is thus revealed.

If Kant's state is necessarily territorial, it is only because Kant imagines the citizen as a landowner. But one must only dispose of this assumption to see a highly radical conception in which land is persistently held by all people in common and government is pure civil authority. This is bolstered by the fact that an act of will is an act of freedom and individuals must have the option of willing *not* to occupy external land. And it is exactly this idea which cannot be sustained within state theory written from positions of power.

209 Paul Raekstad, *Karl Marx's Realist Critique of Capitalism* (Palgrave Macmillan 2022) 98; cf Lea Ypi, 'From revelation to revolution: the critique of religion in Kant and Marx' (2017) 22(4) *Kantian Review* 661, 681.