UNCERTAIN STATES: IRREGULAR MIGRANT LABOUR AND THE QUESTION OF LAW

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Declaration

I, Anastasia Tataryn, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in this thesis.

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Abstract

In this thesis, I explore the phenomenon of irregular migrant labour in the United Kingdom (UK). My particular methodology examines political and juridical attention to so-called irregular labour migration including proposed remedies. My focus is not on the individual situations of persons ('migrants') identified as irregular. The diversity of these situations and experiences, illustrated in numerous quantitative, qualitative and ethnographic studies, immediately problematises the assumption that a cohesive demographic of 'irregular migrants' exists. Any shared experience would be the consequence of subjection to the normative, dominant paradigm that creates the 'irregularity', not an inherent 'migrant' quality. Rather than delve into these important debates and analyses, the bulk of my study interrogates the underlying presuppositions of legal categories, including conceptualisations of citizenship, labour and legal subjectivity that condition how persons moving and working are identified and subjected as 'irregular'. I employ a three-fold methodology that is political, juridical and, with the help of Susan Marks' notion of *false contingency,* incorporates philosopher Jean-Luc Nancy's fundamental 'ontological' questioning via attention to *ecotechnics*.[1]

Through this methodology I contend that the phenomenon of IML is symptomatic of the limits of legal categories based on predetermined frames of recognition that restrict and condition legal subjectivity. My work does not end there, however. Not only are the existing legal categories in immigration and labour law limited in their ability to address what is identified as 'irregular migrant labour', but the limit of the legal framework obscures the processes of neoliberalisation that maintain an economic market system dependent on persons in 'irregular' situations. A critique that stops at identifying the limit of law and legal categories is insufficient to address what is happening in the circulation of capital, production and reproduction. For this reason, I explore Jean-Luc Nancy's work, in particular his term *ecotechnics,* in an attempt to bring attention, within discussion of legal categorical limits, to what is on-going, circulating, and happening in labour migration law.

[1] Appendix A Explanation of terms: *ecotechnics, bodily ontology; false contingency.*

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Acknowledgments

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Introduction

In any given day, at least over the past five years, media in the United Kingdom report stories indicating a crisis of immigration. In 2014/2015, debates over immigration sparked new political trajectories for the ruling Conservative party and opposition Labour party.[2] Underlying political reactions and media attention to immigration is an economic narrative of work and employment. Are immigrants stealing British jobs? Are foreign workers causing a downward pressure on wages and creating conditions of precarious employment for British citizens? Both policy and legal measures, unable to capture a demographic of workers accused of adversely affecting the British labour market for citizens, assign excessive situations to the broad and ambiguous labels of irregular migrant and irregular migrant labour. The 'irregular' eludes definition and evades clear jurisdictional solutions and existing legal frameworks.[3] The nature of migration is such that persons are migrating alongside national territorial and economic priorities that reaffirm the sovereignty of the nation-state whilst profiting from a globalised economic system reliant on global supply chains of precarious labour and production. The term 'irregular' enables policy makers as well as political (and advocacy) responses to migration to evade legal frameworks whilst bolstering them as the only conditions of possibility to respond to tragedy and crisis. Nevertheless, in UK and international policy (international labour organisation; international organisation for migration) the presumption that such a demographic exists, persists. My use of 'irregular migrant labour' recognises it as a

[2] In response to the rising prominence in 2014 of the United Kingdom Independence Party (UKIP).

[3] Franck Duvell, 'Irregular Migration to the UK: 10 questions answered' British Politics and Policy, London School of Economics. Accessed 20 May, 2015 http://blogs.lse.ac.uk/politicsandpolicy/irregular-migration-10-questions-answered/ ; Boat Migrants: the term 'irregular migrants' is commonly used in place of 'illegal' migration. See, European Commission, 'Irregular Migration & Return' 22.04.2015 Accessed on May 20 2015 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/index_en.htm. Eva-Maria Poptcheva, 'EU legal framework on asylum and irregular immigration' European Parliamentary Research Service, European Parliament Briefing March 2015. Whereas the UNHCR uses the terms 'mixed migration' to identify that persons migrating include 'both migrants and refugees.' However, refugee is a legally determined status based on the United Nations 1951 Refugee Convention definition (United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees). Whether someone is forced to flee their country according to terms recognised by the UN Convention, or *choose* to leave where their flight is not recognised as fleeing persecution, or 'well-founded fear of being persecuted' of the standard to constitute the status of 'refugee' can be a contentious distinction: what is *choice* in the face of extreme poverty, political violence, homelessness? UNHCR: Asylum and Migration, 'All in the Same Boat' Accessed on 20 May, 2015 http://www.unhcr.org/pages/4a1d406060.html . Moreover, this is not a new concern in 2015: See Phillippe De Bruycker, Anna Di Bartolomeo, Philippe Fargues, 'Migrants smuggled by sea to the EU: facts, laws and policy options' Migration Policy Centre at the European University Institute, Florence, 2013.

label encompassing an amorphous and ambiguous phenomenon that begs interrogation.

Immigration laws and national security legislation are drawn on to respond to crises in migration within discourses imbued with ideals of sovereignty and regulation on the one hand ('protecting and controlling borders'[4]; enforcing quotas of migrants and asylum claims; the UK's new offence of illegal work[5]), and universalising claims of human rights and protections on the other ('humanitarian crisis'; the EU's collective response to 'save lives' and to 'target criminal smuggling networks'[6]). Responses to immigration, however, increasingly are administrative, about management, and seldom is law itself the focus of inquiry and attention. Yet, who is it that determines 'irregular' migration as opposed to 'regular' migration? Why is it that migration is now deemed 'irregular', when the frequency of discussion and events would indicate that it is in fact a 'regular' occurrence? In order to understand the phenomenon of irregular migration it must be analysed alongside an exposition of the legal regimes, and their underlying contingencies that claim to ground responses to migration in sovereign or humanitarian ideals. I understand IML as symptomatic of the impossibility for existing legal frames, which use as their reference point a notion of what is 'regular' and what is 'legal', to encompass the presence and experience of persons who do not fit into pre-determined frameworks of legal subjectivity. The legal gaps that reinforce migration situations considered 'irregular' reveal that the categories of migration law exist for a limited recognition of a particular conforming legal subject. If one is not recognised as within this legal subjectivity, one is 'irregular'. Yet legal subjectivity itself is not natural. It is a construct of a particular modern legal system. The ideology behind this particular system is historically specific. Consequently, legal subjectivity is a form of recognition within a specific system that can be withheld or denied,[7] in spite of the dominant governance (political,

[4] UK Government, '2010 to 2015 government policy: immigration and borders' Policy Paper, gov.uk 07.05.2015.

[5] UK Government, 'David Cameron's speech on immigration' Accessed 21 May 2015, https://www.gov.uk/government/speeches/pm-speech-on-immigration

[6] EU Commission, 'A European Agenda on Migration' 13.05.2015, pg 3. Accessed 21 May 2015 http://ec.europa.eu/ Laurence Peter, 'Will EU Commission's quota plan for migrants work?' BBC News 13 May 2015.

[7] Legal subjects are recognised under the law, yet if the law is understood in a particular way, under a particular system, then recognition comes from within this specific frame. According to Judith Butler, 'non-compliance calls into question the viability of one's life, the ontological conditions of one's persistence. We think of subjects as the kind of beings who ask for recognition in the law or in political life; but perhaps the more important issue is how the terms of recognition—and here was can include a number of gender and sexual norms—condition in advance

juridical, economic) structure's claim to universal applicability and recognition of all human rights.[8]

The term, IML, homogenises an elusive and largely un-identifiable, undoubtedly diverse, demographic. Moreover this ostensible demographic is only a 'demographic' because it has been labelled one by the dominant framework that claims authorship and authority over the 'regular' 'non-migrant' identity. While my very usage of IML may be accused of reinforcing a reductive social classification, I focus on this label to examine not only how but why this term is relevant to current issues in migration and labour. I interrogate not only what the term signifies, but also what it serves to obscure. Irregular, migrant, and labour are three words that carry immense significance. The first two, reify the opposite meaning; the 'regular' and the 'non-migrant' accrue a legitimacy associated with the 'citizen' or 'national'. The third, 'labour', evokes traditional labour categories that are often conflated with more current and in practice, restrictive definitions of employment and 'employee'. The popular usage of the term, IML, in policy and academic work to encompass persons crossing territorial boundaries and working in precarious employment situations, obscures the ideologies upheld by the normative regular, non-migrant legal subject. Moreover that these persons, amassed as IML, are 'labouring' serves an ideology privileging productivity and capital circulation.

On the one hand, problematically, the label IML works to suspend the diversity and heterogeneity of all bodies living and working within a particular space. The precarious, non-regular working bodies categorised as 'irregular' implies that a) there is a common experience of all persons who are not accepted and recognised as 'regular' 'citizens' and b) the 'regular' 'non-migrant' is immune to the precariousness embodied in the 'irregular' 'migrant'. On the other hand, the label IML serves as an empty container for the excess of existing legal categories, which serve to allocate legal statuses to those recognised as legal subjects. That the blanket term persists and is maintained through the 'gaps' of immigration and labour law (as will be discussed in subsequent chapters) is a curious phenomenon that has compelled my work. I

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who will count as a subject, and who will not.' Judith Butler, *Precarious Life: The Powers of Mourning and Violence.* (London, New York: Verso, 2004), iv.

[8] Hans Lindahl ed., *A Right to Inclusion and Exclusion? Normative Thought Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishers, (2009), 118-135.

organise my study of irregular migrant labour and the underlying intersections of migration, citizenship, labour, market economic priorities and neoliberalisations through questioning how we might think about law and legal categories differently. I examine UK immigration law and labour law for its 'gaps' and grey areas that continue processes of 'irregularisation' for individuals whose presence transgresses norms of the nation-state and citizenship.

I detail the problematic of IML in chapter one. Migrants, employers, and nation-states participate in shifting relationships, as economic priorities and needs alter. Labour migration involves identities and statuses that are continuously in flux, in contrast to the force of normative categories that define legal statuses within the nation-state. The control of the law is in the hands of economically powerful states and economic market priorities, where transnational capital and trade influence policy decisions. State borders and state laws maintain their practical and ideological importance as fixed boundaries. Meanwhile, in practice, the idea of the nation-state is potent when membership is mediated through belonging in what Bridget Anderson calls the 'community of value'.[9] The community of value supports exclusionary participation and reinforces situations of sub-citizenship from within a liberal democratic nation-state. Persons relegated to sub-citizenship, particularly when their immigration status is insecure, can seem to be justifiably excluded from the community of value because their belonging is within a proto-political community. A proto-political community presupposes the bounded political of the nation-state and membership identified through citizenship. This proto-political community reflects a tendency towards universal thinking embedded within conceptualisations of pre-determined community belonging. The ostensible existence of a proto-political community justifies exclusive nation-state membership mediated through a shared community of value: those excluded belong elsewhere in a broader, proto-political universal. Nevertheless, this lack of belonging does not preclude persons continuing to work in de-valued, denigrated and dangerous labour situations without the protection or regulation proffered by national labour legislation and international labour regulations. This proto-political community is one that is malleable to global capital demands, while the community of value under the nation-state refers to a

[9] Bridget Anderson, *Us & Them: The Dangerous Politics of Immigration Control* (Cambridge University Press, 2013), 4.

bounded national membership.[10] These discussions and critiques of community, membership and citizenship under the nation-state expose citizenship as being in reality a highly contested concept. It is from within contestations of citizenship and lived experiences of 'sub-citizenship' that I begin my examination of the label, IML.

Chapter two develops my *political-juridical-ecotechnical* methodology. This methodology draws on Susan Marks' notion of *false contingency* and Jean-Luc Nancy's philosophy. I briefly outline this methodological approach below in this introduction. However, chapter two is dedicated to detail the efficacy of using Marks's critique of false contingency as opening a space for Nancy's work in application to the concerns raised by IML. Also in chapter two, I explain the terms particular to Nancy's work: *sense, ecotechnics, inscription, exscription* and *law*. Chapters three and four apply the political-juridical-ecotechnical methodology to UK immigration law and contemporary questions concerning UK labour law in the twenty-first century. In chapter five, after illustrating the limitations of current legal frameworks, I consider how we might think differently about IML through a bodily ontology, again according to Jean-Luc Nancy's philosophical thought. In this chapter my attention turns to a preliminary case study of care and the marketisation of care work as an instance where a research approach unconventionally developed via Nancy's bodily ontology may resonate with material experiences, *happening,* but that are unrecognisable in standard legal frameworks. Care work, while often associated with a migrant labour force in irregular and precarious situations, is not limited to this (elusive) demographic.

Collectively, the question posed within each chapter of this thesis is: what are the blockages preventing change and remedy to the political and legal concerns of IML? Secondly, how might the *false contingency* present in immigration and labour law be symptomatic of the limits of our dominant Western liberal philosophical framework, the market economic system and regimes of governance? In conclusion, I suggest that a remedy to the precarious situation experienced by persons with so-called irregular immigration and labour status cannot come from within the existing

[10] For example Carolina Moulin Aguiar, "(In)hospitable Border Zones: Situating Bolivian Migrants' Presence at Brazilian Crossroads" In Elspeth Guild and Sandra Mantu, *Constructing and Imagining Labour Migration* (London: Ashgate, 2011), 39-64. Moulin Aguiar argues that the notion of citizen and border is flexible, yet status exists under, and is determined by, an apparatus of control.

political-juridical-philosophical framework. Nancy's work, speaking to and against a philosophical tradition itself, is not immune to potentially reaffirming its own false contingency, especially when 'applied' or brought into conversation with immigration and labour law. Nevertheless, the concluding chapter six closes with a reflection on the contribution that a theoretical framework that brings attention to the political-juridical-ecotechical circulation of meaning, production and reproduction can make to the study of immigration and labour law (labour migration law) and critical legal theory. I draw on the spirit of Nancy's thought that impels towards re-thinking how we understand the basic fundamental *originary sociality* of being.[11] The plurality of singular beings form a sociality, but when it is not pre-determined by limited contingencies then this sociality is original, *originary,* every time. The legal and economic and political circulations, systems and structures follow, rather than pre-empt, sociality.

A three-fold (*political-juridical-ecotechnical)* methodological approach allows me to investigate intersecting political discourses, legislation and practices of UK immigration law and labour law. A theoretical exploration of what is at play in the term IML, implying as it does an 'irregular' function within the political, juridical and economic system, leads me to question the relation between law and Being. However, such an ontological investigation is only possible after identifying the multiple interests steering what is in recent years emerging as a unique field of labour migration law. This illumination is facilitated by Susan Marks's critique of *false contingency*. False contingency refers to the normative conditions of possibility that

[11] Nancy writes of the 'originary sociality' in the *The Inoperative Community* 1991*,* 28. Originary sociality is similar to Derrida's originary sociability. Sociability, in Derrida's originary sociability is 'prior to all *determined* law, *qua* natural law or positive law, but not prior to law *in general*' Jacques Derrida, *Politics of Friendship* (London, New York: Verso, 2006), 231. This 'law in general', has been understood by Peter Fitzpatrick to be a form empty of universal claim. It is preceded by a sense of 'pre-legal' justice. According to Peter Fitzpatrick, law depends on 'what is excluded from it for its determinate content.' In William Conklin, 'Derrida's Territorial Knowledge of Justice' in *Reading Modern Law* 102-129 (Oxon: Routledge, 2012), 122. In other words, the community that is the originary sociability, 'as a continuate being-with cannot be contained within any existent realisation of it [determined law] ... it must ever extend receptively beyond present existence, otherwise it will not be able to continue "in being"' Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Aldershot: Ashgate, 2008), 289. Thus law is both determinate and responsive, meaning that it has the capacity-within law-to be something other than what it purports to 'be'. The question that is debated and discussed about Derrida's writing on law via Fitzpatrick's work concerns how to understand the exteriority of law and the boundaries or limits of sociability as a negative/negated law. This particular discussion of Fitzpatrick's work is beyond the focus of my thesis, nevertheless the concerns about law as both a limit and extending beyond a prescribed, determined limit are relevant. In my work, rather than discuss Derrida and Fitzpatrick's work, I refer to Nancy's reference to 'originary sociality' in order to discuss the *exscription* and *inscription* as the sense that *is* the world. This differs from Fitzpatrick's work and Derrida because my analysis is not focused primarily on the quality or 'being' of law, rather it is concerned more with how the *exscription* and *inscription* is manifest onto IN? legally-reinforced practices of citizenship and subjectivity in IML.

found what is considered to be contingent possibilities. According to Marks, legal categories and frameworks not only function as if the normative paradigm of establishing legal subjectivity were natural and necessary, but these frameworks themselves are built on predetermined contingencies. Their predetermination limits what is imagined as possible in order to explain, understand and remedy a particular situation. In contrast, contingencies that would be, for lack of a better word, more 'honest' would be produced in and by the experience or encounter—what I refer to as the *happening*. To understand what these possibilities might be as well as their articulation, I turn to Nancy and the discussion in chapter two of *sense* and *ecotechnics*. False contingencies are not 'false' against some hidden truth, but they are false representations of 'contingency' because they are based on limited conditions of possibility of legal recognition for the experiences and encounters begging to be identified by legal frameworks.

Marks's critique of false contingency opens up a foundational question of how we think beyond existing, predetermined contingencies. Nancy's work steps into this opening, beginning with Nancy's own question of what the blockages are that prevent simple ('originary') sociality (in Nancy's words, the 'coming together of people in [forming a] common')? [12] I do not claim that Nancy's work exhausts this question, or that Nancy's perspective offers an alternative pure of false contingencies. Indeed such a thing is impossible, if even desirable. The force of Nancy's work, however, is in its challenge to think through the foundational constructions of being (foundational ontological questioning), in order to think of what is happening in material, lived, felt, experience. At every instance, Nancy struggles against linear, deterministic assertions or frameworks.[13] Nancy's ontology cannot be taken as a ground. Nothing is static; thus the pursuit of thought and exploration of legal categories and the phenomenon

[12] This may similarly be framed as a question of what limits the possibility of the encounter or relationality to occur as a foundation for law, legal categories, economic exchanges and circulation. Here I am thinking of Althusser – the materialism of the encounter – see Louis Althusser, 'The Underground Current of the Materialism of the Encounter' *Philosophy of the Encounter: Later Writings 1978-87* edited by Francois Matheron and Oliver Corpet (London, New York: Verso, 2006), 163-207. It could also be framed, with different language, as a Lacanian analysis – the search for the subject see Maria Aristodemou, *Law, Psychoanalysis, Society: Taking the Unconscious Seriously* **(**Oxon: Routledge, 2014).

[13] For instance, Ian James in *Being Social: Ontology, Law, Politics* edited by Daniel Matthews and Tara Mulqueen (Counterpress, 2015), 22: Nancy has no determinate image of the human but still understands the immanence of the social being. Understanding what Nancy is pushing at is only possible with a suspension of 'philosophy's legislative power' James, 28. I believe this is evident in the suspension of legislative and legal potential to address and remedy the situation of irregularity. Crucial to understanding Nancy's work is to see that he bases his thinking in the absence of the determined condition (ground). This, for Nancy, is freedom.

they produce must always be in motion, in movement—not least because we, as sociality, as social beings (constituted by the *singular plural*) are in constant movement. From the cellular composition of our physical bodies to our physical migrations, shifting (political) identities, our thoughts, ideas, perceptions, senses—the world is motion.

Nancy, through the various terms and thoughts he plays with, brings attention to what *is*, but is not 'seen' or 'inscribed' into the legal frameworks that we rely on for order and recognition: in other words, what we in our modern liberal paradigm believe is necessary for things to 'make sense'. IML is a provocative phenomenon to scrutinize in light of Nancy's work because the 'irregular' does not 'make sense'. Yet the use of this blanket category is 'made to make sense', albeit without, as will be detailed in the first chapter, any coherence or consistency of what it is that is 'made to make sense'. Moreover, the 'irregular migrant' does not fit into standard legal frameworks but for being identified as an excessive, and thereby necessarily homogenised, Other. And yet, as the following chapters will aim to demonstrate, the movement that is 'irregular' may be the only thing that *is* sense. As will be explained further throughout the chapters, this *sense* that Nancy brings attention to is lived, it is *happening* as a material, sensual experience—not predetermined, and not necessarily intelligible or recognisable in legal frameworks. Because Nancy's lexis often diverges from common understanding but is integral to the concepts under study here, I have included a Glossary Of Terms (Appendix A).

Drawing heavily as I do on Nancy's thought may be constraining insofar as Nancy is enmeshed within the canon of post-structuralist philosophy. However, in spite of this thesis not being a direct intervention in existing debates in post-structuralist theory and critical legal studies, I contend that Nancy's work provides an unconventional and effective invitation to think about the material experience that *happens* within/in spite of/beyond/after categories. When calling attention back to the material experience, theory becomes indispensible to illuminate the practical, political gridlock encountered by those in precarious situations identified as 'irregular' and 'migrant' labourers. I refer to Nancy as a thinker who confronts the false contingency of philosophical questions, as in chapters three and four where I address the false contingency of immigration and labour law. In both arenas, Nancy brings our

attention to the gestures that *happen,* that are 'made to make sense' as something 'intelligible' (inscribed) and what remains 'unintelligible' (exscribed) but nevertheless felt, or *sensed.*

Another question that cannot be answered within the scope of this thesis arises from this notion of *sense:* can the experiences and multiple forms of discrimination and marginalisation (gender, sex, race, nationality, ability) that render persons as 'irregular' 'migrants' ever be transformed to enable persons to have equal recognition in the normative paradigm? For instance, in spite of enabling citizenship or regular status through regularisation programmes or citizenship laws, contested citizenship remains, and, as I explain later in this chapter, demonstrates the exclusionary power of the normative legal citizen-subject as an eco-technical tool. Multiple interests, economic and philosophical, rely on the suspension of regular subjectivity: the 'irregular' serves a purpose in maintaining the modern philosophical tradition as well as the functioning of the neoliberal economic market system.

An analysis of the term and interests contained within IML could no doubt be carried out in various ways. An intersectionality approach would consider the various gender, racial, nationalist, ableist discriminations that place persons into categories as 'irregular', all against a normative white, male, legal citizen-subject. My work is indebted to research that has raised these points of identification and discrimination with attention to interlocking systems of subjugation built into the institutions of modern politics and law. However, notwithstanding the intersectional discriminations constituting IML, I offer a different perspective to existing literature on labour migration and IML. Delving deeply into the foundational constructions of law, being and plurality involves a thought experiment that brings us 'pre' society, only to return, vitally and urgently, to the current circulation of capital, labour and bodies that 'are' society—as will be discussed below—this *is* the originary meeting, relation or encounter that forms a social. Intersectional systems of oppression, discrimination and marginalisation create and maintain precarious recognition, precarious legal subjectivity and experiences of sub-citizenship. When approached with an intent to think through the creation of these categories of difference differently, I suggest that if we wish to affect change in the persistent interlocking systems of marginalisation, and challenge their force, it is necessary to think not only how, but also why,

categories of recognition, existing restrictive legal frameworks, and the 'regular' persist.

Predetermined and legally embedded categories purport to include or exclude persons within territorially defined national borders. Yet this inclusion and exclusion is more complicated than borders and border controls suggest. Inclusion and membership in the nation-state is not decided clearly at the border by formal legal recognition. Formal recognition could include citizenship status, immigration permission to remain, or temporary legal status to reside and work. Rather, those who are living, working and participating in an economy may have differential membership and experiences of inclusion and exclusion based on individuals' conformity with socially and morally established behaviour, enshrined in the culture of the nation-state. The nation-state, as a political governing structure and bureaucracy does not alone determine the limits of acceptable behaviour. Neither do the legal system, legislation and its application. Social, historically specific values, enshrined within philosophical notions of the individual being, as well as economic market measures and progress, bolster a regulatory community of value. The community of value elusively regulates membership based on ideal conditions of desirability to a social norm established by those in positions of power and authorship.

My political-juridical-ecotechnical approach brings into relief the work of the community of value as well as the persistent false contingency in immigration law and labour law. This is a challenge for us to think beyond preconditioned categories, however this beyond is not utopic. For this reason, I draw on Jean-Luc Nancy's notion of ecotechnics, to bring attention to both techniques of practice and ecologies of circulation—this is the *happening* that is beyond legal categories, but also a *happening* that feeds processes of neoliberalisation, flexibility and precariousness, affecting persons considered to be 'irregular migrant labourers' and those outside this particular problematic label. Moreover, Nancy's 'bodily ontology'[14], discussed in the fifth chapter, disrupts traditional Western philosophical thinking and, I suggest, might

[14] Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006), 91.

offer a way to think not of alternatives for IML, but an alternative thinking of alternatives.[15]

A political-juridical-ecotechnical approach critiques the order and system of bio-political governance that has created, and is dependent on, an ambiguous category of workers: IML. The categorisation of low-waged, low-skilled, non-national foreign workers as IML is rooted in historically specific power relations and hierarchies that espouse a particular understanding of being from a nexus of citizenship/subject/community/sovereignty. The excess of recognised participation in this nexus of legal and political nation-state-centred categories are grouped together as IML. Thus, through the label of IML—with emphasis on the 'irregular'—the experiences of individuals that do not fit into pre-established frames are *inscribed*[16], or written into, the dominant ideology. Yet IML is only 'included' (written, inscribed) as 'excluded', as 'irregular'.[17] The inscription of IML is only possible because it is *exscribed*[18]—written out of—the dominant, acceptable, legal, framework. Meanwhile regular citizen labour, the reverse of IML, is recognised as belonging to the shared values in the community of value. In the community of value, the dominant citizenship/subject/community/sovereignty nexus is the point of reference that is not only unquestioned but made to seem as if they were necessary and natural.[19] These reference points are the product of historically specific tropes, namely the nation-state and market economic system. The nation-state and the market seem to be necessary and natural forms of order, recognition and value. As a consequence of being assumed as natural and necessary, they create false contingency.[20]

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[15] Boaventura de Sousa Santos, "Public Sphere and Epistemologies of the South" *Africa Development* 37:1 (2012): 43-67.

[16] Nancy, 'inscription' one part of the inscription and exscription that is the sense of the world. Jean-Luc Nancy, *The Birth to Presence* trans., Brian Holmes and others (Stanford: Stanford University Press, 1993), 338.

[17] Hans Lindahl discusses the 'included-as-excluded', and 'included as excluded'. Hans Lindahl, "In Between: Immigration, Distributive Justice, and Political Dialogue," *Contemporary Political Theory* 8: 4 (2009): 415-434, 423.

[18] Jean-Luc Nancy, *The Birth to Presence* trans., Brian Holmes and others (Stanford: Stanford University Press, 1993), 338.

[19] False necessity: what is made to seem natural and necessary, but based on a historically specific ideology. Roberto Unger, discussed in the context that I am referring to in Susan Marks, "False Contingency" *Current Legal Problems* 62 (2009): 1-21, 4-5.

[20] Susan Marks, "False Contingency" *Current Legal Problems* 62 (2009): 1-21, 10. I will discuss this in more detail in chapter two.

I draw on Nancy's work, the starting point being a fundamental ontological questioning, to continue working after discussing the operation of false contingency in supporting and reinforcing existing categories and frameworks.[21] I agree with Nancy's attention to bodies. Nancy asks us to consider what is happening in the basic coming together of bodies, forming economies of production and reproduction within and across nation-state borders. Moreover, his 'bodily ontology' involves bodies not only in their physical embodiment, but bodies of thought and knowledge.[22] The amassing, coming together of bodies is not neutral, nor necessarily positive. It is also not a ready solution to current situations of exploitation, where legal grey areas permit the abuse of precarious migrants and labourers. However the coming together of what forms law, makes law, is before predetermined contingencies, which are *false* because they do not come out of experiences but pre-empt them. Nancy's work guides us towards a re-cognition of the dominant interpretation of migration and labour. This dominant framework determines political and legal approaches to labour and migration that create IML, as a label recognisable only through its homogenizing of the mass of persons that do not fit existing categories, but whose 'not fitting' serves a purpose in the economic market. I identify an imperative to think differently in order to effectively address the experiences of marginalisation in work and citizenship.[23] As mentioned above, these experiences are riddled by interlocking systems of oppression[24] and rendered to the margins of immigration and employment law. Their

[21] Jean-Luc Nancy's work, according to Ian James, is a fundamental ontological questioning. James, *The Fragmentary Demand*, 4.

[22] See Appendix A Explanation of terms: 'bodily ontology'.

[23] The liberal democratic nation has been identified as 'the dominant form of the modern state.' David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995), 51. Citizenship is a key feature of the nation-state, in addition to fundamental principles such as constitutionalism, private property, competitive market economy and a (patriarchal) family. Citizenship, under a liberal democratic nation, is believed to enable autonomous individuals to participate in democratic systems and establishes 'rights and duties, liberties and constraints, powers and responsibilities.' Held, 66. These in turn grant legitimacy to government and legal systems through representative democracy and the modern capitalist economy. Held, 70. Yet it is the citizenry of a nation-state who give form to the organisation of their capitalist economy. The state is 'supposed to service the matrix for the obligations and prerogatives of citizenship. It is that which forms the conditions under which we are juridically bound.' Judith Butler and Gayatri Chakravorty Spivak, *Who Sings the Nation-State?* (New York, London, Calcutta: Seagull Books, 2010), 3. The right to limit the boundary of a nation-state by mediating a population and citizenry has been prevalent within theories of justice; for example, the work of John Locke and his notion of the Social Contract (Hegel 1896) and contemporarily J. Rawls, *A Theory of Justice* Rev edition (Cambridge, MA: Harvard University Press, 1999) and Joseph Carens, *Culture, Citizenship, and Community: Contextual Political Theory and Justice* 2000. The right of a nation-state to enforce boundaries has clear implications for the constitution of the political. This is discussed by various theorists, including Hannah Arendt in her concept of the bounded political. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago, 1958) and contemporarily Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

[24] Sharene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998).

marginalisation is a consequence of firmly entrenched hierarchies distinguishing race, sex, class, (dis)ability, manifest through discrimination based on language proficiency, nationality, ethnicity, physical and mental ability, education and labour skills. I take as my point of departure that, as many multi-disciplinary studies of migration and labour have demonstrated, the situation of marginalisation and vulnerability of persons considered as IML is exacerbated based on discrimination and intersectionalities that affect individual's subjectivity – social, economic and legal participation. From here, the political-juridical-ecotechnical approach carries analysis away from particular struggles for recognition, to deeply question what underlies categorisations and how experiences and practices can be re-thought towards epistemological and ontological difference.

The political-juridical-ecotechnical methodology explained

My methodology is political where I consider the political discourses that use the label, IML. Public policy debates, politicians and popular media that discuss migration and labour migrants reveal contemporary meanings and significance of citizenship. The politics of IML impart practises of contested citizenship where immigration, labour and market economics interplay in processes similar to what Nancy describes as a politics of the (k)not.[25] Pursuing a politics of the (k)not, as will be explained in chapter two, means that the aim of the political approach in the political-juridical-ecotechnical methodology is itself political in that there is no prescriptive end or solution. I engage critical theory in order to think of migration and labour from the point of view of alternative thinking, a shifted paradigm, which in other words shares a perspective akin to thinking of 'radical change'.[26]

Secondly, my methodology is juridical in that I question the application of legal frameworks and legal regulations as well as protections for persons considered IML. Furthermore, law, as a practice and a frame of recognition affirms and re-affirms recognition as legal subjectivity. The subjection of persons as legal subjects is troubled when persons are identified as being in the shadow of the law; are they legal

[25] Jean-Luc Nancy, *Sense of the World* (Minnesota: Minnesota University Press, 2008).

[26] Costas Douzinas, "Oubliez Critique." *Law and Critique* 14, no. 1 (2005): 47-69, 66.

subjects? Are they ignored by, or excluded from, the law? With a juridical approach, I question what is the *law* that casts its shadow over those identified as 'irregular'. Nancy speaks of law as both juridical and existential. Law can be identified as a tool of the nation-state, where law is embedded in a market economic ideology, and consequently law maintains persons in legal grey areas as irregular. However, immigration law and labour law enact both juridical and existential law, by what Nancy refers to as the *inscription* and *exscription* of being. Immigration and labour law write into the law and legal categories (*inscribe*) a particular juridical framework—a legal border, so to speak—meanwhile immigration and labour law also, in the practices of law and in the hopeful pursuit of reforming the law, write out of the legal categories and labels (*exscribe*) the experiences that both form and inform the law. Thus, the law is neither a clear exclusionary nor inclusive thing. In fact, the law is not a tangible 'thing' and does not clearly mandate or refuse subjectivity. A juridical approach considers the legislative approaches to migration and labour, whilst simultaneously questioning the construction and re-constructions of law and legal categories in practice.

Finally, my approach is ecotechnical. For Nancy, this term refers to the circulation of meaning and practice in the material experiences of the world. Eco-technics links the *eco*, home, household (from οικος, meaning 'house', and used in eco-nomic, eco-logy, but connects also the body, the biology), with *technē* (from τέχνη, meaning 'craft' or 'art'), the technical structure that orders and 'makes sense of' the interruptive, incoherent and incommensurable (often 'law' refers to this technical practice, technique of order). J. Hillis Miller explains, '"Eco" as in "economy," or "ecology," or "ecotechnology" refers to the house in the extended sense of "environment."'[27] Eco-technics assumes both nature and technology when it refers to the capital circulation in the world that effects the circulation of *sense*.[28] I will explain these terms in more detail in chapter two and five, however, their role in the methodology is to provide a vocabulary for thinking of the materiality and excess of the political and juridical approaches to migration and labour. As well, eco-

[27] '"Eco" comes from the Greek word *oikos*, the house or home. The prefix "eco-" is used more broadly now to refer to the total environment within which one or another "living" creature "dwells"' J. Hillis Miller 'Ecotechnics Ecotechnological Odradek' In *Telemorphosis: Theory in the Era of Climate Change, Vol. 1* ed., Tom Cohen. (Ann Arbor: Open Humanities Press, University of Michigan Library, 2012).

[28] Benjamin Hutchens, *Jean-Luc Nancy and the Future of Philosophy* (McGill-Queens University Press, 2005), 141.

technics provides for what vitally upholds a circulation of neoliberalisation, including current key market values such as flexibility, casualization and mobility. The creation and persistence of the label, IML, serves market economic priorities that allow for the circulation of capital in the ostensibly global economic market system. Persons maintained in the shadow of the law may be obscured by legal categories, but are not obscure when it comes to the modes of production and functioning of labour markets. Their technical presence affirms the ecology of the market. However, the market is itself a construct and its primacy based on false contingency.

An ecotechnical approach attempts to think through false contingency towards what is happening, on the ground, in spite of legal categories, labels and pre-existing frames. A political-juridical-ecotechnical approach to IML involves thinking of both the technical circulation of capital and exchange known through the market economy, and the intersections of beings—people, bodies, interacting and forming labour or community relationships—in the 'eco' beyond predetermined categories, but part of the circulation of bodies that is known, experienced and shared. This circulation is at once the capital circulation that informs the processes of neoliberalisation and the circulation that *is,* and is therefore not captured, is 'sense'[29] and is not 'signified' within the language and systems of capital and market-orientation of (neo)liberalism.[30]

The Research Question

Post-structuralist thinkers have identified that what we write, whatever we wish to express and represent, is rooted in particular historical contingencies.[31]

[29] Jean-Luc Nancy, *Sense of the World*.

[30] For a discussion of the different between 'sense' and 'signification', see Ignaas Devisch and Peiter Meurs, 'The Meaning of Sense' in *Being Social: Ontology, Law, Politics* edited by Dan Matthews and Tara Mulqueen (London: Counterpress, 2015).

[31] Notably, Jacques Derrida's work, see *Spectres of Marx* translated by Peggy Kamuf (New York, London: Routledge, 1994); Jean-Luc Nancy, 'Literary Communism' in Jean-Luc Nancy, *The Inoperative Community,* Peter Connor eds., (Minnesota: University of Minnesota Press, 1991). Enrique Dussel writes even more specifically a critique of the historical (colonial) foundations of modern thought, see Enrique Dussel, 'Anti-Cartesian Meditations: On The Origin of the Philosophical Anti-Discourse of Modernity' *Journal for Culture and Religious Theory* 13:1 Winter 2014. p. 11-52. Judith Butler, very powerfully, writes of the 'contingent foundations' of thought (constructing 'the subject', 'gender', 'sexuality') and the claims, or task, of postmodernist and poststructuralist thought. See Judith Butler, 'Contingent Foundations: Feminism and the question of

Indeed, the attempt to 'thinking differently' is one that has plagued thinkers and philosophers extensively. One can truly be lost, spinning in the endless repetition of limits, frameworks and reaffirming what one is critical of. For this reason, it is crucial to ask why we do want to think differently. What is the purpose or intended goal of the pursuit? For this thesis, the need to think differently arose from consistent dissatisfaction with the debates and discussions surrounding migration, in particular labour migration of persons in low-waged, 'low-skilled' labour. Why, with the proliferation of political and legal attention to 'illegal migration', 'irregular migration' and 'precarious employment', is there still a lasting, perhaps even growing, concern for irregular migration and persons identified as irregular migrant labourers? There seems to be a disconnect between legal instruments aimed to curb migration rendered to legal grey areas, and labour that is 'illegal' and outside the scope of labour regulation. This disconnect does not make sense in light of political and popular attention to migration and labour. If law makers, policy makers, politicians and legal practitioners are aware of the problem, how and why does it persist? Or rather, what, as a remedy or alternative, might make more sense? The material reality of persons migrating, with different immigration statuses and nationalities, across territorial borders to work in low-waged, low-skilled, low-regulated labour sectors continues and begs a re-thought approach and analysis. Citizenship, employment, temporary work permits – these existing categories and frameworks fall short of providing a satisfactory explanation for the intersecting interests and processes at play in labour migration and precarious work.

This is where, on the one hand, political projects may seek to instrumentalise legal categories to extend to those previously deemed 'irregular' or marginalised. However, as the chapters of this thesis demonstrate, extending categories is not always a guarantee of improved subjectivity and status. Thus, Nancy's sobering reflection considers, what if there is no sense to be found? Madness ensues, but we know that madness itself is also a contingent foundation. Through Nancy's work then we return to thinking what is it that is 'going on'. What is *happening* in the production, circulation, reproduction, of legal categories, political interests and economic concerns, including labour market demands? This is the very mundane,

'postmodernism'' In *Feminist Theorise the Political* edited by Judith Butler and Joan W. Scott (New York, London: Routledge, 1992), 3-21.

daily circulation of capital and of sense, much in the same way that concerns for migrant labourers in 'irregular' situations has perhaps become a very mundane situation.[32] The political-juridical-ecotechnical approach of this thesis attempts to open this field of questioning by linking theory with labour migration issues and UK laws. The thesis is not a direct intervention in post-structuralist philosophical debates or critical legal studies about particular formulations of Being or the Encounter. But these elements are important in their construction of the social, which is key to understanding Nancy's work. The social is a locus of labour migration because within the 'social sphere'—be it politics, law, economics—for many individuals, their banal, daily situations of work and life are considered 'irregular' in spite of their labour being demanded and exploited. Existing remedies are ineffective. Nancy's work, beginning with the question of what in material real experiences forms the social, is therefore in conversation with the realities of labour migration not as an abstract exercise. Rather these foundational questions and de-constructions are necessary precisely because what exists as the legal manifestation of the social—the bodies at work in a given territorial space—is not representative of the bodies *actually* present, but represents the juridical power of normative categories that deems some bodies present as lesser subjects.

[32] In a critique of international law's response to irregular migration, Juan Amaya-Castro suggests that international law is able to respond to crisis and thus to the situation of temporary refugee status, but does little to address what he refers to as the mundane realities of irregular migration. Amaya-Castro contends that international law fails to regulate irregular migration because it is not a 'crisis'. Whereas refugee status, for instance, is a temporary status whilst one either waits for permanent leave to remain, citizenship or is returned to their country of citizenship. Juan Amaya Castro, 'International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis' *Netherlands Yearbook of International Law* 2013.

Chapter 1. The Irregular Migrant Labourer, Constructing a Category

In this first chapter, I introduce the political configuration of attention to labour migration that I identify as contributing to the use of the term, and significance of, irregular migrant labour (IML). Further, I discuss the implications an excessive 'irregular' category has on our understanding of law and legal categories. The interests and contestations obscured by the label, IML highlight the complex nature of the nation-state and the function of citizenship, particularly with regard to the market economic system. Simultaneously, the fact that the label, IML, is used reveals rather than obscures that there is an excess of the regular that needs to be identified, albeit in quasi-recognition as irregular and migrant. International and national legal regimes of immigration law and labour law fall short of capturing the demographic of workers referred to as IML. I suggest that this is due to the multiplicity of factors intersecting in IML, the lack of a cohesive or coherent demographic but moreover the salience of predetermined/prescribed notions of citizenship and membership. The function of a very broad label is that it attempts to capture the Other against which the normal legal subject and citizen are constituted.

Citizenship is both a formal legally recognised identification and an idea that is, in practice, constantly contested both by those considered to be inside and outside membership in the nation-state.[33] Citizenship's popular and political significance rests in its tenacity, reaffirmed throughout history by the likes of Aristotle, Kant and most every political thinker of the 20th century, as an indicator of belonging. Citizenship, materially recognised in an identity document such as a passport, demonstrates that the holder is a member and subject of the nation-state. Labour migration is intrinsically tied to concerns about citizenship, where movement across territorial boundaries—moreover the movement of persons who are economically 'active' and productive—affects citizenship by the presence of non-citizens living and working in

[33] Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (New York: Columbia University Press, 2011).

the 'community' that traditionally would be the commonality from which citizenship is granted. Labour migration raises questions about the role and constitution of community as it informs, and is ordered by, law; law that controls who is and who is not granted citizenship. Furthermore, the labour market demand for persons working in so-called irregular situations is enabled by immigration and labour law, where legal grey areas facilitate market economic priorities and processes of neoliberalisation[34] to continue even where these processes conflict with legal aims. The intersection of labour and immigration and the multiple interests involved suggest the emergence of a new field of law, labour migration law, where these intersections and their multifaceted concerns can be further explored and questioned more directly. However, for the present investigation it is the limit of the law and legal frameworks themselves that are of interest. As such, I will examine first the underlying factors and interests underneath the label, IML, and then I proceed to explore immigration and labour as these legal fields identify and address a problematic identified as IML, but in doing so reaffirm the broad and elusive lumping of 'irregular' experiences under the label IML.

'Irregular migrant', as a title or label, suggests a different status or a different type of belonging with reference to territorial boundaries of the nation-state and citizenship. Migrant implies transience. Migrants are considered to be foreigners, in that they are non-nationals, but more potently their foreign-ness implies that these persons are external to what is considered 'regular' within the nation-state. The 'irregular' presence of migrants suggests that these persons do not fit into the regular recognition by the nation-state but neither are they fully external and excluded. Importantly, the label 'irregular migrant' is different from the label 'illegal migrant'. The irregular migrant is not 'illegal'. What the term 'irregular migrant' demonstrates is, as Hans Lindahl describes, 'inclusion-by-exclusion.'[35] Irregular migrants, as present—living and working—are part of the state, but insofar as they are irregular which means that they are excluded from full participation and recognition. However as 'irregular' rather than 'illegal' they are not directly in contravention of immigration or criminal law. To deem someone's presence 'irregular', neither legal nor illegal, is

[34] Jaime Peck, Nik Theodore, and Neil Brennar, "Neoliberalism Resurgent? Market Rule after the Great Recession" *The South Atlantic Quarterly* 111: 2 (Spring 2012): 265-288, 268.

[35] Hans Lindahl, "In Between: Immigration, Distributive Justice, and Political Dialogue" *Contemporary Political Theory* 8: 4 (2009): 415-434, 423.

to discursively blur the lines between the apparent legal distinction of what is legal/illegal, and the conventional presumption that there is a difference, a border, between those who are citizens/noncitizens.[36]

Moreover, when policy and media discussions identify persons as IML, their status as 'labourers' is ambiguous where it is not synonymous with 'employment'. For instance, those employed in low-waged and low-skilled[37] labour often are not included in the legal definition of employment. Employment entails a *contract of service* between an employer and an employee, bound by mutual obligation, as per a standard contractual employment relationship,[38] whereas the work of IML is often temporary, arranged through agencies and/or limited to specific services (*contract for service*). Experiences of persons considered IML are also excluded from policy discussions concerning 'highly-skilled' economic migrants, thus the 'irregularity' and marginalisation based on irregular status is linked to labour sector, perceived speciality or skill level and income.[39]

Concerns for labourers who are in irregular—indeterminate, often precarious and unstable—situations in spite of their physical presence and labour contribution in a nation-state suggests that citizenship, while seemingly a formal recognition that establishes membership in the nation-state, is, in practice, a highly contested category. Bridget Anderson uses the expression of a 'community of value'[40] to discuss the space beyond legal categories where social membership and belonging is arbitrated. The 'community of value', according to Anderson, recognises membership of the Good Citizen, who is deemed to share values of the national community, in the UK case of which Anderson also writes these values are liberal, Christian and tied to market economic values and success. The Good Citizen is rewarded in contrast to the Failed, or sub-citizen, who is exemplified by the IML that does not conform to the

[36] The term 'irregular' is a term that can be understood to blur the line, or rather open up to, the fact that legal/illegal, citizen/noncitizen are not clearly distinct identities.

[37] I say 'considered low-skilled' because the assessment of what 'skilled' means is based on a standards developed by the UK Home Office Immigration Regulations. These do not a) necessarily reflect the skills that the individuals working in these jobs possess and b) reflect the actual skill that may be required to do a particular job well.

[38] Judy Fudge, "Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction" *Feminist Legal Studies* 21:3 (2013), 1-22; Leah Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2010), 1.

[39] Elspeth Guild and Sandra Mantu, *Constructing and Imagining Labour Migration* (London: Ashgate, 2011), 3.

[40] Anderson, *Us & Them*, 178.

parameters of national community membership and is therefore 'irregular'. The social function of a community of value is an implicit acceptance of liberal values (including autonomy, individual rights and market participation, all of which are founded in Western, European and patriarchal ideas) and an aversion to others, namely 'migrants', particularly those stuck in low-waged, 'low-skilled' labour. 'Migrant' is broadly used to refer to those generally 'ethnicised and "racialised" by association with the idea of the ... immigrant or third country national.'[41] The term migrant, in addition to irregular, therefore can function as a label to exclude, or at best blur, one's membership in the community of value. In some situations, persons may be identified as 'migrant', the term implying foreign non-nationals, while holding formal citizenship. Thus the experiences of marginalisation due to legal grey areas can further be enforced through popular ideas of who belongs, and who is deserving of membership, notwithstanding formal legal membership.

IML are differentiated within the nation-state. Physically present and contributing through their labour, their exclusion from the community of value is an excluded-inside. This exclusion-inside is justified through what Hans Lindahl describes as a 'proto-political community'[42], which the nation-state ultimately depends on to define its own borders against a broader, ostensibly shared, community. The label of IML requires interrogation in order to understand who carries the label and how the demand for precarious, irregular, workers is sustained, despite protective labour legislation and immigration laws devised to preclude exploitative work. I suggest that we need a methodological approach that filters through political and legal terms and norms to recognize how multiple layers of interests and actors interact to maintain IML. This methodology informed by Susan Marks's notion of 'false contingency' and Jean-Luc Nancy's philosophy unearths buried assumptions in law, labour and citizenship that make it difficult to think alternatively about labour and migration.

[41] Guild and Mantu, *Constructing and Imagining Labour Migration*, 298.

[42] Lindahl, "In Between", 416.

Contested Citizenship

When asking who migrant workers are, and what makes them irregular, we might ask the reverse: who are non-migrants and 'regular'? By broadly referring to a migrant (racialised, ethnic) labour force, the label of irregular effectively constructs the domestic citizen labour force as regular. These are the persons who share the values of the community of value and form the national community. The community of value enables the state to claim legitimacy through shared values, presumed to be shared by the people: 'the community of value is populated by Good Citizens, law-abiding and hard-working members of stable and respectable families.'[43] As legal status, national citizenship—identified through a passport or other national identity document—represents belonging, identity and rights. Formally, citizenship is understood as referring to the rights and obligations of persons within a sovereign nation-state, of which they are considered to be a national. Through citizenship, sovereign states distinguish their national members from foreigners, and control access to rights accordingly.[44] However, the community of value illustrates how formal citizenship is more than a symbol of membership in a state; it is part of an international system where states bear the responsibility to admit and govern those they have accepted as their citizens.[45] Citizenship under the law, what I refer to above as formal citizenship, tends to universalise belonging, because it suggests that there is an attainable legal status for all persons within a territory. Meanwhile, in practice citizenship is 'characterised by inclusion and exclusion.'[46] However the inclusion and exclusion is not physical, but from membership which is troubled, or in practice defined, by the community of value. Citizenship closes off membership, while

[43] Anderson, *Us & Them*, 3.

[44] Saskia Sassen, "Globalisation or Denationalisation" *Review of International Political Economy* 10: 1 (2003): 1–22.

[45] Bridget Anderson, "What does 'The Migrant' tell us about the (Good) Citizen?" *Centre on Migration, Policy and Society Working Paper* University of Oxford, 94 (2012), 1, 4.

[46] Margriet Kraamwinkel, "The Imagined European Community: Are Housewives European Citizens?'" In *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities*, Joanne Conaghan, Richard M Fischl and Karl Klare, eds., 321-338 (Oxford: Oxford University Press, 2012), 323. Citizenship has been associated with political-economic participation that is based on a liberal, individual, male, property (land)-holding subject being recognised as a citizen of a political community, namely the nation-state. Since the emergence of the nation-state and subsequently the modern welfare state, the distinction made between citizen and non-citizen has become further intertwined with economic entitlements. Citizenship as social entitlement differs from citizenship as a legal status. Moreover, citizenship as social participation is different from citizenship as political/governance participation.

purporting to represent universalism.[47] Membership in a nation-state through citizenship is not only a matter of legal techniques and requirements; it is based on conditions of desirability according to the community of value. These conditions make practical membership for some impossible.[48] Bridget Anderson's Good Citizen overpowers formal citizenship status, such as holding nationality through a passport, because it is a popular category that excludes those who, through circumstances such as gender, ability or occupation, fall through the cracks—the Failed or sub-citizens. There are many examples of citizenship being contested and/or experienced that complicate formal, legal, state-centric, interpretations of the term. In the UK in 2014, there was much debate about how to limit the citizenship rights of, or ban re-admittance to, British citizens who left the country to join the Syrian army and the army of the Islamic State.[49]

A domestic labour market suggests a labour force of citizen-workers. However, the UK labour force has always included the labour of those historically, and currently, not considered full citizens: women,[50] colonial subjects, slaves or indentured servants,[51] disabled persons,[52] prison inmates[53] and children.[54] The experiences of persons designated within these categories further demonstrate that legally possessing citizenship status does not ensure equal recognition of rights in the nation-state.[55] Social and economic inequalities isolate certain sectors of the citizenry,

[47] J. Fudge, "Precarious Migrant Status and Precarious Employment" 110, in reference to Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos," *International Sociology*, 1999: 245-268. Cohen also discusses changing paradigms of citizenship for both political democratic citizenship and juridical conception of citizenship.

[48] Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2003), 54.

[49] Patrick Wintour, 'David Cameron Shelves Move to Ban British Jihadis Returning to UK' *The Guardian* 1 Sept 2014.

[50] Joanne Conaghan, and Kerry Rittich, *Labour Law, Work, and Family: Critical and Comparative Perspectives,* (Oxford: Oxford University Press, 2006), 8.

[51] Adelle Blackett, "Emancipation in the Idea of Labour Law" In *The Idea of Labour Law*, edited by Guy Davidov and Brian Langille, 420-436 (Oxford: Oxford University Press, 2011), 420-21.

[52] John Rigg, "Labour Market Disadvantage amongst Disabled People: A Longitudinal Perspective," Centre for Analysis of Social Exclusion, 2005, 2. Also, advocacy groups bring attention to exploitation of persons with disabilities in "sheltered workshops", hospitals, "therapeutic work activities" in institutions: Jihan Addas, "A Legacy of Exploitation: Intellectual disability, unpaid labour and disability services." *New Politics* 14:1 (Summer 2012), 53.

[53] Noah Zatz, "Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships," *Vanderbuilt Law Review* 61:3 (2008).

[54] Geraldine Van Beuren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1998), 263.

[55] Anderson, *Us & Them*, 4.

who subsequently are relegated, through the labour market, into irregular labour situations that are neither fully inclusive nor exclusive.[56]

Citizens considered less-desirable—foreign-born, as well as those not considered to be fully-citizen, work-able (women, children, disabled, criminally convicted, prison inmates)—together with non-national, migrant workers, can be excluded from the community of value while still being included as necessary actors in the proto-political, global market economy. This is the included-as-excluded.[57] As mentioned above, the idea that there is a 'global' and post-national or international community suggests a universal, or a proto-political, belonging that transcends the immediate national jurisdiction. It is 'proto-political' because it is treated as if it existed before and beyond the particular contexts of governments and national politics. Nevertheless, labour protection and support remains the jurisdiction of the national management of market economies, politics and law. With regard to the citizen, the idea of the proto-political community supports a myth of global belonging, which works within a framework of national citizenship but suggests a belonging that supersedes the nation.

The EU suggests elements of this belief and thereby there is a belief that EU Citizen workers may be protected by legal frameworks that are beyond the particular nation-state where EU migrant labourers are living and working. While this may in some cases be true, where EU Directives may be followed in order to secure protections and freedoms for non-nationals, reciprocity within the EU and allegiance is enlisted by enforcing differences based on who is 'inside' versus 'outside'. These distinctions reinforce an external border against non-EU nationals—the 'inside' being those nations that reflect shared values, namely European values inscribed in the

[56] Jane Wills, Datta, et al., *Global Cities at Work: New Migrant Divisions of Labour* (London, New York: Pluto Press, 2010), 1.

[57] It is noteworthy as well to identify that the economy is not synonymous with the market. Both the market (the neoliberal economic market that informs demand in the labour market) and the management of the household (the broader definition of "economy") form inclusions and exclusions within their definitions. For example, the market formally includes the declared legal market that is identified through wage labour and exchange. The economic household includes traditional (Western-liberal) ideas of household, usually based on a classic model of a nuclear family and male-breadwinner model of employment and income generation through participating in the formal economic market. Judy Fudge, "Labour as a Fictive Commodity," in *The Idea of Labour Law* edited by Guy Davidov and Brian Langille, 120-136 (Oxford: Oxford University Press, 2011), 131. However the 'economy' can include a plethora of markets, where market is defined as supply and demand.

Treaty of Lisbon.[58] Yet in practice, the reciprocity envisioned within the European Community is not a political reciprocity that extends beyond the community of value of the European sphere in its own right. The proto-political reciprocity that is meant to protect non-nationals within the European Community rests on the belief in a more fundamental and all-encompassing political sphere where European values are seen as 'universal'. These values are furthermore permitted to remain 'universal' while enforcing exclusion of difference in the form of non-nationals. According to Lindahl, this is especially the case in the EU where 'the European polity harbours an outside within itself, such that, retrospectively, boundary crossings by immigrants can reveal Europe as being inside out.'[59] Thus, migration within the European member states can be limited based on ones country of origin. Furthermore differences are reinforced by exclusions from, and within labour sectors, that limit employment opportunities along racial, gendered and socio-economic (class) lines.

Notwithstanding practices that indicate significant departure from the effectiveness of the proto-political community, the idea of a broad proto-political sphere can allow individual countries to avoid responsibility for the persons living and working within their borders who are not considered national citizens. Persons recognised as 'migrants' thus may not be excluded directly; rather the 'logic of boundaries' is such that 'boundaries do not simply include and exclude; they *include by excluding*'[60] and *exclude by including.* These boundaries are not only of citizenship and the nation-state, but opportunities for employment and legal protections in cases of employment malpractice and abuse.[61] Labour migration considered to be irregular exposes this logic of boundaries where 'the twofold process of inclusion and exclusion' assumes that 'certain interests [determined] as worthy of legal protection'[62]

[58] Treaty Of Lisbon, Amending The Treaty On European Union And The Treaty Establishing The European Community 2007/C 306/01 Preamble 1 (a): Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

[59] Lindahl, "In Between", 429. The proto-political community suggests that "Arendt's celebrated formula, the "right to have rights," does not mean a "moral" right to have "legal" rights." Rather, Lindahl contends that this right to have rights refers to a "threshold leading from proto-political to political reciprocity." Lindahl, 426. This is thus a discussion of political community, and what underlies the political such that we can speak of a "proto-political" community.

[60] Lindahl, "In Between", 425.

[61] *Siliadin* and *Hounga* will be discussed in chapter four. Would be better to cite cases in full as examples of how the law intervenes with brief description for the reader at this point and then state that a full discussion will follow in chap. 4.

[62] Lindahl, "In Between", 424.

exclude the fact that the national market is dependent on sub-citizens, considered to be 'migrants'. The nation-state still encloses an exclusive 'common space: the common market.'[63] The common market is seen as a common *political* interest, and political citizenship boundaries are intertwined with market priorities that guide who is recognised as a legitimate economic citizen in contrast to foreign labour suppliers. Meanwhile the *proto*-political captures those who participate as 'global' labour suppliers and therefore external of recognition from within the particular nation-state. Within the EU, 'By referring to the market as common, the Treaty of Rome transforms this economic notion into a normative and, in particular, *political* notion.'[64] Nation-states thereby maintain an exclusive hold on their supposedly 'domestic' economic market, while accessing labour more broadly in the EU. Furthermore the 'global' market economic model remains situated within, and supported by, the modern liberal nation-state. Thus the 'domestic' economy is intricately linked, even intertwined, with the so-called international or global.[65]

These trends continue processes that are identified as noliberalisation, by Jamie Peck, Nik Theodore and Neil Brennar. The authors argue that neoliberalism is an ongoing process that is 'a crisis induced and crisis inducing form of market-disciplinary regulatory restructuring.'[66] The movement of neoliberalisation will be discussed in greater detail in my theoretical methodology explained in chapter two, in reference to Jean-Luc Nancy's writing on *ecotechnics*. However noteworthy here is that the chronic instability and patterned tendency of the contemporary, neoliberal market described by Peck, Theodore and Brennar opposes the notion that formal citizenship guarantees status and protection by being included within the nation-state. Peck, Theodore and Brennar use the term neoliberalisation, instead of neoliberalism, to refer to the ongoing process that is 'a historically specific, unevenly developed, hybrid, patterned tendency of market-disciplinary regulatory restructuring.'[67] For this reason, neoliberalisation happens both within the nation-state and in the proto-political. The success of neoliberalisation lies in its ability to encompass, and conform

[63] Lindahl, "In Between", 424.

[64] Lindahl, "In Between", 424.

[65] Differentiated citizenship that impacts labour power and legal subjectivity is not a new phenomenon. See, David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).

[66] Peck, Theodore and Brennar, "Neoliberalism", 268.

[67] Peck, Theodore and Brennar, "Neoliberalism", 269.

to, human action. It is able to respond to and create shifts in population, migration and labour regardless of distinctions in citizenship and immigration status.

Economic growth within the globalised labour market intersects with the nation-state, where seemingly fixed borders and citizenship categories are purportedly protected and upheld. Meanwhile, more flexible, capital-driven priorities steer practices of labour market demand and supply. The processes of neoliberalisation allow the demand and supply of labour, as *irregular* and as *migrant* and at other times in history as *domestic* or *indentured*, to continue to be sanctioned by a legal regime that espouses labour rights, social equity and a bounded nation-state. Market exchange has become 'an ethic in itself, capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs ... [Neoliberalism] holds that the social good will be maximized by maximizing the reach and frequency of market transactions.'[68] Neoliberalism is itself based on economic efficiency and claims to ethical self-responsibility where 'structural causes of social problems are erased by a discourse of moral culpability that manifests at the individual level.'[69] This is manifest in the community of value distinguishing between the Good, deserving, Citizen, and the Failed, morally culpable, sub-Citizen.

The IML, in both labour regulation and border control, exposes dis-empowering mechanisms of control and dependence, with ramifications for bio-political governance beyond the subjects of immigration and labour. Although the mechanisms of governance and differentiation of subjects happen within the sphere of immigration's purported control, control over labour migration can give way to 'control which is no longer about labour nor even about migration as the citizen and foreigner are equally subject to control.'[70] The underlying mechanisms that perpetuate the discursive distinction between migrant and citizen, through IML, maintain situations of precarious labour and migration that benefit the neoliberalisation of the market economic system. IML illustrates that the measure of who deserves recognised membership does not derive from formal legal categories (e.g. immigration legislation), but from a 'community of value.' Instead of legal citizenship rules, the

[68] David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 3.

[69] McNevin, *Contested Citizenship*, 61.

[70] Elspeth Guild, 'Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union' in Guild and Mantu, *Constructing and Imagining Labour Migration*, 207-228: 225.

community of value refers to a shared set of values grounded in liberal individualism infused with historically specific social, economic and cultural biases, and value assessed through economic productivity.

Who are 'Irregular Migrant Labourers'?

According to the International Organisation of Migration (IOM), there are an estimated 80 million migrant workers around the world with 'a large proportion of labour migration occur[ing] in an irregular manner.'[71] Current discussions in both academic and policy research that address labour and migration struggle to encompass the complexities within the label IML, a label that ostensibly includes the excess of other existing categories of migrant labour—such as economic migrant, seasonal worker, temporary visa holder and family migrant.[72] The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) describe IML as migrants who:

> *'... respond to actual opportunities offered by the labour market of the country where they are (generally in the informal sector), they do not respond to a formal demand for labour and do not fulfil all the legal conditions of entry, stay and employment, and therefore may be considered undesirable by the government of the country in question. On one side, the rise of this category is linked with economic changes in countries and with the emergence of new employment niches. On the other*

[71] International Organisation of Migration (IOM). *Labour Migration.* http://www.iom.int/jahia/Jahia/activities/by-theme/facilitating-migration/labour-migration (accessed January 5, 2012).

[72] Academic research, for example, Guild and Mantu, *Constructing and Imagining Labour Migration*; Nandita Sharma, *Home Economics: Nationalism and the Making of "Migrant Workers" in Canada* (Toronto: University of Toronto Press, 2006); Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004); Catherine Dauvergne, *Making People Illegal* (Cambridge: Cambridge University Press, 2008); Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (Vancouver: University of British Colombia Press, 2005). Policy research, for example COMPAS University of Oxford: Martin Ruhs and Bridget Anderson, "Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK" *Population, Space and Place* 16:3 (2010); Bridget Anderson and Ben Rogaly, *Forced Labour and Migration to the UK* Study 2005; CARIM: The Euro-Mediterranean Consortium for Applied Research on International Migration 2010; Finch and Cherti, *No Easy Option: Irregular Immigration in the UK* (London: IPPR, 2011); Ian Gordon, Scanlon, K., Travers, T. & Whitehead, "Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK" (GLA Economics. London: Greater London Authority, 2009).

> *side, it is associated with policies and protectionist measures that reserve a number of professions, skilled or unskilled, for nationals in order to alleviate the problem of persisting unemployment. These policies create a fertile ground for an irregular labour demand and pave the way for different scenarios of irregularity: irregular entrance and/or regular entrance and irregular stay, or regular stay but irregular employment. It is noteworthy that part of these migrants had been initially admitted as foreign workers on a legal basis, who subsequently became irregular due to changing labour legislation or because they overstayed their residence permits. Frequently, migrants do not even perceive the different status given the low level of legislation enforcement.'*[73]

Significantly, the individuals considered to be IML exceed recognised categories of migration because their 'entrance' and 'stay' (immigration) is regular and their employment constitutes the 'irregular' element. Conversely, an immigration status can be considered irregular as a result of changing immigration legislation, lack of access to security in their immigration and employment status, and subsequently—or as a consequence of their immigration/residency/work restrictions—an inability to be employed by other employers or in other sectors.[74] It is most difficult, however, to identify IML who may not have any direct immigration issues but are working in contracts where they are not recognised as employees under the law and are in temporary, flexible work. Persons may still be considered migrants in spite of holding UK nationality and citizenship due to the ethnicisation and racialisation[75] of employment sectors. After multiple generations of migration networks, Eastern European or Turkish small business and shop owners for example, or food processing workers in the Midlands, have come to provide an ethnically/racially-specific supply of labourers.[76] These businesses and the labour they demand can be popularly

[73] The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM), 'Irregular Migration' (January 2010) http://www.carim.org/index.php?callContent=239 accessed 20 February 2013.

[74] Dauvergne, *Making People Illegal*, 14-15.

[75] Racialisation refers to the way that certain labour sectors are associated with (and employers prefer) particular racial and ethnic backgrounds. Jane Wills, Kavita Datta, Yara Evans, Joanna Herbert, Jon May, and Cath McIlwaine, *Global cities at work: New migrant divisions of labour* (London, New York: Pluto Press, 2010).

[76] Martin Ruhs and Bridget Anderson, eds., *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (Oxford: Oxford University Press, 2010), 25.

identified as 'migrant' labour due to the particular labour sector being racially identified as foreign and non-national, not because of the workers' actual legal status (immigration and/or employment status and right to reside and work).

The exclusion of IML from the community, and thereby from the legal protections of the nation-state is not definite. 'Irregular' is not 'illegal'. In fact, the term, irregular, came into popular usage as an alternative to the reference, widely acknowledged as derogatory, of illegal migrants. Migration activists, for example the international movement No One Is Illegal, brought public attention to the derogatory label, illegal.[77] Catherine Dauvergne, in *Making People Illegal,* uses the term illegal because of its pointed, specific implication of the law. Dauvergne discusses the process whereby labels "make people illegal" and create divisions of "us versus them", and contends that the term illegal is the clearest example of this separation.[78] The term *irregular* does not implicate the law in the way that the term *illegal* does. Illegal has a direct association with criminality.[79] Policy makers, researchers and academics more commonly use the term 'irregular' to refer to a subset of labourers who are not plainly contravening immigration or labour laws but nevertheless are marginalized in the shadow of regulations. As stated earlier, 'irregular' is a legal grey area, but grey to the extent that it does not directly implicate the law. Meanwhile the construction of legal boundaries and definitions directly create the space that is then, irregular. Media, international organisations, and advocacy channels have also adopted the term irregular to replace use of 'illegal'.[80] Yet the adjective 'irregular' is not innocent: it presupposes a 'regular' form of what it modifies. Moreover, irregular signifies that the presumed regular is negated—not regular. Because the term irregular labour refers to a broad assortment of employment circumstances, it blurs the distinction between the legal and illegal. Thus the regular citizen labourer is an ideal

[77] *No One Is Illegal (NOII).* http://www.noii.org.uk/ (accessed February 13, 2012).

[78] Dauvergne, Making People Illegal, 16-19.

[79] Dauvergne *Making People Illegal*, 4. The legal ambiguity of the term irregular allows it to be applied to a demographic of labourers beyond a specific legal category.

[80] International Organisation of Migration, "Key Migration Terms." *International Organisation of Migration.* 2011. http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html (accessed July 4, 2014). The International Organisation of Migration (IOM) uses the terms "labour migrant" and "irregular labour migration". On April 2, 2013 the Associated Press changed the entry in its Stylebook. Illegal immigration now can only be used to refer to "entering or residing in a country in violation of civil or criminal law. Except in direct quotes essential to the story, use illegal only to refer to an action, not a person: illegal immigration, but not illegal immigrant. Acceptable variations include living in or entering a country illegally or without legal permission." Paul Colford, "Associated Press (AP) blog online." http://blog.ap.org/2013/04/02/illegal-immigrant-no-more/ (accessed April 2, 2014).

infused with assumptions of what constitutes active participation in the nation-state and deserves to be recognised not within the formal legal nation-state, but within a community of value.

The definition of migrant in reference to migrant labourer or worker is also unclear. According to the UN International Convention on the Rights of Migrant Workers and Members of their Family (UNCRMW), article 2 (1) defines a migrant worker as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'[81] The International Organisation of Migration (IOM) defines labour migration as 'the movement of people from one country to another for the purpose of employment' but does not define what would constitute employment. The International Labour Organisation (ILO) has defined 'migrant for employment' in Convention No. 97 article 11 (1), as 'a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.'[82] The above definitions specifically refer to individuals crossing international borders.

In the UK it is difficult to distil how the popular definition of 'migrant' is applied in data collection and research. The Labour Force Survey (LFS) and Annual Population Survey (APS) are typically used to measure the impacts of migrants on the UK economy and define migrant as 'foreign born'. Based on this definition, calculations of a migrant population would include those who have citizenship and who would not be counted as migrants if 'migrant' were defined as those who are subjected to immigration control or distinguished by self-proclaimed nationality. For data according to National Insurance Numbers (NINo), 'migrant' is defined as a foreign national. However in the Office of National Statistics (ONS), 'migrant' is defined according to the UN definition, where a migrant is someone who is residing in a country other than his or her usual residence for at least a year. ONS data is used in the UK for measuring net migration. Data on net migration have a significant impact on immigration policy and political debates concerning immigration reduction.

[81] United Nations International Convention on the Rights of Migrant Workers and Members of their Family, article 2 (1).

[82] The International Labour Organisation (ILO) Convention concerning Migration for Employment (Revised 1949). Entry into force: 22 Jan 1952.

Yet, the ONS data does not include statistics on actual departures from the UK. Length of stay is based on terms stipulated in migrant visas and self-reporting.[83] The following table illustrates the differences in definitions of 'migrant' used in UK government data.

Table 1 Definitions of migrant as represented in government data sources

	ONS LTIM	LFS	Home Office
UN definition (one year)	Yes (self-reported intent)	Can approximate with length of stay variable	No
Dictionary: "enter in order to settle"	No (may be approximated with length of stay variable)	Can approximate with length of stay variable	Yes, settlement grants
Subject to immigration control	Yes, for those staying at least one year	Can approximate by excluding EU nationals	Yes, with entry clearance visas, border entries

(*from* Bridget Anderson and Scott Blinder, 'Briefings: Who Counts? Migrant Definitions and their Consequences' *Migration Observatory* (Oxford: University of Oxford, 2013), pg. n/a).

The differences in definitions used in UK government surveys are not insignificant. For instance, according to Anderson and Ruhs, if migrants' share of the labour market is a concern for policy makers, that share appears sixty percent larger if one considers all foreign-born workers rather than foreign nationals. In practice, foreign nationals and foreign-born workers have different relationships with the labour market based on whether the intention to stay is permanent or temporary. Temporal restrictions and status concerns for foreign nationals impact the intensity of working hours and length of contract these individuals will agree to. These differences cannot be fairly summarised in most political debates and legal concerns about a migrant labour force. Complications of definitions can be a reflection of the different ways that nationality laws traditionally recognise citizenship: *jus soli* that is citizenship based on birthplace and *jus sanguinis*, based on nationality of parents. However, politically the use of the term 'migrant' can exploit the inconsistent statistical definitions of migrant to further political agendas. Political discourses significantly impact who is popularly considered to be IML, and consequently treated

[83] Bridget Anderson and Scott Blinder, 'Who Counts as a Migrant? Definitions and their Consequences' (Oxford: Migration Observatory, 2013), pg n/a.

as a foreigner and non-citizen. Political support for tighter immigration controls obscures the structural labour market (economic) reasons for precarious work as well as the reality of who is carrying out that labour. It is difficult to determine who is a migrant if the term is broadly used to discuss 'foreigners' but evokes flexible, temporary, transient labour.

IML is not a legal category or definition. In practice (and in political discourse), those viewed as irregular and migrant are regularly included, *as irregular,* within an economic, political and legal system. Reports and studies in the UK reveal practices of irregular migrant work, exploitation and abuse that persist in spite of existing national and international labour standards.[84] The work produced by these authors contributes to discussions by legal academics that concern the legal, political, economic and social reasons for a category of labourers that are considered to be irregular.[85] Although there are many connections, the link between IML and precarious work has not been established clearly. Precarious work can refer to a broad range of labour situations, which will be discussed below with regards to subcontracting and fixed-term contracts, whereas IML is commonly associated with low-waged, low-skilled or 'bottom-end', labour. Notwithstanding the absence of a 'robust legal definition of precarious work'[86] and therefore the possibility that this category also can be used to identify divergent experiences, the concern about IML in the UK indicates possible connections between precarious employment in low-waged low-skilled sectors and a racialised labour force considered to be outside the boundaries of community (national) belonging. The label IML may be a way to deflect attention from increasing employment precarity as a labour norm. The difficulty in establishing both what constitutes an irregular migrant labourer and

[84] See Maria Hudson, Netto, et al., *In-work poverty, ethnicity and workplace cultures,* 2013; Working Lives research institute (http://www.workinglives.org) Sonia McKay, Eugenia Markova, and Anna Paraskevopoulou, *Undocumented Workers' Transitions: Legal Status, Migration and Work in Europe* (London: Routledge, 2011). Research in sociology, see Bridget Anderson and COMPASS: Anderson, "What does 'The Migrant' tell us about the (Good) Citizen?" 2012; public policy: Finch and Cherti 2011; Anderson and Rogaly, *Forced Labour and Migration to the UK* Study 2005; Geography: Wills, Datta, et al. *Global Cities*; politics: McNevin *Contested Citizenship,* and economics: Ruhs, "Towards a post-2015 development agenda: What role for migrant rights and international labour migration?"; Dustman, Fabbri and Preston, "The Impact of Immigration on the British Labour Market".

[85] J. Fudge, "Precarious Migrant Status and Precarious Employment"; Guild and Mantu, *Constructing and Imagining*; Davergne *Making People Illegal.*

[86] Sonia McKay, "Disturbing equilibrium and transferring risk – confronting precarious work." In *Resocialising Europe in a Time of Crisis*, Nicola Kountouris and Mark Freedland, eds., (Cambridge: Cambridge University Press, 2013), 194.

precarious work raises the imperative to probe these labels and their function in the UK labour market.

Although IML can be an elusive label, it is identified as a political problem. According to a 2011 policy report, *No Easy Options*, irregular immigration is 'one of the most difficult public policy issues in the UK.'[87] Concerns about immigration happening for the purposes of employment have significantly informed political agendas for over two decades.[88] Immigration policies have focused on reducing the influx of immigrants identified as irregular, illegal, unauthorised or otherwise undesirable.[89] In *No Easy Options*, the authors discuss the public concern around this issue,

> *'At the moment, there is clear public concern about levels of irregular immigration, with 71 per cent of UK respondents in a recent major international survey saying they are 'worried' by it, and 90 per cent of respondents agreeing with the need for stronger border measures and tougher penalties on employers to reduce irregular immigration.'*[90]

This data sparks a series of questions that remain unanswered: What does it mean to be 'worried' about irregular immigration? Who are these irregular migrants? What does irregular mean? Is this a problem of persons crossing the border? Or are employers and employment opportunities to blame? What is the source of public concern when news media, public opinion surveys and the questions respondents believe they are answering, are inconsistent with legal definitions and with one another?

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[87] Finch and Cherti, *No Easy Option,* 3; see also Saba Salman, "More action needed on illegal immigration, says report" *The Guardian*, April 20, 2011.

[88] International Labour Organisation, "International Labour Migration: A Rights-Based Approach" (Geneva: International Labour Organisation, 2010), 6.

[89] Scott Blinder, Briefing: UK Public Opinion Towards Immigration: Overall Attitudes and Public Concern, (Oxford: Migration Observatory - University of Oxford, 2012), 2, 6.

[90] Finch and Cherti, *No Easy Option,* 3.

The discourses of irregular migration and labour that are common in surveys of public opinion, media and political discussions reinforce stereotypes of irregular migrant labour as a foreign menace, despite the ambiguity around who comprises this labour group. As the CARIM definition above makes clear, these are not persons subject to deportation or detention. Rather, definitions of IML reflect contradictory reactions to immigration on a popular level. Citizens who express outrage at media stories of women being trafficked to work in prostitution may at the same time support measures to deport migrant workers for purportedly stealing local jobs. Conversely, individuals who have no problems with new immigrants in their neighbourhood may agree, through their voting behaviour, that restricting immigration is a national imperative.[91] Therefore, while IML is identified as a problem, isolating how and why this is a problem has been problematic, if not impossible.

Identifying a population of IML is complicated by the diversity of circumstances that contribute to individuals working in certain jobs and employment situations and/or migrating with uncertain status or work permits. Although labourers deemed to be migrant and irregular are suspended in legal grey areas, they remain defined by legal norms. What is 'legal', however, can be as ambiguous as the individuals' compliance with them. Legal norms have developed into technical, statutory provisions in the UK to regulate employment and protect workers. The Employment Rights Act 1996, National Minimum Wage Act 1998, Employment Act 2002 and Equality Act 2010 are among legislation that protect employees by guaranteeing them a national minimum wage, statement of their employment particulars, access to leave, outlining disciplinary procedures, pensions, and protection against unfair dismissal. However within these 'legal norms', as will be discussed in greater detail in chapter four, it is significant whether one is recognised as an 'employee' in an employment relationship. Failing such classification, the statutory provisions protecting employees can be inaccessible to persons working in a

[91] A further phenomenon that will not be explored here is migrant diaspora communities that become supporters of anti-migrant or anti-immigrant policies in order to conform to the presumed ideals of a secure Western European/ North American life, or perhaps to deflect attention away from their own difference from the norm. This is seen in voting patterns in some migrant communities. This is not something that has received sustained academic attention, but the following touch on this issue: Bridget Anderson and Ben Rogaly, "Forced Labour and Migration to the UK Study" (COMPAS in collaboration with the Trade Union Congress, 2005), 29; and Wills, Datta, et al., *Global Cities at Work,* 138-162.

contract of self-employment (freelance), training or internship, or agency work.[92] This creates a space of 'irregularity'. For some, their status as an irregular migrant labourer means that while employment practices authorize their presence, immigration laws do not. For others, their irregular migrant labourer status does not reflect insecure immigration status. Both persons with precarious immigration status and those with secure immigration status but in precarious work situations popularly can be included in the label IML. An investigation of IML must examine the experiences of both. Commonly, IML is addressed as if it were an immigration issue. However, particularly in the UK, workers who are viewed as immigrant labourers are often European Union citizens. Because the category of IML eludes strict definition, it captures a demographic of workers in low-waged, low-skilled labour that are treated as sub-citizens in the 'community' of the nation-state, regardless of rights granted through EU membership.

Martin Ruhs and Bridget Anderson define precarious, or irregular, migration status as a spectrum of compliance, semi-compliance and non-compliance with law.[93] Compliance refers to workers who are legally in the country with a work-permit, a right to work, or citizenship status. Although this is not obviously a precarious status, workers who are in compliance with the law may nevertheless be employed in labour contracts that demand non-traditional flexibility and lack job security, as temporary work programmes (discussed in chapter three) demonstrate. Compliance refers to workers acting in accordance with the terms of their employment and residence, but not necessarily employer or business compliance with international or national labour standards. Employer practices merge into the next area on the spectrum. Semi-compliance takes into account a worker's circumstance that seems to be illegal but is not permanently, or wholly so. An example of this would be participating in undeclared, informal work while waiting for a work-permit or working for employers who are not in full compliance with the law in their own employment practices and hiring policies. In some cases, employers might evade labour regulations by omitting over-time pay with the worker's ostensible consent. Work that is not formally included in the labour market, such as care work or other non-marketised labour could

[92] Government of the UK, *Agency Workers Guildelines*, 2010.

[93] Martin Ruhs and Bridget Anderson, "Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK," *Population, Space and Place* 16, no. 3 (2010): 195-221.

be employment that is in semi-compliance with labour laws by virtue of the definitions of employment not fitting the labour carried out. Finally, in other instances non-compliance may be a breach of the law, such as entering the country without documents (e.g. avoiding passport control) and working informally, using a false identity, passport and national insurance number, or not declaring one's income, residence or wages-earned. This depends, however, on being able to determine what, in fact, the law is that is being transgressed.

Precarious employment is something that falls mostly within 'semi-compliance.' Leah Vosko defines precarious employment as:

> *'work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship between employment status (i.e. self- or paid employment), form of employment (e.g. temporary or permanent, part-time or full-time), and dimensions of labour market insecurity, as well as social context (e.g. occupation, industry, and geography) and social location (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).'*[94]

Precariousness cuts across all forms of remuneration and is not defined only by 'non-standard' employment, even though it is most often associated with non-standard forms of work such as agency work, part-time and fixed-term employment.[95] The International Labour Organization (ILO) defines precarious employment as a 'work relation where employment security which is considered one of the principal

[94] Vosko, *Managing the Margins*, 2.

[95] Vosko, *Managing the Margins*, 1; Judy Fudge, "Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers" Comparative Labour Law and Policy 34:1 (2012): 95-131, 111.

elements of the labour contract, is lacking. This term encompasses temporary and fixed-term labour contracts, work at home and sub-contracting.'[96]

Precarious employment is not a new phenomenon.[97] The context of precariousness can also be referred to as 'vulnerable work'; however unlike 'vulnerability', precarity brings to mind the labour or employment situation as connected to an underlying atypical, fragmented state.[98] When we identify labour as precarious in low-waged, low-skilled sectors especially affecting a racialised or 'foreign' demographic, we also include a category of workers who are not included in legal definitions of forced labour and trafficking. According to the European Experts Group on Trafficking in Human Beings,

> *'...the key element to the Trafficking Protocol is the forced labour outcomes, encompassing forced labour and services, slavery, slavery like practices and servitude. It is these human rights violations against the individual that the Trafficking Protocol seeks to redress.'*[99]

Forced labour and trafficking situations are included as offenses in the UK Coroners and Justice Act 2009. The offence is of holding someone in slavery or servitude, or requiring forced or compulsory labour.[100] Ben Rogaly and Bridget Anderson note that trafficking and forced labour is addressed in UK immigration law in *The Asylum and Immigration (Treatment of Claimants, etc) Bill* 2004.[101] The inclusion of trafficking and forced labour as both a criminal and immigration offense, but not addressed as an employment or labour issue, suggests that 'the primary

[96] ACTRAV, "Policies and Regulations to Combat Precarious Employment" (Geneva: International Labour Organisation, 2011).

[97] For a historical account of shifts in labour in relation to economic and social change, see E. P. Thompson, *The Making of the English Working Class,* (New Penguin, 1991).

[98] Bridget Anderson, "Migration, immigration controls and the fashioning of precarious workers," *Work Employment & Society* 24:2 (2010): 300-317, 303.

[99] Draft Report of the European Experts Group on Trafficking in Human Beings, Consultative Workshop in the Framework of the EU Forum for the Prevention of Organised Crime, Brussels, 26 October 2004. The report continues, 'While in some cases it can be difficult to determine whether conditions are merely illegal and extremely exploitative, rather than forced labour or services there is a wealth of history of international law, standards and interpretation of these concepts to rely on, which can provide sufficient certainty for criminal law and sanctions'.

[100] Section 71 of the Coroners and Justice Act 2009 creates an offence of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour. The offence came into force on 6 April 2010 (United Kingdom 2009).

[101] The legal definition of trafficking, both in the international definition of trafficking adopted by the United Nations General Assembly in November 2000 and the UK Bill 2004 implies situations of forced labour.

concern is with the movement and its facilitation as constituting the kernel of the crime of trafficking, rather than? the forced labour aspects or abusive employment relations.' [102] Precarious, irregular, low-waged, low-skilled work can be highly exploitative, but it is not necessarily forced; there may be ostensible consent, albeit a lack of choice, to work in given conditions. If consent is seen to be lacking, then the employment situation is one of 'forced labour'.[103] However, persons may have little or limited choice to determine their situation of work, yet not indicate a lack of consent. Individuals who need wages and income to meet their basic needs may be relegated to low-waged, low-skilled labour sectors without alternative options, but not 'forced'. Nevertheless, employment law may not be accessible to them, and thus their situation may become increasingly irregular. In the UK, employment law offers statutory rights and protections for those who are in employment situations based on a traditional, standard contractual employment relationship. The contractual employment relationship is based on principles of contract law, including notions of individual autonomy and the voluntary nature of entering into a contractual relationship. The standard contractual employment relationship in law is based on long term, full-time employment, with a single employer in a single country and workplace.[104] Non-traditional, flexible, temporary, subcontracted precarious forms of labour are easily excluded from employment law categories. Without employment opportunities that meet the threshold of a standard contractual employment relationship, workers can be prevented from being legally recognised as 'employees.'

Precarious labour, as IML, in low-waged, low-skilled sectors has not been widely identified in policy discussions as a labour market and employment problem.[105] Instead, the focus in public policy and political discussions is on the immigration status or nationality of labourers. Reports from two UK-based research

[102] Anderson and Rogaly, Forced Labour and Migration to the UK Study, pg n/a.

[103] The Asylum and Immigration (Treatment of Claimants etc.) Bill 2004, states that any person who facilitates travel to or within the UK is guilty of the criminal offence of trafficking if an individual so facilitated: 'is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour)' Or 'is subjected to force, threats or deception (i) to provide services of any kind (ii) to provide another person with benefits of any kind, or (iii) to enable another person to acquire benefits of any kind. Work, or 'services' that are entered into with the ostensible consent of both parties (contractual employment or work relationship) does not meet the definition of 'forced labour'. Anderson and Rogaly, *Forced Labour and Migration to the UK Study*, pg n/a.

[104] J. Fudge, "Precarious Migrant Status and Precarious Employment", 8. The employee is entitled to benefits both private and public, such as pension and unemployment insurance.

[105] Maria Hudson, et al., *In-work poverty, ethnicity and workplace cultures* (London: Joseph Rowntree Foundation, 2013).

institutes, the Institute for Public Policy Research (IPPR) and the Migration Observatory, analyse public opinion surveys that have identified illegal and irregular migration as 'one of the most important aspects of immigration.'[106] According to public opinion surveys, the 'public' wants lower rates of immigration, but, 'the evidence base lacks detailed information on a crucial issue—how do members of the public define 'immigrants?''[107] Not only is IML elusive, the use of 'immigrant' as a label or category is often unclear. Individuals may refer to diversity in their neighbourhoods as an example of immigration even when all residents are legally citizens. The lack of precision around who is considered an immigrant indicates that the data, namely public support, that law makers use to legitimise measures intended to decrease illegal immigration, may be inaccurate.

We can see an example of the obfuscation of meaning surrounding the immigrant label in the common sentiment that *illegal* Eastern European migrants are stealing British jobs.[108] Yet, Polish, Latvian, Hungarian and other Eastern European workers are EU citizens with the right to work in the UK, according to the 2004 Directive/38/EC of the European Parliament and of the Council, on the 'right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.'[109] IML may refer to persons without secure legal immigration status, in low-waged labour often without the ability to enforce their rights in their country of employment. In the UK, however, research indicates that political and popular discourses of IML commonly refer to workers who are likely EU nationals.[110] EU nationals with the freedom of movement within the EU have a secure immigration status. They are entitled to legal rights equal to British citizens. Thus IML is a label used to describe 'non-national' workers and is imbued with unsettling connotations of deviance inscribed onto foreigners. Persons who are admitted legally

[106] Matt Cavanagh, *Migration Review 2011/2012.* London: Institute for Public Policy Research, 2012, 5.

[107] Cavanagh, *Migration Review 2011/2012*, 5.

[108] Anderson and Ruhs, *Who Needs Migrant Workers?*, 31.

[109] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

[110] Scott Blinder, *Public Opinion: how does the public define the immigrants it wants to reduce?* (Oxford: Migration Observatory - University of Oxford, 2012). Christian Dustman, Francesca Fabbri, and Ian Preston. "The Impact of Immigration on the British Labour Market" *Economic Journal* 155:507 (2005): 324-341.

and have legal permission, and rights, to live and work in the UK are labelled 'irregular' and 'migrant'.

Immigration reforms do not address the question of EU freedom of movement; these reforms target migration of third country nationals, seen to infringe not only onto UK territory, but onto the EU as well. Nationalist, populist politics, most recently represented by the United Kingdom Independence Party (UKIP), are concerned with these consequences of EU membership and often champion the rhetoric of 'migrants' 'stealing' British jobs. While UKIP espouses xenophobic and racist tendencies, national surveys subsequently used by British policymakers to demonstrate public opinion towards migrants do not delineate the 'migrant' population in question.[111] The anti-EU sentiment that the UKIP articulates can become confused with fears of unemployment that result in harsh anti-immigrant policies.[112] Members of the public are not asked to define why they may be opposed to immigration, or what experiences inform their opinion. The labour market and demands of a 'globalised' economic market are not part of the discourse that garners support for restrictive immigration. The discourse of irregular migration, and IML, has surpassed the actual experience of migration, citizenship and employment.

The study, *Public Opinion: how does the public define the immigrants it wants to reduce?*, by the Migration Observatory demonstrates that public concern with permanent immigration does not match with immigration policies intended to stem irregular immigration. The Migration Observatory survey analysis also demonstrates that although irregular migration, and migration as a whole, generates fear in the British public, few people identify migrants as problems in their own neighbourhood.[113] If people do not feel the effects of immigration as a problem in their communities, and yet identify immigration as a concern, the concern identified in survey results and picked up in political discourses feeds a fictional fear that migrants are threatening the integrity of the nation-state and its labour market economy.

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[111] Bridget Anderson and Scott Blinder 'Who Counts as a Migrant? Definitions and their Consequences' (Oxford: Migration Observatory, 2013).

[112] Andrew Osborn 'UK's anti-EU party under pressure over race, immigration before vote' *Reuters* 15 May 2014.

[113] Scott Blinder, "Report: UK Public Opinion Toward Immigration Overall Attitudes and Level Concern," *Migration Observatory Briefing* (Oxford: University of Oxford, 2011), pg n/a.

According to the Migration Observatory:

> *'Survey questions about 'immigration' or 'immigrants' rarely define these terms, and certainly do not offer the government's official definition. ... When thinking about immigrants, people in Britain most commonly think about foreign citizens—62% normally think about non-EU citizens and 51% about EU citizens (excl. British)—rather than people who were born abroad and acquired British citizenship after moving to the UK (40%). Very low proportions of the public have in mind British citizens moving (11%) or returning (7%) to the UK. Similarly, few people normally have in mind the UK-born children of immigrants to Britain (12%).'*[114]

Moreover, public opinion surveys do not consider 'migrants' to be members of the responding 'public'; and 'taxpayers' are not seen to include irregular migrant labourers, despite the contrary reality.[115] Immigration policies that attempt to address concerns about excessive immigration tend to restrict temporary visas—namely labour migrants and foreign students. This same study of survey questions and results shows that 'the public' is more concerned with permanent immigration than temporary immigration. The concern with permanent immigration status is interesting because irregular immigration status is commonly believed to be a result of temporary legal status. Just over half of respondents to the survey studied by Scott Blinder and the Migration Observatory, supported a reduction in permanent immigration, while

[114] Blinder, "Public Opinion: how does the public define the immigrants it wants to reduce?": 'While negative views of immigration have been common for a long time, the high level of public concern with immigration is more recent. Aside from migrants with useful skills, those living in one's own neighbourhood seem the most popular with the British public—or the least negatively regarded. In something of a paradox, while vast majorities view migration as harmful to Britain, few claim that their own neighbourhood is having problems due to migrants. Apparently, much of the opposition to migration comes from general concerns about Britain as a whole rather than from direct, negative experiences in one's own community.'

[115] Fay Faraday, Judy Fudge, and Eric Tucker. *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), 74; Kerry Prebisch, "Development as Remittances or Development as Freedom? Exploring Canada's Temporary Migration Programs from a Rights-based Approach" In *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, Fay Faraday, Judy Fudge and Eric Tucker eds., (Toronto: Irwin Law, 2012), 86.

just under half supported reductions in temporary immigration.[116] Perhaps this response reflects the tension created by a fear of migrant settlement and permanent residency paired with the understanding that temporary migrant labour is vital to the economic market.

IML, therefore, is a category that needs to be disentangled from political discourses and sensationalised fears of foreigners stealing jobs from British citizens. Persons in precarious employment situations who live and work in legal grey areas are maintained in this position due to multiple factors, not only immigration status. A fear of exposure for persons with precarious immigration status (fears of expulsion, deportation, detention) as well as fears of 'law-breakers' benefiting from work and residency 'illegitimately' sustains discussions of IML within the realm of immigration law. Furthermore, the market economic benefit provided to the state and industry by persons working in legal grey areas, as precarious workers, encourages the complicity of labour and immigration law in tacitly supporting the current system and elusive category of IML. This complicity is closely linked to the market's dependence on a precarious labour force. Whether individuals are with or without citizenship and legal status/permission to work, the lack of information available about statutory employment rights as well as the lack of legal protection available to labourers in non-standard contracts, in other words, precarious workers, reinforces priorities of market economic growth over the wellbeing of labourers.

Many labourers in low-waged and low-skilled sectors live with insecurity. This parallels a lack of certainty involved with precarious immigration status which Nicholas DeGenova calls 'the deportability of everyday life.'[117] Taken together, the insecurity of precarious employment and uncertainty of living without secure immigration status forms a shared space of 'irregularity' even if individuals do not experience both at the same time. Labourers with secure immigration status who are still considered IML because of their racialised and/or disadvantaged socio-economic position do not fear deportation, but nevertheless live with no security of income, and

[116] 'Less than a third of the public reports having temporary immigrants in mind when normally thinking about immigration.' Blinder, "Report: UK Public Opinion Toward Immigration Overall Attitudes and Level Concern", pg. n/a.

[117] Nicholas DeGenova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31 (2002): 419-447, 419.

no formal recognition of their consistent participation in the economy and community.[118]

The label of IML used in media and policy suggests that this condition of labourers is anomalous. The particular way that mainstream media and policy discussions *inscribe* IML as 'irregular' serves to justify the prerogative to distinguish between Good Citizens and opportunistic migrants, or Failed citizens. The term, *inscribe,* refers specifically to the way that Jean-Luc Nancy uses this term to refer to what is made part of the text. The 'failure' of IML to live up to citizenship standards, and thus their irregularity, is attributed to individual fault. Meanwhile market economic priorities support labour deregulation and decentralisation, maintaining workers in low-waged, low-skilled precarious employment. This status is justified by the nation-state and sanctioned tacitly by law, for the sake of maintaining global competitiveness and economic growth. Thus, in spite of economic insecurity and rising domestic unemployment, the economic needs particularly serving urban centres in high-income countries continue to demand low-waged, irregular labourers. This is especially evident in service and hospitality, construction, domestic care work, janitorial/cleaning, agricultural work, and food processing sectors.[119]

Economic concerns and immigration oscillate between government efforts to ensure that the UK is attractive to the 'the best and the brightest' immigrants—highly-skilled, financially secure and independent migrants—and vigilance to preclude lax policies that might encourage 'opportunistic' migrants to remain in situations where they are 'irregular' or 'illegal'.[120] Although legislation does exist to protect against undocumented workers and opportunistic employers, for example monitoring of Gangmasters (under the Gangmasters Licensing Authority and Act of 2004), enforcement is limited due to lack of funds and resources.[121] Bernard Ryan suggests that 'the general weakness of labour market regulation in Britain'[122] can be associated

[118] Wills, et al., *Global Cities at Work,* chapter 3: 'London's Low Paid Foreign Born Workers', 59-93.

[119] Phillip Martin, "Recession and Migration: A New Era for Labor Migration?" *International Migration Review* 43:3 (2009): 671-691.

[120] Bernard Ryan, "The Evolving Legal Regime on Unauthorized Work by Migrants in Britain," *Contemporary Labour Law and Policy Journal* 27 (2006), 33.

[121] Mike Wilkinson, "Out of sight, out of mind," *Journal of Poverty and Social Justice* 20:1 (2012): 13-21, 15, 17. I will discuss the Gangmasters Act 2004 more in chapter three.

[122] Ryan, "The Evolving Legal Regime", 33.

with unauthorised work. In other words, on the one hand lax employment regulations may encourage non-discrimination in employment to find the 'best and the brightest', while on the other hand, these same regulations may allow for unauthorised and essentially *illegal* employment. Thus employers in sectors that disproportionately favour migrant workers may continue employment practices that regularly undermine existing laws with relative impunity, as long as they demonstrate economic growth. Employers may run profitable businesses[123] by refusing to pay for overtime hours worked, and expect workers to live in inhumane conditions. Even when subjected to regulations, practices can go unchecked. For example, there are reported cases in the UK of employers who purportedly pay their workers the national minimum wage, but then deduct for clothing, training, transport, and even refuse collection.[124] The climate of global economic market insecurity encourages firms (businesses, employers) to prioritise their global economic competitiveness by employing low-waged, low-skilled labour, thereby reducing workers' stability, security and bargaining power, which in turn results in an erosion of the collective bargaining model in labour law. A globalised economic market also creates a global supply of labour, making workers more easily replaceable. Consequently, labourers are forced into increasingly more precarious situations, choosing between sub-standard conditions or joblessness.

The employment of a transnational labour supply, albeit often EU citizen-workers, particularly for precarious work, also contributes to a further downward trend in wages for all employees in sectors that disproportionately employ foreign-born, 'migrant' workers. According to a labour and migration research team in London, 'neo-liberal economic management, the market—and particularly subcontracting—has been used to push down the wages and conditions of work in jobs like cleaning, care and construction.'[125] Within the EU, inequalities between EU member states, not to mention beyond the boundaries of the EU, mean that some individuals who have migrated to the EU 'may be prepared to take on jobs at wages and conditions that many UK nationals [and other industrialised nations] would not

[123] Wilkinson, "Out of Sight" 15; Gary Craig, "Special issue editorial overview," *Journal of Poverty and Social Justice* 20:1 (2012): 5-12, 8. Craig also identifies that, contrary to public scare-mongering about benefit tourism, migrant workers rely little on public funds, therefore are of even more 'economic benefit' to the state because of not taking advantage of services.

[124] Wilkinson, "Out of Sight", 14-15.

[125] Wills, et al., *Global Cities at Work,* 1. However the authors emphasise that this is not a new, neo-liberal phenomenon, but has its roots in British working class history, as well as colonialism.

consider.' [126] Despite the expressed concern of the UK government regarding domestic unemployment, precarious work continues to draw on the ostensible global supply of labour.

The challenge that the existence of IML poses to the legal system of the nation-state exposes why legal definitions regarding immigration and employment fail to capture the precarity demanded by the market economic system. In fact, delineating precarity would position the legal system in opposition to the market economic system. IML are not clearly distinguished through citizenship status or legal right of residence or entry. The lack of clarity comes up against tenacious inside versus outside distinctions, where the nation-state and categories of citizenship only recognise those who are 'inside' versus those who are excluded because they are 'outside'. Meanwhile, irregular status, to a large extent, presents an impasse because these are persons 'included-as-excluded' living and working 'inside'. This impasse translates into the legal field where it is rare for cases concerning irregular, precarious labour to be brought into formal legal arenas.[127] The problematic of identifying irregular migrant labourers exposes the limitations or incapacity of structural 'rights' provisions to extend towards a marginalised labour demographic (such as freedom against exploitation, statutory provisions providing for protection against discrimination and unfair work practices outlined above). Migration scholarship that is concerned with irregular migration and precarious labour outside the scope of employment legislation tends to focus on expanding existing statutory provisions or including migrants into legal categories, for instance work by Ryszard Cholewinski.[128] This attention does not extend to an investigation of the conditions of sub-citizenship demanded by labour markets or a consideration that rights may be ineffective protection for those who fall outside of the scope of legal recognition. As long as state-centric legal structures remain the common reference point of scholarly analyses, the question of how to comprehend the irregular migrant labourer, who is at once included and excluded, cannot be addressed.

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[126] Bridget Anderson, "Migration, immigration controls and the fashioning of precarious workers," *Work Employment & Society* 24, no. 2 (2010): 300-317, 301.

[127] Nicholas DeGenova and Nathalie Peutz, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Durham, London: Duke University Press, 2010), 27; Bridget Anderson, Nandita Sharma, and Cynthia Wright. "Editorial: Why No Borders?" *Refuge 2* 26 (Fall 2009): 5-17.

[128] Ryszard Cholewinski, *Irregular Migrants: Access to Minimum Social Rights* (Strasbourg: Council of Europe, 2006).

Notwithstanding the question of who, actually, is a migrant, the demand for migrant workers is structurally embedded in neoliberalisation processes of market growth. This returns our focus to the labour market. Migrant labour is desired, in fact demanded, in the UK because it is often considered a guaranteed hard-working labour force. Migrants are perceived as a 'self-regulating' and 'self-sustaining labour supply' due to their economic and legal vulnerability.[129] When demand for their labour is high, many non-British citizens will come to the UK and supply the labour. When demand is low, migrants—EU citizens included—may choose to stay in their country of nationality or (more permanent) residency. According to Piore, writing in 1979, migrants are disproportionately available for work regardless of over-qualification because they may choose temporary work or due to the 'wage differential with their country of origin.'[130] This remains a factor, which has become structurally embedded, relegating workers to a 'temporary' status in spite of them holding EU citizenship and thus entitlement to existing labour rights and protection. Again, temporary status implies that migrants may be subjected to sub-standard working conditions and demands to which workers usually would not consent.

Labour markets structured by the preference for a flexible and intense labour force and unfavourable conditions for domestic workers, have created path dependencies on the form of labour traditionally provided by migrant workers. Indicatively, agriculture and food processing have restructured job requirements and classification to allow employers to rely on migrant labour, where hiring British workers is not seen as an option. Although not explicitly stated by the authors, this is an example of where immigration law may be adapted and used to serve market preferences.[131] Other researchers have noted the inconsistencies of immigration law, refugee law, and likewise labour law, which are used to serve the national interests at any given time.[132] Consequently, immigration controls have focused on both keeping out potential migrants to prevent a downward pressure on wages and conditions, as

[129] Anderson and Ruhs, *Who Needs Migrant Workers?*, 25.

[130] Anderson and Ruhs, *Who Needs Migrant Workers?*, 17.

[131] Anderson and Ruhs, *Who Needs Migrant Workers*?, 27.

[132] Guild and Mantu, *Constructing and Imagining Labour Migration*, 3; Prakash Shah, ed., "Introduction: From Legal Centralism to Official Lawlessness?" *The Challenge of Asylum to Legal Systems,* (London: Cavendish Publishing 2005), 1-11, 2.

well as sanctioning opportunistic employers.[133] However, since 'migrant' can be defined in a way that includes EU citizens with access to the labour market equal to British citizens, the reliance in these labour sectors on a *migrant* labour force is not a consequence of lax immigration controls. To a large extent, the focus on immigration and not on practices in the labour market and employment has exacerbated the situation of IML.

The Labour Market And Migrant Workers

Judy Fudge, drawing from observations made by Bridget Anderson, maps a taxonomy of the 'nexus between precarious migrant status and precarious employment.'[134] The taxonomy demonstrates that the causes of precarious migrant status overlap with factors of precarious work. This summarises the above discussion to demonstrate that while individuals with precarious migration status experience the greatest insecurity, the category of IML broadly encapsulates a range of legal grey areas that cannot be easily addressed through immigration law or existing labour/employment law. Categories in immigration create precarious statuses for migrants and the legal categories of employment similarly produce a spectrum of precarious legal recognition for workers.

Table 2. Fashioning precarious workers

Conditions of Entry
• Migrant worker: skill level, age, gender, country of origin, marital status
• Family accompaniment
• Employer: occupation, sector
• Temporal: duration of visa
• Spatial: mobility to leave and re-enter receiving country and to move around it

[133] Employment relations and wages will be discussed further in chapter three.

[134] J. Fudge, "Precarious Migrant Status and Precarious Employment", 109.

Employment relations

- Labour market mobility: dependence on an employer
- Duration of employment relationship
- Terms and conditions of employment: wages, hours, health and safety
- Legislative protection: employment standards, occupational health and safety, collective bargaining, workers compensation
- Unionization

Institutional insecurity

- Social citizenship entitlements: health, unemployment insurance, social assistance
- Pathways to more secure migrant status
- Family reunification

Figure 1 From: J. Fudge 2012, 14-15 *from* Anderson, 'Fashioning Precarious Workers', 307-12.

The relationship between precarious labour and immigration involves a process whereby uncertainty is institutionalized. Employers favour workers who are in a state of temporariness and insecurity.[135] The availability of workers from within the EU, willing to work for less, and a deregulated labour market in the UK promotes a supply in response to a demand for precarious workers. However, importantly, the ideal flexible worker does not include workers whose immigration status depends on their employment. For precarious work, 'employers must avoid being tied into sponsorship and other obligations, and [thus they] turn to flexible labour already in the UK.'[136] Temporary work programmes and the legal employment of third-country nationals are highly regulated. Thus immigration controls 'rather than a tap regulating the flow of workers to a state, ... might be more usefully conceived of as a mould *constructing* certain types of workers through selection of legal entrants, and the requiring and enforcing of certain types of employment relations.'[137] Citizen workers, especially EU-citizen migrants who may be willing to work for less, are left with little choice but to conform. Thus in spite of the problem of defining who are IML and

[135] Zero-hour contracts, for example, are widespread. Elizabeth Rigby, Duncan Robinson and Andrea Felsted, "Zero-hour work kept down dole queues, says CBI," *Financial Times*, August 6, 2013.

[136] Anderson, *Us & Them*, 81.

[137] Anderson, *Us & Them*, 91.

what this label attempts to encompass (and consequentially homogenises), much attention is invested into thinking of immigration, economic migrants, labour and citizenship.

The dynamic of labour demand and supply focused on migrant labour requires further analysis and methodology to avoid a focus solely on non-British citizens at the expense of ignoring the labour participation of persons who are not mobile or migrating. Although migrant labourers are integral to supplying a particular type of temporary, flexible and precarious worker, the labour demand (flexible, temporary, precarious) extends to citizen-workers. Employers will demand what they 'think they can get from the various pools of available labour, while at the same time, labour supply often adapts to the requirements of demand.'[138] Thus employers will demand the same cheap, expendable, flexible labour from all workers (low-waged, considered low-skilled) whether they are 'migrants' or not. Workers in these labour sectors have little choice but to follow suit and supply this type of labour, which is characterised by a lack of security and precarious circumstances. The perception that these are 'migrant' jobs heightens animosity against anyone suspected of being a 'foreigner', even if such suspicions are evidently racial and discriminatory.

The perceived availability of a migrant labour force has facilitated a reduction in training programmes and incentives to invest in local workers. The lack of training and investment weakens the connection between the state, industry and people, that builds a system of social welfare and creates traps of in-work poverty, where individuals may be employed but without access to job progression, wage increases or training. One method practiced by employers to maintain workers in this employment stalemate is to offer non-permanent contracts to 'self-employed' workers rather than hiring them as 'employees.' If workers are either technically self-employed or not legally defined as 'employees', employers are able to evade the legal responsibilities that they would owe to 'employees'.[139] This allows employers to cut costs and maintain economic competitiveness.

[138] Anderson, "Migration, immigration controls and the fashioning of precarious workers", 6.

[139] According to the UK Employment Rights Act 1996 (ERA), 'workers' are entitled to national minimum wage, health and safety protections; whereas rights and responsibilities are granted only to 'employees'.

Another tactic used by employers to avoid contractual employment obligations is through relying on subcontracted labour. Subcontracting has become the paradigmatic form of labour in the twenty-first century.[140] Subcontracting in labour most often means that workers are placed in precarious situations where they are not considered employees (in a standard contractual employment relationship) because they are hired by a third party or agency. Avoiding the definition of the standard contractual employment relationship absolves the employer from extending statutory protection to these workers. The worker is left to depend on the market, income and work, for her/his well-being. Subcontracting functions in tandem with deregulation. After a primary contract is negotiated between those demanding labour and those supplying (contractors), those responsible for supplying the labour in turn enter into another contract with workers to supply a portion of the labour. These workers are not the primary contractors and are responsible for only a specific aspect of the total job. Subcontracted workers are more precarious because they are vulnerable to the demands of the first contract and second contract, the second or subsequent contracts often holding fewer guarantees of protection and obligations.[141]

The International Labour Organization (ILO) has raised international concern with subcontracting, particularly in construction industries.[142] Similarly, in the hospitality industry, catering companies may rely on subcontracting and/or outsourcing to provide food for hotel events.[143] Commonly, workers in hospitality

[140] Jane Wills, "Subcontracted employment and its challenge to labour," *Labor Studies Journal, special issue on community unionism* 34: 4 (2009): 441-460.

[141] The law regulating third parties to contracts could be relevant in an expanded discussion of this point. For example in the Privy Council case of *New Zealand Shipping Co. Ltd. v. A. M. Satterhwaite & Co. Ltd.* [1974] UKPC, [1975] AC 154. However this is beyond the scope of the chapter.

[142] International Labour Organization. "Search – subcontracting." *International Labour Organisation (ILO).* http://www.ilo.org/Search3/search.do?searchWhat=subcontracting&locale=en_US (accessed November 7, 2011). Subcontracting is common in construction industries where a construction company will subcontract pieces of the work: a kitchen refurbishment company may subcontract an electrician, or a flooring company; or a building construction company will subcontract installation of windows or cleaning.

[143] A more in-depth discussion of outsourcing is beyond the scope of this project, but signals a potential future research project. Practices of outsourcing labour refers to, for example, how the British Hospitality Association (BHA) lobby the UK government in favour of increasing the outsourcing of hospitality services in schools and public sector businesses of all forms (National Health Services, NHS, prison services and National Defense). This outsourcing is to enlist services through private multinational firms. Most of the BHA Board of Directors are representatives of such private multinational firms. Sodexo provides a current example of an outsourcing industry. Sodexo call themselves a 'quality of life services' company with 420,000 employees in over 29,000 sites. Sodexo offer everything from catering services to private prison security to hospital staff and waste removal services. Sodexo have their own 'human rights policy' where they "promote respect for human rights" and "ask suppliers to abide by a code of conduct" which is based on the ILO Group Supplier Code of Conduct. However, Sodexo is not governed by national or international law in the way that the government of a nation-state (in a liberal democratic nation) ostensibly is. The lack of enforcement or accountability guiding Sodexo and their code of conduct (or its adherence to the ILO standards) means that they are able to operate in a legal grey area of their own.

services are hired through an employment agency and then subcontracted to third party employers, who are not the direct employers of that worker. This is in contrast to hospitality staff being hired directly through the human resources department of a large hotel chain, for example, and thereby entering into an employment contract with that business.[144]

A focus on immigration control distracts from the market preference for precarious and irregular labour. Currently, economic growth under a flexible, 'global' labour market and restricted immigration are both assumed to be necessary for the good of the economic system of the nation-state. Indeed, restrictions on immigration suggest that persons considered to be migrants can be relegated to low-end labour and low-wages. The intensive production expectations of workers depends on a labour force that is willing to work for less. Workers from less economically strong EU member states and British nationals in disadvantaged positions can consent to work for less, for indeterminate periods of time, within a labour market that looks to international flows of workers as if this would supply a steady, self-regulating stream of labourers when needed. These factors result not only in a downward pressure on wages but also in conditions where individuals are not employable or hireable unless they conform to lower standards of employment and pay.[145] In other words, unless workers are willing to become IML, the jobs are not available.

Political discourses speak of migrants 'stealing British jobs'. Significantly economic data and sociological studies have demonstrated that the demand for migrant labour is not based on real labour shortages. A 'native' citizen-based labour force is reluctant to work in particular sectors. Citizens with access to education and social welfare are unwilling to take lower paid, devalued jobs.[146] Nevertheless, statistics of unemployment during the first decade of the twenty-first century in the UK demonstrate that a citizen labour force could adequately fill labour demand.[147]

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[144] Rosemary Lucas and Steve Mansfield, "The use of migrant labour in the hospitality sector: current and future implications" in Anderson and Ruhs, *Who Needs Migrant Workers?*, 157-187.

[145] Bridget Anderson, and Martin Ruhs, "Reliance on migrant labour: inevitability or policy choice?" *Journal of Poverty and Social Justice* 20:1 (2012): 23-30, 25. And Guild and Mantu, *Constructing and Imagining Labour Migration*, 3.

[146] Anderson and Ruhs, *Who Needs Migrant Workers?*, 29.

[147] Anderson and Ruhs, *Who Needs Migrant Workers?*, 3. These sectors have become associated with particular racial or ethnic groups—stereotypes include the 'Ghanaian security guard', 'Portuguese hotel cleaner' and 'Polish plumber'.

Popularly, this data can be used to blame persons who are unemployed, those dependent on social assistance citizens and migrants for causing problems relating to precarious work and irregular migrant labour. However, if employment conditions and job quality (part-time/full-time, availability of benefits, long-term secure contracts, training opportunities and so on) were improved, a citizen workforce and a *regular* migrant workforce could be better regulated and would not push down wages.

As we have seen, employers and industries concerned with cutting costs and maintaining market competitiveness prefer IML. However, an overt demand for the type of worker embodied by the migrant would belie the purported values of the twenty-first century liberal democratic nation-state. Purported objectives, as articulated in Western European and North American countries, include democratic governance, the rule of law and human rights as intrinsic to their constitution. If liberal democratic nations explicitly demanded an easily exploitable irregular labour force, this would contradict foundational elements of their constitution. Thus when 'migrant' refers to those who are EU citizens, these workers can occupy legal grey areas where access to rights and recognition of citizenship status is complicated by the structure of the EU. The difficulties of engaging in coherent discussions about migrant labour outlined above and heightened by the experience of free movement in the EU suggest that the nature of citizenship is more in question than immigration controls. The nature of IML does not derive from a denial of formal legal status or a lack of formal legal protection for non-citizen workers.

Guy Standing argues that trends of restructuring labour markets, employment and purportedly globalised markets have formed a new precarious working class: the precariat. He contends these workers are prevented from seeing the social and economic situation that is creating and producing a common set of vulnerabilities.[148] Low-waged, low-skilled labourers are distinguished into two equally contrived categories: 'irregular migrants' contrasted to 'benefits scroungers'.[149] Precarious citizens and workers are pitted against each other and blame each other for their subjugated and disadvantaged position. The broader economic and political system is

[148] Guy Standing, *The Precariat: The New Dangerous Class* (London, New York: Bloomsbury Academic, 2011), 25.

[149] Bridget Anderson, "What does 'The Migrant' tell us about the (Good) Citizen?" *Centre on Migration, Policy and Society Working Paper 94* (Oxford) 2012.

not blamed for systemically enforcing precarious situations and disadvantaging, marginalising and 'excluding' certain members of the population. Rather, these Failed Citizens provide a vehicle for social regulation, to dissuade people from transgressing the law, but also to juxtapose the Good Citizen against the Failed Citizen. These forms of control are focused in the community of value as the reference point of worthy membership/belonging. According to Bridget Anderson,

> *'... the Illegal Immigrant and Benefit Scrounger serve as powerful warnings to benefit claimants and legal migrants of what they might become, and what they must dissociate themselves from. In the same way that the immigrant is faced with actual and rhetorical slippages into illegality, the claimant must constantly beware the slippage into the scrounger.'*[150]

Neither the irregular migrant nor the benefit scrounger is able to achieve the rank of 'modern citizen' 'public' or 'taxpayer', in spite of their actual social and economic participation and formal legal status. Research in migration can often inadvertently place persons considered to be irregular migrant labourers into two camps—either as victims or villains—without drawing attention to how this dichotomy simplifies otherwise complex social and economic relationships.[151] Unless the concept of citizenship is questioned, citizenship norms can continue to be reconstituted on neoliberal lines, according to market priorities. Legalising the status of undocumented workers, or extending labour legislation to include more precarious forms of labour, significantly raises awareness of this labour force. Nevertheless, legalisation can exacerbate rather than remedy the factors underlying irregular migrant labour. Granting status may alleviate anxiety surrounding potential deportation and detention without changing one's precarious employment situation.

[150] Anderson, "What does 'The Migrant' tell us about the (Good) Citizen?", 14.

[151] Good versus Bad Citizen, like victim migrant versus villain migrant, can be seen to justify measures of control, such as limits on immigration and work permits, to maintain the regular status quo. The dichotomy established between the regular and the irregular serves to organise the nation-state. This apparently necessary, or natural, separation obscures the way economic business priorities are met because of a fragmented responsibility to labourers, and de-centred accountability away from the nation-state to individual employers and industries.

Recognition and extension of legal 'protection' remains focused on worker's employment status in increasingly flexible, temporary and insecure work oriented towards a global labour market. Thus, engaging in waged labour in low-skilled, low-waged sectors is contingent on accepting a labour market that relies on a subjugated labour force. Furthermore, proposals for legalisation and citizenship can reaffirm flexibility and insecurity as a form of civic virtue if these proposals do not problematise the labour demand for precarious labour.[152]

As discussed above, the common market is intertwined with the 'global' economic market and labourers, nationals and foreign nationals, are together caught in hierarchies that differentiate citizenship. In practice, Good Citizens are those who are deemed worthy and 'Good' participants by the nation-state, and consequently have access to the common market. Others whose participation is mediated through legal grey areas are excluded from the 'common market' and are therefore irregular, sub-citizens or Failed citizens. In spite of their actual participation and contribution, these people are neither consumers nor taxpayers, and their active citizenship is obscured. The idea of the global market, as a presupposed *common* market, permits nation-states to differentiate between regular and irregular labourers, all the while maintaining those deemed irregular (outsiders) within (inside) this same domestic economy and territory.[153]

Conclusion: Questioning Immigration and Labour Law

Existing legal mechanisms, if un-interrogated, buttress the universal and totalising claims of a proto-political community. Interrogating the category of irregular migrant labour demonstrates the constraints of 'legal, social and cultural circumstances in which [migrants] are embedded.'[154] However, the legal, social and cultural circumstances are not inevitable, or the only possibility for law. Law's authors constrain these circumstances. Law itself is no-*thing* until it is given value and

[152] McNevin, *Contested Citizenship*, 151.

[153] Hans Lindahl argues the global market is proto-political, and I have borrowed from his discussion of the EU borders and market to my study. Lindahl, "In Between", 424.

[154] Harald Bauder, *Labour Movement: How Migration Regulates Labour Markets* (New York: Oxford University Press, 2006), 200.

meaning by those who use it. The discourses of citizenship, legal status and rights currently fail to access the persons, the beings who are participating in the on-going constitution of the labour market. Existing frames for understanding our economic, political and legal relationships (work and citizenship) continue to perpetuate the deeply entrenched marginalisation of precarious, 'irregular' 'migrant' workers. A fundamental questioning of what these terms and categories signify, and how they might be re-thought, is vital before a viable approach might be found to address persons existing in legal grey areas, vulnerable to employment exploitation.

IML is a category that is based on practices of recognition that blur the distinctions between inclusion and exclusion. Persons caught in this category experience contestations of citizenship and ambiguous exclusion from a community of value. Processes of neoliberalisation within the market economic system maintain a demand for precarious work that is supplied by persons in the ambiguous spaces of 'irregular' and 'migrant' labour. Consequently, the structure of the nation-state is upheld by a fiction of formal legal citizenship. It is a fiction because it relies on the marginalised presence of 'superfluous' populations, those whose presence contests categories of 'regular' 'citizen' 'worker'. In other words, the structure of the nation-state relies on the idea of formal legal citizenship facilitating belonging and recognition, whilst the practices of citizenship and the economic system that upholds the nation-state includes a demographic of labourers who are considered irregular and treated as sub-citizens. However, because the nation-state and market economic system are both seen as essential, even natural, their tenacity and universality is unassailable. The law and legal instruments regulating migration and work are complicit in obscuring the reality of persons living and working within a certain territory. The jurisdiction of immigration and labour law is established based on what I will explore in greater detail in chapter two using Susan Marks' term, 'false contingencies'.[155] These are the conditions of possibility embedded in the system of the nation-state and market economy.

Governments concerned with the labour market impact of a foreign, migrant labour force may criticise immigration law for not being hard, or strict, enough. Concerns about migrant labourers and low-waged, low-skilled workers vulnerable to

[155] Marks, "False Contingency", 10.

abuses from employers, highlight tensions within immigration law, but also conflicts between immigration and labour. This is especially true given responses to the economic crisis of 2008 and de-centralisation/re-regulation of UK employment law in the twenty-first century. Proposals to remedy the problem often 'do not challenge underlying mechanisms of labour subordination, including citizenship.'[156] There are many reasons for this. The very real situations of abuse and exploitation that are experienced by persons in irregular labour market situations make it difficult to take a step back and consider the underlying paradigms of thought that condition categories and frameworks surrounding the institutions involved. Indeed, there are immediate ethical and justice claims that demand attention, such as being aware of forced labour, modern slavery and in-work poverty.[157] However, responses to these exigencies reaffirm nation-states and their borders (as a necessary evil) that enable governments to organise populations into liberal nation-states, and thereby to support liberal democratic values.[158] The state and its institutions are always our addressees in labour and in immigration law. However, 'when they self-privilege as our most important addressees, we are called into and by their perspective and we lose hold of our capacity to imagine politics otherwise.'[159] Thus, existing frameworks are reaffirmed. The values believed to be contained within the nation-state and its institutions seem incontrovertible because of the universal benefit they offer. Values include the primacy of the individual, the idea of the autonomous citizen-producer (as an economic unit) as well as social welfare as determined by political priorities and state governance.

The terms, 'standard employment', 'work' and the 'labour market'—like 'migrant'—are terms used legally and politically to signify particular value or worthiness in the nation-state. These categories operate based on historically specific and ideologically informed conditions of possibility, which obscure how the labour market is only one possibility of measuring value and economic participation. The

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[156] Bauder, *Labour Movement,* 200.

[157] Hudson, Netto, et al., In-work poverty, ethnicity and workplace cultures, pg. n/a.

[158] 'It is this dystopic vision that allows for either the consequent Hobbesian response […] or the related communitarian response (in which national state formations are defended on the grounds that democracy itself can flourish only if bounded with strong insides and outsides). In both scenarios, national sovereignty, although potentially unjust, is cast as a necessary evil.' Anderson, Sharma and Wright, "Editorial: Why No Borders?", 12.

[159] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy,* (Princeton: Princeton University Press, 2009), 135.

market economic system is neither natural nor necessary in its particular scope; it is historically conditioned. Similarly, in migration scholarship, border control and the mediation of immigration at the border of the nation-state is assumed to be natural and necessary. Popular conviction that citizenship and legal status are the only possibility for recognition and justice in the face of precarious, irregular, employment ignores other possibilities of thinking of population of persons in-common, forming a social, an economy and law.

Although rights and benefits may be bestowed onto non-citizens, 'there are important variations as to their universality and accessibility. Many restrictions are imposed on the basis of residence and other criteria.'[160] At the same time, people turn to rights and law to speak to the concerns and needs of a marginalised population. The law is imbued with a desire within liberal democratic states for grounding and ultimate truth: for bounded and protected national borders to ensure security (force), concurrent with a benevolent government that recognises basic human rights (justice). According to Jacques Derrida, 'Law is the element of calculation, and it is just that there be law, but justice is incalculable, it demands that one calculate with the incalculable and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule.'[161] Irregular migrant labourers expose law as a force in tension. Yet this tension is not an impasse that is fixed or static. It is aporetic. Law is in constant tension within its presence as a tool of enforcement, in the hands of government, economic market priorities and state power, and the continuous movement and calculation within governance, economic market and shifting social relations. While law enforces order for a population through the mechanisms of the nation-state, it is irreparably tied to enforcing a limit of what is already part of its constitution—law can only exclude that which it encompasses and comes before, or under, its ambit. Jean-Luc Nancy's work can be interpreted as calling on analyses of law to bring into the frame of legal analysis what is being written-out of legal and

[160] Tendayi Bloom and Rayah Feldman "Migration and Citizenship: Rights and Exclusions," In *Migration and Social Protection: vulnerability, mobility and access*, Rayah Feldman and Rachel Sabates-Wheeler, eds., 36-60 (New York: Palgrave Macmillan, 2011), 50.

[161] Jacques Derrida, "Force of Law: The Mystical Foundation of Authority," In *Acts of Religion,* Gils Anidjar eds., 230-258 (New York: Routledge, 2002), 244.

political discourses.[162] Thus thinking of law away from the political frame of the nation-state demonstrates how law traces interactions and relations of sociality, of our being together in pluralities. This plurality exceeds the categories of belonging in the nation-state or what is recognised as participation in the economic market.[163] It also exceeds the way law is instrumentalised, and illuminates that law is not some*thing*.

In the next chapter, I discuss a political-juridical-ecotechnical approach to investigate how, in spite of fighting exploitative labour situations, legal scholarship, theory and advocacy can itself be part of the enforcement and re-enforcement of categories and frameworks that create IML. Susan Marks' attention to 'false contingency' unearths the tenacious belief in a proto-political community, which affects the persistence of the ambiguous label, IML. Jean-Luc Nancy's notion of law, and his fundamental ontological questioning, further deepens attention to 'false contingency' by opening onto the *exscription* that is active and working beyond IML as a label and category. The concepts that these two writers have developed cast a new light on the problematic of IML by deeply questioning underlying conceptual frameworks and contingencies that bolster thinking of the nation, citizenship, regularity and work. The methodology developed from Marks' and Nancy's work addresses the questions raised in this chapter because as an approach it embraces the unspoken within our dominant frameworks, rejecting the universalising claims of contemporary models in favour of an understanding of law as necessarily incommensurable and constantly in process.

[162] Due to the notion of *exscription,* and if *exscription* is thought of in the context of legal and political discourses as I am attemption to do.

[163] Jean-Luc Nancy, *The Inoperative Community,* Peter Connor eds., (Minnesota: University of Minnesota Press, 1991), 28.

Chapter 2. A methodology of exscription: politics, law and ecotechnics

My analysis of irregular migrant labour (IML) begins with the previous chapter's description of a particular economic market system that, through what Hans Lindahl refers to as 'inclusion-as-exclusion' and 'the proto-political community', constructs migrant labour as 'irregular'.[164] 'Irregular migrant labour' (IML), as the previous chapter describes, is as a broad, homogenising term used to encompass an elusive population. Labelling heterogeneous experiences of migration and labour together in one category of 'irregular migration' juxtaposes migration, and individual migrants, that do not conform to existing categories within immigration and labour law to an equally elusive notion of what is 'regular'. Moreover, the term IML used to refer to the individuals themselves suggests that their irregularity is a consequence of individual actions, where non-national foreigners transgress existing immigration and labour standards. I have sketched the shortcoming of current legal and conceptual frameworks in that they assist in the creation of the illusory category of IML in the previous chapter. In this chapter, I elaborate how Susan Marks' *false contingency* and philosopher Jean-Luc Nancy's *fundamental ontological questioning* helps me to develop a methodological approach to the study of IML that is political, juridical and ecotechnical.[165] The respective writings of these two authors bring into relief the contingencies and categories that create IML. Susan Marks explains these contingencies are false because they do not operate as contingencies of events and interactions as they are happening. Instead, predetermined conditions of possibility are rewritten as contingencies. For instance, recognition of one's person-hood, or one's status as a member of a community and society, is believed to be possible through legal recognition, constituting the legal subject as a citizen. The basis of recognition is pre-determined from a historically specific point of reference, which

[164] Hans Lindahl, "In Between: Immigration, Distributive Justice, and Political Dialogue." *Contemporary Political Theory* 8, no. 4 (2009): 415-434.

[165] Susan Marks, 'False Contingency' Current Legal Problems 62 (2009) 1-21; Ian James, *The Fragmentary Demand: Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006).

now is conditioned through the market economic system. The market economic system is privileged as it was not only necessary but natural. It is difficult to imagine persons working, in other words labouring, in a framework different from one that has developed in reference to citizenship and the market. My methodology ultimately challenges us to think of IML and law differently, by bringing attention to false contingency in order to open onto Nancy's work.[166] I suggest a methodological approach that enables Jean-Luc Nancy's philosophical questioning to speak to the gaps of legal remedies and existing legal instruments. Nancy pushes beyond debates that acknowledge the limitations of our language and conceptual frameworks yet fall short of considering how the physical materiality of our bodies and their labour continues the movement of the world in spite of categories that limit recognition.[167]

This chapter provides a detailed outline of my methodological approach while chapters three and four identify the false contingency of immigration law and labour law in order to illuminate the systems of thought that underpin situations of precarious, subjugated labour—homogenised under the label IML. In the final chapter, I will return to consider the consequences that thinking differently through *ecotechnics* and a bodily ontology might have on labour and migration, specifically where experiences are exscribed from what is able to be marketised and commodified in care and care work.

Eco-technics is a word Nancy uses to refer to the circulation of capital, but as connected to the ecology of our being in-common. *Eco-technics* enables thinking of the simultaneity of techniques of capital, of labour markets and processes of neoliberalisation and the way persons come together in *originary sociality*. In the originary sociality, the drive for determination, for categories and labels, is incommensurable with the material reality or experiences that are always exceeding the categories and frames. In no small way, this suggests returning critiques of processes of neoliberalisation and labour market demand back to consider the original sense of the term, *economics*. *Economics* originally refers to the regulation, or logic,

[166] Nancy's work includes a *corpus* of articles, books, interviews that by quantity and theoretical contribution far surpassing the article from Susan Marks that I refer to for false contingency. Thus, I do give greater weight to explaining Nancy's work.

[167] Nancy's work discusses how the *corpus* of the plurality of singular bodies that cannot be programmed or fit into conceptual frameworks because of their movement that is always in excess, exscribed, from the fixed, inscription of being. It is the materiality of bodies that is the sense of the world. Jean-Luc Nancy, *Sense of the World* (Minnesota: University of Minnesota Press, 2008), 11.

of the 'home', the household (οικος).[168] In the development of modern liberal thought, the home and household played a key role in providing the foundation for the citizen. Problematic for its blatant racial and gendered basis, the household was the foundation from which the man—the original 'good' citizen—then was enabled to participate in the public sphere. Women, children, slaves, domestic workers, in contrast were contained in the so-called private space of the home. *Eco-nomics* thus on the one hand harkens back to this traditional link where the citizen emerged from the private to the public, and *his* economic activity upheld both the home and the public (the state). On the other hand, economics, the logic of a household, does not need to necessarily reaffirm the historically specific interpretation of the household. The 'household' and the 'home' could be the basic relation of the singular plural (discussed below), uprooted from the ideologically prescribed, patriarchial and limited (false) contingency of the nation-state and citizenship.

Nancy's 'bodily ontology'[169] puts into material presence the 'eco' of eco-technics. Through the body's physical, material, presence Nancy suggests that our being is known, 'we' know 'I', in the relation of the singular being with the plural. The world of bodies is a plurality of singular beings not because the plurality is a 'community' or a 'nation-state' or a 'citizenry', but because a plurality of singularities—whatever we call them, however we aim to contain them—is experienced. Moreover, the experience of body, as bodies, is always exterior—we can never know from the inside of our body what 'we' are as a physical being—and for this reason then our singularity and singular experience is not enough.[170] The singular plural is relevant to eco-technics because the eco-technical circulation of capital is founded on the basis that the world is a world of bodies, singular bodies in the plural. If we take as a starting point that bodies are the materiality of the world, then the bodies coming together form the concretisation of circulation: capital, economics, law. But the capital, economics and law are not what form the bodies or our being as foundationally singular plural. The foundation as singular plural being is always in

[168] As explained in the introduction, the term eco-technics links the *eco*, home, household (from (οικος, meaning 'house', and used in eco-nomic, eco-logy, but connects also the body, the biology), with *technē* (from τέχνη, meaning 'craft' or 'art'), the technical structure that orders and 'makes sense of' the interruptive, incoherent and incommensurable (often 'law' refers to this technical practice, technique of order).

[169] James, *The Fragmentary Demand*, 150.

[170] Derrida discusses this aspect of Nancy's understanding of body, *corpus*, in Jacques Derrida, *On Touching—Jean-Luc Nancy,* trans., Christine Irizarry (Standford: Stanford University Press, 2004).

circulation; it is in constant motion determined in as much as it constantly exceeds determination. The incommensurability of our sociality is, for Nancy, what we have as the world: it is the *sense of the world*. Moreover, Nancy's focus on what *is* happening in the sociality (singular plural) that is the basis of the relation as a naked element of our being in the world, involves attention to both the *inscription*, what is inscribed through text, language, within boundaries and the *exscription*, which is the term Nancy uses to refer to what is 'written out of the text'.[171]

Within this web of explanations for our being (singular plural) and our sense of sociality (as the groundwork of our world), law plays a key role. Firstly, law provides an example of both inscription and exscription. Rules, orders and structures are inscribed as laws, legislation, codes and judgements/judicial decisions. Equally, the processes that pursue justice, fairness, which involve interpretation and decision-making, as well as the contingencies, traditions, prejudices and force of law are law's exscription. Secondly, in its basic role or bare task, law traces the originary sociality.

Thinking of law in this way brings us toward *sense*, in terms of the experiences happening in the world, rather than focusing critical perspectives of law on the destruction of existing law or construction of new law. In ecotechnics, the technics of our being, technology as well as our very bodily materiality, are taken into account as they 'amass' together as the material experience of being. Another one of Nancy's many terms is *struction,* which he uses to name this 'amassing' or 'heaping' of sense that is not construction, not destruction, but *struction.*[172] In other words to summarise these words and multiple terms, I draw on an ecotechnical approach in order to bridge the experience and materiality of labour markets with a theoretical exploration of what categories are relied upon to frame belonging and membership. This is furthermore linked by an overarching question of ontology: of how being is understood and related. The theory is built from Marks' *false contingency*, used to demonstrate how, and consider why, discourses and categories cover up experiences and material, bodily, realities. Nancy's understanding of law (via sociality and sense) serves as a basis to think about what is after *false contingency*.

[171] Jean-Luc Nancy, *The Birth to Presence* trans., Brian Holmes and others (Stanford: Stanford University Press, 1993), 338.

[172] Jean-Luc Nancy, "Of Struction" *Parrhesia* 17 (2013): 1-10, 4.

Susan Marks, an international law and human rights scholar who writes from a Marxist tradition, discusses false contingency to comment on critical perspectives in international legal scholarship.[173] The notion of false contingency has relevance beyond international law and poses a challenge to scholars who are critical of labour law and immigration. A critique of false contingency in IML challenges us to question not only how but also why economic choices are prioritised over social concerns. False contingency as connected to false necessity[174] exposes the complicity of existing legal regulations to maintain a precarious, IML force. False contingency refers to what are thought of as the only contingencies—the only conditions of possibility. Their imagined singularity offers a false sense of resolution. False contingency refers to ideologically informed and historically specific determinations, which have been embedded into the framework of the dominant political-juridical-economic system (liberal, democratic, Western). They are false because they are not reflective of the multiple possibilities and experiences within and beyond these frames. When these conditions of possibility are disentangled from assumptions that are otherwise unquestioned and therefore presumed to be inevitable, it becomes clearer how operative categories and identities are contingent on a particular historical perspective that excludes other possibilities of thinking otherwise.

The political-juridical-ecotechnical approach I use in this thesis opens to an analysis of the systems of power (political, juridical) and the circulation (eco-technical) of bodies working and moving in the global market economic system. The economic market system has assumed a totalising presence in a global-international system and is enabled through every day practices of social and economic relations. Labour market pressures seem to contradict legal regulatory regimes, however both are rooted in the regime of bio-political governance and control.

The critique of the label IML through my methodological approach does not explain the experience of individuals. Neither does it provide an explanation for how to move forward in a normative assertion of an alternative. Instead, I question how to think deeper about the intersectionalities and interweaving systems of categorisation that are reaffirmed even in legal attempts to remedy the situation of persons

[173] Marks, "False Contingency", 2.

[174] Roberto Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (London: Verso, 2004).

considered to be migrants and relegated to precarious, exploitative labour situations. Writing does not construct a new programme or framework of thinking that could ever explain the depth and diversity of such experiences. Instead, an approach through *ecotechnics* is ongoing and affirmative—it is about bringing together and taking account of the practices and experiences that are forming our world.[175] Nancy's work as well as Marks's attention to false contingency contributes an approach to migration and labour akin to what Costas Douzinas identifies as 'critique from the point of view of radical change.'[176] 'Radical' change is radical because it involves resistance to repetition of the same identifications and false contingencies (intersectionality and gender studies included). The basic happening and relations within the coming together of sociality, as a process of becoming, is considered the starting point for interrogating the phenomenon of IML. This is important in order to suggest a different way to think of labour, migration and the law that would be more relevant to the experiences of workers and persons coming together, forming the ecology and the technical production and reproduction, in a common social and economic space (already happening and continuing). My approach is not intended to re-write legislation, reform legal practice, or to re-frame community for the purpose of creating a space for IML. Nor is my approach akin to critiques of the undeniably gendered and racialised experiences of exclusion, and inclusion-as-exclusion, experienced by persons who are identified as migrant labourers in irregular situations. More fundamentally, pre-legislation, I question law's role and the meaning of legal or quasi-legal categories that affirm and reaffirm a politics of belonging versus sub-citizenship. I do this through attention to *ecotechnics,* which allows a theoretical lens to situate the methodological approach within a concern with how people are already physically present and active as a part of the labour market. Questioning law in this way, revealing the distinctions between areas of law as false, could lead to a rethinking of legal fields by changing the frame as a necessary starting point for re-thinking and for change. IML highlights an imperative to think of labour migration and the so-called global market economic system as an intersecting phenomenon, one that begs a holistic legal and theoretical approach.

[175] In critical theory, others have written about an 'affirmative ethics' in ways that resonate with my interpretation and discussion of Nancy's work. For instance, Rosi Braidotti, *The PostHuman* (Cambridge: Polity Press, 2013). I do not explore the language of ethics here. However the connections would be relevant and worthwhile in future research.

[176] Costas Douzinas, "Oubliez Critique." *Law and Critique* 14, no. 1 (2005): 47-69, 66.

As a way to think of an ecotechnical approach, I mentioned above the term *struction. Struction*, according to Nancy, means 'to amass, to heap', that which is beyond construction and destruction. Nancy uses this word to imply what it is that happens, that *is,* without a unitary principle of coordination.[177] *Struction* is a state of being that de-familiarises the systems of being that traditionally, normatively inscribed value. Nancy brings attention to *struction* as a process that is contiguous and contingent sharing, which opens onto a present but is never accomplished as presence.[178] *Struction* as a term helps to give form to a thinking of ecotechnics, where *struction* is affirmative in that it refers to some*thing* material and concrete against the mythologies and fictions of predetermined categories. Along a similar vein, Rosi Braidotti writes of 'ethics of affirmation' as an 'eco-philosophy of multiple belongings for subjects constituted in and by multiplicity.' [179] While the terminology and entry into discussing ethics is different from my approach here, Braidotti writes towards an ethical relation that looks at joint projects and activities to affirm a positive becoming.[180] Her approach to critical theory is about affirming a non-essential vitalism concerning multiple ecologies of belonging. Braidotti's approach, while using different terminology parallels Nancy's *struction,* which similarly concerns that which is experienced together, in an affirmative (another word for 'productive' without the connotations of market productivity and quantification) ecology of experience and happenings. However, I remain focused on the words and terms Nancy uses and do not engage with the perspective of ethics. In an ecotechnical approach, therefore, being is not in itself a self-fulfilling entity, but part of ecologies of belonging and becoming. Being is instead about 'contiguity, contact, tension, distortion, crossing and assemblage.'[181] For Nancy, being is paradoxically within itself as a singular being and opposed to the unity and singularity of being that denies the interdependence with a plurality of other beings.[182] Rosi Braidotti refers to the

[177] Nancy, "Of Struction", 4.

[178] Nancy, "Of Struction", 5.

[179] Rosi Braidotti, *The PostHuman* (Cambridge: Polity Press, 2013), 144. Against the negativity of contemporary social and political theory that 'stresses vulnerability, precarity and mortality'–forensic shift, politics of melancholia, Braidotti, 142.

[180] Braidotti, *The PostHuman,* 190.

[181] Nancy, "Of Struction", 5.

[182] In other words, this being that Nancy identifies is what other theorists have identified as an ongoing condition of life where the experience of becoming is an actual praxis, embodied and embedded but 'firmly located somewhere according to the radical immanence of the politics of location.' Braidotti, *The PostHuman,* 188.

being here as a subject that is 'post-anthropocentric', a subject that is relational, and non-unitary but also distanced from assumptions of universal value.[183] Nevertheless, Nancy's *ecotechnics* brings this similar gesture and approach into a fundamental ontological questioning that engages with the philosophical, and critical legal, canon that guides modern Western philosophical thought and understanding of the legal subject. Moreover, ecotechnics and struction directly relate to thinking of the materiality of fundamental questioning, and the excavation, in Susan Marks' terms, of false contingency.

The politics of ecotechnics are different from politics understood as 'management of production, exchange and growth.'[184] Politics, when thought of via Nancy's numerous terms de-familiarises the normative vision of self and others. The defamiliarisation at play works to shatter 'the flat repetition of the protocols of institutional reason',[185] where the 'institutional reason' is what conditions and constructs precarious work into categories of immigration, relegating individuals into an ambiguous category of IML in order to support a neoliberal market economic model. According to this model, capitalism—capital accumulation and economic growth—is proliferated through its power to define value. Value is understood as proliferating infinity of ends. Accordingly, the end to be reached is an endless increase imagined through un-inhibited market growth. Economic growth of this kind is total, and the economic market model espouses capital as the ultimate and only way to participate in the economy. Nancy's work, alternatively, identifies the 'heaping' of politics as much more incoherent and inconsistent. The circulation of happenings, of bodies interacting, relating and labouring is more akin to, what Nancy calls, a politics as of the (k)not.[186] This is a politics of the tying, rather than setting, or conforming to, pre-determining categories. This is a politics of sense, of being singular plural, where the imperative of the limit, that is law, and the decision, are constantly in process and motion.

[183] Braidotti, *The PostHuman,* 188.

[184] Marie-Eve Morin, *Jean-Luc Nancy* (Cambridge: Polity Press, 2012), 104.

[185] Braidotti, *PostHuman*, 169. For Braidotti, de-familiarisation is towards a post-human frame of reference whereas Nancy's struction is a different language and different engagement (post-structuralism), but similarly suggests a 'mode of relating to what is "outside-of-self."' Nancy, "Of Struction".

[186] Nancy, *Sense of the World*, 90.

Within such a politics, economics is never static. Rather the tying of the (k)not constantly questions what eco-nomics itself is: what is home and the household, and how it is enacted, and how or what does regulation of home mean. Importantly, by drawing on Nancy's notion of ecotechnics (including struction and politics of the (k)not), this is not to counteract or deny the market economic processes referred to above as neoliberalisation. The eco-technics of the world is not *non*-economic. Instead this politics of the (k)not suggests moving away from pre-determined economies, and as such may facilitate a deeper understanding of the market and neoliberalisation itself.

It must be emphasised that false contingency is imperative to this analysis because it is the link between identifying legal grey areas and gaps in existing legal formulas in immigration and labour, and thinking differently through Nancy's theoretical propositions. Ecotechnics (and struction) remind the critical analyses of immigration and labour of the very practices and happenings that are presently determining difference in law, legal categories, and subjectivities.

Political-Juridical-Ecotechnical Approach

The political-juridical-ecotechnical methodological approach of this thesis is firstly political, both in terms of questioning dominant political discourses and opening onto a politics of the (k)not. Public policy discourses have created an ambiguously defined category of IML. The political and popular salience of this label, particularly in sensationalised reactions to migrants threatening British jobs, illuminates how citizenship refers to belonging in a community of value and not to a formal legal category. Notwithstanding, rights are granted under European Union (EU) Directives on the freedom of movement for labour and give equal status to Union citizens as to British nationals.[187] Nonetheless, the community of value arbitrates along a privileged community, which cannot be understood solely through legally defined statuses. Persons may be legally entitled to live and work in a

[187] Article 45 of the Treaty on the Functioning of the European Union *Official Journal 115 , 09/05/2008* (article 45 (2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.)

territory. They may be formal 'citizens', but are still treated as sub-citizens or Failed Citizens and are considered to be 'irregular' and 'migrant'. Their irregular situation is permitted and the cheap, flexible labour they provide is demanded by businesses according to political priorities of economic growth and subsequently weak labour regulation.

Thinking politics as a politics of the (k)not shifts the discussion of IML away from conventional discussions of citizenship and immigration as concerning the status of foreigners. Politics, according to Nancy, is a gesture that is the (k)not in process—always still to be tied. He suggests a politics without sovereignty.[188] This politics immediately shifts thought away from false contingency of the citizen/subject/community/sovereignty paradigm. The withdrawal from the paradigm, that underpins dominant frameworks of the nation-state, economic participation and law, neither denies the force of this thinking nor denies the need for technical engagement and critique. But in order to bring into relief the structures that make it seem impossible to move away from particular frames of thought that predetermine conditions of possibility politics of the (k)not aims to open onto the happening of relations and the technē before and beyond the citizen/subject/community/sovereignty. This 'politics' is a political spacing according to who and what informs the particular tying, in an indeterminate sociality. Nancy's politics of the (k)not challenges us to think of the movement, the tying and untying, that takes place within these political discourses and categories. The 'tying' is the imperative to speak, to inscribe persons and their entitlement to rights. The 'untying' is the multiplicity of contestations that constantly interrupt the inscribed by the exscription, that together (as the words and terms above) are the incommensurability of the originary sociality.[189]

To further explain the relevance of Nancy's work in dis-entangling IML it is important to note the trajectory of Nancy's thinking on the political. Nancy, together with Lacoue-Labarthe, suggested a distance from political philosophy and a retreat from the political.[190] In 1982, they established the Centre for Philosophical Research

[188] It is a 'withdrawal of sovereignty/community.' Morin, *Jean-Luc Nancy*, 99.

[189] Nancy, *Sense of the World*, 103.

[190] Phillipe Lacoue-Labarthe and Jean-Luc Nancy, *Retreating the Political* Simon Sparks ed., (London: Routledge, 1997).

of the Political (Centre de recherché philosophiques sur le politique). This centre was intended for 'the *philosophical* questioning of the political' and 'the questioning of the philosophical *about* the political.'[191] The aim was to question the notion of a philosophico-political paradigm itself, without being tied to a single philosophical and/or political figure. According to Illan Rua Wall, '[t]hey claimed that it was important to take such an approach, because the political had withdrawn from politics—it had retreated. Thus, traditional political theory and political science were incapable of thinking the political because they simply took politics as their object.'[192] Nancy's starting point with the term political is therefore a politics that is detaching from itself.[193] This detaching is similar to the work of Susan Marks's false contingency, which questions *why* certain ideas have come to be privileged over other possibilities and modes of thinking of the individual being, the subject and coming together in common or community. For instance, Nancy's most recent engagement with 'politics' asserts democracy as 'the figure of a politics without foundation, without Cause, ...'[194] And this comes back to the term I use: ecotechnics. The eco-technics, according to Nancy, have come to dominate what is now 'politics' in the world. The politics, evident through IML, is now in many ways synonymous with economic concerns, recognised through the market economic system. Ecotechnics as a word aims to describe the technique that forms, and performs, the logic of a world.[195]

An approach to IML that is political, juridical and eco-technical brings attention to what is in circulation, what is happening in labour markets beyond or between political discourses and legal categories/juridical processes. This happening, as discussed in the previous chapter, is what neoliberalisation, as the process mechanism of the market economic system, capitalises on. Nancy's sense of politics, thought through, illuminates the technique of economic circulation, of capital and the global economic system as part of the sense, the politics of the (k)not, that is the

[191] Lacoue-Labarthe and Nancy, *Retreating,* 108.

[192] Illan Rua Wall, "Politics and the Political: Notes on the Thought of Jean-Luc Nancy," *Critical legal thinking.* February 2013. http://criticallegalthinking.com/2013/02/20/politics-and-the-political-notes-on-the-thought-of-jean-luc-nancy.

[193] Jean-Luc Nancy, "The Political and/or Politics," Unpublished lecture for Derrida Konferenz, Goethe-Universitat Frankfurt am Main, Frankfurt, Germany, March 14 2012 .

[194] Morin, *Jean-Luc Nancy*, 99.

[195] Benjamin Hutchens, *Jean-Luc Nancy and the Future of Philosophy* (McGill-Queens University Press, 2005), 151.

world, not as a quest to *make* sense, 'but as an infinite tying up of sense from the one to the one, or as a tying up of this infinity that sense *is*—abandoning consequently all self-sufficiency of subject or city, allowing neither subject nor city to appropriate a sovereignty and a community that can only be those of this infinite tying.'[196] This is relevant to understanding IML because as a consequence of global economic market pressures on labour markets, IML is both a technical awareness of subjugated, precarious labourers and an admission of their *not-illegal* status—in other words—their suspended irregularity. The ambiguous legal position reveals the insubstantiality of the regular citizen standard employee, as well as the forms of control and allocation of value that operate above and beyond legal categories and political discourses.

The second part of this methodological approach looks at juridical categories inscribed into statutory regulatory provisions for migration and labour at national, European Union and international levels as well as the practical interpretation of these categories in UK case law. These juridical frameworks are imbued with false contingencies that are manifest in countervailing agendas of rights, protection, freedom and access to economic markets. The difficulty for legal definitions to regulate migration and labour across national boundaries and the legally-enabled processes of neoliberal economic markets, notwithstanding the fact that law-makers and legal theorists *think* within a nation-state centric 'globalised' economic system, create legal grey areas where persons are made to be 'irregular'. Yet, as discussed in the previous chapter, IML is neither fully legal nor strictly illegal. Persons in these grey areas are subjected to the law, in that they are included within the ambit of law by their activity, and importance, in the labour market. However, they are denied recognition as 'full' legal subjects, both through popularly reinforced notions that they are 'migrant' and foreign/non-citizens, and because their labour market position relegates them to spaces and conditions that are in the margins of statutory protection. The legal grey areas occupied by persons considered IML suggest that to search for a legal remedy for the phenomenon of IML is to face a legal impasse. However, Nancy's understanding of law frames this impasse as an impasse only if the frame ignores what is beyond the limited conditions of possibility inscribed in legislative

[196] Lacoue-Labarthe and Nancy, *Retreating,* 111.

instruments. In other words, the impasse exists if the only legal possibility is based from within the false contingencies of labour and immigration law.

The experiences of persons considered to be IML are *exscribed* from the text of the law. Experiences that do not fit into existing categories are written out of the legal instruments that address immigration and labour. Meanwhile, individuals in precarious and racialised/ethnicised labour sectors are *inscribed* as IML. This inscription means that persons identified as IML are presumed to be outside of the 'regular' national jurisdiction. This does not mean that recognition is denied, but this recognition is presumed to come from belonging to a proto-political community and not the community of the nation-state. The inscription as 'irregular' and 'migrant' exscribes experiences of people whose labour provides a 'regular' labour force, albeit precarious. IML exscribes the heterogeneity of the people living and working in the margins of recognized citizenship and labour as well as the fact that 'regular' (common) labour practices rely on precarious workers. Jean-Luc Nancy's work when brought into critiques of law brings to light law's incommensurability, where law is the trace of the limit of an originary sociality. Thinking of law in this way, as the tracing of the limit of this coming together, or in other words of providing a frame each time for the sociality, shifts how we think about law—law is not something in and of itself. Law understood as this tracing or framing therefore does not precede the sociality, however neither does it shape nor respond to a different originary sociality each time. Rather law, as incommensurability, is between inscribing the limit of sociality each time and adapting the tracing to the shifts to the frame that an originary sociality may cause. Moreover, based on the dominance of determinate categories and their pursuit, law is always (not inevitably) being prescribed and predetermined by those who enjoy recognition, and therefore authority, within the community of value (the Good Citizens, full legal subjects, privileged in the modern Western philosophical paradigm). When we think of law in this way, we no longer look solely to how we might improve legal categories. Law is not some*thing* to be applied, used and instrumentalised, nor is it some*thing* that contains its own power within itself. Law, instead, is a tracing movement of the singular plural beings that are relating and forming a limit. But within the current circulation of beings, capital production and economic market systems this limit operates within a specific ideological paradigm that names privileged legal subjects while obscuring the participation of others. Yet

'law' as a constituting limit and the force of this limit is not limited to these particular vocabularies and ideology. In fact, as will be discussed in chapters three and four, the indeterminacy of some judicial decisions with regards to 'irregular' migration and labour/employment, demonstrates that law, by what it ultimately permits, traces the eco-technics more so than it firmly re-enforces rigid frameworks of existing legal categories or is consistent in offering the protection mandated by legislation.

Law plays a broad role to constitute and legitimate communities, communities that have in the modern era been identified through the framework of the nation and nation-state.[197] The nation-state has been understood to, in turn, prescribe the law.[198] This serves as a foundation for the modern legal system and modern theories of law. Contrarily, not unlike other theorists of law, Nancy speaks of law from within a 'radiant paradox'[199] where law guarantees the exception—what is beyond it—as a condition of its possibility. The law constitutes and legitimates nations, and the nation-state enables legal systems to order and regulate populations, through legislation and the UK common law jurisprudence. The law is concurrently connected to notions of justice, which reveals incommensurability between a juridico-ethical pursuit and the order of law as a regulatory regime. Law, in its paradox, is open to the possibility of what is beyond the confines of the nation-state border and that particular historically specific ideology: again, while it defines a limit, the law is not some *thing* unto itself.[200]

Importantly, any examination of how Nancy uses the term, law, must acknowledge the issue of translation. The translation of Nancy's use of 'law' is both linguistic and jurisdictional: English common law and French civil law. According to Gilbert Leung, 'Nancy often uses the term *loi* or law in this typically civil law sense of positive and institutionally recognised legislation.'[201] Nancy uses the term *droit* 'to refer to what common law lawyers understand as 'law' rather than right.' As well,

[197] Ruth Buchanan and Sundhya Pahuja, "Law, Nation and (Imagined) International Community," *Law/Text/Culture* 8 (2004): 137-167, 137, 143.

[198] Butler and Chakravorty Spivak, *Who Sings the Nation-State?*

[199] Gilbert Leung, "Law," In *The Nancy Dictionary*, edited by Paul Gratton and Marie-Eve Morin (Edinburgh: University of Edinburgh Press, forthcoming 2015).

[200] This perspective on law, as discussed above, has also been explored by Derrida, and expanded by legal theorists such as Peter Fitzpatrick. See Ruth Buchanan, Stewart Motha and Sundhya Pahuja. *Reading Modern Law: Critical Methodologies and Sovereign Formulations,* (Oxon: Routledge-Cavendish, 2012).

[201] Leung, "Law", pg. n/a.

Nancy uses the term 'law' outside the juridical context to refer to an ontological context, where '"law" involves an obligation, order or imperative voice that is 1) obeyed and/or disobeyed, 2) respected and/or transgressed, 3) the tracing or providing of limits.'[202] The ontological elements of law can also, according to Leung, apply to juridical law. The key difference, however, is that juridical law is imposed onto a subject, while the existential law *is*: it imposes itself upon itself. Juridical law is the law of order and management. Here, legislators write the law and legal subjects are under the authority of the law. Subjects are recognised according to law's prescribed definitions. Existential law is the law that is in the occasion of persons together with each other that imposes a limit by being a sociality of beings. Law traces the limit constituted by a particular plurality of beings in-common. It is a 'particular' plurality of beings because this coming together and constituting or re-constituting law is unique each time. Nevertheless, the coming together with one another is a formation of community. Because the plurality, as an originary sociality, is particular, community cannot be something that is predefined—it depends on the unique experience and configuration of persons being together (common).

According to Nancy, law inscribes community in spite of its excess. The constitution of a sociality through law *makes* a common, a community, and is reaffirmed by law and through law. This merges juridical and existential law in the happening of law. It is impossible, ultimately, to keep the identified juridical and existential aspects of law distinct from one another—juridical law and existential law are distinct but they also co-appear[203] in the inscription of community (juridical law), which is challenged beyond itself by what is part of the common *before* it is inscribed (the reason for existential law imposing itself). What is exterior or external to definitions and categories nevertheless informs and makes law, but further, to say law 'itself' is to make it go out of 'itself' because law cannot be contained 'in' a 'self'.[204] Nancy's resistance to signification challenges us to think not of a separation of laws, but instead to think of juridical and existential law as co-existing and happening, within the ecotechnics, circulation, of the world.

[202] Leung, "Law", pg. n/a.

[203] Jean-Luc Nancy, *The Inoperative Community* Peter Connor eds., (Minnesota: University of Minnesota Press, 1991), 28.

[204] Jacques Derrida, *On Touching—Jean-Luc Nancy,* trans., Christine Irizarry (Standford: Stanford University Press, 2004), 299.

This particular perspective on law—juridical and existential law—is a theoretical study of law's presence and role. The practical experience of relating to juridical law imposing legal subjectivity, however, is not irrelevant to this discussion. There are experiences that are enforced as an acceptable part of law and those that are condemned. Still others are exscribed and exterior to law's articulation. Nancy's work draws attention to the creation and constitution of the imperative for law where exscription makes possible the ex-istence, and the inscription, of law as a limit.[205] Law is a tracing of the movement generated through the coming together that happens in the *originary sociality*, and thus it cannot be reduced to solely a fixed entity arbitrating order and justice, or what is legal versus illegal.

The paradox of law (law's incommensurability) suggests that although juridical law is guided by categories that provide order and definition, these categories can only offer a limited order due to an ever-shifting existential law and vice versa. This paradox practically causes the ambiguous legal grey areas where persons are considered IML. Existential law mandates that there be a law recognising those living and working in a given territory. The limited frames of recognition instrumentalised by juridical law and bound by citizenship, however, prevent openness to all bodies living and working in a given territory. The way that this tension of juridical and existential law is played out is not prescribed, but is seized by neoliberalisation and economic market values. Law is instrumentalised in the nation-state system and market economy, but this structure is not inherent to law itself. Rather it is a condition of law's authors. Law itself, juridical and existential, is no-*thing* until it is given value and meaning by those who speak it and are subjected to it.

The practical experiences of migration and labour demonstrate an exposure to incommensurability. The necessity, inevitability and impossibility of being signified are evident in the ambiguous legal treatment of persons at the intersection of labour and migration. In other words, we cannot escape the fact that there will be categories, definitions and order imposed onto experience. Likewise, we cannot escape that this will always fall short of what is experienced. Both indicate that we cannot escape law:

[205] Law as a trace of the limit, comes from Nancy: "We could also say: 'existence is law,' but if law, in general, essentially traces a limit, the law of existence does not impose a limit *on* existence: it traces existence as the limit that it is and on which it resolves." Jean-Luc Nancy, *The Experience of Freedom* trans., Bridget McDonald (Stanford: Stanford University Press, 1993), 30.

we are 'abandoned to law.'[206] Abandonment in law is not a withdrawal of being to a totality that is claimed by a universal or over-arching law. Abandonment to law does not affirm an absolute force of law. Rather, abandonment refers to the loss of control over sense. We cannot 'know' abandonment—where knowing would involve conceptual grasping, or at the very least a *making present* of something. Being abandoned to law is to be abandoned to the exscription, where law is open to its incommensurability. Nancy refers to this opening to violation as *freedom*. We are abandoned to law as/because the exscription of law opens to freedom, freedom being the lack of determination, the naked happening of being. The only address that law, and our abandonment to law, can make is to this freedom.[207] Freedom is without contingency, not an alternative space or other experience. Freedom is the experience, sensed, that jolts what has been inscribed. With regard to the IML, freedom is the question of the 'irregular' that is in fact a regular presence in the labour market. Furthermore, the question asks how the presence of IML, who are not necessarily 'migrant' and not 'irregular', challenge (interrupt) legal categories and notions of citizenship and the nation-state.

An interrogation of the factors at play in IML through an ecotechnical approach encompassing Nancy's thought provokes an altered thinking of law. As emphasized in the previous chapter, my aim is not to make existing legislation or legal practices more just or open. It is the form itself that I question. If our critique demands that law be some*thing* 'better'—when 'it' itself is (falsely) constituted as a *thing* and a totality—then the happening of beings relating in the world, where the law is shaped by and shapes events and economic interrelationships, is obscured. Nancy's perspective on being and the world is informed by fundamental ontological questioning that offers a way to see law as vitally connected to the *happening* of a sociality. Sociality refers to the social *happening,* where beings participate together in shared economies of production, reproduction and exchange. This includes law as a part of its constitution, but law does not, and cannot, define the totality of sociality.

This incommensurability is the starting point for Nancy. The singular-plurality, and the coming together that this involves, affirms incommensurability as

[206] In Nancy's words, 'we are abandoned to law' and 'it cannot be otherwise.' Nancy, *The Birth to Presence*, 44.

[207] Gilbert Leung, "Illegal Fictions," in *Jean-Luc Nancy: Justice, Legality, World*, Benjamin Hutchens ed., (London: Continuum, 2012), 93.

the only grounding for existence—which, as incommensurable, is not a ground.[208] Consequently, as argued above, the law is no-*thing*. It is infused with signification and meaning from what is inscribed as law, but also what is exscribed from this signification. Law takes place, it *happens*, as an imperative.[209] Through this imperative, law enables a sharing which is 'always incomplete, or it is beyond completion and incompletion.'[210] This sharing is not cohesive or coherent, but it is sharing because it is a consequence of our being together in the singular plural. This 'sharing' (sharing of the incommensurable) is where the law addresses itself to an opening. This opening is an incomplete sharing which opens to freedom, to that which is beyond inscription. But law is not founded by freedom.[211] Law acts as a commandment that is what binds subjects, bringing order against freedom. But law is never able to fully satisfy the binding because neither law, nor the subjects, are an end unto themselves. The commandment can always be violated[212] because there is more than the framed being as a subject under law's authority.

Jacques Derrida, in "Force of Law: The 'Mystical Foundation of Authority' " describes law as the 'element of calculation, and it is just that there be law, but justice is incalculable.'[213] He contends that law necessarily exists in tension with justice, which is 'an experience of the impossible'.[214] The law carries the potential to respond to a call for justice, while at the same time law as the limit, the 'force of law', can never do justice to justice. Derrida too is writing of the incommensurability of law with justice. Arguably, Derrida and Nancy share an approach to law and justice, where justice involves a search for a way to speak that would 'do justice to what is or what occurs.[215] In Derrida's words, 'deconstruction is justice'[216]; justice is an experience of aporia.[217] While in Nancy's work, 'justice can only reside in the

[208] Ian James, "The Just Measure," in *Jean-Luc Nancy: Justice, Legality, World*, Benjamin Hutchens eds., (London: Continuum, 2012), 37.

[209] Nancy, *A Finite Thinking*, 138.

[210] Nancy, *The Inoperative Community*, 35.

[211] Nancy, *A Finite Thinking*, 150.

[212] Nancy, *A Finite Thinking*, 138.

[213] Derrida, "Force of Law", 244.

[214] Derrida, "Force of Law", 244.

[215] James, "The Just Measure", 42.

[216] Derrida, "Force of Law", 243.

[217] Derrida, "Force of Law", 244.

renewed decision to challenge the validity of an established or prevailing just measure *in the name of the incommensurable*'.[218] Justice in the name of the incommensurable is thus the inability to secure a ground, a firm basis from which the subject can be fixed.[219] Here, thinking of justice is not about seeking a concept or word to encompass 'justice' or to situate it between concepts. Rather, justice is the same aforementioned abandonment, where we are abandoned to groundlessness—the freedom from strict determinacy.[220] Truly, it could be argued that there is little difference between Derrida's 'deconstruction is justice' and Nancy's justice in the incommensurable and our abandonment to this incommensurability.

Where Nancy's theory and writing differs from Derrida is in his extension and development of the body and the materiality of bodies as the sense of the world. Nancy insists on the question of Being as a fundamental question because of the being of bodies always already happening in the world that philosophy speaks of and philosophises about. Eco-technics, sense and exscription are all developed by Nancy as a *corpus* of thought that I have taken as an invitation to think about the production and reproduction of labour migration. Nancy's *corpus*, notably most thoroughly engaged by Derrida himself in the book *On Touching—Jean-Luc Nancy* (2004), affects analyses of law and critical discussions of law because it is vitally concerned with the material experience of bodies on the ground. This is not a different pursuit from Derrida's work (deconstruction, differance, aporia and the force of law), and yet it differs in its sensuality and its insistence on the core of the body and bodies as the being singular plural that is the sense of the world. Where in this thesis I explore how IML serves not the dominant language and categories of the UK or European law and legal systems but the language of neoliberalisation and the circulation of capital, ecotechnics brings attention to how the presence and labour of bodies on the ground circulates. Nancy's work offers a theoretical space to speak of the legal grey areas where IML can be deconstructed.

Nancy's engagement with community and the world, sense and the being singular plural is concerned with the conversation, the text and the limit, that is the

[218] Nancy, *The Experience of Freedom*, 75.

[219] Fenves, 'Foreward', in Nancy, *The Experience of Freedom*, xxiv.

[220] Fenves, 'Foreward', in Nancy, *The Experience of Freedom*, xxiv.

confrontation between the regular and the irregular. This concern re-aligns, or rather disorients, contingencies and the very paradigm of law in the nation-state by the question of foundational ontology and contingency. In spite of Nancy's language of abandonment, justice is not abstract. It *is* the co-originary material sense. This will be discussed in chapter five as a bodily ontology, which highlights being as presence, and this being present as a form of justice.[221] The clarity that Nancy's work strives for is the justice of bodies, in the singular plural. Conversely, injustice is 'the mixing and stifling [*broyer*] of bodies, making them indistinct'[222], which is what happens in the homogenising label of IML. A juridical approach within the political-juridical-ecotechnical methodological approach considers both the legal juridical frameworks that frame the homogenous label of IML and the underlying notion of law as connected to justice that demands attention to the *happening* and experience of persons considered to be IML.

Thirdly in my methodological approach, I draw on Nancy's eco-technics to bring to the fore the presence of bodies-at-work, in spite of and because of categories that inscribe beings as regular/irregular, citizen/noncitizen, marketised/nonmarketised. As Nancy writes, the experience of the world, being together and sense is forever *exscribed*—written out of the text—of that which is inscribed, as law.[223] Yet the inscription is as much a part of what is happening as the exscription. Together the inscription/exscription form the *eco-technics* of our world. Eco-technics includes the circulation of capital that is furthered by processes of neoliberalisation, yet the circulation of capital cannot happen without the circulation of sense. Eco-technics opens onto fragments that reveal the exscribed that underlay what the technical (apparent) structures overtly obscure.[224] Thus ecotechnics refers to the materiality, the circulation, of our activity as beings: beings that are singular plural. This includes both the techniques of circulation and the ecology of being. I interpret an ecotechnical approach as one that recognises that a plurality forms economic exchanges, labour markets and their contestations. This plurality is simultaneously predetermined within existing governance and regulatory regimes (e.g. the market economic system and

[221] In fact, 'justice is consistently tied up with instances of worldly existence and presentation and with doing justice to those instances.' James, "The Just Measure", 36.

[222] Jean-Luc Nancy, *Corpus,* trans., Richard A. Rand (New York: Fordham University Press, 2008), 47.

[223] Nancy, *The Birth to Presence*, 338.

[224] Hutchens, *Jean-Luc Nancy and the Future of Philosophy*, 155.

circulation of capital) yet open to the circulation of bodies before and beyond regimes of order.

The technique of economic activity has been made intelligible via a market economic system. However, processes of neoliberalisation are constantly in movement responding to, and engulfing bodies-at-work as labourers: casual/temporary/employees, within shifting labour market demands. These labour relationships transcend categories that order identities through the nation-state. An ecotechnical approach opens onto processes of neoliberalisation where the critiques of political and juridical approaches are unable to capture movement beyond, or in excess of categories and frameworks. Neoliberalisation moves beyond the inscribed labour market that operates within a nation-state. Within this system, workers are maintained as vital and as irregular. They are vital because they are irregular, and irregular because they are vital to a purportedly free market globalised, economic system. Yet, this circulation of labour and capital is neither free nor geographically global.

On the one hand, the ecology of labour markets and economic exchanges is the happening of capital and social reproduction that occurs when persons come together. On the other hand, labour markets and economic exchanges are identified only through already limited economic experiences and subjectivities. Meanwhile these experiences purport to be 'global' and 'equal', in other words, proto-political. The ecotechnical approach suggests that the originary sociality of singular plural beings forms economies of sociability, as well as a need for a limit and an order. This is the paradox of law: a need for law clashes with the ecology of sociality, which is only known through, and because of, the technique of economics. Thus, Nancy's ontological *being singular plural,* is made to *make sense* through the technē that is the bodies-at-work, which based on their originary sociality and co-appearance, create the need for categories and order. At the same time, this sociality and co-appearance goes beyond the categories and order that informs an elusive demographic of IML.

The living materiality of the ecotechnical responds to the *injustice* of having a vulnerable, exploited labour force relegated to legal grey areas, but also does not shy away from the very incommensurability of law as regulation and order that cannot include-*without*-excluding. Ecotechnics is not a programme or a prescription. Rather

it aims to refer to what *is* the world and the co-appearance of singular plural beings together within the world. The ecotechnics of the world refers thus to the technical material function of incommensurability. Here, nothing is external to the circulation of law and law as an instrument that traces limits of originary sociality: socialities that are interruptions of inscribed happenings, not limited to persons or human beings, but that take into account the experience of ecology and all beings. However, within law as we know it through the nation-state, and through operative identities that grant belonging via citizenship, justice for all beings is continuously exscribed. For some critical theorists working off Jacques Derrida's 'Force of Law', justice is distinct from law as a consequence of the very indeterminacy of law.[225] In Nancy's work, this indeterminancy is the incommensurability of law. My discussion of migration and labour, and the persistent labelling of persons as IML who experience a plethora of diverse labour and migration restrictions and subsequent precarity, aims to demonstrate how the existence of the label of IML and the inscription and exscription that maintain legal categories as (false) contingency are a consequence of law's incommensurability.

However, crucially, this incommensurability is not predestined and predetermined to relegate persons to the shadows of the law due to their immigration status, labour sector and skills, gender, citizenship, race and so on. Rather, attention to the eco-technics of migration and labour brings to light that the practices of movement and employment (whether formal and legally recognised employment or not) happen within a circulation of bodies and capital and markets that may even themselves be part of the incommensurability of law. Law itself, as Nancy insists, is no-*thing*. Law removed from being a thing of signification and instead tracing the happening of persons in common, or in other words Nancy's *sense of the world*, thus must be deeply analysed as part of a political-juridical-ecotechnical movement that is happening, in movement, in the world and not restricted to the categories and frameworks that thinking of a legal system or legislation maintains.[226]

[225] Peter Fitzpatrick, 'Finding Normativity: Immigration Policy and Normative Formation', in Hans Lindahl ed., *A Right to Inclusion and Exclusion? Normative Thought Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishers, (2009), 118-135.

[226] In thinking of law as no *thing*, and thus as the sense and not the signification, one could move this analysis into psychoanalytic thinking and in particular discussions of law and Lacan (see Maria Aristodemou, *Law, Psychoanalysis, Society* Oxon: Routledge, 2014). For the purpose of this thesis however, I remain solely engaged

Nancy's work draws out elements of the juridical and existential law, and thereby offers 'a way of thinking that attempts to address positively its own conditions: the social, political, linguistic, meta-physical and historical conditions of its own thought.'[227] His attention to sense, as the ecotechnics of being singular plural, 'render[s] inoperative every appeal to an authentic original togetherness' but starting from 'everydayness' instead of abstract thought.[228] The *sense of the world* that Nancy makes central in his work is not an abstraction from the actual practices in the world. This is what I refer to as the *happening,* or what is *on the ground.* The *sense of the world* precisely refers to the ecotechnics—the ecology, circulation and interweaving of various interests, fields (private, public, social, singular) and the technical practices—of neoliberalisation, as well as to the violence, hatred, antagonism, resistance, subversion, revolt present in what we call politics, as this is all enacted on our very bodies. As above, for Nancy, the starting point of thinking is not the discourses or political-juridical systems themselves. The starting point is the originary sociality that is the very singularity of our bodies as bodies that continue to function, work, create, and reproduce. What Nancy's work therefore offers us is to think of what *is* the world away from categories of determination, or what in Susan Marks' words are the contingencies that are made to be the only condition of possibility.[229] The movement away from Marks' false contingency and pervasive categories of determination is found, according to Nancy's work, in the body and bodies. Bodies are co-originary with sense, because they are: they happen. This co-appearance of the physical body and the sense that is *exscribed* escapes signification. Furthermore, vitally, this exscription of sense is not 'beyond', but rather is tangible in how we, in practice, enact our sociality in relation to juridical law and existential law. The sense, in other words, is the practice, but it is the *happening*, the eco-technics, and not what is identified when we restrict our legal analyses to existing false contingencies.

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with the critical legal studies interest in deconstruction and law, with a focus on what Nancy's work offers critical legal theory following from discussions of Derrida's work in law.

[227] Todd May, "From Communal Difference to Communal Holism." In *Reconsidering Difference: Nancy, Derrida, Levinas and Deluze*, 21-75 (University Park, PA: Pennsylvania State University, 1997), 31.

[228] Ignaas Devisch, *Jean-Luc Nancy and the Question of Community* (London: Bloomsbury, 2013), 116.

[229] Nancy argues, 'we must respond to the world as it is without recourse to transcendental discourses, including the still-theological discourses of modernity operating within the logic of Christianity and its messainism.' Peter Gratton and Marie-Eve Morin, *Jean-Luc Nancy and Plural Thinking* (New York: SUNY Press, 2012), 2.

To refer this discussion precisely to Nancy's work, the divergent and incommensurable happening of life is the sense of the world. *Sense*—'the sense of life, the sense of man, of the world, of history, the sense of existence ... And the sense which exists, or which produces existing without which there would be no sense'[230]—and the weight of our physical body in the plurality of singular bodies, the weight of thought, the weight or materiality of thinking, make experience of the world. Sense, like the being singular plural, is not a word that marks a presence of substance. Instead sense is what exceeds signification, paradoxically present and withdrawn.[231] This paradoxical logic is not as one or the other, or oscillating between one and the other. They are simultaneous.[232]

Related to the analysis and investigation of migration and labour, the exigency of migration and labour as a legal issue highlights a central question troubling existing legal frameworks: what to do with persons relegated to legal grey areas and the shadows of the law? The elusiveness of the persons encompassed under the label, IML illuminates the limitations of concepts and categories that, when unquestioned, seem universal, natural and necessary frames of reference.[233] The categories fail to encompass the experiences of persons living and working in 'irregular' situations, and thus this blanket term, IML, has emerged and is commonly used to refer to amorphous and vastly heterogeneous populations. Nancy's theories and discussions of sense and ecotechnics help us to probe the intersections at play in IML. The *sense* that is the happening of ecotechnics emerges after thinking through false contingency, and reveals incommensurability, but does not stop at this revelation. Far from a validation of the transcendent, the incommensurability that Nancy identifies is rooted in the singular plural—it is ontological. However, this ontology is not a defined, or clear,

[230] Nancy, *A Finite Thinking*, 3.

[231] James, *The Fragmentary Demand*, 64.

[232] *Sense* is not the Other, but precedes 'itself' and 'other': 'there can be no signification of sense, because sense is the condition of possibility of signification.' Christopher Watkin, "Being Just? Ontology and Incommensurability in Nancy's Notion of Justice," in *Jean-Luc Nancy: Justice, Legality, World*, Benjamin Hutchens eds., (London: Continuum, 2012), 21. *Sense* is what escapes signification, but still *is* part of experience and part of what is the world. Sense is the structure of the world, but hollows out therein, such that sense is the significance of the world itself. Nancy, *Sense of the World*, 55. In other words, 'sense will defer itself and will differ always from all that you will seize, from all philosophy, and yet you will have had a sense of it, and philosophy will have the sense precisely of this'. Nancy, *Sense of the World*, 36. It is an idea as much as it is a material experience. Nancy, *Sense of the World*, 58.

[233] My engagement with the topic of irregular migrant labour is not to reproduce the findings of empirical studies or analyses of policy. Instead, I question why and how this demographic of workers continues to be present, in spite of existing legal regulations.

equation in contrast to conventional identifications and subsequent understandings of our being. Such conventional approaches identify subjects/citizens using a linear logic (represented through an equation): if 'a' plus 'b', then 'c' (a + b = c): if we are human-beings + living in a nation-state = we are citizens with rights and protections. Nancy's singular plural confounds linear logic and rests upon the complexity of material being in the world, as the messiness of bodies inscribed and exscribed in various legal subjectivities that both include and exclude particular movement and labour.

Labour migration is a particularly important entry point to engage in thinking of false contingency in legal categories and the happening, the ecotechnics, of sense. Labour and migration are examples of the *concretion*[234] of the sense of the world. Work and movement are concrete instances, experiences, that instantiate the technologies, technics, of people coming together. *Sense* brings the concretisation of the world.[235] In other words, the sense *is* people moving and working even if their status is irregular or undetermined along fixed, understood, legal categories of immigration and employment. Moreover, the fluidity of contemporary practices of labour and migration enable, concretely, the neoliberal market economic system to flourish due to the availability of de-regulated labour and employment arrangements that are themselves in the shadow of the law. Thus, the *ecotechnics* that is how persons live and work together makes concrete the modern 'globalised' market economic system and the current framework of the labour market. The labourers who work in precarious employment are the materiality, inscribed as irregular meanwhile their diversity and presence is exscribed, of eco-technics. This materiality is 'the affect-medium in which objects endure (appear and fade away).'[236] Materiality, like a body, is not an instance or a set definition, but resists itself as a singular expression because it is a happening of being in a form and presence. Thus the materiality of physical labourers who are able and ready to work in low-waged, low-skilled, bottom end labour, and supply the demand for cheap, precarious flexible workers in the UK

[234] Nancy, *Sense of the World*, 10.

[235] Nancy, *Sense of the World*, 14.

[236] Warwick Mules, "Creativity, singularity and techné" *Angelaki* 3:1 (2006), ftn 13, 83-84, reference to Nancy, *The Birth to Presence*, 9-35: 22.

not only allows the labour market and economic system to continue, but depends on the legal framework to omit and obscure the regulation of exploited workers.

To return again to Nancy's own theoretical exploration of these concepts, the material bodies-at-work, which are the building blocks of the politics of the (k)not[237], can be thought of as technē. Technē is a philosophical term that refers to the 'craft' of what moves towards experience 'while simultaneously staying at arm's length (experience is kept at a distance by calculation or the production of 'good form').[238] Technē is akin to technique, and the technique of the present, according to Nancy, is a 'calculated operation', a 'procedure' whereby what is produced is not 'with a view to another thing or a use, but with a view to its very production, that is, its exposition.'[239] The eco-*technical* aspect of the political-juridical-ecotechnical approach to labour migration therefore brings attention to this exposition and law as tracing this exposition (again, in my words, the *happening*) rather than law as fixing 'use' and 'productivity' of present experiences. I will return to this in the final chapter where I consider care and care work through a bodily ontology.

In drawing on Nancy's notion of *sense,* we locate the *sense* of what is not the Other, but precedes 'itself' and 'other' as what *is* in the world.[240] In other words, as discussed above with regard to labour migration and IML maintaining the labour market and economic system, *sense* is what escapes signification, but still *is* part of experience and part of what is the world.[241] In Nancy's words, 'sense will defer itself and will differ always from all that you will seize, from all philosophy, and yet you will have had a sense of it, and philosophy will have the sense precisely of this.'[242] In order to understand eco-technics*,* it is important to note that sense is a material

[237] Nancy, *Sense of the World*, 103.

[238] Mules, "Creativity, singularity and techné", 23.

[239] Jean-Luc Nancy, 'The Technique of the Present' in *On Kawara: Paintings of 40Years* Texts by Shiuji Inomata, Jean-Luc Nancy and Osho, Producer by David Zwirner (New York/London, 2004).

[240] Accordingly, 'there can be no signification of sense, because sense is the condition of possibility of signification.' Christopher Watkin, "Being Just? Ontology and Incommensurability in Nancy's Notion of Justice," in *Jean-Luc Nancy: Justice, Legality, World*, Benjamin Hutchens eds., (London: Continuum, 2012), 21.

[241] Nancy, *Sense of the World*, 55. 'Sense is the structure of the world, but hollows out therein, such that sense is the significance of the world itself'.

[242] Nancy, *Sense of the World*, 36.

experience, the materiality is the experience tied to the technē or technical processes which then is the concretisation, as discussed above, of the world.[243]

Nancy's theory is further imbued with his specific understanding of being together, in a common. Being is singular plural; the plurality forms a common, and a sociality, that is finite before it is signified. This is the starting point of Nancy's ontological questioning. In order to be *something*, to be a plurality, the *thing* is signified. The common, coming together in the singular plural is an 'inoperative community.'[244] It is inoperative because it is not some*thing*. The common, before signification, has no category and there is no inscribed aspiration toward a collective goal or agenda. The community is 'inoperative' precisely because the pursuit of, or longing for, an authentic community is a historically specific product of Western-modern thought, attributable to philosophers such as John Locke and the Social Contract, or Immanuel Kant.[245] Before signification, the common is inoperative. To bring this to the analysis in this thesis, legal categories and labels are fixed by pre-determined (false) contingencies where individuals are signified as limited subjects despite experiences that exceed the determined frameworks. In order to think away from the categories and frames of recognition that guide Western thinking and modern law[246], Nancy re-visits the term 'community' to refer to the sociality of singular beings coming together in a plurality with others that is the 'common'.

In *The Inoperative Community*, Nancy objects to conventional uses of the term community, where 'community' is used to describe a collective of individuals that can, and should, be formed.[247] This constructive approach to community is one where people are made to fit and conform to a group. Such an approach is, for Nancy, the root of totalitarianism. It is also what underlies nationalism and citizenship, where people are *made* to fit, to conform to the community of value and are subjected to a

[243] Nancy, *Sense of the World*, 58.

[244] Nancy, *The Inoperative Community*.

[245] Nancy, *Sense of the World*, 109.

[246] Fitzpatrick; also for a discussion of the emergence of these categories in 'modern philosophy' as claiming a universalism from specific historical and ideological basis see Enrique Dussel, 'Anti-Cartesian Meditations: On The Origin of the Philosophical Anti-Discourse of Modernity' *Journal for Culture and Religious Theory* 13:1 Winter 2014. p. 11-52.

[247] He is critical of community, when used in discussions of social or legal phenomena, being used to represent communitarian and socially prescriptive ideologies. For a discussion of communitarianism versus liberalism, particularism versus universalism: Devisch, *Jean-Luc Nancy,* 11.

self-affirming, overarching totality. This totality identifies its members according to an overarching governance programme that envisions a particular form of individuals in-common. Such an enforced collective can, in the extreme, result in the kind of uniformity and repression of difference seen totalitarian regimes. In ostensibly more benign or democratic contexts the idea of identifying members into a collective similarly enacts violence through enforcing power hierarchies and disparities. Identifying citizens against non-citizens can formally exclude and include persons in a community. Moreover, as discussed in chapter one, identifying a community or nation through so-called shared values reinforces powerful yet informal lines of membership in a community, based on repressing and marginalising those considered foreign or different. In using the terms originary sociality and inoperative community, Nancy re-thinks what it means to 'co'-exist in the world. Such a theoretical, and abstract re-thinking ultimately entails a resistance to the governance power of predetermined programmes and categories because it enables thinking and giving credence to the materiality of the 'co'. Configuring community as *désoeuvrement*, or inoperative is to think of the coming together of persons—inevitable because of the ontology as singular plural—as un-ravelling or in-operating pre-determined, programme-oriented categories and frameworks.

Nancy's re-thought community resists determination, and cannot be accounted for within common signification.[248] *Community* resists common definition not because of what it *is* before the definition prescribes meaning. Community, re-thought, is a *sense* of being singular plural. It is imperative to see these terms that Nancy builds on and works with not as forming isolated, defined concepts, but as together articulating his particular pursuit of ontological questioning. For instance, since publishing *The Inoperative Community,* Nancy has largely substituted 'being-together', 'being-in-common' and 'being with' for the term 'community', preferring the 'with' to the 'co-'. Nevertheless, the sense of what he is getting at, what compels using these words remains largely the same.[249] In "Confronted Community" Nancy uses the term, "unoccupied community", but agrees that there is in community, in

[248] May, "From Communal Difference to Communal Holism," 31.

[249] Thirteen years after writing *Inoperative Community*, Nancy's 2001 (original publication) 'Confronted Community' was written in response to Blanchot's *Unavowable Community*. In response to Blanchot, Nancy indicates that he is in favour of substituting 'being-together', 'being-in-common' and 'being with' for the term 'community', preferring the 'with' to the 'co-'. Jean-Luc Nancy, 'The Confronted Community' trans Amanda Macdonald *Post-Colonial Studies* 6:1 (2003), 23-36, 31.

being-with-others, always something that is 'occupied'.[250] The question of what occupies our being in the singular plural continues to drive Nancy's writing on the being-with. Nancy's pursuit of the 'with' strives to 'expose ourselves to what has gone unheard in community.'[251] What is 'unheard' is the incommensurability of the 'sharing out of singularities,' where community is nothing but this exposition: community is neither a bond nor a production of unity, but is the 'condition of our existence.'[252]

Nancy's ontological questioning, which is embedded in his notion of being singular plural, sense and ecotechnics, has the potential to alter the terrain of the concepts that guide our political, juridical and economic life: citizen, subject, sovereignty and community. These terms dominate political and philosophical thinking. The citizen and subject are 'two ways of organising community and claiming sovereignty.'[253] In practice it has become difficult to differentiate the citizen from the subject under the totalising claim of the global, proto-political community discussed in the previous chapter. The citizen is a subject-member of a nation-state, while the subject is subjected to/recognised by an authority, or a legal order. With and without citizenship status, one remains a legal subject, but as with citizenship this subjectivity differs—one may be subjected to the law as a lesser subject, a sub-citizen or subject only to legal limits and force without enjoying any of the benefits of the legal order. The proto-political order is an imagined foil to the nation-state, and permits the nation-state to structure exclusive legal recognition and interpretations of law while being constituted by purportedly inclusive labour markets, that subject

[250] According to Blanchot, community is the "sharing of 'something' which precisely, seems always already to have eluded the possibility of being considered as part of sharing.' Maurice Blanchot, *The Unavowable Community* trans. Pierre Joris (New York: Station Hill Press, 1988), 8. It is an unavowable experience, a presentation of the mortal truth, a presentation of finitude and excess without return, Blanchot, 11. Unlike the term *désoeuvrement*, translated as 'inoperative' or 'unworking', the term 'unavowable' is work that cannot let itself be communicated, but its work is no more a fact than the fact of 'being in common.' Nancy, "The Confronted Community", 33. Nancy concludes his response in 'Confronted Community' by asking, 'without god or master, without common substance, what is the secret "community" or "being-with"?' Nancy, "The Confronted Community", 34.

[251] Being-With: which is nothing but the confrontation of the 'with confronting the with', 'us confronted by us.' Nancy, *The Inoperative Community*, 26.

[252] Devisch, *Jean-Luc Nancy,* 30. Community, 'being with' or the 'being together' is elemental to the ethical-political stakes of deconstruction Devisch, 22. For Nancy, the bodily, present and material singular plural being-in-common *is*. We are always in relation within the world where a being is not total onto itself. Jean-Luc Nancy, *Being Singular Plural* trans., Robert Richardson and Anne O'Byrne (Stanford: Stanford University Press, 2000), 48. Further, being-with happens because we *are* in the world, not because we have determined a particular foundation or definition through which to speak of ourselves. Therefore Nancy's attention is to what happens under, above or beyond false contingency, rather than what may be possible to change.

[253] Morin, *Jean-Luc Nancy*, 107.

everyone to its frame via claims of a global economic order. Through Nancy's work we revisit the citizen and the subject at its core. 'I', the singular, is not completely defined by others. 'I' is not a citizen or a subject before being signified as one. Moreover, even as a citizen or a subject, 'I' maintain 'my' singularity—the sense of my singularity as well as the undeniable singularity of physical bodily form. A body can never be melded with an/other. This is physically, biologically, impossible and would cause death. I am at my limit in relation to other bodies, other singular beings, who themselves are always a singularity.[254] 'You' touches 'I' and 'I' touches 'you', neither to become one or the other, nor to know one because of the other.[255] This *happening* pursues a comprehension of being that is a radically different premise from the modern western philosophical paradigm where 'I' start from being recognised as some*thing* some*one* under a sovereign community, as a subject and citizen.

The modern paradigm and its language is indeed our inheritance. Thus the form and the language is, inevitably, what we have at our disposal and must engage with. Nevertheless, resistant attention to *sense* and the materiality of the world offers a possibility to dig into the construction of law and legal categories that have created the political phenomenon of IML and the seeming impasse of existing vocabulary and legal categorisations. This so-called impasse is the incommensurability within current legal categories and frameworks of analysis to address and deal with what is exscribed in the shadows of the law. Attention to ecotechnics and the shift towards sense and deconstruction based on the very materiality of what is happening in the world—what my methodological approach calls for—aims to identify the messiness of labour and migration within the current market practices that are in tension with legal regimes.

If we think about labour and migration in this way, then we think away from pre-existing categories—we are all merely bodies. But then what of the existing law and the force of the law, including its violence? If law is what traces the eco-technical circulation of capital, and of bodies, it is still a part of our sociality and a result of the

[254] Further, the singular plural cannot be configured as a dialectic of you versus I, or I versus you. Nancy interrupts a dialectic turn with the singular plural as what touches on the limit of our (individual) thinking. This thinking has been framed through Cartesian ideas of a split mind and body, as well as notions of the individual represented through concepts of subjectivity and sovereignty. Nancy resists such a split, and the limits of these modern philosophical concepts. Benjamin Pryor, "Law in Abandon: Jean-Luc Nancy and the Critical Study of Law," *Law and Critique* 15 (2004): 259-285, 279.

[255] See Derrida, *On-Touching*.

sociality. Law does not externally define the sociality, but is a technique of intelligibility: a technique that is employed by those in positions of power to make intelligible their 'community of value' as if it were universal. Thus, within the sociality, power immediately determines how the law traces the plurality. We cannot escape this determination, even through calls for justice—justice is part of the lexicon of modern law, and reinforces falsely universalising notions of equality, access and fairness, which remain contingent on the nation-state, citizenship and market economic values (such as socio-economic status). Thus, within the resistance to determination and unexamined acceptance of false contingency we must also resist thinking of law as ever capable of addressing the totality of our existence. If law is the trace of sociality, it must come from the sociality itself, and it is the very movement that continues to circulate (ecotechnics) as the *sense of the world*, wherein those who claim authorship over the law (power) would not be in power without the labourers and migration that maintains economic circulation and systems. Moreover citizenship would not be privileged were it not for the non-citizen, or migrant; the regular cannot exist without the irregular. The authority therefore is contingent on obscuring the interconnection of production and reproduction with economic market prosperity. Nancy's re-thinking of the citizen, subject, sovereignty and community therefore involves uprooting these false contingencies without knowing what revealing their 'grey areas' will spark—yet this 'revealing' is only turning our attention to was is already happening, what is *struction*, circulating in the eco-technics of the world. There is nothing new, nothing created or constructed.

The *sense* of what is happening is what goes unheard in community as it is fixed and constituted. It is what is *exscribed* away from the text that is inscribed. *Sense* writes towards the fact that abandonment is at the heart of community; the community or any 'common' is at once present and fragmented. The community, like law, is no*thing.* The only possibility of justice, therefore, is 'the exposition of finitude and abandonment in community.'[256] So long as our thinking of community is concerned with establishing definitions and borders to identify, name and solidify experience and presence, then justice is definitively avoided. Our thinking of labour migration is confined to thinking of who is let into the community and whose membership is withheld. Labour and migration circulate in closed discursive

[256] Pryor, 'Law in Abandon', 274.

conditions of possibility, where contingencies remain bound to the nation-state and citizenship. According to Susan Marks, this is how *determinism* versus determination functions behind intellectual ideas and limits—the possibility of thinking about labour migration is determined by the categories that are referenced as frameworks of recognition. Attention to ecotechnics opens these frameworks because the circulation of capital transcends the order of the nation-state. The privilege of dominant paradigms prevents us from observing how the system itself depends on precarious, 'irregular' labourers. Thus in order to 'dethrone' this privilege,[257] false contingency analyses, when applied to the discussion of irregular statuses—in particular advocacy efforts towards legalisation and regularisation of status—demonstrates that the *necessity* of legal status and the equation of legal status with citizenship is historically specific. Access to rights, legal recognition and circumvention of exploitation of one's labour are contingent on holding legal status, legal subjectivity, within the nation-state. Such that when advocacy efforts aim to include persons considered 'irregular' into 'regular' categories, they reaffirm the very system that will, as a consequence of its very foundation, withhold recognition to those necessarily deemed 'irregular'.

As discussed in the first chapter, false contingency builds on the idea of false necessity. Roberto Unger uses the term 'false necessity' to refer to what we accept, without reservation, as essential conditions for order in our society and world. The economic market is prioritised over social welfare, under the belief that if the market is 'happy' then a society's welfare will be provided for. This ideology reveals a 'false necessity' of economic growth: needing to keep the market happy. To a large extent, the concept of false necessity is broadly recognised and critiqued. Legal pluralism and socio-legal studies have exposed how the dominant legal system of the nation-state and economic participation according to that particular legal order are based in the belief that the legal and economic system is universal and necessary. Marks extends a false necessity critique to explore more deeply what are underlying false contingencies. The critique of false necessity would assist in refuting claims that IML is a category identifying persons who are in 'irregular' situations based on their own transgression and that facilitating their regularisation to citizenship status is of paramount importance. Whereas an analysis mindful of false contingencies offers a way to speak outside of what are assumed to be the only conditions of possibility:

[257] Marks, "False Contingency", 12-13.

recognition in the nation-state through becoming 'regular' and a 'citizen'. Formal, legal citizenship is conditioned by false contingency, by limited conditions of possibility for recognising membership and participation.

IML suggests an outsider status, different from categories of citizen and employee. Identifying workers who are participating in the labour market as if they were irregular and foreign reinforces an idea of who is 'regular' and 'inside'. However the persons who may be considered IML are participating 'inside' in various ways. Underlying the label, IML, is the false contingency of regular labour, and how labour is recognised. Regular labour is consolidated through legal identities and definitions that recognise employment relationships but are founded in principles of citizenship as mediating participation in the collective community of the nation-state. One's access to 'rights' is contingent on recognition within a nation-state as equal to citizenship. However, the nation-state is a relatively recent historical phenomenon.[258] Furthermore, the priorities of a globalised economic market system and economic growth can trump practices, or presumed entitlements, of citizenship. Citizenship is differentiated according to economic power and productivity in much the same way as the power of sovereign states is hierarchically valued in the international sphere according to financial wealth.

Whereas legal scholars may be familiar with acknowledging variations of regulatory regimes and legal structures, awareness of false contingency in nation-state centric legal systems requires paying attention to how particular ideas come to be privileged, such that what is considered to be necessary may be rewritten as contingency.[259] As previously noted, having a low-waged, flexible temporary labour force is considered to be necessary to keep the market 'happy' and for the UK to maintain global economic competitiveness. This is rewritten as contingency when having a low-waged, 'irregular', casual, precarious labour force is seen as the only way to maintain labour in the twenty-first century. It is no longer merely advantageous for the economic market; it transforms into the *only* possibility of managing labour demand and supply.

[258] Marks, "False Contingency", 3-4.

[259] Marks, "False Contingency", 15.

Marks urges legal scholars to pay attention to the way in which our scholarship can reinforce limited and deterministic (ideological) frameworks. Academic scholarship that addresses labour and migration can, unintentionally, reproduce assumptions suggesting abuses and precarious vulnerable work are 'random, accidental or arbitrary'[260] and therefore scholars neglect to analyse why 'irregular' situations/categories persist. False contingencies are false in that they offer a false sense of resolution while underlying systems of belief (ideology) and "planned misery" are obscured.[261] Marks does not suggest that proposed conditions and frameworks alternative to the subject of critique would be less false. Nevertheless, the process of calling attention to limited conditions of possibility and making them contingencies rather than necessities creates a site for difference.[262] Asking why necessities exist and what logics our critique follow, reveal the structures that 'mask historicity of existing arrangements and prevent us from grasping their contingency, provisionality and hence, their mutability.'[263]

Exposing false contingency reveals false necessity's myths that uphold an established order made to seem normal, and the only way of being. Necessity may not be *un*noticed, but it is disguised. Acting as if the nation-state legal system was self-explanatory and market participation a key aspect of one's citizenship and valuable participation in society may still inform our work in spite of recognising that the nation-state system is not the only system of organising law and populations.[264] As a consequence of not being held in relief against the possibility of other experiences and frameworks or conditions, 'injustices of the present order are made to appear as though they were random, accidental and arbitrary. And if they are random, accidental and arbitrary, then the prospects of changing them become every bit as remote as if

[260] Marks, "Human Rights and Root Causes", 74.

[261] Marks's term, 'planned misery' comes from Naomi Klein, *Shock Doctrine* (Allen Lane: London, 2007), cited in Susan Marks, "Human Rights and Root Causes." *Modern Law Review* 74:1 (2011): 57-78, 75.

[262] Contingencies are false in that they seem to provide answers to a problem, but the conditions of the answers come from the same framework that forms the problem in the first instance. False contingencies are not inherently wrong in relation to something else that is true.

[263] Marks, "False Contingency", 2. Marks acknowledges that traditionally legal scholars shy away from identifying historical specificity due to a fear of determinism. Marks does not advocate for determinism in the traditional Marxist sense. Her call is to bring attention to the process of determination where limits and conditions are affirmed and create "false" contingencies that are "false in what they exclude." Marks, "False Contingency", 17. Marks cites Terry Eagleton on ideological statements: "true in what they affirm, but false in what they exclude." Terry Eagleton, *Ideology: An Introduction* (London: Verso, 1991), 16.

[264] Necessity may not be unnoticed, but 'what we may still fail to recognise are the effects of acting as if it is; we may fail to see how this impacts upon lived reality.' Marks, "False Contingency", 18.

they were fated.'[265] Thinking otherwise or differently becomes impossible because all possibilities are conditioned through a paradigm that remains unaware of its own limits and existence as a paradigm. The matrix of false necessity and false contingency prevent imagining alternative possibilities outside the most familiar framework.[266]

False contingency, as part of a methodological approach names a process of conceptual *de-familiarisation* that aims to open up the possibility of alternatives that are not rooted in the same dominant frameworks of the nation-state, market economy and law. De-familiarisation is a process or technique of critical theory. As discussed in the previous chapter, de-familiarisation is a process of 'dis-identification' distancing from familiar, normative values.[267] Rosi Braidotti writes in reference to the idea of the human and human subject, but her affirmation that the 'loss of familiar habits of thought and representation' can 'pave the way for creative alternatives'[268] is akin to drawing out false contingency to open unto conditions previously thought to be impossible. Immigration law and employment (labour) law reflect a specific version of contingent conditions of possibility. Within the international political system and global market economy, these specific versions are accepted as if they were natural. The citizen, the employee, and the legal subject, much like the global market, are presumed to be necessary categories that inform the conditions of possibility of our sociality, community and world. These categories frame possibilities and alternatives for difference. The global market economy can, for instance, be traced to the nineteenth century.[269] The consolidation of a market economic system was not natural or inevitable, but based on ideas of individual free market exchange emerging from previous forms of association and systems of organising economic exchange. A market society however developed as subordinated to the market economy, rather than the market economic system existing as one of many possibilities for economic systems and exchange. The false contingency critique

[265] Marks, "False Contingency", 20.

[266] Marks, "False Contingency", 13: The topics of critique in our work are based in a particular logic, not just 'a logic within the argument' but a 'logic stretching beyond it, a "bigger picture" of which this was a part.'

[267] Rosi Braidotti, *The PostHuman,* 89.

[268] Braidotti, *The PostHuman,* 88-89.

[269] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 2nd).

of IML is partially about questioning the primacy of the particular labour market as it is wedding to processes of neoliberalisation demonstrated in the economic priorities of the UK government (allowing for firms to access cheap, flexible labour) and unexamined acceptance of a global economic market 'system'. The other part of the critique recognises the shortcomings of existing scholarship that has proposed alternatives to remedy the situation of IML, where scholarship can, unintentionally, reproduce the same limited contingencies that reinforce the market economic system (like the proto-political community).

Conclusion

By approaching the phenomenon of IML from the three angles, political-juridical-ecotechnical, I aim to unearth how and why IML continues to be identified as an issue of public concern in the UK. False contingencies underlie legislative attempts and proposed (theoretical) alternatives to remedy persons considered 'irregular' and 'migrant'. Ecotechnics focuses on the bodies-at-work in the labour market rather than on the legal categories that seek to order and define people as citizens versus non-citizens. Law is deconstructed, via Nancy's attention to the technē and sense of bodies in their circulation and sociality, and re-thought as tracing the processes of persons as an incommensurable ecology.[270]

The value of this methodology lies in its resistance to the proliferation of legal principles. Rather than think of alternatives through more categories or broader legal instruments, I endeavour to think what it might mean to return to the political, ethical and justice claims that are rooted in the heart of law and its imperative. Anna Grear writes, 'There is a need for law to face up to and embrace a certain non-negotiability of *ethical* demand emerging from the implications of living materiality itself.'[271] This

[270] 'We are in the technē of the neighbour', the sharing bodes in the technē. This technē refers to the various ways that trace the *areality* along which we are *exposed together*, 'not presupposed in a subject, not post-posed in some particular and/or universal end.' Jean-Luc Nancy, *Corpus*, 91.

[271] Anna Grear, 'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject,' in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* Martha Albertson Fineman and Anna Grear eds., (London: Ashgate, 2013), 31.

demand involves resisting 'the disembodying closures of the liberal juridical order,'[272] which in other words predetermine conditions of possibility. The liberal juridical order is based on a false contingency that presents a false sense of resolution by making a claim to a total, universal order—as if legal citizenship, as discussed above, could bring all citizens equality, justice and protection. The liberal, juridical order cannot within its framework comprehend the contradictions and contestation of bodies. Meanwhile, the market economic system working within (and without) this order thrives on the incoherence and irregularity of these bodies, at-work and moving across borders.

The reality of precariousness and ambiguity of the label IML draws our attention to the way that existing categories are unable to define the experiences of labour migration and precarity. The fact that labourers and their labour position are considered 'irregular' disrupts the language, categories and organisation of labour, which cannot be reconciled with sociality as something that is in movement, and in continuous process of becoming. Whether the disruption is a product of workers' status, defined 'legally', or the stratification of citizenship, it marks the inadequacy of the frameworks of subject and citizen. The 'irregular' disrupts as it appeals for the incommensurable manifestation of the singular plural.

IML exposes and abandons us to the incommensurable. In Nancy's words,

> *A moment arrives when one can no longer feel anything but anger, an absolute anger, against so many discourses, so many texts that have no other care than to make a little more sense, to redo or perfect delicate works of signification. That is why, if I speak here of birth, I will not try to make it into one more accretion of sense. I will rather leave it, if this is possible, as the lack of "sense" that it "is." I will leave it exposed, abandoned.*[273]

[272] Fineman and Grear, *Vulnerability*, 31. The vulnerable subject is 'embodied and affectable in the structural "unevenness" of the globalised world order, which she contrasts with the mythical "evenness" of the juridical plane implied by the formally equal actors at the heart of liberal legal theory.'

[273] Nancy, *The Birth to Presence*, 5.

Thinking of Nancy's philosophical thought in the context of IML moves scholarship away from a focus on the legal universe, or law and legality as some*thing* that encapsulates and encompasses, or not, community into its fold. This does not deny the power of law to be enforced, experienced and resisted. In fact resistance, is central to Nancy's thinking of being/being-with. This is the resistance within engaging with *sense* rather than categories, of delving into the messiness of ecotechnics as processes of liberalisation shape labour relations at the level not of legislative changes, but material practices and relationships we engage in as workers, consumers, employers, citizens and beings. In place of a universalising claim for law or the opposite being a denial of law, 'we are then left with a radiant paradox: the *law guarantees the outlaw*, it guarantees the exception to the exception indeed it becomes their condition of possibility.' [274] Thus law itself—juridical and existential—is complicit in the ambiguous category of IML. However the ways in which IML is left unquestioned is not an inevitability of law, but rather a failure to interrogate the categories that are perceived as natural contingencies assumed to be the only possibilities, thereby obscuring the processes subjugating particular persons and workers. A politics of the (k)not, ties and unties material experience as it is *struction.* The relations happening here open towards a radical critique of the political-juridical systems that depend on maintaining the eco-technical happening of labour, market and populations of people coming together in grey areas.

The blanket use of the label IML demonstrates the constraints of 'legal, social and cultural circumstances in which [we] are embedded.'[275] These circumstances are experienced in neighbourhoods, households, workplaces, schools and bureaucracies. The border of the nation-state, which I discussed in the previous chapter as membership in the community of value, is enforced at various points of time and space to distinguish between those included 'inside' the nation as Good Citizens and those ambiguously maintained 'outside' as sub- or Failed Citizens. Yet the experience of these legal, social and cultural circumstances exceeds the boundaries imposed through categories of identification. This excess of categories is evident in how we

[274] Gilbert Leung, "Abandonment," in *The Jean-Luc Nancy Dictionary*, Gratton and Morin, pg. n/a.

[275] Bauder, *Labour Movement*, 200.

relate to each other in our basic relational living experience, socially being together day-to-day, and also in the way that the category of irregular migrant labour itself exceeds definitive lines of what is 'legal' versus 'illegal'. The label IML acts therefore not as a catch-all, but as an empty signifier of discrimination, marginalisation and vulnerability to abuse and exploitation. IML is not a legal category, and yet it is used as if the label captured a transgressive, *extra*legal labour force. Meanwhile irregularity, precariousness and foreign-ness are experiences shared by persons with citizenship status and those considered non-citizens. The experiences at the nexus of the category irregular migrant labour are, in Jean-Luc Nancy's words, *exscribed,* beyond inscribed legal frameworks and political terms. Experiences are necessarily exscribed, but the way in which IML exscribes by inscribing (how the label IML perpetuates an inclusion-as-exclusion) demands attention due to the harmful situations labourers, rendered to positions of sub-citizenship, find themselves in.

A critical legal perspective recognises how with the multiple assumptions of power, in the name of justice and law, beings are constituted through recognition of their continuous becoming subjects. Political/cultural/social factors inform and categorise becoming subjects, but what is *exscribed* always escapes the category. Exscription, according to Nancy, is not a surreal beyond, such as thinking of the metaphysics of Being. Rather the exscribed is the material happening that is written out of the text—in some sense 'formally' unaccounted for, but part of the happening. The exscribed forms and informs the imperative of law to be a continuous process but also Nancy's work opens onto a deeper critique of subjectivity itself. Law, in the sense of grappling with both the inscription and the constant exscription, is more than any one structure, system or meaning. At the same time, law is nothing without the infusion of meaning via conditions of order, regulation, and limit.

The task is not to make law 'differently', but firstly to expose and resist the totalising presence of law—where law is posited and problematised as if it were an absolute, and total, authority. Law maintains a sense of what is exscribed because it assumes a relationship with justice. Secondly, the challenge is not to lose sight of law as a regulatory limit that articulates the definition of a sociality, a population living and working together, in-common, and the imperative of law's force. Law, according

to Nancy, traces the limit of persons coming together and forming an in-common. But as a tracing, law is also what renders 'inoperative' coming together, 'operative', when bound into prescribed (legal) limits. This is where law is incalculable: it is both a movement and a fixed limit. Law is also incommensurable with being defined as some*thing* just as our sociality is incommensurable with the singular plural of being. The radiant paradox of law, if it grapples with a process of sociality as becoming rather than assuming law is fixed or stagnant (either in its notion of justice or regulation), subverts the false contingency where law occupies a total presence as a predetermined authority mediated through the structure of the nation-state and citizenship, or through extra-national, post-national governance.

Chapter 3. Immigration law and the construction of irregular migrant labour

Immigration law plays a critical role in constituting IML. Immigration law presumes the necessity of a nation-state government to mediate access to residence and citizenship status within its borders and jurisdiction. Citizenship is desirable, and sought after, because formally it identifies the legal subjects of the nation-state. For instance, even if the United Nations recognises that each human being is endowed with 'rights', it is the nation-state that recognises a person as a member of the nation and therefore a legal subject of the state. International legal instruments and UK immigration laws support this structure of recognition through the nation-state.[276] Indeed it is difficult to conceptualise our identity and sociality, the 'common' Nancy writes of, beyond the framework of nation-state and its legal regime. Critical theories of migration and citizenship may trouble nation-state centric boundaries that privilege citizenship. They interrogate the role played by law to recognise and restrict membership via immigration rules and to enforce distinctions between legal and illegal migration. However, some critical perspectives on citizenship and immigration law, which will be discussed in this chapter do not acknowledge or question the false contingency of citizenship and legal subjectivity that forms the building blocks of how we conceive of our identity in-common. Thus the necessity of citizenship remains unquestioned. The inscription of migration and labour as regular or irregular as if remedied through attaining citizenship supports a false contingency of subjectivity and recognition. Contingencies, which form conditions of possibility, are based not on the experience (inscribed and exscribed) of migration and labour, but on predetermined frameworks. These frameworks support categories of recognition

[276] International legal instruments, particularly those regarding human rights, are commonly thought of as capturing what amounts to a 'proto-political' community or humanity. 'Proto-political', comes from Hans Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, M. Loughlin and N. Walker eds., 9-24 (Oxford: Oxford University Press, 2007), 9.

according to the movement of the market economic system and processes of neoliberalisation.

This chapter applies the political-juridical-ecotechnical methodology by identifying false contingency in immigration law and scholarship.[277] After considering subjectivity and the shortcomings of legal rights and human rights provisions beyond the nation-state, I examine UK immigration law in relation to the constitution of the label IML. IML, and indeed the individuals experiencing precarious labour situations and considered to be foreign migrants, can neither be identified nor remedied through immigration law and conventional deliberations of citizenship and the nation-state border alone. IML, grouping together persons in the legal grey areas of immigration law, reveals the false contingency of citizenship against the false necessity of the market economic system. Both citizenship and the market are inscribed as the conditions of possibility for recognition, status and legal subjectivity. Meanwhile the existence of such elusive irregular labourers permits labour practices (and thus, in practice recognition) that are in excess of the frame of citizenship and that evade existing formal labour laws to employ people maintained in the shadows of full legal subjectivity. IML therefore is not only allowed, but constitutes a regular feature of low-waged, low-skilled labour markets (demand and supply).

Throughout Europe, 'the proliferation of laws on immigration has given rise to enormous legislative efforts, some virulent debates, a degree of legal uncertainty as to the law applicable to the facts in a given case, and procedural ambiguities that give police considerable latitude, but it has not changed the demographic and economic realities.'[278] Dider Bigo argues that policies, state and regional, that have tried to regulate, control and order migration have failed. Bigo suggests policy-makers have, for example, ignored research that shows how prohibition policies create more problems, including a professionalisation of fraud. Instead law and policy continues along the *insecurity continuum* that builds on fears of an im/migrant threat. Furthermore, immigration law, in spite of attempting to tackle the problem of IML, in

[277] Labour law will be discussed separately in chapter four.

[278] Dider Bigo, "Reflections on Immigration Controls and Free Movement in Europe." In *Constructing and Imagining Labour Migration*, Elspeth Guild and Sandra Mantu eds., 293-305 (London: Ashgate, 2011), 294.

effect maintain persons as IML.[279] Irregularity establishes insecurity as a state of being. Although immigration law purports to control borders,[280] immigration law and policies are in practice largely subservient to labour market and economic factors that are exscribed from the nation-state centric law. Immigration law sanctions the market by demanding a limited, contingent legal subjectivity where persons are differentiated not only due to immigration status, but as well based on their economic market productivity and value. In other words, their place in the labour market as low-waged, low-skilled equates these workers with 'irregular migrant' status. A precarious labour force, considered IML, is preferred and encouraged so long as these workers remain in the legal grey areas that allow their labour to be exploited. These grey areas exist as a consequence of false contingency of citizenship. Yet the labour market demand for 'irregular' workers—racialised, marginalised, and 'migrant'—reveals the ecotechnical circulation of labour, bodies and capital beyond conventional legal measures and categories.[281]

Law and the Subject

Costas Douzinas describes the legal subject as paradoxically both 'the subject of law or *subjectum* the holder of rights and the bearer of duties and responsibilities' and 'the subject as *subjectus* subjected to law, brought to life by law's protocols,

[279] Bigo, "Reflections on Immigration Controls", 294.

[280] Immigration law is identified as the legal field responsible for persons considered migrant labourers, since crossing borders instigates a 'dynamic and on-going process of status determination.' Guild and Mantu, *Constructing and Imagining Labour Migration*, 3.

[281] This is the case not only in the UK. Guild and Mantu, *Constructing and Imagining Labour Migration*, 'The Appearance of Control: Examining labour migration regimes with high control claims' (135) analyses countries that appear to be in control of their migration policies, and how the realities are nuanced or silenced. Chapters in this section discuss Canada, the EU, Australia and Japan, exposing competing interests and priorities, as well as how global competition and economic priorities take precedence over rights and overt claims of immigration law's priorities and limits. The needs of the economy in Canada, for example, demonstrate a need for "low-skilled" migrants. However, the image and rhetoric of Canadian immigration policy favours high-skilled migrants, and lower-waged labour migrants employed in the country are not recognized formally and given rights such as access to citizenship (Christina Gabriel, chapter 6, 137-155). Anais Faure Atger's chapter on "Competing Interests in the Europeanization of Labour Migration Rules" (157-174) discusses how European Union Directives ultimately are not harmonized and the protection of rights of third country nationals is left up to the individual employers, rather than controlled by the EU. The fragmentation within the EU further criminalizes irregular migrants and push towards undocumented labour. The case of Japan, explored by Midori Okabe illuminates how changes in labour needs/demand/influences are not reflected in immigration law and policy, and this disconnect is attributed not to economic concerns, but international security concerns.

shaped by law's demands and rewards.'[282] Here, law functions as both something binding (static), and something fluid, actively being redefined. Writing in the context of international law, Juliette Rogers argues that the legal subject is split amongst differentiated bodies such that certain people are *subjectum* while others are only *subjectus*. 'Regular' citizens (male, Western) are seen as subjects of the law (*subjectum, state belongs to them*). In contrast, marginalised beings are subjected to the law (*subjectus, they belong to the state*).[283] The persons assumed to be IML appear to be in the latter category, what I've referred to previously as sub-citizens. The absence of vocabulary to unpack who and what IML are, in legislation or UK case law demonstrates IML's exclusion. However, these labourers are not practically excluded from residence, work and employment in spite of possibly being excluded from the legal status of 'employee' as will be discussed in chapter four. The inscription of IML indicates how the assignation of this identity relates to the state—a person's identity of 'irregular' and 'migrant' is in reference to the regular citizen of the nation-state. However to gain membership as a regular citizen is to participate in the community of value, not merely to attain legal citizenship status. The precarity and vulnerability of persons in labour situations that are in legal grey areas is precisely a consequence of certain persons being located within the nation-state where their participation is obscured but not prohibited. These persons are present but invalidated, thus 'irregular'. The economic role of persons considered IML is to fill a gap in the labour market and thus their partial subjectivity continues without remedy. IML are recognised and subjected to the law, in that they are identified as being *not*-regular, *not*-permanent citizens. But their subjectivity is not equal to 'Good Citizens' (regular) who are participating agents of the law, *subjectum*. When the effects of IML in the labour market are felt, such as downward pressure on wages, IML are identified and blamed, but not as individuals with power in the law. Rather IML is addressed through calls for stricter immigration law and immigration controls to exclude these 'foreigners'.

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[282] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century,* (Oxford, Portland: Hart Publishing, 2000), 183. Douzinas further notes, "We think of the subject as the exclusive vehicle of freedom, perhaps because the split is no longer fully apparent as it was in pre-revolutionary Europe; the subjectum/subjectus dyad has been fully internalised and the law, self-given and externally imposed, already inhabits and conceals itself in the recesses of the self." Douzinas, 226.

[283] Juliet Rogers frames this in terms of the female body and FGM: "Flesh Made Law: The Economics of Female Genital Mutilation Legislation" in *International Law and its Others*, Anne Orford ed., (Cambridge: Cambridge University Press, 2006), 364.

Douzinas's paradox of the legal subject rather than lying within one person/subject can depend on one's position relative to citizenship and the nation-state. In other words, it is from within the exercises of state power that subjectivity is distinguished. Persons may be subjected to the state, but only insofar as they are *subjectus*—belonging to the state. However, subjectivity, the condition of being a *subject*, is not a sovereign precondition of action and thought. More accurately, the condition of being is subsumed to the authority of the state through the idea of the Subject. This state of being parallels Judith Butler's analysis of legal dispossession.[284] According to Butler, it is state power that produces, maintains and continues legal dispossession. Legal dispossession detracts subjectivity but only insofar as subjectivity is predetermined as an essential condition of the subject. In and of itself the subject is a 'socially produced "agent" and "deliberator" whose agency and thought is made possible by a language that precedes that "I".' [285] The 'I' is produced through power and exercises of power in politics and law determines who can be a subject. 'I' means inclusion, and dispossession is the exclusion of the 'I'. Nevertheless, politics and law determine the subject as 'a differential effect or power', not as a precondition of politics. There is *being* that comes before, or after, the subject, exscribed away from these politics and law. This being is, in Nancy's work, the *being singular plural* where the *sense* of being is materially experienced in our very bodies, away from the categories that precondition Being. Bodies are not an item able to be objectively viewed and analysed; instead bodies are *sense,* they *happen.* Bodies experience exscription and inscription. It is the bodies of labourers relegated to so-called irregular situations that meet the current labour market demand for precarious flexible, cheap, labour. The 'regular' legal subject *seems* to occupy the language of how, what and why bodies come together. But there are persons—bodies—that are kept out of the definition of the subject, all the while identified as part of subjectivity. This is, again, what Butler discusses as the *dispossessed*: persons who are dis-possessed with reference to the state that prescribes *possession* of subjectivity and status. Individuals are identified as dispossessed or irregular because their being is only understood in reference to the limited frame of recognition, and within this frame the 'irregular' is what does not fit into the 'regular'. This limited

[284] See Judith Butler, *Precarious Life: The Powers of Mourning and Violence,* (London, New York: Verso, 2004), 10-13.

[285] Butler, *Precarious Life,* iii.

frame of recognition is the false contingency of state/citizenship/economic market and can include immigrants, foreign nationals, women, non-marketised workers of various kinds, 'criminals' and other such sub-citizens distanced from the community of value.

While it seems that what makes a person recognisable is their subjectivity, 'to be a subject at all requires first complying with certain norms that govern recognition – that make a person recognisable.'[286] For Butler, the critique of subjectivity illustrates the gender and sexual norms that govern our social relations and recognition, that pre-empt and determine relations in the sociality. The originary sociality is denied because the subjectivity is constituted by the normative force of predetermine recognition. IML further exposes the relationships of power and law that determine what is recognised participation in the nation-state. The complexity of these relationships deepens with the intersection of labour market priorities and economic productivity, where irregular status is beneficial to capital growth.

In summary of this initial opening, the legal subject can be understood as split between the *subjectum*—where the state belongs to them—and the *subjectus*—where they are subjected before the law. The *subjectum*, where the state belongs to them, are those included within the 'regular' or the Good Citizen. The status of the subject is always made in reference to the Good Citizen. In the UK, this Citizen is British, economically productive in a standard employment relationship. The *subjectum*, Good Citizen, provides a reference point, or grounding[287], from which the IML is differentiated. Persons considered to be IML are not denied subjectivity, but are *subjectus*, subjected before the law. They cannot be otherwise unless they conform to the parameters of Good and worthy membership in the community of value and standard employment. The movement from *subjectus* to *subjectum*, however, is unlikely because of the priorities of economic growth and demand for cheap, flexible temporary labour. One may hold citizenship, as discussed in chapter one, but remain an IML—as if they were irregular, temporary and foreign—in order to fill the labour market demand for precarious low-waged, low-skilled labour.

[286] 'And so, non-compliance calls into question the viability of one's life, the ontological conditions of one's persistence. We think of subjects as the kind of beings who ask for recognition in the law or in political life; but perhaps the more important issue is how the terms of recognition—and here was can include a number of gender and sexual norms—condition in advance who will count as a subject, and who will not.' Butler, *Precarious Life,* iv.

[287] James, *The Fragmentary Demand*, 53.

Jean-Luc Nancy's exploration of exscription, as discussed in the previous chapter, can suggest that those who do not comply with the norms of society are the *exscribed* of subjectum. However, it is not sufficient to identify IML as the *exscription* of the subjectum. IML *inscribes* difference as 'irregular' 'migrant' 'labour'. The inscription suggests that persons considered within this label are justifiably different and can be treated as sub-citizens based on the presumptions of citizenship and regular, standard employment as paramount to 'full' legal subjectivity. Thus in order to think away from the legal subject-as-citizen, we must rethink the exscribed, or in Butler's words think of what comes after the subject. Butler and Nancy's work converge where both theorists identify the significance of what is left out of the text of legal subjectivity, where the Subject assumes a universal and total presence. Because of the dominance of the Subject, we struggle to conceptualise what may be before or beyond the subject. However, Nancy's work suggests that the corporeal materiality of the body, the sense of the world as the coming together of persons in-common, is *struction.* Struction is not about identifying subjectivity because the subject is made in reference to false contingency. This false contingency involves immigration law as the border controlling citizenship, but even more fundamentally, the idea of the individual autonomous subject with power over and in the law.

The very notion of subject and subjectivity refers to a particular historical and philosophical context: the shift from feudal relations (status) to 'modern social and legal relations' (contract), when 'the liberal individual became the fundamental unity of law.'[288] According to Anna Grear, '[a]rguably the most complete conflation between personhood and rights-bearing status or legal subjectivity was achieved with the historical emergence of liberal individualism.'[289] The subjectification of the individual follows from the belief that the individual can be an essence, a totality in and of itself, and an economically productive unit. The individual subject is recognised and subsumed (*subjectum* and *subjectus*) under the authority of the law

[288] Anna Grear referencing Nekam 1938, 49, "The legal "person" had become the archetypal manifestation, arguably, of naturalist philosophical commitments." A. Nekam, *The Personality Conception of the Legal Entity* (Boston: Harvard University Press, 1938), in Anna Grear, "Law's Entities: Complexity, Plasticity and Justice." *Jurisprudence* 4, no. 1 (2013): 76-101, 83.

[289] Anna Grear, "Law's Entities: Complexity, Plasticity and Justice." *Jurisprudence* 4, no. 1 (2013): 76-101.

spoken through the juris-diction of the nation-state.[290] Individuals are thereby subjected under the universal claim of law as it is entangled within a proto-political community assumed to transcend beyond the nation-state itself, but ordered through the nation-state. Subjectivity in the law is presumed to provide individuals with rights and freedoms that precede the nation-state via a proto-political community, where the idea of legal subjectivity is shared. The proto-political community is implied through the frame of the nation-state that exscribes a universal, common and all-encompassing legal space 'in which, in principle, everyone has her/his own place.'[291] Although citizenship is embroiled within this construction of the individual and recognition, citizenship is assumed to be a reflection of subjectivity, where 'modern man is the law's *subject* in a double sense: he is the legislator, the subject who gives the law and the legal subject, subjected to the law on condition that he has participated in its legislation.'[292] The legal subject is a citizen and much more than a citizen because this recognition extends to the proto-political community.

Modern man, or the liberal individual subject (gendered and racialised), can be paralleled with Anderson's description of the practice of citizenship via the Good Citizen as a member in the community of value. Anderson discusses citizenship rather than subjectivity; nevertheless she identifies how citizenship, like Rogers's subjectum/subjectus split, is experienced and differentiated with reference not to formal legal recognition in the nation-state, but through what is given value or seen as worthy and deserving of recognition. The community of value is the domain of the *subjectum,* while the *subjectus* are the Failed Citizens who do not share, or participate in, the community of value. Failed Citizens (or sub-citizens) experience legal dispossession beyond the limits of the sayable, formal law. They are not denied subjectivity, as I will demonstrate below when looking at legislation (national and international) that addresses IML. Yet people that can be referred to under the label of IML are considered 'failures' because their presence and activity are always measured

[290] Shaunnagh Dorsett and Shaun McVeigh, *Juris-diction* (Oxford: Routledge, 2012).

[291] Hans Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, M. Loughlin and N. Walker eds., 9-24 (Oxford: Oxford University Press, 2007), 9.

[292] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, Portland: Hart Publishing, 2000), 193.

in reference to subjectivity interpreted through notions of the individual, liberal economic Subject, which is also the Good Citizen.

Failed citizens are made 'irregular', not 'illegal', dispossessed of the community of value or participation in the law (*subjectus*) in spite of their continued subjectivity and even their formal legal status. The ideal of the Good Citizen is embedded in the legal fiction that the individual legal subject, modern man, contains both *subjectum* and *subjectus*. The individuals considered to be irregular partake in the communities that collectively influence the practice of law. Nevertheless, 'autonomy before the law only exists within the context of recognition by the law.'[293] IML as a label recognises the situation of certain persons as being not-quite regular: not illegal, but not-quite fitting in. When this 'law' is the law that is rooted in the nation-state, then the migrant labourer in precarious employment and/or precarious immigration status is recognised only in relation to the inscribed law. The category of IML inscribes the legal grey areas of sub-citizenship participation in the nation-state. Meanwhile the experiences of precarious workers—not clearly migrant, not clearly irregular—are beyond definition, they are the exscription of citizenship. They are persons, they are bodies working, they are even recognised because their labour is included in the labour market. Yet these persons are denied full participation and subjectivity even within the category that supposedly encompasses them: IML. Therefore, the very idea of the subject and legal subjectivity, even when we try and widen this definition, supports and constitutes a division of an inside-outside but simultaneously troubles the line between the two. Citizenship, affirmed and distributed through immigration law, enacts differential subjectivities, which can be understood not as inside versus outside but the very incommensurability of being in categories where beings are subjected to law; from our originary sociality where we are singular beings in the plural.

Irregular Migrant Labour in International Law and Scholarship

Integrating such analyses of subjectivity and citizenship is far removed from most legal scholarship concerned with IML. For some scholars, international

[293] Rogers, "Flesh Made Law", 364.

legislation and legal instruments offer hope that persons who are not included in national legal regimes may be protected by a broader, proto-political, legal regime. This prospect is most often explored through human rights law. Virginia Mantouvalou suggests that international human rights law can provide a normative standard for citizenship rights based on humanity 'irrespective of nationality'.[294] Other scholars are more wary of the practical applicability of human rights as a way to remedy for IML. Mark Bell discusses the reluctance of states to accept and implement international human rights instruments. Often national governments may fear that human rights legislation infringes on national sovereignty and 'domestic' matters, namely economic priorities. Yet the important role that extra-national legal instruments can play in transforming the situation for non-nationals in abusive labour situations cannot be discounted. The European Court of Human Rights (ECtHR), for instance, protects individuals against 'extreme forms of exploitation'[295]. The case of *Siliadin v France*[296] demonstrated how the ECtHR provided a vehicle for rights recognition of persons whose claims of abuse and exploitation by nationals at the level of the country's Courts were dismissed. In *Siliadin v. France,* Siliadin—a Togolese national—received insufficient protection from the French state for her rights under the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (article 4: 1. No one shall be held in slavery or servitude 2. No one shall be required to perform forced or compulsory labour). This case demonstrated the ability for the ECtHR to intervene in cases of extreme exploitation of non-nationals. However, *Siliadin* may remain an exceptional case. Broad labour protections for non-nationals, EU third country nationals and precarious workers in low-waged labour sectors would need to be adopted and enacted by the nation-states in order for ECtHR law, Council of Europe recommendations and conventions, European Council and EU Charters outlining principles of European labour law (such as the Community Charter of Fundamental Social Rights of Workers) or International Labour Organisation (ILO) treaties and recommendations[297], to be substantively

[294] Virginia Mantouvalou, 'Workers without rights as citizens at the margins,' *Critical Review of International Social and Political Philosophy* 16:3 (2013), 366-382.

[295] Mark Bell, "Irregular Migrants: Beyond the Limits of Solidarity?" In *Promoting Solidarity in the European Union*, Malcolm Ross and Yuri Borgmann-Prebil ed., 152-172 (Oxford: Oxford University Press, 2010), 159.

[296] *Siliadin v. France* 73316/01 [2005] ECHR 545

[297] Council of Europe, *Convention on Action against Trafficking in Human Beings*, opened for signature on 16 May 2005; *Forced Labour Convention*, adopted on 28 June 1930 by the General Conference of the International Labour Organisation (ratified by France on 24 June 1937)

effective.[298] Conceivably, such protections would only be adopted only if immigration law were to change its mandate away from defending the territorial border protecting the sovereign nation-state from foreigners. As long as national territorial sovereignty is the basis of legal regimes, any international or trans-national effort to create supra-national laws will come up against the prerogative of immigration law and territorial sovereignty. Moreover, as will be discussed in more detail in chapter four, current exceptional judicial decisions that extend protection to non-nationals in abusive labour situations do so on the basis of forced labour and modern-day slavery. Currently, political and legislative attention to forced labour and slavery in the UK has been primarily focused on the individual female victim of traffickers and 'evil' employers. This individual focus is not accompanied by broader commentary or analysis of the labour market demand for workers in slave-like conditions, and the legal grey areas that permit these practices to persist.

A deeper critique of international legal human rights provisions suggests that human rights remain within a historically specific conceptualisation of humanity and a belief in the individual, sovereign subject.[299] Rights, as they have conventionally developed through human rights instruments and are applied through existing legislative instruments, are limited in application and practice based on their inability to firstly, 'be' some*thing* tangibly granted, and secondly to 'be' universal.[300] Moreover, human rights are recognised in the legal subject. In other words, one's human rights are protected when one is a legal subject. If one's legal subjectivity is 'lesser', illustrated above regarding dispossession or sub-citizenship, then the power to claim rights is diluted. Within the practice of law, IML are not devoid of legal rights. Due to the work and persistence of international Human Rights campaigners

[298] *The EU Charter of Fundamental Rights*, a charter of the European Council whose provisions are included in the Lisbon Treaty, include the fundamental rights that apply to EU citizens as well as the economic and social rights contained in the Council of Europe Social Charter and the Community Charter of Fundamental Social Rights of Workers http://europa.eu/legislation_summaries/employment_and_social_policy/antidiscrimination_relations_with_civil_society/c10107_en.htm, Chapter IV 'Solidarity' states that 'every worker has the right to protection against unjustified dismissal'. However the qualifications of 'worker' include those with authorization to work, and who are 'legal residents'. This excludes third country nationals with irregular immigration statuses from these 'fundamental rights'. Bell, "Irregular Migrants", 161- 165.

[299] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

[300] Costas Douzinas and Conor Gearty, *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge: Cambridge University Press, 2014), 19, 233-250. See also, Illan Rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Oxon: Routledge, 2012).

and advocates, international and national statutory provisions recognise migrant workers, domestic workers and moreover labour and employment legislation can be interpreted to extend to include non-citizens, or persons in domestic/national legal grey areas. Universal rights are ostensibly for all persons and thus the work of many legal scholars is to continuously attempt to enact and mobilise rights.[301] Especially since the language and vocabulary does allow for 'universal' application.[302] International and domestic laws extend to workers as human beings such that immigrants and non-citizens are *legally* recognised, albeit as *subjectus*.

Examples of international legal efforts to extend protection to vulnerable and migrant workers include the Multilateral Framework on Migration (MFM) from the International Labour Organisation (ILO), the ILO Conventions on workers' rights, including Core Labour Rights[303] and European Union Directives on work, family reunification and rights[304] and the European Social Charter.[305] Within the European Union, migrant, non-national and temporary workers in particular are recognised in the European Social Charter, Article 18 (3) and Article 19, which requires states to protect the rights of migrant workers and their families, and assist them with information, access to health services, support and equal treatment.[306] Beyond the European community, the 1949 ILO Migration for Employment Convention (No. 97)

[301] Chantal Thomas, "Convergences and Divergences in International Legal Norms on Migrant Labour," *Comparative Labour Law and Policy Journal* 32 (2011): 405-444, 437.

[302] See Santos et al., Reclaiming human rights, 2005.

[303] ILO Declaration 1998*, "*The International Labour Conference adopts, by an overwhelming majority, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Declaration commits all ILO member States to respect the principles in four areas, whether or not they have ratified the specific Conventions. Those four areas are: freedom of association and collective bargaining; the elimination of forced labour, the elimination of child labour; and the elimination of discrimination in respect of employment and occupation." International Labour Organization. *The International Labour Organization's Fundamental Conventions* (Geneva, 2003)http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf (accessed 05 September 2012).

[304] EU Directives such as, Regulation 492/2011 on workers' rights; Directive 2004/38 sets out procedural requirements and family reunification rights. This includes but is not overruled by citizenship in the Union as the status "of all nationals of the Member States." Citizenship in the Union as per the Court of Justice of the European Union, C-184/99 *Grezleczyk* ECR [2001] I-6193. From: Elspeth Guild, "What EU Labour Market? Migrant Workers and the Single Market," Unpublished conference paper, Migrants at Work conference - June 23 (Oxford, 2012), 4.

[305] Article 18 (3) and Article 19 requires states to protect the rights of migrant workers and their families, and assist them with information, access to health services, support and equal treatment *The European Social Charter* 1961. Revised 1996, Strasbourg http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm The United Kingdom signed the revised treaty on 7 November 1997, but has yet to ratify. Signatories as of 04 April 2012 http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf

[306] *The European Social Charter* 1961. Revised 1996, Strasbourg http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm The United Kingdom signed the revised treaty on 7 November 1997, but has yet to ratify. Signatories as of 04 April 2012 http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf

was meant to address and facilitate the worldwide movement of 'surplus' labour from Europe. It encouraged bilateral agreements and equal treatment for migrant workers to citizen workers. However this was only applicable for migrant workers who were legally working and living in the country where they were not nationals.[307] The ILO Convention No. 143 (1975 Migrant Workers Supplementary Provisions) included some rights for migrant workers with irregular status. The premise of the Convention is that states respect the basic human rights of all migrant workers.[308] Currently the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW) is the main international provision for the protection of migrant workers. It was adopted by the General Assembly of the UN in 1990, but entered into force in 2003. Effectively, the significant lack of signatories from migrant-receiving, high-income nations means the ICRMW fails to guarantee this protection. Most high-income, migrant-receiving countries have not signed or ratified this Convention.[309] Moreover, even if nation-states were willing to be bound by international legislation, the ICRMW Convention recognises the primacy of state sovereignty to give priority to its laws, including immigration law to determine inclusion or exclusion of foreign nationals. According to Article 79 of the ICRMW: 'nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admissions of migrant workers and members of their families.'[310] In spite of the Convention's limitations, it 'endeavours to sever immigration law issues from labour issues' where employers and their employees engage in a contractual relationship separate from the relationship of the state to the

[307] Martin Ruhs, *Towards a post-2015 development agenda: What role for migrant rights and international labour migration?* Background Paper for the European Report on Development: the Overseas Development Institute (ODI), Deutsches Institut für Entwicklungspolitik (DIE) and European Centre for Development Policy Management (ECPDM), 2013, 3

[308] Bell, "Irregular Migrants", 158.

[309] Ruhs, "Towards a post-2015 development agenda", pg n/a.

[310] United Nations General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* Adopted by General Assembly resolution 45/158 of 18 December 1990, article 79. According to the Office of the United Nations High Commissioner for Human Rights Fact Sheet No. 24 (2005), *The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* is "the latest of the seven so-called core treaties, which together form the United Nations human rights treaty system. The other six are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. Most of the rights contained in these treaties also apply to noncitizens and thus provide a basic protection of migrant workers and their families against discrimination and other violations of their fundamental human rights" (Office of the United Nations High Commissioner for Human Rights n.d.), Office of the United Nations High Commissioner for Human Rights Fact Sheet No. 24 (New York, Geneva: United Nations, 2005), 12. http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf accessed 22 May 2013.

foreign national.[311] The value, for some, of this separation is that the labour issues can be strengthened via a human rights approach to marginalised, precarious labour.[312] Yet the shortcoming remains that few nations are willing to adjust immigration laws to reflect labour practices that prefer migrant workers precisely due to their irregularity/precariousness.

These international conventions mandate that state parties recognise the rights of all workers while at the same time permit restrictions that create 'illegal' and 'irregular' situations.[313] The market economic system and priorities of economic growth benefit where immigration priorities counteract labour demands and enable labour demand to by-pass migration controls. In doing so, the limits of immigration law create irregular, exploitable labourers in legal grey areas. Tendayi Bloom and Rayah Feldman note that 'international Convention rights for migrant workers are much less recognised than those pertaining to refugees, despite several major concerns being widely recognised by many authorities including international human rights, legal and church organisations and the International Labour Organisation, as well as academic authors and NGOs.'[314] States maintain their prerogative to determine how international and EU Directives are incorporated into domestic legislation when it comes to labourers who serve an economic market purpose.

The difficulty for legal categories to recognise—identify and name—transnational movement, employment and residence status, what is referred to as the spectrum of precarious status, means that many people's status can slip into categories where they are considered irregular or fall under the jurisdiction of domestic criminal law into 'illegal' situations. Neither the ICRMW, nor ILO Conventions on Migrant Workers (No. 97 and 143) can offer protection or rights beyond existing categories and practices that depend on legal subject status being recognised by the state.[315] These legal instruments can only be instrumentalised to maintain differentiated

[311] Bell, "Irregular Migrants", 157.

[312] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' 3 *European Labour Law Journal* (2012): 151-172.

[313] Dauvergne's book is based on the critique of how law 'makes' people illegal, *Making people illegal*.

[314] Tendayi Bloom and Rayah Feldman, "Migration and Citizenship: Rights and Exclusions," in *Migration and Social Protection: Vulnerability, Mobility and Access*, Rayah Feldman and Rachel Sabates-Wheeler ed., 36-60. (New York: Palgrave Macmillan, 2011), 54.

[315] Davergne, *Making People Illegal*, 169.

subjectivities, in spite of rights discourses opening dialogue for remedying the phenomenon of IML.[316]

In order to conceptually move beyond rights discourses and legislation, scholars, such as migration scholar Catherine Dauvergne and political theorist Seyla Benhabib, have suggested alternatives to the current international and European legislative frameworks. In the first example of an alternative, Dauvergne problematises how people are 'made' illegal. In order to counteract the endemic political and social differentiation of foreigners identified as 'illegal', she suggests 'unhinging' the rule of law from state sovereignty in order to sever legal status and legal subjectivity from national citizenship.[317] The dominant interpretation of law is that law is something embedded in the nation-state, mythologised as a quasi-theological force within a modernist narrative of the nation-state. Unhinging the law from the nation-state, according to Dauvergne, would allow the law and the legal form (the rule of law) to operate independently from the state. Citizenship, as a measure of membership in a territorially defined political community, would lose its claim in identifying and differentiating legal subjects. Rights and accountability would be judicial and international.[318] Dauvergne develops this proposal in light of

[316] IML is not a coherent or cohesive demographic. However, if we take IML as including undocumented migrants, in an example outside the scope of the European Union in the Inter-American Court of Human Rights, undocumented migrants cannot not be excluded based on principles of equity before the law and non-discrimination, which it ruled were *jus cogens* or 'pre-emptory human rights norms.' The Inter-American Court of Human Rights, 'Juridical Condition and Rights of the Undocumented Migrants' Advisory Opinion, OC-18/03, 2003, para 101 cited in Sarah Cleveland, 'Legal Status and Rights of Undocumented Workers' (2005) *American Journal of International Law* 99: 460-465. The Advisory Opinion in the Inter-American Court of Human Rights in 2005 found that, so long as migrants' human rights were not impacted and due process was followed, states are able to deny political rights, regulate entry and deportation, deny permission for employment and residency. Yet once an employment relationship was formed, then the migrant had to be entitled to rights as a worker, 'as a consequence of the employment relationship,' regardless of regular, irregular or illegal status (para 134 Advisory Opinion, cited in Cleveland 2005. Cleveland argues that recognition of non-discrimination as a *jus cognes* norm by the Advisory Opinion marks a substantial development in international law (Cleveland, 462). However, consistent with ILO Migrant Workers Convention (No. 143, Concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975) and UN General Assembly Resolution on the Protection of Migrants (GA Res. 54/166 2000 and 'Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live', GA Res. 40/144 1985), "the opinion in OC-18 does not offer any concrete basis for determining which workplace rights are 'inalienable' human rights that cannot be denied on the basis of migration status and which are not." Cleveland, 464. Thus the Advisory Opinion provides potential for recognition of workers and employment rights for irregular migrants however only as persuasive authority and not binding law. However, significantly, the United States and Canada do not recognise the jurisdiction of the Inter-American Court. This is similar to the UK's Protocol exemptions from EU law.

[317] Dauvergne draws on the critical perspectives of William Twining and Peter Fitzpatrick, who deconstruct law in the nation-state. There are similarities between Dauvergne's work and Bridget Anderson's community of value in that they both identify that the law is different from the political (economic and social) interests of differentiation and belonging.

[318] Davergne, *Making People Illegal*, 169-190.

the 'global crackdown on extra legal migration'[319] in response to the perceived loss of control of states over policy initiatives. Dauvergne contends that the inability to control migration has more to do with political governance than with the law.[320] States derive power from 'the global' to organise identity and economic production, but an emphasis on governance prevents comprehensive, sustained enforcement of migration at both the local and the global level. If the state is no longer the arbitrator of one's legal subjectivity, then one could be a 'global citizen' without membership in a particular nation-state but still have one's rights, particularly labour rights, protected. This protection, Dauvergne argues, would prevent the current situation where illegality is created in part by a lack of comprehensive migration policy and enforcement.

Dauvergne confronts the 'hierarchical arrangement of sovereign power'[321] where wealthier nation-states dictate migration laws onto the international sphere. In spite of her awareness that international governance is hierarchical and hegemonic, her alternative reaffirms traditional frameworks of a hierarchical law. By placing faith into an extra-national law, Dauvergne assumes that law is some*thing* that can exist apart from the nation-state and be used to govern or contain human interaction and sociality, namely labour. Dauvergne contends that if migration laws were international they would allow for equality amongst nations and their citizens, as well as those excluded from citizenship. Accordingly, she purports that globalisation has opened onto the rule of law's emancipatory potential[322] where law, unhinged from the nation-state, holds the capacity to include the excluded.[323] Yet her commitment to the rule of law as a potential to mediate migrants internationally does not problematise historical exclusions in the practice of law and the limits of the rule of law as a concept. Furthermore, Dauvergne further fails to consider that the international itself is based on the hierarchical arrangement of sovereign power that relies on membership of citizens in a nation-state. Those who speak in the name of the "international" have the power to dictate the terms and conditions and to subject

[319] Davergne, *Making People Illegal*, 2.

[320] Davergne, *Making People Illegal*, 163.

[321] Davergne, *Making People Illegal*, 173.

[322] Davergne, *Making People Illegal*, 175.

[323] Davergne, *Making People Illegal*, 181.

others to their authority. What is more, power in the 'international' has been in the hands of those who created the system in the first place.[324] Unhinging law and the nation-state would shift the boundaries of migration law. Nevertheless, the question of where to locate legitimacy remains.[325] This question exposes the fact that legitimacy does not need to be found in the nation-state. However if law is the tracing of the limit and not an entity or governing body itself then the tracing must reconstitute the sociality based on who is participating in the sociality in order for the law, the tracing, to depart from the existing order and thus consistently return to the (false) contingency of nations and citizenship. Dauvergne's work does not pursue the question of law and thereby her proposal continues to be based within a framework that reaffirms a faith in the ability of law to withstand separation from the nation-state and still be some*thing* independent.[326] Dauvergne pre-supposes law as a rule, some-*thing,* that when instrumentalised in the nation-state is a false contingency of sociality. Moreover, Dauvergne does not problematise the relationship between the law and market, and the power of market forces guiding recognition and legal subjectivity. Thus while it is conceivable that the law and jurisprudence would manifest justice and order differently were they not embedded in the nation-state, the significant presence of the global market economic system cannot be ignored for the sake of reifying an emancipatory potential of law. Thus while rights may be recognised, subjectivity is 'incomplete' for some and of particular interest to this thesis, incomplete for persons considered within the label, IML.

The second proposed alternative of radical transformation of the international and its relationship to IML is Seyla Benhabib's disaggregated or cosmopolitan citizenship. Benhabib explores the notion of cosmopolitan citizenship in the context of claims for distributive justice. Benhabib refers to Kantian cosmopolitanism from Kant's *Perpetual Peace*.[327] According to Kant's design of cosmopolitan citizenship,

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[324] Origins of international law, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) and Enrique Dussel, 'Anti-Cartesian Meditations: On The Origin of the Philosophical Anti-Discourse of Modernity' *Journal for Culture and Religious Theory* 13:1 Winter 2014, 11-52.

[325] Davergne, *Making People Illegal*, 183.

[326] Davergne, *Making People Illegal*, 188.

[327] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, section II 'Containing the Definitive Articles For Perpetual Peace Among States' 1795. http://www.mnstate.edu/gracyk/courses/web%20publishing/KantOnPeace.htm

foreigners have a right to membership and to be naturalised in a given territory.[328] From this, Benhabib proposes a 'discourse-ethical standpoint' where the sovereign of a democratic nation decides between the principle of rights and a schedule of rights in order to best address the needs of the population they oversee.[329] In spite of proposing to challenge existing frames of recognition and citizenship, Benhabib's theory reaffirms false contingencies of citizenship-as-belonging. Benhabib fails to disentangle the paradigm of the nation-state, as central to recognition, from ideas of citizenship and membership in a universal community. Her work suggests that there is a proto-political community, as discussed in the first chapter, which would be able to capture the 'cosmopolitan citizen' who is not granted membership in the nation-state.

While Benhabib does think beyond the limits of the nation-state, citizenship remains the ultimate goal and symbol of identity and belonging. A similar belief in the importance of citizenship is reflected in proposals for the regularisation or legalisation of statuses.[330] Undeniably in the immediate short-term, being granted citizenship where one otherwise is an illegal or undocumented migrant is beneficial as it can reduce immediate threat of deportation and subsequent vulnerability to abuse as a result of this fear. In the longer-term, regularisation as a solution to IML, or the experience of working in precarious situations, fails to recognise that legal status and formal citizenship do not remedy sub-citizenship or subjugated, precarious employment in spite of formal citizenship.[331] Thus, IML continues to benefit the market economic system while persons are neglected the privilege of citizenship, under the assumption that persons 'excluded' from the community of value (citizenship in the nation), discussed in chapter one, will be included in the proto-political community. The idea of a global proto-political sphere purports to unite people politically and socially across national borders and differentiated citizenship while allowing nation-states to forego responsibility for workers in the 'global' market.

[328] Seyla Benhabib, Bonnie Honig, Will Kymlicka and Jeremy Waldron. *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations,* (Oxford: Oxford University Press, 2006), 141.

[329] Benhabib, Honig, et al., *Another Cosmopolitanism*, 141.

[330] Cholewinski, *Irregular Migration in Europe*, Institute for Social Research, Oslo, 24 November 2009.

[331] Hudson, Netto, et al., *In-work poverty, ethnicity and workplace cultures*, pg. n/a.

Benhabib's cosmopolitanism, in spite of claiming to be open for everyone—all humanity under a cosmopolitan citizenship—remains rooted in the structure of the modern nation-state as the mediator of rights and granter of status to the individual. Her view of cosmopolitan citizenship, that she calls 'disaggregated' citizenship, obscures how it is the purported exclusion of some, at the boundary of the nation-state, which forms and gives identity to the bounded nation-state. The citizen is recognised in contrast to the non-citizen. In the face of globalised economic markets and labour mobility 'citizenship is an aspiration to persist'[332] in the nation-state. Yet claims of cosmopolitan citizenship elide the actual experience of being excluded-inside, of sub-citizenship and marginalisation within the system of the nation-state. Within the nation-state, immigration and labour laws are used to manage and regulate the movement and citizenship rights of individuals. Some persons are marginalised into unofficial situations of sub-citizenship or simply not given the power to speak as subjects.

Judith Butler refers to such situations as 'highly juridified states of dispossession.'[333] Butler argues that within the nation-state, we are deprived of lexicon to understand other networks of power—all we have is reiteration of the same terms and same perspectives on power. For example, a key element of the nation-state is the border. The border allows a nation-state to exist, physically, as a defined territorial space. On the one hand, the border assumes a physical place such as an airport or seaport where the territorial border is physically policed on the spot. On the other hand, and more relevant to concerns of IML, the border is not a territorial border of a nation, but is a shifting construct that follows certain persons (Failed and sub-Citizens) who are considered to be 'outsiders' 'inside'.[334] The dominant political and social idea that citizenship is negotiated through immigration law at the border does not take into account the shifting borders that affect citizens and non-citizens through

[332] Davergne, *Making People Illegal*.

[333] Judith Butler and Gayatri Chakravorty Spivak. *Who Sings the Nation-State?* (New York, London, Calcutta: Seagull Books, 2010), 42. Butler argues we need to develop "more complex ways to understand the multivalence and tactics of power to understand forms of resistance, agency, and counter-mobilization that elude or stall state power." Butler's discussion draws on Hannah Arendt's contention that we need a community that is rigorously non-nationalist (Butler and Chakravorty Spivak, *Who Sings the Nation-State?,* 50).

[334] Judith Butler: "But the most important point here is that we understand the jettisoned life, the one both expelled and contained, as saturated with power precisely at the moment in which it is deprived of citizenship." "Power instrumentalises the criteria of citizenship to produce and paralyze a population in its dispossession." Butler and Chakravorty Spivak, *Who Sings the Nation-State?,* 40.

differentiated membership (discussed in the first chapter). The physical border exists as if to control who is 'in' versus who is kept 'out'. Yet the more elusive border that is within the territorial boundaries of the nation-state privileges those who are recognised as valued, economically productive, Good Citizens and marginalises others as sub-citizens.[335]

In response to concerns for the recognition and protection of migrants' rights, scholars beyond Benhabib have explored the potential for de-nationalised citizenship. The European Union (EU), and within this the idea of European community, was one such imagined haven of post-national citizenship.[336] It is through this potential that Benhabib argues that legal recognition (rights) should not rely on national citizenship, but on citizenship as a global, cosmopolitan belonging. Benhabib uses the EU as her primary point of reference. Benhabib proposes that a discourse-ethical standpoint, recommended as a perspective for the EU, is a double gesture that extends itself beyond itself and thus has the potential to include those excluded. Benhabib uses the language of hospitality to describe the 'mediation between the ethical and the moral, the moral and the political.'[337] However, her distinction of ethical, moral and political implies a normative standard that new claims for membership need to meet and satisfy before they can be validated or included.[338] Benhabib reaffirms a faith in universality as a principle from which claims are judged. This implies an overarching logic that conditions the categories and the definition, or limits, of the universal. The foreigner, or the one labelled as a migrant, is always 'marked as particularly in relation to European universality.' [339] Rights claims concern the foreigner's relationship to the fixed universal encompassed in the myth of the EU. 'They' are foreign to 'us', the international, universal European. While the European Union may represent success for the inclusion of some through its supra-national citizenship-potential, Benhabib's claim that it represents a 'remarkable evolution of hospitality'[340]

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[335] Guild and Mantu, *Constructing and Imagining Labour Migration*, 2-3; Phillip Cook and Jonathan Seglow, 'The Margins of Citizenship: Introduction' *Critical Review of International Social and Political Philosophy* 16:3 (2013), 321-325.

[336] Yasemin Soysal, *Limits of Citizenship Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994).

[337] Seyla Benhabib, Bonnie Honig, Will Kymlicka and Jeremy Waldron, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (Oxford: Oxford University Press, 2006), 158.

[338] Benhabib, Honig, et al., *Another Cosmopolitanism,* 110.

[339] Benhabib, Honig, et al., *Another Cosmopolitanism*, 110.

[340] Benhabib, Honig, et al., *Another Cosmopolitanism*, 36.

or a new type of transferrable, post-national cosmopolitanism denies the present realities of persons, citizens and non-citizens, relegated by a nation-state-centric legal governance regime to legal grey areas.

Although the EU is used as an example of post-national citizenship, it was not constructed to transcend the nation. The EU is an economically motivated union of separate sovereign nation-states. According to Jacqueline Bhaba, already in 1998 it was evident that 'the concept of European Union citizenship, designed in part to address the rights deficit within Europe, has not so far created a base of fundamental rights capable of trumping state interests. Instead EU citizenship functions primarily as an exclusionary concept directed against non-Europeans.'[341] The EU is defined by its exclusionary border, in spite the inclusion of rights provisions within the Lisbon Treaty for those *inside* the Union being included. It is the European Court of Human Rights (ECtHR) under the Council of Europe that recognises legally admitted visitors and/or residents and allows claims to be brought forth to the European Court, as mentioned above with the example of *Siliadin v. France*. The ill treatment of IML can be held to be in contravention to the ECHR, specifically article 3, prohibiting torture, degrading or inhumane treatment, and article 4, prohibiting slavery, servitude, forced or compulsory labour. [342] However these provisions do not easily extend to cases where one is without legal status or when residency and/or employment are insecure within the EU. The external borders of the EU are furthermore constituted such that if one is not a Union citizen then EU hospitality and disaggregated citizenship, as celebrated by Benhabib, is of little practical consequence. [343] In spite of the supranational economic structure of the EU and provision for the freedom of movement, citizenship in the EU is regulated by individual nation-states through unique processes of naturalization and immigration laws. EU citizenship enables mobility and labour rights within EU nations signed onto the Schengen agreement (as of 2006 the Directive on the right to move freely[344]) however persons deemed

[341] Jacqueline Bhaba, "Enforcing the Human Rights of Citizens and Non-Citizens in the Era of Maastricht: Some Reflections on the Importance of States," *Development and Change* 29, no. 4 (1999): 697–724.

[342] European Court of Human Rights, "Convention for the Protection of Human Rights and Fundamental Freedoms" as amended by Protocols Nos. 11 & 14, Registry of the European Court of Human Rights, June 2010.

[343] Jacques Derrida, "Derelictions of the Right to Justice" in *Negotiations: Interventions and Interviews, 1971-2001* Elizabeth Rottenberg ed., (Stanford: Stanford University Press, 2002), 133-144.

[344] European Parliament and Council Directive 2004/38/EC ('The right of citizens of the Union and their family members to move and reside freely within the territory of the Member States').

undesirable, predominantly but not exclusively non-citizen with precarious legal status, in spite of their work and residence, can be removed. For example, in 2010 there was a broad, legally sanctioned expulsion of Roma workers (EU nationals) that were deemed to be in France 'illegally'.[345] In 2015, the ongoing criticism of Greek and Italian immigration controls reveal the policing of Europe's external borders, particularly at the border with North Africa. The European community's decision to cease funding the Italian 'mare nostrum' programme in 2014 further exemplifies the limit of European hospitality and the stark lack of recognition of the humanity (their human rights, the 'universal' protection of which European nations pride themselves on) of persons beyond European citizens.[346]

My approach to IML is primarily focused on the individuals who are labourers, actively working, as if they were irregular and migrant in low-waged and low-skilled sectors. Benhabib's claim does not take into account the, what I call, political-juridical-ecotechnical, experiences of people and labour markets, consequently falling short of interrogating the limits of universalism (universalism refers to a foundation, which contradicts its ability to be universal) and hospitality that are experienced by those that are relegated to the grey areas or sub-citizenship. Claiming universalism would mean overcoming statism. Until this conceptual leap is made, all acts claiming the 'universal' are subsumed within a state-centric project and are reliant on citizenship to organise membership. For this reason, the political-juridical-ecotechnical methodology questions how, and why, claims for universal or total identities or belonging persist. Similarly, hospitality, when used as a utopian concept, can undermine the violent protectionism that is inherent in the state and its practice of citizenship and immigration law. This issue invites a much broader discussion which is beyond the scope of my present focus on citizenship and proposed alternatives.[347]

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[345] Sarrazin, "France: Roma; Germany" 17:4 2010.

[346] European Council of Refugees and Exiles, 'Mare Nostrum to end: New Frontex operation will not ensure rescue of migrants in international waters.' Weekly Bulletin, 10 October 2014. Accessed 09 April 2015 http://ecre.org/component/content/article/70-weekly-bulletin-articles/855-operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters.html

[347] The framework of hospitality, in its traditional Kantian form, reinforces citizenship-based exclusion. "Conditional hospitality concerns itself with rights, duties, obligations, etc. It has a lineage tracing back to the Greco-Roman world, through the Judeo-Christian tradition, and to the political philosophies of Kant and Hegel." Mark W. Westmoreland, 'Interruptions: Derrida and Hospitality' *Kritike* 2:1 (June 2008): 1-10, 1. Those who are citizens, in the host state, hold the prerogative to refuse hospitality, or withhold welcome. This implies a limited hospitality that is conditional on the existence of a limit from which to offer, to open, hospitality. Jacques Derrida and Anne Dufourmantelle, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond*, trans., Rachel Bowlby (Stanford: Stanford University Press, 2000). Congruent within the statist structure of the political

The claim for cosmopolitanism, rather than an open inclusive notion, can become a 'technically delivered accountancy for the powerful.'[348] While Benhabib aspires towards a conceptualisation of 'mediation between the ethical and the moral, the moral and the political,'[349] this, ultimately, is limited to a predetermined framework backed by false contingency. Under the pretence of 'universal' or 'cosmopolitanism', the categories of 'ethical', 'moral', and 'political' are not questioned for their meaning (or for their false contingency). Benhabib assumes that these are *the* logical categories through which to speak about rights, citizenship and migration, specifically the rights of non-citizens or new citizens.

Importantly, both Dauvergne's and Benhabib's theoretical analyses of irregular migration prompt alternative ways to think about IML. However, they also reaffirm the false contingency to the necessity of the nation-state and the market remain citizenship, proto-political community and a particular law-as-transcendent-order. False contingency limits imagining possibilities based on experiences of coming together of persons in common, experiences that are caught up in processes of neoliberalisation and market economics as they fall into grey areas of formal definitions and categories. Citizenship is assumed to be the only way to order our identity and belonging, as if the nation-state were the only possible governance structure that our scholarship must either instrumentalise or resist. The process of revealing false contingencies and thereby de-familiarising dominant paradigms guides critical analyses to work towards bringing into relief the particular systems that continue our understanding of the nation-state, citizenship and economic market

(and economic) system, the figure of the IML is constituted as if these individuals were permanent foreigner-outsiders, but outsiders nonetheless. This permanent foreigner-outsider in 'asking' to be 'regular' rather than 'irregular migrant labourer', begs a hospitality that is unrecognized and denied in modern (Kantian) understanding of hospitality. The fear of the foreigner is that they become a permanent 'guest' – the foreign-other may be a permanent visitor without the possibility that they reciprocate hospitality in their own home. Without a home territory to return to, or without demonstrating a requisite homage towards the statist structure of international relations by maintaining regular legal status, the foreigner-outsider demonstrates a lack of law and a transgression of the state norm. For Kant, irregular migrant workers may well represent moral digression and anarchy seeing as they are beyond the state, and therefore lack the rational element that mediates individuals who are themselves inherently irrational. Sidney Axinn, "Kant, Authority, and the French Revolution," *Journal of the History of Ideas* 32, no. 3 (1971): 423-432, 425. Without the state, the individual is an irrational being and lives in anarchy (evil). This extends further to include those who circumvent or subvert the state. Axinn 1971, 424. Hospitality, which is fundamental to Kant's Perpetual Peace under the claim that "The Law of World Citizenship Shall Be Limited to Conditions of Universal Hospitality," is mediated through the state and reinforces the prerogative of civil society and civil law of that state. This paradigm dedicated to statist hospitality is foundational to our present-day conception of territory as state and the responsibility/ obligation citizens bear towards immigrants, visitors and other migrants.

[348] Douzinas, *Human Rights and Empire*, 225.

[349] Benhabib, Honig, et al., *Another Cosmopolitanism,* 158.

participation. As alternatives they remain addressed to the structure of the state and its institutions, obfuscating possibilities of discovering foundational false presumptions. Hence, the suggestion remains that Jean-Luc Nancy's work is invaluable in its capacity to illuminate what it might mean to be open to contingencies, beyond current *false* contingencies.[350] Thinking of IML necessitates a step back from migration and labour scholarship if we strive to address false contingencies, in an effort to avoid reproducing the same limited conditions of possibility. This enables us to consider 'critique from the point of view of radical change,'[351] where even critical legal studies of immigration and labour need to be kept in check for their own unquestioned contingencies.

Immigration law has been the site of attempts to remedy the condition of irregular, or illegal, migration. Popularly, the emotional fear of migrants threatening UK borders and domestic (national) economic (labour) opportunities persist. In the UK, the fear of migrants and their labour market impact has its roots in a history of non-national workers supplementing a domestic labour force, especially during times of economic growth. Both immigration from the Commonwealth nations and the European Union has influenced the labour market availability of low-waged, low-skilled labourers.

UK Immigration Law: Reinforcing limited subjectivity for IML

If we identify above that legal subjectivity rests in a state-centric normative order, then the next step of identifying the false contingency of immigration law that supports the blanket label of IML is to question how national immigration laws address the issue of irregular migration and labour. Immigration law in the UK is uniquely situated between historical connections to the Commonwealth and the European Union (EU)—formerly, the European Economic Community, EEC.

[350] This is not to say that false contingency can be avoided. Nancy's Being and fundamental ontological questioning is used by Nancy for a necessary philosophical engagement. Yet Nancy's being assumes that sociality is ever present. The being singular plural assumes sociality as existence, which may presuppose the linear construction of consciousness, whereas contingencies of dream or other consciousness are dis-allowed. This limit may be Nancy's own false contingency and invites further thought as his theory, as Nancy himself would no doubt agree, unravels and deconstructs itself the minute it is written or taken up.

[351] Douzinas, "Oubliez Critique", 66.

Citizens of Commonwealth nations held, and continue to hold, certain privileges in the UK. The European Union and the Council of Europe meanwhile oblige their members to adhere to certain Conventions and Treaties. In the 1950s and 1960s, the UK found itself in a position between controlling immigration from the Commonwealth and managing the free movement of labour from the EEC.[352] The policy question concerning UK immigration was whether to fill labour shortages with workers from the Commonwealth or the EEC. The government favoured European workers who were less likely to remain in the country, since unlike citizens of the Commonwealth they had no claims to citizenship in the UK.[353] The policy choice to favour European workers set a precedent for employing European workers on short-term employment contracts in the UK—migrant workers—commonly facilitated through temporary worker programmes. In the UK, the Seasonal Agricultural Worker Scheme (SAWS) initially permitted non-British nationals to work as agricultural workers, through a scheme that was separate from other temporary work permits (for low-skilled migrants). In 2012, the SAWS was limited to nationals of Bulgaria and Romania and only for six-month work terms. This country-specific limitation followed changes in 2008, when the Home Office phased out Tier Three, the category of immigration that allowed temporary low-skilled work permits to foreign nationals including non-EU nationals. The availability of EU workers was identified as sufficient to satisfy demands for this sector of migrant workers.[354] Moreover as of January 1, 2014, the special permit/restriction for Romanians and Bulgarians in SAW was removed.[355] Guestworker/Temporary Foreign Worker programmes were, and some continue outside the UK to be, promoted by governments and are believed to

[352] Article 45, *European Economic Community Treaty*, 1957; Regulation (EEC) No. 1251/70 of the Commission of 29 June 1970 on a worker's right to remain in the territory of a Member State, after having been employed in that State.

[353] Ian Spencer, *British Immigration Policy Since 1939: The Making of Multi-racial Britain* (London: Routledge, 1997). The minutes from Cabinet meetings in 1971 also demonstrate that discussions of foreign workers taking over certain labour sectors, such as agriculture, the service industry and catering, are not unique to the early twenty-first century. United Kingdom Home Office 1971. United Kingdom Home Office, *Cabinet Conclusion, 4. Immigration Policy. 13 May 1971* UK Archives, http://filestore.nationalarchives.gov.uk/pdfs/small/cab-128-49-cm-71-25-25.pdf accessed 05 September 2012.

[354] UK Border Agency, *Seasonal Agricultural Workers Scheme* (UK: Home Office, 2012). The Worker Registration Scheme (WRS), which closed in April 2011 (WRS closed contrary to advice given by the (United Kingdom Border Agency 2008), United Kingdom Border Agency. *Migration Advisory Committee report: Review of the UK's transitional measures for nationals of member states that acceded to the European Union 2004* (UK: Home Office, 2008), similarly allowed employers to access foreign labour for short-term, sector-specific contracts.

[355] UK, Office of National Statistics, 'Bulgarian and Romanian migration to the UK', 17 June 2014. Online: http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/may-2014/sty-bulgaria-and-romania.html

benefit both countries of emigration and immigration.[356] The two largest guest worker or migrant worker programmes began in the 1940s in Germany, the *gastarbeiters,* and the United States, the *bracero* programmes. The gastarbeiter programme was discontinued in 1973, and the bracero programme was abolished in 1964. Both have since been widely criticised for causing massive influxes of immigrant populations; the 'guest' workers never left.[357] In spite of government-sponsored temporary worker programmes implemented in countries worldwide, scholars and advocates have been critical of many of these programmes.[358] A migrant labour force has been a factor in labour market restructuring towards precarious employment: seasonal migrant workers were, by definition, precarious workers in intensive, short-term and thus exceptional employment situations. Those in favour of temporary worker programmes argue that the remittance payments given back to the country of origin benefit 'developing' economies while the migrant is working abroad. It is assumed that migrants will invest skills, labour and money in their country of origin after they return from the temporary work programme.

Notwithstanding criticism of remittances, the actual temporariness of temporary work programmes is misleading. Rather than facilitating a neat exchange of labour for money, these programmes have established patterns of circular migration, which not only supply a regular (constant) labour force that is ostensibly temporary and therefore precarious (lacking in security and long-term employment), but circular migration can lead to a lack of investment in local and national industries and a dependence in the country of emigration on foreign income.[359] In the 'host'

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[356] Dovelyn Rannveig Agunais, Christine Aghazarm, and Graziano Battistella. *Labour Migration from Colombo Process countries: Good practices challenges and ways forward,* (Geneva: International Organisation of Migration - IOM, 2011), 17. "Temporary labour migration can enable destination countries to meet labour shortages and thereby increase their capacity to compete in the globalized economy, while avoiding some of the difficulties arising out of permanent migration. In addition, the temporary admission of migrant workers tends to be more readily accepted by citizens in developed countries, who may feel threatened by rising migration inflows. At the same time, origin countries can benefit from the transfer of remittances and from the knowledge and skills gained from returning migrants. Migrant workers themselves can counterbalance periods of unemployment, adverse working conditions and low income in their home countries." International Labour Organisation. "International Labour Migration: A Rights-Based Approach," (Geneva: International Labour Organisation, 2010), 9.

[357] Kitty Calavita, *Inside the State: The Bracero Program, Immigration and the INS* (New York: Routledge, Chapman and Hall, 1992).

[358] For a detailed discussion of Temporary Foreign Workers in Canada, see Delphine Nakache and Paula J. Kinoshita, The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns? (Quebec: IRPP Study, 2010). Nandita Sharma, *Home Economics: Nationalism and the Making of "Migrant Workers" in Canada* (Toronto: University of Toronto Press, 2006).

[359] Prebisch, "Development as Remittances", 86. However, others argue that the remittances sent back by temporary foreign workers benefit local economies more than other forms of 'development' aid. Christian

country, guest worker programmes create a demand for, and a reliance on, foreign workers. These workers provide a type of labour that was never considered to be regular, but is seen to be economically beneficial and thus has become part of the regular (common) labour market.[360] Although restrictions and limits placed on immigration have reduced or discontinued many seasonal work programmes, as noted above in the UK, the demand for flexible, seasonal, irregular labour remains.

Since the SAWS programme in the UK for low-skilled workers has been phased out, migrant advocates and researchers warn that the vulnerability of agricultural workers has increased. Martin Ruhs summarises key failures of temporary migrant workers programmes as the following: the exploitation of migrant workers in both recruitment and employment; the emergence of labour market distortions, and the growth of a structural dependence by certain industries on continued employment of migrant workers and, perhaps most importantly from the receiving country's point of view, the non-return and eventual settlement of many guest workers.[361] The UK agricultural sector is currently less regulated for all labourers including for EU and citizen workers, who are working in this sector.[362] The standard expected from employers and workers for both costs of production and consumer costs are based on the seasonal agricultural worker supply. Moreover, as non-EU nationals have little possibility for acquiring work permits in low-waged, low-skilled labour in the UK, their labour is still desirable. For instance, as soon as EU citizens have access to other labour sectors, which, as noted above became the reality for Bulgarian and Romanian workers since January 1, 2014, it has been suggested by employers and politicians that EU-nationals will find work in less demanding industries as these opportunities become available. This would renew demand for workers in bottom-end jobs.[363] However, the downward pressure on wages and labour practices suggests that

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Dustman and Josep Mestres, "Remittances and Temporary Migration," *Journal of Development Economics* 92, no. 1 (2010): 62-70, 63.

[360] Prebisch, "Development as Remittances", 105-107.

[361] There are many advocates both in favour of temporary worker programmes and opposed to their management of foreign workers. Ruhs, "Towards a post-2015 development agenda", 18.

[362] Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2010 4th ed), 370, 384.

[363] Helen Warrell, "Fruit farmers look to foreign labour influx" *Financial Times*, January 21, 2013. According to this article, "farmers fear that those who have previously picked soft fruit and salad crops during the peak season from May to October will abandon this hard, outdoor graft for better paid jobs in bars, care homes and restaurants as soon as the restrictions on their employment are lifted."

regardless of being EU nationals, labourers in bottom-end jobs are treated as IML. The employer demand for migrant labour (where hiring temporary foreign workers is one option among many), and measures to facilitate return have been identified as key areas of analysis necessary to determine the positive and negative effects of temporary worker programmes.[364] This is salient to our discussion of IML because the conditions and standards established through years of employment through seasonal temporary worker programmes are now the model for irregular labour—a flexible, temporary, dis-missable, precarious and 'captive' labour force. Temporary worker programmes have contributed to an institutionalisation of irregular demands, which now form commonplace labour practices in low-waged, low-skilled sectors. The prices of the production and commodities, such as affordable 'British grown' produce depend on the availability and employment of cheap, flexible and precarious labour. These labour practices, together with a lack of regulation from the government or labour organisations, have led to many low-waged, low-skilled sectors demonstrating a high potential for undeclared and irregular work.[365] Often, but not exclusively, workers in these sectors are considered to be 'migrants'.

Immigration policies that restrict internal/national mobility, as well as access for non-nationals to state support, further increase the probability that persons without citizenship status can end up in irregular situations.[366] A practice of immigration control that causes more irregular situations while purportedly deterring irregular migration is, for example, preventing persons already living and working in a country to apply for permission to work.[367] When persons already present within the UK are not allowed to apply for permission to work whilst within the country, they are forced to decide between exiting the country to apply for a work permit from abroad, or working without a valid permit. For persons employed in high-skilled work with a sponsor the administrative step of leaving to renew or apply for a work permit may be costly but not unviable. Those without a stable permanent employer, who would not

[364] Ruhs, "Towards a post-2015 development agenda", 18-19.

[365] Fay Faraday, Judy Fudge and Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), 74.

[366] Anderson, "Migration, immigration controls and the fashioning of precarious workers"; J. Fudge, "Precarious Migrant Status and Precarious Employment", 102; Kerry Prebisch, "Pick-Your-Own Labour: Migrant Workers and Flexibility in Canadian Agriculture" *International Migration Review* 44: 2 (2010): 404-441; Audrey Goldring, Carolina Bernstein, and Judith K. Bernhard, 'Institutionalizing Precarious Migratory Status in Canada' *Citizenship Studies* 13:3 (2009): 239-65.

[367] Davergne, *Making People Illegal*, 162.

be able to secure official sponsorship for a work permit or those who have a failed asylum claim may chose to continue in unregulated irregular work without a valid work permit. This may be the preferred choice, worth the risk, despite the increased vulnerability to worker exploitation and the 'illegality' of working without a valid permit. The policy decision to limit access to work and services (similar to those afforded to citizens) intended to deter migration in practice creates a division of labour and a demand for the labour force that results from these irregular situations.

In the UK, since 1999 Immigration Acts have tightened regulations and limited access to formal citizenship.[368] Failed asylum claimants (persons without status) are excluded from accessing benefits.[369] While a discussion of access to rights for asylum seekers is beyond the scope of this thesis, it is noteworthy that Section 55 of the 2002 Act demonstrates inconsistencies between UK immigration legislation and EU commitments and ILO Conventions.[370] The Nationality, Immigration and Asylum Act 2002 established criminal sanctions against employers hiring labourers who did not have permission to work; however these reforms did not successfully address precarious statuses. The 2002 Act also strengthened Section 8 of the Asylum and Immigration Act 1996: section 8 deemed it an offence 'to knowingly or negligently employ people without permission to work.'[371] Contrary to expectations that this provision would decrease the prevalence of irregular employment and help

[368] Among the Acts established since 2000 are the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration Act 2004, Asylum and Immigration (Treatment of Claimants etc.) Act 2004, Immigration, Asylum and Nationality Act 2006, the United Kingdom Borders Act 2007, the Criminal Justice and Immigration Act 2008, and the Borders, Citizenship and Immigration Act 2009.

[369] Section 55 of the 2002 Act stated that there was no obligation on the State to provide support where the claim for asylum was not made within 'reasonable' time. This caused a legal uproar after individuals (migrants) were left with no access to support, and were prevented from legal employment, when they arrived to the UK as asylum seekers. United Kingdom Border Agency, 'Full Guide for Employers On Preventing Illegal Work in the UK' (London UK: Home Office, May 2012), 33.

[370] The House of Lords case, *Szoma* [2005], held that the blanket application of section 55 was contrary to international legal obligations. In *Szoma,* the House of Lords decided that people temporarily admitted into the UK were "lawfully present" and therefore could not legally be denied access to all benefits. *Szoma v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64 para 9: Whilst previously the appellant had been entitled to income support simply by virtue of his presence in the United Kingdom, the 1999 Act changed that position. Section 115(1) of the Act, under the heading "Exclusion from Benefits", provided that no one is entitled to income support and a number of other specified security benefits "while he is a person to whom this section applies." Subsection (3) provides that "This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed." Subsection (9) provides: "'A person subject to immigration control' means a person who is not a national of an EEA state and who - (a) requires leave to enter or remain in the United Kingdom but does not have it. . ." These inconsistencies include neglecting commitments to human rights, and passing acts and amendments with great frequency and speed. These factors create irregular legal status for individuals who may have legal status and rights according to some regulations, and, according to other regulations, may have illegal status.

[371] UK Border Agency, *Secure Borders, Safe Haven* (2002) Cm 5387, 79.

workers, the 2002 Act protected employers by ensuring that employers had a statutory defence against section 8 violations. If employers held that they did not know about illegality at the time of entering into the employment contract, then they were not contravening section 8.[372] As a result only their workers, the 'migrants,' were at fault.[373]

The focus in immigration policy on legal sanctions to prevent unwanted foreigners from entering the country rather than confront why employers continue to employ workers in sub-standard conditions reflects Britain's historical reluctance to regulate employment in the UK.[374] Regulation is seen to harm economic growth. However, increased controls may also unintentionally increase the prevalence of undeclared employment because non-compliant employers hide their undeclared employment practices more carefully, instead of dismissing their employees.[375] Even the threat of sanction for employers has exacerbated conditions that create uncertain, irregular immigration and labour statuses because employers are pushing their workers further 'underground'.

The 2002 White Paper, *Secure Borders, Safe Haven,* suggested that to end the availability of illicit work for irregular migrants, government, business and the public needed to form a collective response, 'to ensure that illegal work is not readily available in the UK.'[376] The proposal in the White Paper, however, did not consider questions of why, in economic terms, the demand for irregular labour existed in the first place. In other words, the proposed strategy aimed to deactivate the pull factors that encouraged irregular migration withheld an analysis of labour market demand and economic market pressures. The proposal further reinforced citizenship as a

[372] A Home Office document in 2003 on the Prevention of Illegal Working proposed changes to the list of required documents under section 8 (law on preventing illegal working – employer offense). Section 147 of the *Immigration Act 2002*, together with the *Immigration (Restrictions on Employment) Order 2003* made changes to Section 8 (1) and (2) to be more precise about which were the acceptable documents and how they must be scanned by employers. The Immigration (Restrictions on Employment) Order 2003 outlined the documentation that potential employees needed to provide to their employers. Employers were directed specifically on how to copy and store this data, presumably so that the Home Office could conduct inspections.

[373] Section 8, the *Nationality, Immigration and Asylum Act* 2002, also legislated the doctrine of illegality into UK immigration law this will be discussed in the next chapter.

[374] Bob Hepple, "Employment Law under the Coalition Government," *Industrial Law Journal* 42: 3 (2013), 203-223.

[375] Mike Wilkinson, 'Out of sight, out of mind' *Journal of Poverty and Social Justice* 20:1 (2012), 13-14; Bernard Ryan, 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain,' *Contemporary Labour Law and Policy Journal* 27 (2006), 27.

[376] United Kingdom Home Office 2002, 77-78.

cornerstone of membership and participation.[377] According to the White Paper, migrant labourers were providing false and fraudulent documents to their employers in order to gain admission and employment to the country. Ostensibly, the deceptive techniques of those persons lumped together under the label IML became responsible for irregular employment. In practice, the White Paper shifted responsibility onto employers to ensure that the documentation of migrant labourers was not fraudulent. However the lack of enforcement that followed these recommendations indicates the absence of serious consideration by government in regards to underlying factors that create and maintain a precarious labour force.

Security precautions for all visa holders and mandatory sponsorship are measures, introduced in 2005, aimed at ensuring that migrants on temporary permits leave the UK when their permit expires.[378] The Home Office introduced the points-based system (PBS) for work permits. The PBS obliged all applicants below Tier 1 (highly skilled work permits) to apply via a UK sponsor. The employer-sponsor was responsible for the migrant—for their entry requirements and, more importantly, for their exiting the country according to the conditions of their work permit.[379] This shift abrogated government oversight over immigration work permits and opened the potential for businesses to benefit from cheaper labour, which government saw as beneficial for the national economy. However, sponsorship has also increased the potential that workers will be exploited. Workers are bound to particular employers for their legal right to be in the country and thus without recourse to seek safer, or non-abusive employment.[380]

Immigration policies prioritise an employer-led, flexible system, 'responsive to market needs'[381] above labour protection. Work permit sponsorship has lent more

[377] Anderson, *Us & Them*, 2.

[378] United Kingdom Border Agency, "Controlling Our Borders: Making Migration Work for Britain," Cm 6472, 2005, 8. According to Charles Clarke, "swift removal [of failed asylum seekers and other immigration offenders] is central to the credibility of our system."

[379] In 2005, unemployment (UE) was at a historic low and there seemed to be a genuine economic need for migrant workers, particularly in the service sector. In spite of this need, as mentioned above in text, it was recommended that low-skilled work permit schemes (Tier 3) be phased-out within three years due to the availability of a labour supply from the EU. Accordingly, Tier 3 was phased-out by 2008, except for A2 migrants, from Romania and Bulgaria.

[380] Anderson, "Illegal immigrant": Victim or Villain?' *Centre on Migration, Policy and Society Working Paper*. University of Oxford 64 (2008).

[381] UK Border Agency, *Controlling Our Borders: Making Migration Work for Britain* (2005) Cm 6472:15.

power to employers and, although there are regulations intended to hold employers accountable, the provisions against exploitative employers have not been enforced to the same extent as those punishing labourers. An example of the lack of enforcement is the 2004 Asylum and Immigration (Treatment of Claimants etc.) Act and, separately, the Gangmasters (Licensing Authority) 2004 Act (GLA). These Acts addressed unregulated employment and situations whereby employers knowingly employ illegal workers by introducing workplace inspections and spot fines for employers using illegal workers.[382] The 2004 Act and the GLA were specifically meant to respond to gang labour. Gang labour is 'a form of temporary casual labour in which an agent ('gangmaster') contracts and supplies workers for employment in the British labour market, traditionally in the horticultural and agricultural sectors.'[383] This form of employment facilitates a flexible labour supply that is mostly filled by migrants from EU countries. According to Kendra Strauss, 'many gang workers are economic migrants from the EU accession countries, recruited in their country of origin by local labour intermediaries, while some ... are undocumented workers who become enmeshed in local networks of non-British labour contractors.'[384]

Many migrant advocates and workers welcomed the intervention made by the GLA in 2004. However, the GLA focuses only on particular labour sectors, excluding labour that is self-employed or agency work. Consequently, much of the on-going exploitation experienced by precarious labourers occurs beyond the scope of this legislation. The GLA also suffers from a severe lack of funding to enforce its mandate and carry out inspections.[385] In spite of the GLA's mandate to regulate employers and the Points Based System (PBS) formalising work permits, the demands in employment that maintain irregular and exploitative labour practices exceed existing regulations. The continuous lack of funding has prevented the GLA from being enforced in a way that would sufficiently guard against exploitation in the workplace. The PBS made the process of acquiring legal permission to migrate and sponsor

[382] *Gangmasters Licensing Act* 2004 ch.11; Gangmasters Licensing (Exclusions) Regulations of 2006, S. I. 2006/ 658). The GLA (2004) was established after the deaths of migrant labourers (cockle-pickers) in Morecambre Bay, UK. BBC News, "Tide kills 18 cockle pickers" *BBC News* February 6, 2004.

[383] Kendra Strauss, "Unfree again: social reproduction, flexible labour markets and the resurgence of gang labour in the UK," *Antipode* 11 (2012): 1-18.

[384] Strauss, "Unfree again" pg. n/a.

[385] In May 2012, Strauss wrote, "the GLA is facing (like other government departments and agencies) significant cuts to its budget as a result of the Conservative–Liberal Democrat coalition government's austerity budget." Strauss, "Unfree again", p. n/a.

migrants more difficult, and the number of persons coming in from non-EEA countries to work in low-skilled/ low-wages occupations has decreased. Meanwhile the standards, wages and conditions in the labour sectors have not improved.[386] Neither the PBS nor the GLA eliminated precarious employment where this type of employment is kept off record. Employers may extend working hours, withhold pay, or require workers to work overtime without pay, all the while appearing to give their workers autonomous choice to consent or refuse. Employers are able to manipulate terms of employment that defer their responsibility, for example when labourers are technically self-employed or sub-contracted through an agency. In these cases, the employer is not necessarily bound to protect the workers through existing company regulations or policies.[387]

Since 2004, much of the focus in government policy has been on border crossing and entry. This has not left room to focus on 'how to make the UK (and the EU as a whole) a more unattractive environment for working illegally.'[388] If employment conditions were improved, regulated and monitored, then the type of jobs and conditions precarious migrant workers are employed in could potentially be avoided. Many low-waged sectors profit, and rely on, a supply of labourers who work in sub-standard conditions. Since 2010, the coalition government has continued to target 'illegality', but simultaneously has prioritised economic growth that relies on a precarious labour force. Thus, government policy and legislation has largely failed to confront the on-going exploitation of vulnerable labourers: EU workers, British working poor, and non-EU immigrant workers.

As mentioned above, the accession of ten East European states to EEA in May 2004 decreased the demand for labour from outside of the EU.[389] EU-country nationals are not immigrants with precarious, or uncertain, immigration status. Instead of immigration, IML may be explained more accurately as a racialisation or ethnicisation of labour sectors, where ethnic, linguistic and race-based factors—even

[386] UK Home Office, *Managing Migration: The Points Based System*, Select Committee on Home Affairs report July 2009, Thirteenth Report of Session HC 217-1 (2008-2009).

[387] Anderson and Ruhs, *Who Needs Migrant Workers?,* 13. A more detailed discussion of employment law will follow in chapter four.

[388] Cavanagh, *Migration Review 2011/2012*, 6.

[389] Learning and Skills Council (LSC) Research Paper, "Migrant Workers and the Labour Market" (UK: 2007) http://readingroom.lsc.gov.uk/lsc/National/nat-migrantworkersandthelabourmarket.pdf data accessed 5 September 2012

if second generational—determine the type of work in which people are employed.[390] This suggests that, as UK Prime Minister Gordon Brown implied through the slogan 'British jobs for British workers'[391] in 2007, there are limited jobs available for *white-ethnically*-British workers. Thus, in spite of the enforced exclusion of non-EU labourers, labourers *considered* to be migrant continue to fill a labour demand that is conditioned towards a migrant labour force. The political and media rhetoric claims that labourers considered migrants remain disproportionately represented in certain sectors to the extent that employers do not seek out a 'British' (implicitly white) labour force. The ethnicised groups from which employers draw their workers in low-waged or bottom end sectors fuel discourses that blame immigrant labour for displacing existing workers.[392] Meanwhile, research indicates that, 'despite high-profile media debate on this issue ... migrant labour does not generally disadvantage existing workers by displacing or depressing wages.'[393] Economic evidence published in 2014 supports this fact.[394]

Labour sectors that continue to employ low-skilled, low-waged workers, often in irregular labour situations, remain absent from visa guides to the UK.[395] Concurrently, restrictions have increased for all migrants, and since 2013, the future of EU membership became a major political concern.[396] Employment practices that exceed traditional frameworks and bypass existing employment law protections continue, which suggests that persons with actual immigration status and/or

[390] Networks of migration transnationally bring in workers, but also labour sectors are racialised, for example the typical 'Polish cleaner' in London, or 'Nigerian security guard', Jane Wills, Datta, et al., *Global Cities at Work,* 96, 101.

[391] Justin Parkinson, "What does 'British jobs' pledge mean?" *BBC News*, November 2007.

[392] Wills, Datta, et al., *Global Cities at Work* 27.

[393] Learning and Skills Council (LSC), 8.

[394] Dustmann, 2014.

[395] In 2011-2012, immigration policy placed a 20,700 annual limitation on all visas for non-EEA skilled workers until 2014, and low-skilled visas are no longer available at all. Minimum salary requirements for settlement were introduced for Tier one: high-skilled entrepreneurs and self-employed migrants. United Kingdom Border Agency, "Increased funds required for Tier 1 Applications." 2012. http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/62-t1-maintenance-changes (accessed September 2012).

[396] Tougher rules govern overseas (non-EU) domestic-care workers, and youth exchange schemes have a one-year limit. The funding requirements for foreign students have increased and the UK Home Office expects academic institutions to monitor foreign students. Vasagar 2013. Jeevan Vasagar, "London Metropolitan University challenges loss of sponsorship license," *The Guardian*, September 3, 2013. The rise in prominence and popularity of the UK Independence Party (UKIP) has renewed debate, and potentially a referendum, about the UK's membership in the EU. Patrick Wintour, "EU referendum to be put forward by Tory MP," *The Guardian*, May 16, 2013.

citizenship are employed in irregular situations—or in some cases, migrants may enter as skilled workers but are soon swept into low-waged, low-skilled sectors due to existing networks that directly feed a particular demand for this labour.[397] In either case, low-waged, low-skilled labour sectors impact the legal subjectivity of labourers regardless of their citizenship status. Thus, IML are those who are denied legal status as 'full' subjects: both *subjectum* and *subjectus.* They remain only partial subjects because they are only *subjectus*: 'subjected to law, brought to life by law's protocols, shaped by law's demands and rewards subjected under law.'[398]

Conclusion: False Contingency in the Demand for Migrant Workers

The idea of legal subjectivity and who is a legal subject, with access to rights and status underpins immigration law's mandate to mediate citizenship. A citizen of a nation-state is believed to be a subject of the law, and the law is believed to exist for the subject and because of the subject. The label IML imposes a different subjectivity onto persons who do not conform to the community of value, in other words to acceptable categories of immigration and belonging within the nation-state. The condition of subjectivity for persons considered IML is that they remain IML in legal grey areas while contributing to the economic market system. Immigration regulations are intended to regulate legal status, and legal status allows one to access rights within the nation-state. Yet formal citizenship that is equated with full legal subjectivity is based on the false contingency of citizenship. If one is considered a British citizen, it is assumed that s/he will be granted rights that enable her/his participation as a subject of the nation-state. This subject is believed to be active in the liberal democratic system constituted by, and in obedience to, the law and legal system. Employment status and one's economic productivity recognised in the market economic system intertwine with what is considered regular legal status. Citizenship is often synonymous with having the right to vote in elections, having ones (human) rights protected, being in an employment relationship, earning a waged income and participating productively in the economic market. Citizenship, legal subjectivity and

[397] Wills, Datta, et al., *Global Cities at Work,* chapter one.

[398] They are not recognised as active Good Citizens, or *subjectum* 'the holder of rights and the bearer of duties and responsibilities.' Douzinas, *The End of Human Rights*, 183.

economic productivity are not the same thing. One's economic participation may be more or less recognised by the market economic system, and rendered more or less desirable as an attribute of Good Citizenship. Moreover, one can be a subject or subjected to a regime (legal and national) without enjoying the presumed privileges of citizenship.

When the law acts as a regulatory regime of the nation-state, the law establishes the Subject as free and autonomous but simultaneously subjected to the logic of institutions. The methodology of my analysis of IML meanwhile relies on Jean-Luc Nancy's theorising of law, which pushes us to think of law and frameworks beyond, or before, the presupposition of a Subject. Nancy discusses this through thinking of the ecotechnical circulation of bodies: the very materiality of sociality as the law that can be traced, but not traced-into (inscribed) predetermined categories as predetermined sociality, namely the formal nation-state and in practice the community of value. Law as it is conventionally discussed and instrumentalised relies on Subjects to be subjected, submitted, under law's authority. The legal system is deemed to represent the 'dominant ideology of society,'[399] and therefore implicitly law has its authority and legitimacy affirmed by the consent or approval of those same subjects. This legal relationship determines those who are 'within' a society as subjects of the law, granted rights and protection from the law mediated through the state. Immigration law ostensibly allocates worthy participation against those who are deemed unworthy of citizenship (non-citizens). Thereby immigration law relies on the order of the international political and legal system, where it is presumed that everyone belongs to a state. 'Migrants' are identified as migrants because, within the ideal of the nation-state and citizenship, they are persons in movement but with a state that is their 'country of origin' to which they can return for their rights and citizenship to be validated.[400]

It remains difficult to conceive of remedies for IML where immigration law is unaffected. According to Dider Bigo, it is not so much a failure of immigration law, but mis-placed attention through policy responses to security. Efforts to resist overt discrimination in EU immigration claims have at times been successful 'based on

[399] Costas Douzinas and Conor Gearty, *The Meanings of Rights: The Philosophy and Social Theory of Human Rights,* (Cambridge: Cambridge University Press, 2014), 8.

[400] Derrida and Dufourmantelle, *Of Hospitality,* 25.

fundamental rights, legal cohesiveness and social and political mobilisation ...' but this has meant that 'those most affected in practice are the most vulnerable foreigners, second generation immigrants ...'. [401] Immigration law does not address the embedded racial and socio-economic discrimination that reinforces the elusive category of IML, based on legally reinforced social and legal sub-citizenship. There is no coherent, single labour force or migration demographic that is IML. Moreover, it is insufficient to say that this category is beyond existing legal categories, as if constructing more categories would create inclusion. The demand for migrant labour begs for close scrutiny in order to unravel the phenomenon of IML,[402] and yet a 'reliance on migrant labour will not be decreased by immigration policies alone.'[403] 2010 statistics of unemployment in the United Kingdom (UK) demonstrate that a citizen labour force could fill labour demand and therefore a migrant labour force is not practically necessary. However, citizens, Good Citizens, with access to education and social welfare support are reluctant to take lower paid, devalued jobs. [404] Overall employment conditions and job quality (part-time/full-time, availability of benefits, long-term contracts and so on) would need to be improved in order to attract a citizen workforce.

The demand for IML is structurally embedded and dependencies have been created for both migrant and citizen workers. The impact on production expectation of temporary worker programmes and the racialisation of low-waged labour sectors has created a downward pressure on wages. There are workers agreeing to work for less, for intense periods of time and international networks supply a steady, self-regulating stream of labourers when needed. These factors result in conditions where people—EU citizens, nationals and non-nationals—are not hireable unless they conform to lower standards of employment and pay. [405] In other words, processes of neoliberalisation condition workers to become IML, sub-citizens with economic value only as *subjectus*. The inscription of value based on low-waged, low-skilled, ethnicised and racialised labour, is based on false contingency of citizenship,

[401] Bigo, "Regulating", 304.

[402] Anderson and Ruhs, *A Need for Migrant Workers?*, 3.

[403] Anderson and Ruhs, "Reliance on migrant labour", 24.

[404] Anderson and Ruhs, *A Need for Migrant Workers?*, 29.

[405] Anderson and Ruhs, "Reliance on migrant labour", 25; Guild and Mantu, *Constructing and Imagining Labour Migration*, 3.

economic value and subjectivity. Substantial institutional changes need to be implemented regarding immigration, citizenship and employment to address labour protection for all workers engaged in social production and reproduction. These changes would address the current division that posits a national (domestic) labour force, as if these people were able to demand minimum wage and labour protection, while foreign labourers are those willing to work under substandard conditions and pay because they have no other option. Contrary to commonly expressed fears in the UK and beyond, there is no direct correlation between unemployment and immigration.[406] Consequently, 'immigration should be seen as the effect of wider problems, not the cause.'[407] According to a UK policy analyst, firms 'stuck in low-skill, low-value business models, employing millions of people on chronically low wages' are the deeper and more pressing, issue.[408]

My argument follows that labour market forces and the legal and social, moreover economic, subjectivity—how persons are subjected to the false contingency of the labour market as 'irregular' and 'migrant'—is the more pressing and fundamental issue. Precarious employment is common for around two million workers in the UK.[409] Labourers agreeing to work with short-term flexible contracts are replacing a permanent workforce.[410] Whether through subcontracted work, agreeing to zero-hour contracts,[411] not claiming hours worked or forfeiting overtime wages and/or benefits, labourers and businesses that fight to maintain economic competitiveness exist in legal grey areas and irregular situations.[412] And while

[406] Christian Dustman, Fabbri and Ian Preston, "The Impact of Immigration on the British Labour Market" *Economic Journal* 155: 507 (2005): 324-341.

[407] Matt Cavanagh, "Right to Reply: Why do so many new jobs go to foreigners?" *The Spectator*, August 31, 2011.

[408] Matt Cavanagh, "The right tries to blame youth unemployment on immigration again" *New Statesman*, January 2012.

[409] Workers employed in chronically low-waged, un-regulated labour sectors share potentially exploitative employment conditions and vulnerability, in spite of citizenship or legal status: "The Commission on Vulnerable Employment estimate that around two million workers in the UK find themselves in vulnerable employment – which we define as precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship." Trades Union Congress, "Hard Work, Hidden Lives: The Full Report of the Commission on Vulnerable Employment," (London: TUC, 2008).

[410] Anderson and Ruhs, "Reliance on migrant labour", 25.

[411] Elizabeth Rigby, Duncan Robinson and Andrea Felsted, 'Zero-hour work kept down dole queues, says CBI' *Financial Times* 6 August 2013.

[412] Anderson and Ruhs refer to situations of semi-compliance, a category that identifies conditions of irregularity that are not completely illegal, but neither are they fully in compliance with the law. Martin Ruhs and Bridget Anderson, "Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK," *Population, Space and Place* 16: 3 (2010): 195-221.

businesses may prosper in the short-term, workers remain in precarious, marginalised and shadowed positions.

Defining these demographics and their direct relationship to law is impossible. This is both a condition of the inability for the label IML to capture the experience of precarious labour and migration, including the way labour sectors are racialised and ethnicised, and the inability for law to be a fixed mould applicable to all experiences. The suspended recognition encompassed in the category of IML discussed here disrupts legal immigration categories. Yet the systemic 'irregularity' is *exscribed* in relation to a changing ideal, as well as *exscribed* from the homogenising category of IML. To speak about IML and the experiences that are inscribed into this label as well as those exscribed, we must move beyond conventional notions of subjectivity, citizenship and legal status arbitrated through immigration law.

Chapter 4. Labour Law's False Contingency

This chapter discusses false contingency in labour law. Attention to false contingency opens up other fresh possibilities of labour law's scope and mandate where traditional labour law is identified as limited. The political-juridical-ecotechnical method of examining IML points to the previously under-theorised importance of labour and labour markets. The eco-technics of labour bring to light what is happening on the ground within political discourses, juridical decisions and practices of employment, work and economic participation. Harry Arthurs suggests we think of 'labour law as law incarnate'.[413] He joins other labour law scholars to scrutinize question and debate the role and purpose of labour law in the twenty-first century.[414] Labour law is particularly suited to my methodological approach and Nancy's work, particularly where labour concerns social reproduction, care and un-quantifiable work, which I introduce in the final section of this chapter. Approaching IML through a deep questioning of subjectivity and citizenship utilizing Nancy's notions of *ecotechnics, struction*[415]*, sense* and *exscription*[416] can be transformative for labour law.

Currently, diverging international and national labour regulations and legal regimes make it difficult to consolidate what protections and regulations exist for precarious labourers and migrants (persons considered IML).[417] The lack of a

[413] Harry Arthurs, "Labour Law After Labour" in *The Idea of Labour Law*, Guy Davidov and Brian Langille, eds., 13-30 (Oxford: Oxford University Press, 2011), 21.

[414] Guy Davidov and Brian Langille eds., *The Idea of Labour Law* (Oxford: Oxford University Press, 2011).

[415] *Struction* changes the way that we relate to categories and definitions—away from expecting legal categories, in particular, to contain a remedy or to maintain a regular, encompassing framework above the market. Law is instrumentalised within processes of neoliberalisation, yet law itself is no thing and consequently is not solely a tool of neoliberalisation and market ideology.

[416] Jean-Luc Nancy, *The Birth to Presence*, 338. Exscription refers to what is beyond the inscribed, what is present, but placed away from the 'text'. Nancy uses this theme in many of his writings, but what is relevant here is when Nancy attempts to articulate the 'sense' of the world and the world of sense. Nancy, *Sense of the World*, 9, 14.

[417] Chantal Thomas, "Convergences and Divergences in International Legal Norms on Migrant Labour" (2011) *Comparative Labour Law and Policy Journal* 32: 405-444.

consistently defined demographic that is IML together with the difficulty of negotiating national, European and international jurisdictions in trans-national labour regulation challenges conventional frameworks of legal analysis. Theoretical deliberations of labour law and production struggling to reinvigorate mid-twentieth century labour rights and justice concerns also are challenged by the shift from industry production models of labour relations to trans-national, corporate business employers and firms. In much the same way that in the previous chapter we saw migration scholarship perpetuating a systemic—economic labour market—reliance on IML, labour law scholarship can too be complicit in IML reinforcing legal grey areas by failing to recognize false contingency. Often, the conditions and limits of labour law are assumed to be natural and necessary and, therefore, unquestioned. The global market economic system and subjectivity based in a contractual employment relationship, and hierarchies of value based in economic productivity and participation are believed to form the foundation of labour and labour regulation. When challenged, the alternatives lie in notions of justice, equality and freedom that nonetheless assume citizenship in a collective nation-state as the basis for participation and economics. However, the dynamics of twenty-first century markets and shifting labour demands complicate these assumptions. This climate of flux enables labour law to turn towards an exploration of its potential to respond to a different understanding of incommensurability and the law. Jean-Luc Nancy's theoretical challenge to re-think law offers a route to confront false contingency. Potentially, Nancy's fundamental questioning can release our thinking from the confines of citizenship and, in labour law, the standard contractual employment relationship. Contingencies will infinitely encounter their false assumptions and false contingency as a consequence of the incommensurability of the limit (law). However, Nancy's challenge to think of the experience of value and economics by people in originary socialities offers a significant movement towards shifting paradigms of thought and frameworks of labour and migration.

IML is a label developed in contrast to operative 'regular' citizenship that enables or facilitates categories of employment and work in UK employment law. Again, these categories are bound by the dominant subject/citizen/state/sovereignty paradigm that has served as a foundation for conventional understandings of law, labour and economics. However the contemporary practices in low-waged, low-

skilled sectors, where a flexible and temporary form of employment has become a requisite for businesses to maintain national and international competitiveness, suggests that the regular citizen worker, and the Good Citizen discussed in previous chapters, is not a tangible material practice.[418] If anything, the 'irregular' is 'regular'. Businesses/employers encourage a workforce that can be hired and fired in response to unpredictable changes, for instance, shocks in financial markets that affect labour market decisions.[419] Short-term, fixed-term or temporary sub-contracted labour is commonly seen to be most economically profitable and viable as a labour practice in the globalised labour market system. Consequently, labour practices have instigated a shift in employment that affects the relationship of the social welfare state to persons in employment, where individuals are precarious contracts without stable or sufficient (living wage) income, as well as detrimentally affects an individual's access to employment law and protection against abuse.

In 2013, Prime Minister of Britain, David Cameron, deemed that 'immigration and welfare are two sides of the same coin.'[420] Migrants are blamed for labour market changes that result in higher pressures on social welfare systems and a perceived lack of resources. In fact, citizen and non-national workers are affected by de-centralised and global market-focused labour regimes that have privatised responsibility for workers and their social welfare. Consequently, if the social welfare and well being of workers is not a market or industry priority, there is little accountability to ensure individuals receive adequate wages, sick pay, and access to health care, pensions or disability pay. Labour practices based on the global market economy have shifted individuals position in relation to the state via the community of value that deems who is deserving of access to legal protections and legal subjectivity. Thus citizen-workers, like non-nationals, are left to work in situations that are precarious and temporary—work previously reserved for a temporary, seasonal migrant labour force.[421] The unquestioned, false, contingency of the economic market system and its

[418] Wills, Datta, et al., *Global Cities at Work*, 7, 23.

[419] "A 'temp' can be hired and fired at an hour's notice, be paid less for doing the same job, and lacks rights such as paid holidays and redundancy pay." Owen Jones, *Chavs: Demonisation of the Working Class* (London: Verso Books, 2012), 149.

[420] David Cameron, 'Immigration Speech' 25 March 2013 https://www.gov.uk/government/speeches/david-camerons-immigration-speech accessed 1 June 2013.

[421] See Anderson, "Migration, immigration controls and the fashioning of precarious workers", 313; Anderson, *Us and Them*; Guy Standing *The Precariat: The New Dangerous Class* (London, New York: Bloomsbury Academic, 2011).

impact on labour markets assumes a totalising, global presence. It is simpler for the UK government to focus on immigration policies as the cause of IML rather than grapple with a neoliberalising, globalised economic model. The economic market system guides political and legal discussions and priorities. Therefore the institutional response to remedy IML comes first from within the market system that must keep this labour irregular. Moreover, this market economic system is believed to provide justice and rights through (free) market participation. The humanitarian or ethical imperative to respond to situations of subjugation and vulnerability can be placated, or silenced, by idealised market-ends. Therefore the market model continues largely unquestioned because its presence as the underlying, guiding false necessity and false contingency is for the most part un-noticed. Immigration tackles a familiar site of differentiation, the territorial border, and therefore problems of IML become immigration problems, rather than a consequence of neoliberal market economics. However immigration law and policy is incapable of addressing the market forces that underlie IML. IML is a manifestation of a privileged global market economic system that through processes of neoliberalisation has capitalised on the eco-technics of our coming together in-common.

Critical Labour Law Scholarship and IML

As a legal field, labour law is situated precisely at the paradox of law's incommensurability with itself: law is a co-appearance of a limit and the *exscription* of that limit. Labour law responds to a market economic system and is instrumentalised to establish legal rules as well as legal ambiguities according to the dominant market economic model. Concurrently, labour law traces a material sociality because the field of labour and law are understood to be capable of responding to our bodies at work (labour) as recognising them as more than a market and part of processes of social reproduction and community. Simply, a deconstruction of 'labour law' can be understood as part of the processes forming an economy as 'logic' of the 'household', while labour is a mode/manner of interaction in a plurality/sociality/community. Labour law, therefore, is not fixed to the standard contractual employment relationship and market model. Labour law is not predetermined as a field of law in the way that immigration is meant to regulate and

control the territorial, nation-state border. Alternatively labour law has the potential to open avenues for work to be recognised for the value of persons' labour as participation in a sociality in spite of the dominant global economic market. But this alternative can only be realised if expectations of legal subjectivity, and the practices of differentiating subjectivities (*subjectum* and *subjectus* discussed in the previous chapter) are likewise questioned and re-thought. Thinking of labour law alternatively is only possible insofar as we fundamentally re-evaluate what is considered to be labour, work and labour market participation.[422]

Harry Arthurs responds to the crisis ostensibly facing labour law scholars by envisioning labour law as incarnate, since labour law is 'to a significant extent path-dependent; it takes its purpose, form and content from the larger political economy in which it originates and operates.'[423] Labour law has developed with a purpose of enabling workers to seek equality and/or justice in the workplace and arguably the labour market. The structure of the workplace and labour market are currently predisposed to prevent access to labour protections for workers in the labour market, particularly for those in low-skilled, low-waged work. Regulations are seen to inhibit economic growth and financial progress. However labour law, and indeed labour and law independent of each other, are not isolated practices or sets of rules. As Nancy's work indicates, law is no *thing*. Therefore labour law has within its ambit a task to re-think, and arguably to re-define, how the limits of labour protection and the market are constituted and reproduced.

One of the central tenets of labour law, enshrined in the International Labour Organisation (ILO), is resistance to labour as a commodity. Although labour is exchanged within a labour market system, in essence it is the activity of social production and re-production—what keeps 'society' functioning. Meanwhile, labour has been constructed as if it were a commodity and some*thing* consumable as a modality of economic production. Judy Fudge identifies labour as a 'fictional

[422] See Guy Davidov and Brian Langille eds., *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), especially chapters by Judy Fudge, Noah Zatz and Adelle Blackett, who also draw on social reproduction and feminist economic approaches.

[423] Harry Arthurs, "Labour Law After Labour," in *The Idea of Labour Law* , Guy Davidov and Brian Langille eds., 13-30 (Oxford: Oxford University Press, 2011), 26.

commodity'[424] because labour cannot exist as a commodity independent of an owner. This distinction is important to distil from debates within labour law where 'the *object* of regulation (a labour market problem of some kind or other here termed a regulatory dilemma) [is difficult to distinguish] from the *means* of regulation (particular institutional responses).'[425] The labour market and market economic responses have engulfed labour study into a self-referential circuit. Labour law is totalised into a specific form of regulation, which although 'responding at a particular moment in time has come to be seen as *the* form, rather than *a* form, of labour law.'[426] The labour market and recognition of marketised labour is only understood in response to the market economic system, such that international or national regulatory efforts to think of justice or (labour) rights can do so only with reference to market participation. This is based on a false contingency of economic productivity and the market.

Labour law's transformative potential persists because of labour's productive and reproductive capacity that reaches across multiple borders, including but not limited to the dominant market economic system.[427] UK labour law is informed by practices of employment, cultures of work, economic markets, as well as notions of justice, fairness/equality (Equality Act 2010) and rights (Employment Rights Act 1996). But labour law also concerns the link between production and social reproduction. The paradox of law is played out in the demand for regulations, flexibility, productivity, fairness and justice for workers and modes of production.[428] The movement of people providing labour (labourers) and the shifting demands, or fluidity, of the labour market challenge regulatory efforts and definitions of employment by what is exscribed beyond the inscribed frames of labour—both in terms of market economics and traditional Marxist theories of labour. The exscribed are the incommensurable forces of market productivity and fairness, of national (domestic) labour protection and global market economic growth that enact differential legal subjectivity inside the eco-technical circulation of capital and social

[424] Judy Fudge, "Labour as a Fictive Commodity," In *The Idea of Labour*, Guy Davidov and Brian Langille eds., 120-136 (Oxford: Oxford University Press, 2011), 121.

[425] Jamie Peck, quoted in J. Fudge, "Labour as a Fictive Commodity", 121.

[426] J. Fudge, "Labour as a Fictive Commodity", 121.

[427] Adelle Blackett, "Emancipation in the Idea of Labour Law," in *The Idea of Labour Law*, Guy Davidov and Brian Langille, eds., 420-436 (Oxford: Oxford University Press, 2011), 436.

[428] Labour is dependent on the reproduction of labour. J. Fudge, "Labour as a Fictive Commodity", 131.

being. By identifying the potential of labour law to be understood beyond the standard or conventional employment relationship model, labour law scholars are raising issue with the falsity of the market. The falsity of the market creates precarious labour as the demand and supply of workers and 'global' migration. Nevertheless, the question remains of how to avoid reproducing it. Amartya Sen's capabilities approach has been proffered as a positive new approach to labour. However, in Sen's approach, "capabilities", are themselves limited to what an individual requires in order to participate as an active member of the social, economic, community. Judy Fudge highlights that according to Sen, capabilities are assumed to be for an individual who is autonomous, 'unencumbered by care responsibilities.'[429] As long as paid employment and "active" (wage-earning) participation in the market economic system is privileged over socially necessary, but undervalued work, for instance work in the home or care work, an approach that seeks to enable capabilities will continue to reproduce economic inequalities that are based on where and how value of work is allocated and recognised. The very nature of what is considered labour—waged, marketised, quantifiable work—impacts the scope of labour law's ability to expand towards precarious, vulnerable labourers, even in alternative approaches such as Amartya Sen's capabilities approach. The task to think about what is labour and how this connects to value and economic participation parallels work by critical legal theorists who draw attention to the ideological underpinnings and contradictions within traditional jurisprudence in order to think about the role of law in social reproduction and social being through post-structuralism and post-modern theory.[430]

For instance, Judy Fudge's critique of labour law as a fictional commodity presents an insight similar to labour law's false contingency. As Susan Marks

[429] J. Fudge, "Labour as a Fictive Commodity", 132.

[430] Douzinas and Geary refer to this task of critical legal studies as the "ontology of social life." Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart, 2005), 11. Theorists such as Jacques Derrida, Giorgio Agamben and Jean-Luc Nancy have been taken up by critical legal thinkers to bring to light how perspectives on law can be taken beyond critiques of the legal positivism purported by H. A. Hart, or subsequent theories of law and its moral, ethical, nature Richard Dworkin, *Law's Empire* (Oxford: Hart, 1998). Poststructuralist approaches brought into critical legal studies bring attention to language and its construction and have facilitated legal critiques of positivism, modernity and the reification of law as an authority enforcing order and justice. Critical legal theories reimagine dynamics of power and law away from strict hierarchies of dominance and subordination, as well as away from metaphysical notions where law exists in relation to a universal, absolute truth. These critical legal theories draw on 'the deconstruction of the metaphysical urge in philosophy and law.' Douzinas and Geary, *Critical Jurisprudence*, 48. Critical Legal theorists have also explored the resistance that comes from the subjugated, or subaltern, to resist the power of a sovereign, modern law. Ruth Buchanan, Stewart Motha and Sundhya Pahuja, *Reading Modern Law: Critical Methodologies and Sovereign Formulations* (Oxon: Routledge, 2012).

cautions, false necessity[431] can be rewritten as contingency: the 'false necessity' of economic growth has been re-written as contingency of the market.[432] The market is but a form of labour organisation and one that is itself fluid and malleable, however it is assumed to be a natural and necessary framework. The single frame for labour law through the market is pervasive: 'we are [not simply] wedded to and driven to see the content of labour law in [terms of consumer protection for the vulnerable in the labour market] ... we are also driven to answer questions about the scope of labour law in a certain way.'[433] When market economic growth is the priority, inequalities produced and sustained by lax labour regulations are excusable. Persons considered to be IML are regrettable casualties of economic growth. Their precarious work is justified for the sake of Britain's progress, as well as the income (and economic growth) they are believed to generate towards a proto-political, global, economic community. The contribution to a proto-political community here includes the economic benefit seen to be gained from a migrant labour force contributing remittance payments back to their home countries/ countries of origin.[434]

To remedy or address these casualties of economic growth, some labour law scholars argue in favour of a more sector specific, localised labour law regime.[435] For others, the pervasiveness of cross-border industries and transnational or multinational businesses suggest the need for a reformed, and stronger, international labour rights regime.[436] A local labour law regime is difficult in the UK context, for instance, in light of the immigration history of migrant workers, discussed in the previous chapter. As well, the current legal obligations derived from EU membership mandate that

[431] Roberto Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (London: new edition Verso, 2004). Roberto Unger uses the term 'false necessity' to refer to what we take, unquestioned, as necessary conditions to maintain order and definition.

[432] Susan Marks, 'False Contingency' *Current Legal Problems* 62 (2009) 1-21.

[433] Brian Langille, "Labour Law's Theory of Justice," in *The Idea of Labour Law*, Guy Davidov and Brian Langille eds., 101-119 (Oxford: Oxford University Press, 2011), 107.

[434] Christian Dustman and Joseph Mestres, "Remittances and Temporary Migration" *Journal of Development Economics* 92: 1 (2010): 62-70, 62.

[435] James Atleson claims that labour law is a local regime and, 'the ILO [should be] looked to for standards, but not enforcement.' Atleson, "The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law," in *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities*, Fischl and Klare Conaghan, 471-487 (Oxford: Oxford University Press, 2002). Guy Mundlak also suggests a localised labour law/regulation to address cross-border labour migration, rather than 'supra-national' labour regulatory regimes. Guy Mundlak, "The Limits of Labour Law in a Fungible Community," in *Labour Law in An Era of Globalization: Transformative practices and possibilities*, Joanne Conaghan, Richard Michael Fischl and Karl Klare ed., 280-299 (Oxford: Oxford University Press, 2002).

[436] Philip Altson, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) *European Journal of International Law* 15:3: 457-521.

consideration be given to EU Directives that permit the movement of labourers within EU member states. Concurrently, as discussed in the previous chapter, international labour regulations can only provide directives for the nation-state, not enforcement. In the UK, the Courts remain 'extremely resistant to the incorporation of ILO (and even ECHR) principles regarding the entitlement to engage in collective bargaining and the right to strike.'[437] The ILO is potentially seen to infringe on national law. Especially when national laws are driven by priorities of economic growth, international regulations are avoided. The UK's membership in the EU has already come under intense pressure and criticism in terms of the influx of EU-Citizen workers, and EU labour regulations are likewise met with reluctance or antagonism.[438] Paradoxically, the resistance to international and/or EU regulations is justified not to enable a local regulatory labour regime, but by the need for the UK to participate more 'freely' in the global economic system.

Labour Law's 'Crisis'

As mentioned earlier, in the twenty-first century, labour law is a field that is widely considered to be in crisis.[439] The shifting labour practices discussed above undermine the regulatory aim and historically specific mandate of labour law, namely to facilitate the collective bargaining model of labour relations. The collective bargaining model holds a narrow focus on labour situated in workplaces, where workers are organised into unions or collective bargaining units to negotiate their rights and status with a clearly defined employer. The prevalence of more fragmented labour relations where employers-employees are not clearly defined, (in fact there could be multiple employers or subcontracted labour), and the breakdown of the industry model has caused labour lawyers to question the theoretical foundation (purpose) and future potential for labour law.[440] The twentieth century witnessed responsibility for employment well-being and security shift from the nation-state and

[437] Tonia Novitz, 'Social Justice in Action' *Social Legal Studies* 19:2 (2010) 235–241, 237.

[438] Bob Hepple, "Employment Law"; Mark Bell, 'Irregular Migrants', 152-172.

[439] Davidov and Langille, *The Idea of Labour Law*, 1.This is largely identified as a characteristic of 21st century labour law, unlike immigration law which, for the most part, does not consider itself in crisis arguably due to the (false) necessity of maintaining territorial national borders and sovereign nation-states.

[440] Arthurs, "Labour Law After Labour", 14-16, 20-22.

collective bargaining models based on worker associations to individual and private employment contracts.[441] In the more current model, the individual is expected to depend on the market and personalised negotiation of the market for support (insurance, risk, benefits), rather than on state and/or collective action.[442] The market is substituted for 'society' and the proto-political community (discussed in the first chapter) is not an imagined site for collective support, but a free-market of individuals. Moreover, the ideology of the market assures that 'the market will provide' if only individuals conform to its totalising influence. The sociality is replaced by the market and thus the law that traces sociality traces the market and exscribes discrimination based on limited subjectivity and sub-citizenship (including limited recognition of participation in the market).

However, labour law scholars and practitioners agree that labour law maintains within its defining purpose a sense of community that is perceived by its members as more than a market place.[443] A shared goal amongst many labour law scholars is to ensure that people in many forms of work can be recognised and not exploited. The sense of community that labour law scholars claim as fundamental refers to traditional labour law's task of improving workplaces for employees and resisting managerial models that subjugate workers to hierarchical employment structures.[444] The disagreement, however, within labour law now lies in how labour law can work within or without the parameters of the labour market and dominant (global) market economic system. Through the practice of labour and employment law, regulations can exacerbate precarious employment and labour insecurity rather than encourage work environments where workers, by virtue of work rather than their conformity to a standard contractual employment relationship, are protected.

For some, the crisis of labour law has prompted re-imagining ways for labour law to adapt to changing employment relations, for example through the personal

[441] Mark Freedland and Nicola Kountouris, "Legal Characterisation of Personal Work Relations" in Guy Davidov and Brian Langille, eds., *The Idea of Labour Law* (Oxford: Oxford University Press), 190-207.

[442] Kerry Rittich, 'Core Labour Rights and Labour Market Flexibility: Two Paths Entwined?' Permanent Court of Arbitration/Peace Palace Papers, Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Resolution (Kluwer Law International, 2003), 157-208, 167.

[443] Guy Mundlak, 'The Limits of Labour Law in a Fungible Community' in Conaghan, Fischl and Klare, *Labour Law in An Era of Globalization* 2002, 281.

[444] Karl Klare, 'The Horizon of Transformative Labour and Employment Law' in Conaghan, Fischl and Klare, *Labour Law in An Era of Globalization*, 12.

employment contract.[445] For others, the crisis of labour law illustrates law's inherent incommensurability. This incommensurability is not an impasse. Rather when we think through Nancy's work on ecotechnics and sense, including more recent writing of struction as the heaping of experiences, Nancy suggests that instead of incommensurability leading to a vacant or unbounded imagination, labour law, when re-thought, opens onto the breadth of social modes of economic production that are already happening but are exscribed from conventional legal categories and political discourses. Re-thinking labour law is not a project of creating new forms of being or new forms of labour. Labour law is re-thought in order to give attention to what is already happening within the eco-technics of labour, which processes of neoliberalisation and the market capitalise on, while legal recognition struggles to keep up. The label of IML, identified in political discourses and public policy, acts as a repository of the labourers that are excluded from employment law categories and denied participation as Good Citizens in the community of value, but who are included—in fact are a regular and invaluable presence—in the labour market and economic production. Thus the question linking together the above observations is what is the future of labour law with regard to protecting all workers against exploitation and precarity, regardless of citizenship and immigration status.

According to Arthur's notion of labour law as law enfleshed (incarnate), labour law can maintain a role questioning the 'normative regimes whether domestic or transnational, formal or informal, that justify the ends and limit the means of concerted action by workers and other citizens.'[446] Labour law can act to question the limit of employment law that prevents IML from being fundamentally problematised as a labour practice sustaining vulnerable, precarious labourers. Labour law is normative in that it is rooted in the idea that it is critical to regulate workplaces and work in pursuit of 'equality', 'justice' and 'rights' for workers engaged in an employment relationship or labour exchange. Moreover the definitions of 'labour' 'work' and 'employment' are undeniably vital. Re-thinking labour law does not prevent labour law scholars from questioning, challenging and reworking the boundaries of its normative frame while still maintaining a normative frame. For instance, Brian Langille suggests labour law might be re-thought via an aspiration

[445] Freedland and Kountouris, "Legal Characterisation of Personal Work Relations", 190.

[446] Arthurs, "Labour Law After Labour", 27.

towards human freedom, where labour is connected to a pursuit of freedom and justice.[447] Langille supports labour law being guided by a strong theory of justice, connected to human freedom and capabilities. He argues labour law would be revitalised to advocate on behalf of workers for egalitarian working conditions, broadly extending beyond the industry model to link with Amartya Sen's capabilities approach, mentioned above.[448] Simon Deakin argues the capabilities approach in labour can offer institutional accessibility for market participation.[449] This suggests that labour rights be constituted as part of the process of institutionalising capabilities, which reaffirms the institutionalised approach to labour under the neoclassical model of the labour market. I agree with Judy Fudge's observation that the institutional approach tends 'to place too much emphasis on the consistency and coherence of juridical concepts,' as if it they were separate from economic and political systems.[450] Therefore an approach that recognises the movement of law and the operation, or the *happening*, of labour, away from institutional frameworks and aspiration rights, is necessary to re-think the field. Arthur's suggestion of thinking of labour law as law incarnate challenges us towards thinking differently. How to think differently is where attention to false contingency and Nancy's fundamental ontological questioning comes into play.

The crisis or difficulty to form new ways of thinking of labour law only supports thinking of labour law as law incarnate. Paradoxically, according to Arthurs, labour law is both dependent on, and independent from, the state. Arthurs emphasises the practices of labour law where laws are regulated and mandated through state law

[447] Brian Langille, 'Labour Law's Theory of Justice' in Davidov and Langille 2011, 4. In other words, the focus of labour law would create and provide for conditions that make effective labour market participation possible. This does not offer labour law the potential to be critical of the (false) necessity of the market, or contingencies underlying labour market participation. Moreover, Langille's call to human freedom and justice is also informed by a theoretical tradition from Hannah Arendt that follows a discussion of human rights and rights protection. I have not delved into these themes because I am interested in the practice of labour markets and IML in spite of, or beyond, rights discourses and national, EU and international rights provisions (statutory protections or directives). A discussion of 'rights' is relevant, but I think restricts thinking more broadly about the processes of inclusion-as-exclusion, and technique whereby legal and political categories and discourses make individuals 'irregular' and yet a regular labour market presence.

[448] Human capital as the key to human capabilities, which is the enabling force for humans to participate and interact together has been further by Amartya Sen, *Development As Freedom* (Oxford: Oxford University Press, 1999).

[449] Simon Deakin, 'Capability Concept and the Evolution of European Social Policy' GENet Working Paper No. 14 (2005), 6.

[450] J. Fudge, "Labour as a Fictive Commodity", 128.

yet interpreted by 'specialised public, private or hybrid agencies and tribunals.'[451] Priorities of economic growth and underlying 'free market' ideologies indicate that labour is not regulated solely by the state. Labour law's many 'non-legal' areas, expressed in norms, administration and processes that are social, cultural, political, economic and transnational,[452] suggest it is independent from the state. However simultaneously, labour law concerns our constitution as a sociality and collective political population. Ruth Dukes suggests labour law can be integral to the development of law's constitution and constitutional law, because of labour law's ability to intervene in situations of employment, work and economic participation beyond nation-state boundaries. These qualities of labour law support Arthur's conclusion that labour law is 'neither non-law nor a mutant form of law, but law incarnate, an experiment in social ordering that reveals the true nature of the legal system in general.'[453] Yet this cannot be theoretically pursued without situating labour law's complicity in processes of neoliberalisation. Labour law is orchestrated through the nation-state while practices of labour actively transgress bounded nation-state jurisdictions because market economic demands are transnational. Therefore on the one hand, the idea of labour law as law incarnate brings us closer to understanding how law might be thought outside the frame of the nation-state—how the false contingencies underlying the dominant standard version of labour law may be brought into relief as 'false' in their seeming necessity and universality. On the other hand, in a move similar to Catherine Dauvergne's proposal of 'unhinging' sovereignty from the nation-state critiqued in the previous chapter, isolating ('unhinging') labour law away from the nation-state is not sufficient to enable us to expose false contingencies. Thinking beyond the nation-state, unless accompanied by a critique of the proto-political international, or global, community will not reach the fundamental ontological questioning involved in recognising the *struction* within IML.

Labour law functions as law incarnate via its diverse applications and significance. Labour law acts in response to the labour market, which responds to a neo-liberal market economic system. The labour market—demand and supply—

[451] Arthurs, "Labour Law After Labour", 15.

[452] Also, this has opened the field of labour law to various perspectives of legal pluralism, critical theory and reflexive law. Arthurs, "Labour Law After Labour", 16.

[453] Arthurs, "Labour Law After Labour", 16.

differentiates subjectivity, where some people are maintained in precarious labour situations when their work is not valued equal to an ideal citizen labourer in a full, standard employment relationship. The market, however, is not an entity itself. The nation-state and citizenship are subsumed to the ideology of a market economic system that works in tandem with the architecture of the nation-state that practices differentiated citizenships to the benefit of (short-term) economic growth. Nevertheless, labour law is positioned to engage critically with the privilege of economic productivity and growth. While some suggest labour law should be merged with broader social welfare concerns, justice and social rights (social security law), labour law is also specifically concerned with employment, work, productivity, value and economic participation.

This specificity enables labour law to speak to the privilege and totalising presence of the market as it has conditioned work and labour to be limited to labour and employment that is recognised within the labour market.[454] The market that is, like citizenship, a false contingency. Labour is, under this lens, a 'mass but not collective activity', where 'the lower you are on the economic scale, the less formal your relation to the economy, the more alone you are in the project of maintaining and reproducing life.'[455] A right to work and earn wages is espoused as a fundamental element of social inclusion and citizenship. For example, the previous chapter highlighted how UK immigration law privileges 'high skilled' workers through the Point-Based System (PBS). Consequently, unauthorised work, non-market labour, un-paid work, or undeclared work, including precarious or undefined work, is a basis for exclusion, marginalisation and sub-citizenship.

While currently legal categories and definitions of citizenship equated with legal subjectivity are delegated from within the nation-state, attention to the practices of labour law illuminate how a governance regime embedded in the nation-state is but one form of social order imposed onto broader, divergent social relationships. Labour categories are made to fit into processes of neo-liberalisation, but these processes depend on unequal labour relations to facilitate market competition, growth and financial profit regardless of labour categories purportedly extending labour

[454] This excludes the value and economic contribution of social production and reproduction.

[455] Lauren Berlant, *Cruel Optimism* (Durham and London: Duke University Press, 2011), 167.

protection equally to a range of workers. Although the dominant economic market model and the labour market as a tool of the economic market appear to support or depend on the framework of the nation-state, the market also relies on the (idea of the) proto-political global community, which is transgressive of nation-state boundaries and limits while justifying exclusive national boundaries. It is difficult to escape the circulation of the market and neoliberalisation. Perhaps then the precise value of Nancy's understanding of law as tracing the sociality of singular plural beings together is that it is not an alternative to neoliberalisation. Instead, through his work we can access a better understanding of the eco-technics of production and capital, co-appearing and forming the limited economy. Processes of neoliberalisation *happen* through the movement and groundlessness of our bodily ontology, only as the being singular plural amassing of bodies happens removed from (in spite of) predetermined legal categories. This movement complicates efforts to pinpoint law's precise limit or purpose in migration and labour because the processes of neoliberalisation and eco-technics constantly overreach legal limits, notably when immigration laws and labour laws are transgressed. If law is understood as the tracing of a sociality, then the political and juridical systems of governance that mandate legislation and inscription of law are removed from law itself; the systems of governance do not define law, they instrumentalise it.

Labour Law's False Contingency: the structure of UK employment law

A shift within the field and approach of labour law, as suggested above, cannot happen without dismantling the regulatory power of the labour market and categories of employment law (based in contract law principles). Proposals to expand the definition of labour to recognise persons working in precarious situations allow the false contingency of the labour market system to continue unquestioned. However, a shift from the traditional, standard frame of labour to a different orientation does not only mean engaging in deconstructive questioning. The very practice itself is anxiety-inducing,[456] not least because this fundamental (ontological) questioning touches upon our very relationship to law and to our way of

[456] Mark Freedland, quoted in Langille, "Labour Law's Theory of Justice" in *The Idea of Labour Law* Guy Davidov and Brian Langille, eds., 101-119 (Oxford: Oxford University Press, 2011), 107-108.

understanding sociality and social relations. It uproots traditional labour law, which was intended to mediate inequality for workers in disadvantaged bargaining positions. A new approach questions labour law's complicity in maintaining disadvantaged positions for precarious workers. This is unsettling because what then would exist as protection for those recognised within the existing system? Judy Fudge suggests that nothing less than a new imaginary is required to address the regulatory dilemmas, inclusions and exclusions, which result from the limited scope of labour law. For example, when thinking of what it would mean to include care work in labour law, Fudge argues labour law could shift 'to include all of the regulatory dilemmas inherent in governing the labour market [...] to address power relationships in households, workplaces, and society at large.' [457] A new imaginary involves addressing the embedded contingencies that inform labour law and employment, while keeping within the frame of analysis the real situations of workers and employment practices.

Labour law, specifically its more common juridical manifestation of employment law in the UK, has developed within the market system based on contract law principles.[458] These principles are believed to facilitate labour market participation. For some workers considered to be IML, their labour market participation is made possible precisely because they are persons outside of the legal categories and contractual employment relationships that would facilitate their access to rights and protection. The political priorities of economic market growth are opposed to greater labour regulation. Indeed, in the UK, labour law protections are seen to restrict growth. The UK has long been guided by a belief that 'limiting employers' freedom to manage, hire and fire without restraint' [459] would be economically devastating. For instance, in May 2010 the Government committed to review employment laws for 'employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive.'[460]

[457] J. Fudge, "Labour as a Fictive Commodity", 136.

[458] Hugh Collins, *Employment Law* (Oxford: Oxford University Press, 2010, 2nd ed), 4.

[459] Hepple, "Employment Law", 220.

[460] UK Department of Business, Innovation and Skills, *Employment Law Review* (United Kingdom: Government Publication, 2012). Measures included cutting costs, imposing mandatory two-year employment periods before being able to claim unfair dismissal against an employer). Government discussions were concerns with how to

In the UK, labour law has developed in a climate of de-centralisation where private firms manage labour relationships with their employees and workers. The promotion of a flexible labour market contrasts with labour law's mid-twentieth century origins of collective laissez-faire.[461] Concerns for redistribution and protection of workers with unequal bargaining power have been overtaken by legal regulation to facilitate competition and flexibility. Predating and following after New Labour, British governments have been reluctant to regulate labour. Regulations have been seen as potentially interfering with the freedom employers and businesses have to control their workplace and negotiate employment contracts. The UK has long been guided by a belief that 'limiting employers' freedom to manage, hire and fire without restraint'[462] would be economically devastating. Bob Hepple suggests the UK coalition government is 'locked into a model where there is a presumption that regulation interferes with the efficient working of free markets.'[463] In 2010 the Government committed to review employment laws for 'employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive.'[464] It is questionable whether protecting fairness is compatible with providing competitive environments, but it seems the latter constitutes the main pursuit. For example, during the era of the economic recovery schemes (2012-2013), Britain's Prime Minister expressed the incentive for the government's policies as a need to compete in the 'global race'. Economic growth and maintaining competitiveness in a global market were made explicit priorities for the British government. Priorities included maintaining a global economic presence to compete with other national economies, and immigration policies aimed to attract the 'best and the brightest' immigrants, whilst keeping out those believed to 'drain' the economy.

'equalise' the playing field because perception was that too much power in employment law was given to the employee.

[461] Ruth Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' *Modern Law Review* 72:2 (2009) 220-246, 221.

[462] Hepple, "Employment Law", 220.

[463] Hepple, "Employment Law", 220.

[464] UK Department of Business, Innovation and Skills, *Employment Law Review* (United Kingdom: Government Publication, 2012). Measures included cutting costs, imposing mandatory two-year employment periods before being able to claim unfair dismissal against an employer). Government discussions were concerns with how to 'equalise' the playing field because perception was that too much power in employment law was given to the employee.

The definition of employment in the Employment Relations Act 1996 (ERA) reinforces a traditional model of employer-employee contractual relationships.[465] After the ERA, extensive legislation has created new categories, based on classifications of status such as employment protection (Employment Equity Act 2010), working time (Working Time Regulations 1998), and provisions set out in the Temporary Agency Work and the Agency Workers Regulations (2010) and National Minimum Wage Act (1998).[466] These statutory provisions divide workers not simply according to whether they are employees or self-employed but also according to 'the degree of length and regularity of employment, the duration of normal working week, and the normal weekly wage or salary.'[467] The classifications may seem to provide more opportunity for recognition. However, by being more specific these new categories exacerbate legal grey areas because they enforce stricter classifications that exclude those not specifically recognised. New regulations for agency workers, for example, have been drafted in response to the prevalence of these types of contracts. However their efficacy at offering protection has yet to be tested in case law.[468] It is suspected that the legislation will fail to adequately affect the precarious situation of most agency workers. Primarily this is because the economic benefit of their dispensible labour is privileged over their protection.

Recently legislated labour regulations have steered labour law's mandate towards rights-based statutory discourses. Labour law's scope nonetheless in both the collective bargaining model and statutory rights depends on defined employment

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[465] Category of 'employee' in the Employment Relations Act 1996 (ERA) sec 230 (1): an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. (2) "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. (3) "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

[466] My attention to who is excluded from the application and performance of labour law does not concern debates about the territorial scope of UK labour law. I am not addressing questions about the scope of the ERA 1996 for overseas workers, posted workers or expatriate employees. For instance, factors relating to *Lawson v Serco Ltd.,* 2006, and the Convention on the Law Applicable to Contractual Obligations 1980 (The Rome Convention), incorporated into UK law by Contracts (Applicable Law) Act 1990, and the Posted Workers Directive of the EU (Directive 96/71/EC). See Simon Deakin and Gillian Morris, *Labour Law* (6th. Oxford: Hart Publishing, 2012), 121-123.

[467] Deakin and Morris, *Labour Law*, 134.

[468] Directive 2008/104/EC on Temporary Agency Work and the Agency Workers Regulations 2010. UK agency workers rarely have a contract of employment with their agencies, but possibly will have a contract for services. Deakin and Morris Labour Law, *Labour Law,* 210.

relationships. Traditionally, th distinction between contract of services (commonly the employer-employee relationship) and contract for services (temporary contract for specific period of time and specific service, commonly self-employment contracts) has been important because whether one is contracted *for* services or in a contract *of* services allows certain rights claims for employment malpractice to be made or refused. When one's employment relationship is not recognised as a contractual employment relationship but a contractual agreement, the possibility of being considered 'irregular' and in legal grey areas is much greater. The distinction currently allows employers and businesses to evade statutory employment laws, as will be discussed below. Less regulation of employment practices is encouraged through political priorities focused on economic growth, where governments sanction economic competitiveness in a local and global labour market.

Contract *of* services is a contractual employment relationship that has been interpreted as involving 'mutuality of obligation' of both parties to maintain an employment relationship. Both employer and employee are granted statutory rights. The worker is recognised as an 'employee' for the purposes of taxation and employment law, with statutory rights to holiday pay, sick pay, maternity and paternity rights, redundancy payments and termination of employment. Contract *for* services is not an employment relationship, but a contractual agreement for a limited period of time and specific service. There is no requirement for the business to treat the service provider as an employee, and statutory employment rights are not guaranteed. In terms of UK taxation laws, payments are made through invoices rather than payroll. In spite of the different treatment in law, the distinction between a contract of services and a contract for services can be difficult to discern in practice. In many cases, persons initially contracted via a contract of services clearly maintain an employment relationship with the other contracting party. However, it may be of benefit to the employers to limit the contract, officially, as one of contract for services where statutory employment rights are not protected and employers are not obligated to provide for their workers as employees.

One of the main tests that have been used in case law to determine the type of contractual relationship is the presence or absence of mutuality of obligation. However the absence of 'mutuality of obligation' has centred on the experience of the

worker. Obligation is based on what an ostensibly free individual could do in such a contractual agreement. The case law (*Carmichael v National Power plc* and *Consistent Group v Kalwak* discussed below) has confirmed that 'obligations' are based on contractual terms, not on the relationship and social experience of the worker and employer. In other words, the basis of recognising an employment relationship is not on the *ecotechnics*—the way that the relationship and work is actually being carried out—but instead the categories (build on false contingency) of recognition. The case of *Carmichael v National Power plc,*[469] affirmed that when casual workers have the option to refuse work this demonstrates a lack of mutuality, and thereby no contract of employment. The difference in obligation between when work was offered and the obligation at the time of work was understood to demonstrate that the parties were not in a relationship of continuous employment. Therefore, *legally,* there was no relationship of mutual obligation that extended beyond the contract for services. This waves workers' entitlement to an employment contract, the reasoning being that they are not obligated to continue providing services (working) with that contracting party. Without an employment contract, workers do not have established provisions for grievance procedures, termination of contract, sick pay, pension or benefits. The contract law model operates on an individual contractual basis, without any consideration overarching the contractual agreements to provide individuals with assistance towards their well-being or social welfare. These benefits are believed to be the mandate of *public* services, not the *private* realm of contractual agreements. Due to the de-centralisation and de-regularisation of industries and labour, for the sake of encouraging a free market economy, the public social welfare system is increasingly unable to provide for individuals outside of their private employment relationships. After *Carmichael,* casual, or agency workers, engaged in a discontinuous contractual relationship were, by law, not considered employees. The obligation to provide support and protection to workers is interpreted as mutually reflected in the obligation of a worker to continue working.

Similarly in *Consistent Group v Kalwak*,[470] the Court of Appeal asked whether claimants were employees employed by Consistent Group Limited, and whether they were employees, workers or neither, of Welsh Country Foods Limited (WCF). The

[469] *Carmichael v National Power plc* [2000] IRLR 43

[470] *Consistent Group v Kalwak* [2008] EWCA Civ 430

discussion focused on whether the 'obligations' term in their contract of employment was legitimate or a sham.[471] If the obligations element of the contract was found to be a sham this was on the basis that 'both parties intended to paint in that respect a false picture as to the true nature of their respective obligations.'[472] The Court of Appeal decided the relationship lacked the 'mutuality of obligation' to be a contract of employment. This meant that the workers were not legally considered employees of Consistent Group Limited.[473] As a result, Consistent Group was not legally obligated to provide workers with compensation for unfair dismissal. The workers were not employees, but contracted, casual workers, and by virtue of not having access to protection as employees, this meant that they were rendered to positions akin to so-called irregular (migrant labour) situations. However because according to the contractual terms the workers were able to refuse work, they were considered an autonomous contractual party in a voluntary contractual agreement. A contractual agreement that is not a contractual employment relationship removes labour law's prerogative of negotiating an inequality of bargaining power in employment relations.

The main shortcoming of these legal decisions is that the contractual model and notion of contracting for services assumes that the worker is able to refuse work and, equal to the business or employer, find employment and income elsewhere. In many casual, contract-based jobs, the worker is low-waged and under-paid for their labour. Individuals consent to work in sub-standard conditions often out of necessity, not out of a freedom of choice. The need to have a basic income to survive, places people in situations where they might consent to substandard, precarious and casual contracts; the right to refuse work is hardly an empowering factor. Nevertheless the common law has reaffirmed the contract law basis of employment relations and distinction between contract for services and contract of services which ultimately supports the ideal of the free market, bolstered by the ideal worker as the individual

[471] A sham employment contract has been recognised where legal rights and obligations detailed in the written contract are different from what is intended, and practiced, by both parties. Sham contracts were discussed in *Snook v. London and West Riding Investment Limited* [1967] 2 QB 786 para 802. A sham can be where the 'actual legal obligations' are different from words in a written contract. See *Firthglow Ltd (t/a Protectacoat) v. Szilagyi* [2009] EWCA Civ 98 para 52, 53.

[472] *Consistent Group v Kalwak* [2008] EWCA Civ 430 at para 28.

[473] *Consistent Group v Kalwak* [2008] EWCA Civ 430 at para 55. According to Lord Justice May, 'the written contract between each other claimants and Consistent expressly purported to be a self-employed subcontractor's contract for services. The 'Obligations' clause, ... , taken at face value ... would not constitute the claimants as employees for the purpose of section 230 of the Employment Rights Act 1996.'

autonomous subject.[474] Accordingly, the individual engaged in a contract is recognised as being an autonomous party, on equal terms with another equally autonomous party.[475]

For early twentieth century theorists the aim of labour law was to address the inequality of bargaining power between employers and employees. This was not done by questioning the frame of contract law itself, but by supporting, through collective action and organization, the bargaining power of workers. Thus, employment law has the difficult, if not impossible, task of ordering work, and social relations, into a particular contractual framework and economic system.[476] Paradoxically, the employment relationship is never a relationship of equal bargaining power. Labour law developed as an intervention to protect workers who were in a disadvantaged contractual position, constituted by an unequal bargaining power in collective bargaining.[477] In the twenty-first century however, the inequality embedded within the labour relationship is exacerbated in low-skilled, low-waged work where employers presume that labour demand can be filled by a seemingly 'global' labour supply. And these labourers, embedded within the label IML, are without full legal recognition and subjectivity.

Workers are disadvantaged in relation to the power of their employers because there is a presumption of greater supply than demand. In spite of the clear inequality of bargaining power, the contractual agreements in many low-waged low-skilled sectors are precisely the work relationships that are not considered to be contractual employment relationships and they exist outside the ambit of collective bargaining processes and national statutory labour regulations. In spite of the clear power imbalance between employer and employee, labour law decisions and legal statuses have been framed by fundamental principles in contract law where contracts are believed to involve a voluntary and mutual 'meeting of minds.' The equation of employment relationships with the classical model of contractual agreements has integrated other contract law doctrines have been integrated into the practice of

[474] Contract law is informed by eighteenth century notions of freedom of contract. Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Claredon, 1979).

[475] Collins, *Employment Law*, 14-15.

[476] Collins, *Employment Law*, 5.

[477] Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in *The Idea of Labour Law* Guy Davidov and Brian Langille, eds., (Oxford: Oxford University Press, 2011), 30-42.

labour/employment law. Significantly for irregular migrant labourers, the doctrine of illegality has been used to prohibit persons without permission to work (illegal immigration status) from making claims against discrimination or enforcing their rights as workers. Moreover, persons fitting into the label IML often would not qualify as 'employees' based on the 'casual' nature of their employment arrangements.

The contract law doctrine of illegality deems that if illegality is present when the contract was formed then this illegality, and its legal consequences, overrides the contract.[478] In 2009, the UK Law Commission affirmed that if illegality of immigration, as a statutory or common law offense, is known, then the contract, employment contract included, is void.[479] The UK Law Commission report was influenced by a case that directly concerned persons considered IML in the United States: *Hoffman Plastic Compounds v. National Labour Relations Board (NLRB)*.[480] In *Hoffman Plastic,* an unauthorized Mexican worker was denied the payment owed to him (back-pay) due to his being 'alien', without legal immigration status. The United States Supreme Court ruled that immigration policy was more powerful than the National Labour Relations Board (NLRB) policy of awarding back-pay. Following this decision, those working without legal authorization are not able to claim compensation or losses protected by the NLRB.[481] *Hoffman Plastics* affirmed that legal immigration status is paramount; if not for this ruling, the state would be seen to condone illegal employment. As a consequence, the doctrine of illegality entitles the state to contravene its own labour law if the 'foreigner' transgresses immigration law. Therefore, even if the employer is at fault, the employee, if illegally working, may be blamed and will be unable to bring legal action against an employer for their illegal activities. The doctrine of illegality developed through UK law not

[478] Dauvergne, *Making People Illegal,* 21. With reference to *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) and a United Kingdom case, *Sharma v. Hindu Temple and Others* (1990) EAT/253/90.

[479] Law Commission UK, *Illegality Defense Consultation* (UK: Law Commission, 2009), 12. The argument backing this doctrine is that if illegal conduct is condoned then the tribunal representing the law is overtly contradicting itself by permitting illegality.

[480] *Hoffman Plastic Compounds v. National Labour Relations Board* (NLRB) 535 U.S.137 (2002)

[481] *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) According to Ho and Chang, "Hoffman discerned, for the first time, a Congressional policy to bar important remedies for undocumented workers under the National Labor Relations Act ("NLRA") if such remedies could be construed to somehow "encourage . . . evasion of . . . immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Hoffman* 535 U.S. at 151-52, quoted in Ho and Chang 2005. Christopher Ho and Jennifer C. Chang, "Drawing the Line After Hoffman Plastic Compounds, Inc v. NLRB" *Hofstra Labour and Employment Law Journal* 22 (2005) 473-531.

primarily in response to immigration illegality, even though this is currently the most controversial usage of this doctrine.[482]

In UK law, *Hall v. Woolston Hall Leisure Ltd*[483] the doctrine of illegality was not upheld due to the particular facts of the case. This was not a case of immigration illegality. In this case, Ms. Hall was involved in illegal conduct (unpaid tax on her income). Notwithstanding this illegality, she was allowed to pursue a discrimination case against her employer. The basis of the illegality, according to the Court of Appeal, was found to be not 'inextricably linked' to the issue of the complaint, which was compensation under the Sex Discrimination Act 1975 for dismissal by reason of pregnancy. Thus the illegality was not incorporated as a term into the contract itself.[484] In contrast, cases that concern immigration illegality, although nuanced as per the most recent 2014 decision discussed below, generally uphold the doctrine of illegality. In the 2012 Court of Appeal case of *Hounga v. Allen*,[485] the contract of employment was 'tainted with illegality'. This illegality overwhelmed the discrimination case pursued by Mary Hounga (under the Race Relations Act). According to the doctrine of illegality, Mary Hounga's non-dismissal discrimination claim was not allowed as a result of her illegal immigration status and employment (as a live-in *au pair*) without a work permit.[486] The UK Supreme Court overruled the 2012 Court of Appeal decision in 2014. However, this was not on the basis of the doctrine of illegality. Thus the contract law principle remains intact to be applied to cases of immigration status 'illegality'.

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[482] In 1991, the UK case *Sharma v Hindu Temple* (EAT/253/90 unreported, 1991) strengthened the doctrine of illegality in the common law, where the Courts deemed an employer with a criminal offense unable to bring forth a contract-based claim. In 2004, *Vakante v Addey & Stanhope School* affirmed the use of this contract law principle in employment, where an employment contract that is illegal in performance is nullified when illegality is known. *Vakante v Addey & Stanhope School* 4 AII ER 1956 also demonstrated how immigration law enforcement is preferred over labour standards. Discussed in Bernard Ryan, "The Evolving Legal Regime on Unauthorized Work by Migrants in Britain" Contemporary Labour Law and Policy Journal 27: 27 (2006), 58. The UK Supreme Court, in the spring of 2014, reviewed the case of *Hounga v. Allen and Another* [2012] EWCA Civ 609, which concerns a migrant (foreign national) domestic worker who did not have a visa permitting her to be employed in the UK. *Hounga v Allen* [2014] UKSC 47.

[483] *Hall v. Woolston Hall Leisure Ltd* [2001] ICR 99.

[484] And Hall, a British national, was understood not to have actively participated in the illegality itself. Gibson LJ determined that there was 'nothing that shows that she [Hall] herself was guilty of any unlawful conduct'. *Hall v. Woolston Hall Leisure* [2001] ICR 99 at para 47.

[485] *Hounga v. Allen and Another* [2012] EWCA Civ 609

[486] In *Hounga*, the Court of Appeal followed *Vakante v. Governing Body of Addey and Stanhope School (No 2)* [2005] ICR 231. Both cases concerned foreign nationals whose illegality was based on their lack of permission to work in the UK.

On the one hand, the leading UK case of *Hall* demonstrated that an employee may be 'barred by illegality from enforcing her contract of employment' but this will not automatically prohibit her from 'claiming compensation for a discriminatory dismissal from her employment'.[487] On the other hand, although Mary Hounga was herself in a situation of great vulnerability to her exploitative and abusive employers, for the Court of Appeal her illegal immigration status overwhelmed any discrimination claim against her employer. The Court of Appeal dismissed Hounga's claim against her employers because her illegality was found to be intrinsic to the contract of employment, more so than in *Hall*.[488] The Employment Appeal Tribunal (EAT) acknowledged Hounga was an employee of the Allens. However, as a Nigerian national in the country illegally, she had no legal right to be employed. Both the EAT and the Court of Appeal recognised that she was exploited by employers who clearly were themselves participating in her illegal situation. The Tribunal and Court agreed that the Allens had more knowledge of the illegal situation than Hounga herself. Nevertheless, the Court of Appeal agreed with the EAT that Hounga herself did participate and continue her illegal behaviour, where the illegality was 'inextricably bound up with' the employment contract itself. As a result, *Hounga*'s discrimination claim in the EAT was dismissed, and supported by the Court of Appeal in 2012, based on the doctrine of illegality.

Similarly in *Vakante v. Governing Body of Addey and Stanhope School (No 2)*,[489] a Croatian national who worked without a work permit tried to, after being dismissed from employment, bring a claim for race discrimination. His claim was not allowed based on the fact that his illegal conduct was 'inextricably bound up with' the claim. It was decided that to allow the appeal would appear to condone the illegal behaviour.[490] Mummery LJ distinguished *Vakante* from *Hall* based on who bore responsibility for the illegal conduct. In *Vakante,* the fault was seen to be entirely the workers' own.[491] However in *Vakante* the employers were innocent of any illegality

[487] *Hounga v. Allen and Another* [2012] EWCA Civ 609 Rimer LJ at para 49.

[488] *Hounga v. Allen and Another* [2012] EWCA Civ 609 para 36 by Rimer LJ.

[489] *Vakante v. Governing Body of Addey and Stanhope School* (No 2) [2005] ICR 231

[490] *Vakante v. Governing Body of Addey and Stanhope School* (No 2) [2005] ICR 231, Mummery LJ at para 2

[491] In *Hounga,* Rimer LJ linked Mary Hounga's situation to *Vakante,* and not *Hall,* arguing 'the employment contract was illegal in its inception since it was a contract for Miss Hounga to work in the United Kingdom when both parties knew that she was not entitled to work here.' *Hounga v. Allen and Another* [2012] EWCA Civ 609 para 60.

and in contrast, the Allens (in *Hounga*) were judged to have participated in the illegal employment contract. This did not affect the Court of Appeal's decision to apply the doctrine of illegality. There is much to be critiqued in the Court of Appeal case of *Hounga.* The Allens and Mary Hounga were deemed to have equally participated in the illegal conduct. The imbalance of power between employer and employee was not taken into account. Hounga arrived to the UK solely to work for the Allens and clearly was not familiar with immigration practices and policies in the UK. Whilst living with the Allens, Hounga was subjected to physical violence. Thus while the court refuses to condone illegality, it remained silent about the illegal (criminal assault: offenses against the persons) behaviour of the Allens. The labourer is blamed for her own illegal situation, in spite of the ongoing labour demand for an illegal, 'captured' labour force. Hounga's employment as a live-in *au pair* in the Allens' house challenges the scope of responsibility and assumed consent to one's illegal situation. The question of forced labour was taken up by the UK Supreme Court in *Hounga* [2014]. The Supreme Court reviewed the use of the doctrine of illegality against Miss Hounga's claim for discrimination in employment, and ultimately allowed Miss Hounga's appeal. The majority (Lord Wilson, Lord Kerr and Lady Hale) found that 'Hounga was the victim of forced labour'.[492] Consequently, the majority ruled that 'it would be a breach of the UK's international obligations under the Convention for its law to cause Miss Hounga's complaint to be defeated by the defence of illegality.'[493] Meanwhile the Supreme Court referred to current political attention to Modern Slavery, but did not overrule the application of the doctrine of illegality. The doctrine of illegality remains in place as a consequence of state sovereignty and immigration law's false necessity to preserve to deem persons (immigrants) legal or illegal.

Prior to the Supreme Court decision in 2014, the two cases involving immigration law, *Hounga* and *Vakante*, demonstrated the prominence of the doctrine of illegality where immigration and employment intersect. The cases highlight the reluctance or inability of labour law to intervene in situations of precarious and vulnerable labour, where the power inequalities are extreme and where intervention

[492] *Hounga v Allen* [2014] UKSC 47 at Para 39.

[493] *Hounga v Allen* [2014] UKSC 47 at Para 50. Dissenting opinion, however, stated that in spite of Hounga being abused by the Allens', her participation in immigration illegality meant that she would not be protected by trafficking provisions.

would contradict principles of contract law and freedom of contract. Furthermore, these cases applied the doctrine of illegality for the purpose of public policy and immigration control. The more 'irregular' the employment relationship, the more difficult it is for labour law to intervene because of its narrow categories of employment, particularly if there is an element 'tainted with illegality'.[494] Hall was able to proceed with her anti-discrimination claim based on the level of illegality, but also because her employment complied with the standard employment relationship. Meanwhile, as affirmed in the Court of Appeal 2012 decision, Hounga was not only working *illegally* without a work permit, she was also employed in a private setting, as a live-in carer, outside of the traditional and standard employment relationship. There is no language within existing labour law that would extend to recognise her employment relationship as worthy of law's protection akin to workplace regulations. The 'private' matter of the Allens' abuse, including compelling Hounga to come to the UK to work without legal status, was not considered a valid concern of labour regulation and the Employment Tribunal, or the Court of Appeal.

The Supreme Court in 2014 held that the doctrine of illegality was founded in public policy and that the abuse that Mary Hounga was subjected to fell under the definition and therefore attention of trafficking (forced labour) legislation.[495] Therefore according to the attention in the UK parliament to trafficking and forced labour, demonstrated in the Draft Modern Slavery Bill, Cm 8770, presented to Parliament in December 2013, the Supreme Court deemed it contrary to current public policy to interpret the doctrine of illegality in the way the Court of Appeal had dismissed Hounga's claim in 2012. The Draft Modern Slavery bill has been reviewed and in June 2014 (Cm 8889) responded to parliamentary committee amendments to include a statutory defence to a victim of trafficking who, as a result of trafficking, has been compelled to commit a crime.[496] The dissenting opinion did emphasise that this statutory defence was only possible if the trafficked individual did not knowingly commit the illegality in the first instance. And this fact was established in the 2012 Court of Appeal decision. The dissent in Hounga 2014 contended that the extent of

[494] *Hounga v. Allen and Another* [2012] EWCA Civ 609 para 4.

[495] The legislation cited was the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons ("the Palermo Protocol") signed in 2000 and ratified by the UK on 9 February 2006. This was cited in para 47 of *Hounga* [2014].

[496] Cited in *Hounga* [2014] para 52.

her knowingly engaging in illegal action meant that she was not a victim of trafficking under this proposed statutory defence. In spite of this ongoing question in the law on illegality and the application of this doctrine, the majority concluded,

> *' of the ILO's six indicators of forced labour, there might be argument about the existence of the second (restriction of movement) but, on the tribunal's findings, there certainly existed the first (physical harm or threats of it), the fourth (withholding of wages) and the sixth (threat of denunciation to the authorities where the worker has an irregular immigration status). Judicious hesitation leads me to conclude that, if Miss Hounga's case was not one of trafficking on the part of Mrs Allen and her family, it was so close to it that the distinction will not matter for the purpose of what follows.'*[497]

While the 2014 Supreme Court decision is a success for Miss Hounga and those fighting for the protection of non-nationals (especially undocumented migrants) from abuse and exploitation, the decision focuses on the criminalisation of trafficking and the individual private behaviour of the Allens. The legal debate has not taken into account what economic and labour market forces underpin decisions to limit non-nationals from accessing Employment Tribunals to enforce their labour rights. The labour that is outside of the home holds labour market value and subsequently creates a demand for devalued domestic 'home' workers, while re-enforcing a concurrent disinterest in their well-being and labour market presence. So-called private employment situations exemplified by the work Miss Hounga was engaged in (domestic worker/live-in caregiver) but not limited to this type of work, are private in contrast to labour law's public demographic of workers. Private forms of work, including care giving and care work inside the home, are excluded from conventionally recognised formal employment or waged work. Informal work in the 'private'-sphere continues to be an exception to what remain the ideal standard forms of labour. Einat Albin argues that the culture of particular labour sectors has a

[497] *Hounga* [2014] para 49.

significant impact on the type of labour and treatment of workers regardless of citizenship status or indeed access to the law.[498] This is especially true where there is no organising collective that formalises this labour and the labourers. For instance the service industry operates with employment arrangements that are fundamentally different from the manufacturing model. Albin explores how workers in the service industry are expected to embody the company for which they work; they are not simply parts performing their labour. Like care work and work in the home, this type of labour is much more demanding of physical and emotional presence and can constantly necessitate workers to exceed their contracted hours. This expectation applies both in cases of high-waged business services and low-waged catering, hospitality services and care-work, which, although divided by income, exemplify employment practices that go well beyond what can be recognised within a fixed idea of labour regulation and can be considered forms of precarious work. Thus, the way that Hounga's situation needs to be made exceptional via forced labour and not via existing labour law remedies emphasises the shifting labour practices are external of labour law and labour legislation.

The twenty-first century emphasis on labour rights has shifted away from a collective bargaining focus to rights structured and enforced through national and international laws and citizenship-based recognition. Work is increasingly carried out in private and based on *personal* contractual employment relations, which Freedland and Kountouris refer to as 'personal work profiles.'[499] Industry-wide, multi-employer collective bargaining throughout the latter part of the twentieth century has been commonly replaced by private, single-employer enterprise level bargaining.[500] The

[498] Einat Albin, 'Labour Law in a Service World' *The Modern Law Review* 73: 6 (2010) 959-984, 975. Albin explores how workers in the service industry are expected to embody the company for which they work; they are not simply parts performing their labour. Like care work and work in the home, this type of labour is much more "demanding of physical and emotional presence" and can constantly necessitate workers to exceed their contracted hours. This expectation applies both in cases of high-waged business services and low-waged catering, hospitality services and care-work. And although divided by income, both employment practices go well beyond what can be recognised in the fixed idea of labour regulation.

[499] Freedland and Kountouris, "Legal Characterisation of Personal Work Relations", 190.

[500] Paul Davis and Mark Freedland, *Towards a Flexible Labour Market—Labour Legislation and Regulation since the 1990s* (Oxford: Oxford University Press, 2007), 3. Since the 1960s, there were differences in opinion and practice of how inequalities were best addressed, for example whether to use labour legislation to check collective bargaining and trade union power, or to focus on management and reducing the power of trade unions. Davis and Freedland 2007, 4. In the latter part of the twentieth century there was movement away from the regulatory technique of collective (laissez-faire) bargaining towards greater regulation through state-centred legislation. These changes were significantly influenced by a turn toward European Union Law and European Directives. Especially towards the end of the twentieth century, significant change was made toward individualisation of employment rights and a juridification of labour relations. Hepple, "Factors Influencing the Making", 39.

private, personal nature of many employment contracts has shifted the site of rights recognition away from the centralised nation-state towards private policies of firms and corporate accountability.

The tension between market forces and the demands of labour recognition are such that the expansion of marketised labour has not had the effect of extending social security provisions and state support to formerly private forms of labour. Instead, the marketisation of previously private spheres has led to a transfer of accountability to a new privatised realm instead of an expanded 'public'. This was a clear policy promoted by the New Labour government (1997) to transform the sphere of employment to be more receptive to the demands of a neo-liberal, flexible and ever-expanding labour market. The primary concern of employment regulation was to ensure growth and flexibility for business development.[501] The labour market is guided by the logic of the dominant neoliberal economic system, and employment law is conditioned from within this frame of recognition.[502] Consequently, the UK's economic struggles are blamed on immigrants.[503] Since the economic crisis, which began in 2008, fears of rising unemployment and joblessness in Britain dominate media headlines and political debates.[504] Citizen-nationals seem to be positioned against foreign nationals in the labour market, competing for scarce employment. Concerns of economic downturn and rising unemployment, when discussed in media and public policy debates, rarely correlate with analyses of the globalised movement of labour or the dominance of a particular globalised economic market.[505] The economic market and processes of neoliberalisation are seen as the only possibility. Consequently, they do not become the subjects of legal criticism particularly when legal discussions remain focused on how to work better within the existing, normative, paradigm. Hence Arthurs, Fudge and Langille among others, call for a re-thinking of labour law.

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[501] Davis and Freedland, *Towards a Flexible Labour Market*, 234.

[502] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (2nd. Boston: Beacon Press, 2001), 45.

[503] Matt Cavanagh, 'The right tries to blame youth unemployment on immigration again' *New Statesman* (UK) January 2012.

[504] Spencer Thomas, 'Long-Term Unemployment: The national emergency that refuses to go away' *Left Foot Forward* (London, UK: January 17, 2013); Nick Pearce, 'Europe's Recovery Won't Solve Underlying Problems in the Jobs Market' *Huffington Post UK* (April 2014).

[505] Stuart Hall, Doreen Massey, Michael Rustin, 'After neoliberalism: analysing the present,' in After Neoliberalism? The Kilburn Manifesto *Soundings* (2013), 8.

The idea that political, economic and juridical decisions must serve and support the market, and 'keep the market happy', is seen as a necessity and a priority for government. The false contingency of the market suggests that our society, the social, is coterminous with the market economic system, which is manifest in the neo-liberal democratic nation-state. The law, as practiced and developed under the nation-state as a regulatory instrument that provides order and enforces social norms, has no alternative reference under the limited contingencies of the global economic system but to be subservient to the market. The market economy is dependent on a market society where all the elements of industry—labour, land and money—are required to be part of the market. These elements become recognisable (are made to 'make sense', in Jean-Luc Nancy's terms) when subordinated to the market and understood within a market-driven ideology.[506]

Nevertheless the labour market itself is 'fundamentally contested, and law does not simply regulate an already existing labour market, but helps to produce employment and labour markets as social fields.'[507] Recent case law suggests that there may be scope for judicial interpretation to open possibilities to challenge the exclusion of workers as a result of de-centralised and privately regulated employment practices. A 2012 Supreme Court decision, *Autoclenz Limited v. Belcher and others*[508] marks a turn in favour of workers' being able to hold to account employers' responsibility to pay entitlements to employees outlined in the ERA 1996.[509] In *Autoclenz Limited v. Belcher and others*[510] it was established that where written documentation of the contractual agreement 'may not reflect the reality of the relationship' it is possible to find the contract a sham employment contract.[511] In *Autoclenz*, even though the terms of the contract explicitly stated that the workers were self-employed, the actual provision of services demonstrated that the contract was in reality one of employment. Here, valet parking workers were hired as 'self-employed' workers; however, it was found that the self-employed status that was

[506] Polanyi, *Great,* 74.

[507] Anderson, *Us & Them*, 79.

[508] *Autoclenz Limited v. Belcher and others* [2011] UKSC 41

[509] In this case, the judges used 'a strong purposive approach to ensure that those individuals most in need of protection can exercise fundamental social rights effectively.' Alan Bogg, 'Sham Self-Employment in the Supreme Court' *Industrial Law Journal* 41:3 (2012) 328-345, 345.

[510] *Autoclenz Limited v. Belcher and others* [2011] UKSC 41

[511] *Autoclenz Limited v. Belcher and others* [2011] UKSC 41 at para 22 (Lord Clarke).

written into the employment contract did not represent the reality of the employment situation. According to the Supreme Court, the workers were employees of Autoclenz. The case demonstrates that the terms and conditions of an employment contract may be drafted in a way that intentionally prevents workers from accessing protections. In this case, the concern was holiday pay. In other scenarios, rights to prevent arbitrary termination, for example, could be affected.[512]

Thus in cases, such as *Autoclenz*, where employers intentionally had drafted contracts that, by using titles like self-employed in the terms of the contract, avoided their legal responsibility and accountability to labour standards, a judicial approach interpreting the contract based on the actual relationship has enabled judges to intervene on behalf of otherwise precarious, irregular, workers. However, the power of judicial interpretation can only go so far. In cases where an individual is illegal or is in 'semi-compliance' with the law because of insecure immigration or permission to work status, the precedent set in *Hoffman Plastics* [2004] and the Law Commission Report on the doctrine of illegality discussed above in relation to *Hounga* [2012/2014], suggests the UK Supreme Court would not favour labour protection over the individuals' illegal actions. In spite of a decision that recognised Miss Hounga's exploited situation, *Hounga* [2014] did not negate the continuing possibility of enforcing the doctrine of illegality in cases of immigration illegality and rather focused on her situation of forced labour according to political priorities combating Modern Slavery.

The progress made in the case law, to date, suggests that the members of the judiciary are aware that the traditional and standard definition of the employment relationship may obscure realities on the ground. However, when not scrutinised in the Courts or the Employment Tribunal, employment practices continue to be under-regulated particularly in sectors that are dependent on low-waged workers. Without a defined employment relationship, workers are marginalised within employment and labour laws that continue to look for a formal, standard contractual employment relationship. Thus we again see that the demographic considered IML is broadly encompassing of labourers who do not fit into the standard, limited, definition of labourer/worker.

[512] Bogg, "Sham Self-Employment", 328.

Self-employed or casual labourers are not excluded from labour law regulations. However, there is a lack of uniform terminology within UK labour laws and EU Directives that refer to 'workers' and 'employees'.[513] While purportedly there is potential for rights to be extended to non-traditional, meaning more precarious, forms of labour/employment the contractual basis of employment continues to dominate as the regular form of labour. Embedded within this contract-based definition of employment is a particular legal subject as worker: a national with formal citizenship status, who is a full time employee working for one employer in a workplace that is neither the employer nor employees place of residence, and rights (benefits, holiday pay, sick leave and pension) are delegated accordingly. The community of value, described by Anderson and discussed in chapter one, recognises these employees and this contractual relationship as suitable membership in the community of value.

Alternatives Within Labour Law To Challenge IML

The function and aims of labour law can be understood by looking at its 'constituting narrative.'[514] According to Arthurs, the idea of labour law is that: there is an asymmetrical distribution of wealth and power in society and workers are inherently disadvantaged because they have less wealth and power than employers. Arthurs proceeds to explain that according to labour law, 'disadvantage generates injustice, injustice resistance, and resistance social unrest. Hence, states must intervene in the employment relation.'[515] Further, especially in the latter decades of the twentieth century, injustice mobilises public concerns that law *should* be mobilised to step in to enforce a 'more just' situation. Continuing with Arthurs' explanation, the state responds to the injustice of labour relations typically in the following ways (all of which could be considered labour law): 'redistributing wealth through taxation and transfer payment, detaching power from wealth by mandating

[513] European Directives apply to employees, even though Directive 98/59 refers to them as 'workers'. The references, or meaning of these terms do not seem to change much between Directive 98/59 and Directive 2001/23 and Directive 91/533, the latter two refer to 'employee'.

[514] Brian Langille, "Labour Law's Back Pages" in *Boundaries and Frontiers of Labour Law*, Guy Davidov and Brian Langille eds., (Oxford: Hart Publishing, 2006), 13.

[515] Arthurs, 'Labour Law After Labour', 17.

workers' participation in enterprise and workplace governance, or by nullifying the advantages enjoyed by employers by encouraging countervailing worker power in the form of unions.'[516] Or, another approach is to place 'outer limits' such as minimum labour standards, supporting social programmes, or conversely, silencing the disadvantaged and preventing unrest.[517]

The current critical labour law scholarship recognises that labour law, and its constituting narrative, alone has been unable to address the way that market dynamics influence labour standards more powerfully than legislation and legal tools intending to protect disadvantaged workers (address injustice). In response to the limited scope of labour law within the standard contractual relationship, Alan Supiot suggests attention be given to the core fundamental principles of the ILO since the 1944 Declaration of Philadelphia.[518] The Declaration of Philadelphia, 1944, established the International Labour Organisation (ILO) within the United Nations, and has as its founding principle that labour is not a commodity. The declaration recognises that labour is elemental to our sociality. To draw on Nancy, labour is key to how we are together as singular plural beings. Labour is what 'we do', as action, to maintain our common life. Yet the limited frame of recognition renders labour to be represented solely as labour market economic participation. Consequently, labour as basic human action is interpreted as productivity in the economic market. Human beings have been identified with their productivity, such that labour, especially in low-waged, low-skilled sectors has become a commodity, superseding the persons involved. Labour treated as a commodity denies the significance of labour to social production and re-production, and the circulation of commodities as one facet among many of our lives. Supiot's, and others', call to return to the principles of the ILO reflects an effort to bring attention to labourers as persons whose rights and dignity, according to the UN, need to be protected and honoured. The ILO aims to support countries to achieve full employment and affirms that 'all human beings, irrespective of race, creed or sex,

[516] Arthurs, 'Labour Law After Labour', 17.

[517] Arthurs, 'Labour Law After Labou'r, 17.

[518] Alan Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.[519]

Alan Supiot describes labour law as 'social hermeneutics'.[520] Labour law, when considered an issue of basic foundational social relations, is constitutional. Labour law's constitutional significance dispels a distinction between the political public sphere and the workplace, often assumed to be private. A constitutional approach to labour law identifies vulnerability and powerlessness as something that affects all citizens and workers. This widens labour law's scope beyond the workplace and employer-employee relations to have a social function.[521] However, with regards to IML, a broad social role for labour law can detract attention away from the labour market and the economic reasons that irregular labour situations and precarious work are maintained. If labour law as constitutional remains within a legal framework that relies on the recognition of rights to be based in a nation-state system then the systemic, technical ways that economic policies condition a de-regulated labour market beyond the nation-state can be ignored.

Throughout his analysis, Supiot focuses his attention on the European Union and Europe as a social arena. He argues that the EU's founding principles should be used to revitalise Europe's social justice agenda as part of constitutional obligations and duties to labourers. The 1944 Declaration affirmed that work is a human relationship and that workers are to be protected for their well-being as human beings, not because of their market exchange value. The ILO declared that 'labour is not a commodity'. However, as I argue above, the treatment of precarious workers in low-waged and low-skilled labour, and the phenomenon of IML, suggests that labourers maintained in legal grey areas are treated as commodities. People in these situations are defined by their precarious, temporary and replaceable work. They are denied recognition as persons, citizens, worthy of articulating their status and rights. In response to the persistent conditions of vulnerability experienced in work, and in society, Supiot proposes a 'new type of norm' where states would recognise labour as social hermeneutics. Principles concerning decent work would be mandated into state

[519] International Labour Organisation (ILO) Declaration of Philadelphia, 1944, II (a).

[520] Emilios Christodoulidis and Ruth Dukes et al., 'Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot' *Social Legal Studies* 19: 2 (June 2010) 217-252, 217.

[521] Supiot, in Christodoulidis and Dukes, 'Dialogue & Debate', 217.

policies and practices, but states would concurrently be obliged to define the local and/or national conditions needed to put these principles into force. Supiot suggests states would collaborate with international financial institutions and workers organisations to combine broader social justice objectives with local experiences of work.[522]

There are strengths to Supiot's attention to the sociality of labour. Yet like Benhabib's notion of EU hospitality discussed in the previous chapter, Supiot does not recognize the EU's inability to create and enforce substantive rights, particularly for those who are without practically recognized citizenship status. This limits the applicability of Supiot's new norms.[523] Moreover, the lack of constitutional doctrine in the EU has been pointed out as rendering discussions of constitutional duties futile.[524] Without a fundamental critique of the demands within a neoliberal market economy, Supiot's contention that international financial institutions and worker organisations would be able to discuss social justice and local experiences ignores the systemically embedded function of precarious, irregular labour in the neoliberal 'globalised' economic market. A critique involving attention to false contingency that questions what is meant by sociality and justice, although linked to an incommensurability, may be the way to address why persons in irregular situations continue to be present in spite of legislative protections.[525] The false contingency of the international legal regime and the persistent difficulty to discuss labour law's complicity in the labour market—and what de-coupling labour law from the labour market would entail—suggests the imperative to think of a new and more fundamentally transformative approach to precarity and vulnerability in labour.

The notion that labour law is rooted in a constitutional form, where the action of labour generates from a negotiation of social relations, parallels Nancy's discussion of originary sociality, struction and ecotechnics. However, a sustained analysis of the possible implications of such a connection—between labour law, migration and post-

[522] Supiot in Christodoulidis and Dukes, 'Dialogue & Debate', 226.

[523] Keith Ewing, in Christodoulidis and Dukes, 'Dialogue & Debate', 220.

[524] Florian Rödl in Christodoulidis and Dukes, 'Dialogue & Debate', 244.

[525] Ewing: 'trade union power has been constitutionalized by the neoliberal counter-revolution.' Keith Ewing, in Christodoulidis and Dukes, 'Dialogue & Debate', 235. Tonia Novitz discusses how those in control of flexibility are those with power and resources. Therefore while flexibility is desired and seen as a positive element of guiding principles, it can easily be co-opted within power relationships and serve economic market growth rather than worker well-being. Novitz in Christodoulidis and Dukes, 'Dialogue & Debate', 240.

structuralist theory—must continually keep in check recurring false contingencies that may obscure ongoing processes of neoliberalisation that, in order to be critiqued, need to be held in relief with the complicit systems of political and legal governance. Attention to the social dynamic (or root) of economics and labour, while crucial, cannot lose sight of labour law's particular intervention in labour regulations, protection and labour markets. For instance, agreeing with Supiot's work, Manfried Weiss suggests that labour law extend to social security law. A broader social security law would encourage transnational, international labour rights and principles. This approach seeks labour market membership as a social right based on participation in socially valuable work. Socially valuable work contrasts work that is given value only as a commodity in the market, where persons are given value and status as legal subjects based on performing marketised financially valued (high-income) work.[526] Methodologically, this would mean legal recognition equally encompassing all persons working no matter their income or status, as participants in Nancy's originary sociality. However, international legal instruments purport to already do this. Meanwhile they lack substantive enforcement power due to the primacy of state sovereignty, but perhaps even more so because of the primacy granted to financial profit and global economic market concerns.

Broad frameworks identify labour rights and protection for all workers. Nevertheless, 'distributive justice for workers remains a pressing, and elusive, goal.'[527] According to Kerry Rittich, countervailing labour law agendas undermine international labour standards. There is tension, or indeed incompatibility, within core labour rights and labour practices. Firstly, global labour norms exist in conflict between (national) protectionist limits on labour practices. Secondly, the priorities of international financial institutions favour labour market flexibility.[528] While economic development schemes incorporate Core Labour Rights, economic imperatives dictate their own 'position and prospects of workers in the global economy.'[529] Employer, investor and corporate goals are 'increasingly promoted and reflected in legal and

[526] Supiot, in Christodoulidis and Dukes, "Dialogue & Debate", 219; see also Alan Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2011).

[527] Kerry Rittich, 'Core Labour Rights and Labour Market Flexibility: Two Paths Entwined?' In Permanent Court of Arbitration/Peace Palace Papers, Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Resolution (Netherlands: Kluwer Law International, 2003), 157-208, 157.

[528] Rittich, "Core Labour Rights", 161.

[529] Rittich, "Core Labour Rights", 161.

institutional structures at the national and international level,'[530] at the expense of worker protection laws. The pervasiveness of cross-border industries and transnational or multinational businesses suggest the need for international labour regulations. Meanwhile international labour regulations can only provide directives for the nation-state, not enforcement.

The present circumstances where core labour rights are opposed to labour practices via the demands of the global economic system demonstrate 'countervailing labour agendas.'[531] National labour standards are under downward pressure towards the 'creation of subordinated flexibility' in spite of provisions to protect core labour rights and 'decent work'.[532] The downward pressure consequently places many workers in situations where they are not recognised as persons in work relationships, but they are subjected 'simply to the logic of commodities.'[533] The phenomenon of irregular migrant labour encompasses many of these workers. The labour market and economic market priorities create the conditions that legal rights instruments, core labour rights, intend to remedy. Concerns for redistribution and protection of workers with unequal bargaining power have been eclipsed by concerns for the facilitation of business competition and flexibility. Although the language of rights and protection (of unequal bargaining power as well as justice claims) persists in employment law discourses, labour/employment law is embedded in the neoliberal market economic system and access to rights and protections, through recognition of an employment relationship, is limited.[534] If labour law is limited to mediating an injustice between employers and employees, based on inequalities of bargaining power in an employment contract then labour law's limit lies at the limit of the collective bargaining model. If labour law is meant to speak for labourers participating in the labour market, both currently recognised and those in legal grey areas, then labour law must surpass traditional normative frames, including those of international legal instruments.

[530] Rittich, "Core Labour Rights", 162.

[531] Rittich, "Core Labour Rights", 163.

[532] Rittich, "Core Labour Rights", 165.

[533] Rittich, "Core Labour Rights", 165.

[534] Chantal Thomas, "Convergences and Divergences in International Legal Norms on Migrant Labour," *Comparative Labour Law and Policy Journal* 32 (2011): 405-444.

Critical labour law scholars seek to re-imagine the scope of labour law, contending that 'to include all of the regulatory dilemmas inherent in governing the labour market allows [labour law scholars] to address power relationships in households, workplaces, and society at large.'[535] Labour law holds the possibility to address labour restructuring and to respond with restructured frames. However the question troubling scholars remains a tension between law's critique and labour law's normative project. Labour law is a normative legal field that is informed by justice claims to better working situations and conditions.[536] What the analysis of irregular migrant labour demonstrates, however, is that the proliferation of legislation, or even developing jurisprudential techniques to protect precarious work, will not be sufficient in addressing irregular migrant labour unless labour law and labour market are de-coupled from each other.

How, then, to de-couple labour law and the labour market? As one alternative response, Mark Freedland and Nicola Kountouris propose that a 'personal work profile' provide a locus for labour protection and organisation. This profile does not provide a set status or fixed employment relationship; it provides a 'technique of analysis for understanding in what sense and to what extent particular personal work relations should be regarded as secure, autonomous, or freestanding, or precarious.'[537] Freedland and Kountouris argue that precarious work is not a category of work, since there is no 'single-spectrum legal taxonomy' that can encompass the complex dynamics of work arrangements, both personal and non-personal. Instead of a category of work, precarious work is 'an increasingly broad and loose area of (de)regulation' and it encompasses a growing range of work relations. Precarious work also includes employment and work relationships that were previously seen as 'secure.'[538] The idea of 'personal employment contracts' and 'personal work profile' attempts to create space for the divergent experiences of precarious work without the limitations of pre-determined categories or definitions. However, identifying work as a 'personal' relation and contract furthers the individualisation of work, potentially exacerbating the lack of responsibility or accountability of broader social and

[535] J. Fudge, "Labour as a Fictive Commodity", 136.

[536] Langille, "Labour Law's Theory of Justice", 107-108.

[537] Freedland and Kountouris, "Legal Characterisation of Personal Work Relations", 191.

[538] Freedland and Kountouris, "Legal Characterisation of Personal Work Relations", 196.

economic factors. Also, forms of labour that cannot be isolated into individual autonomous actors would have to be moulded to fit the frame of a 'personal work profile'. Therefore while the personal work profile may be a positive move for those currently engaged in marketised work, it does not transfer easily to those in subjugated forms of labour due to their attenuated value in the dominant economic market.

Among scholars concerned with labour and migration, particularly relating to low-waged 'irregular' migrants, there is general consensus that irregular labour fills a labour demand that is ideal for the economic market priorities of neoliberal nation-state. A temporary, flexible and precarious labour supply is ideal for supporting a system of labour 'generated by transformations in the systems of production.'[539] Bruno Caruso suggests that the flexibility and adaptability demanded through the market reflects the life of the individual migrants. It is possible that migrants may have a 'lack of interest in comprehensive welfare coverage'[540] and thereby encourage the flexibility as well as, ultimately, the vulnerability of their situation. As a remedy, Caruso proposes a new constitutional compromise where the right to work would be a universal right, regardless of citizenship. This is a 'vision of globalization that is not purely economic, but social, political and cultural.'[541] Caruso argues that the flexibility offered in the current labour markets could be in line with a new view of constitutional equality.[542] This vision of constitutional equality, unlike other conclusions that turn to cosmopolitan ideals or imagining situations beyond the nation-state, explicitly (unlike Benhabib) exists within a state structure. However it would allow labour contracts and arrangements to be legalised in spite of immigration law.

This proposal, albeit interesting, may not be as viable as intended. Instituting a universal right, like existing universal human rights, may not bring change. The categories that determine membership and classification as 'work' or 'worker' would continue to limit claims to purportedly universal rights. Further, the frame of the

[539] Bruno Caruso, "Immigration Policies in Southern Europe: More State, Less Market?" in *Labour Law in An Era of Globalization: Transformative practices and possibilities* Joanne Conaghan, Richard Michael Fischl, Karl Klare, eds., (Oxford: Oxford University Press, 2002), 310.

[540] Caruso, "Immigration", 313.

[541] Caruso, "Immigration", 318.

[542] Caruso, "Immigration", 319.

nation-state determines an exclusive and exclusionary recognition. Laws become contradictory or paradoxical when law opens the possibility of non-state-mediated rights through the language of universality and international human rights legislation. Fundamental human rights may be acknowledged through legal instruments, but at the same time, international legal instruments reinforce the sovereignty of the nation-state and national legal frameworks. The IML, ostensibly a figure standing *within* a country that is employing her/him but systemically refusing to grant her/him legal subjectivity, is before the law and kept in the shadow of the law. Or, if law itself is re-thought according to law's incommensurability as part of the eco-technical reality of our world, then law can be understood as tracing what is happening within peoples' relationships to each other, which is nothing but the experience that is the struction of sense in the world.

Rather than extend the scope of labour law within the same market system, contemporary labour law can be seen as one form among many possibilities.[543] The question remains, however, how can labour law recognise labour power 'embodied in human beings ... tended in a network of social relations that operate outside the direct discipline of the market?'[544] Contingencies that have been an 'absent present'[545], as for example, the possibility that the dominant economic system depends on legal grey areas that are participating and happening within the same labour market, can be questioned and resisted.[546] Similarly, the notion that non-market labour is less worthy and not economically productive can be subverted and challenged. Recognising these contingencies is not a matter of strain and intellectual labour. The apparent necessity of prioritising the market economic system is in tension with social realities and needs—this tension is the incommensurability of eco-technics. Thinking of labour and migration as struction reveals activity, as well as processes of neoliberalisation, that are part of the paradox of law.

[543] J. Fudge, "Labour as a Fictive Commodity", 121.

[544] J. Fudge, "Labour as a Fictive Commodity", 130.

[545] Marks, "False Contingency", 14.

[546] Marks, "False Contingency", 12.

Labour Law Through A Political-Juridical-Ecotechnical Approach

The political-juridical-ecotechnical approach opens onto Nancy's notion of *sense* and *ecotechnics*. My approach is concerned with the experiences that impact and *are* happening in and beyond categories. Ecotechnics—as the management of circulating bodies and technics, or practices, of this circulation and movement that is always already happening—lends itself to this approach. In labour law, such an approach brings to mind how labour relations have 'relied on controlled borders and commodity flows as well as gendered/racialised division of labour to sustain an embedded liberal compromise in the North.'[547] The liberal compromise sacrifices the freedom and autonomy of some (sub-citizens) for the sake of the Good Citizens. This means that materially, physically present bodies are consistently relegated to marginalized, 'sub-citizen' experiences where subjectivity is limited (*subjectus*) and their participation de-valued. Blackett demonstrates that labour law makes universal claims for justice and rights for workers, but 'tolerates the commoditization of "other others."'[548] The other-others are primarily those persons whose labour is excluded from the market. Their 'work' is excluded from the idea of what is productive labour and work. For instance, work in the home and care-work.

In the evolution of labour law in the UK, in the 1970s many women entered the labour market as waged, income-earners employed in work outside the home. The shift this caused in the labour market impacted so-called 'public' employment because the jobs that women took on were often more precarious, casual, part-time and lesser paid, than the dominant, standard employment model. Scholars have referred to this as a shift towards a 'feminisation' of the labour force. However the feminisation of labour also impacted the home, or so-called 'private' sphere, as discussed above. The work that predominantly women had previously carried out in the home, now vacated due to their wage-earning responsibilities. This created a new demand for domestic workers in middle-income, dual-waged earner households. This influenced a new marketisation of work in the home.[549] Work in middle-income homes, which was previously non-marketised, un-waged and relegated to a 'private'

[547] Blackett, "Emancipation", 428.

[548] Blackett, "Emancipation", 428.

[549] Judy Fudge, 'Making Claims for Migrant Workers: Human Rights and Citizenship' unpublished conference paper, Migrants at Work, Oxford University, June 22 2012.

sphere, was integrated into market labour demand. However, this new labour demand remained external to the standard contractual employment relationship even when employees had to be hired outside of the home and the family. The pervasiveness of the standard contractual employment relationship as the point of reference for identifying labour market participation meant that formerly non-waged labour, most notably but not exclusively care-work, is not readily recognised as labour within the market. This is in spite of the labour itself becoming marketised and waged.[550]

The example of women entering the formal labour market and criticisms involved in the differential value of this labour, which will be developed further in the next chapter, demonstrate that the incorporation of labour into the market is not a clear solution to protect unprotected workers. If labour were to be addressed through the market for its role in market efficiency, then labour law could be extended to protect 'socially valuable work,' as Alan Supiot argues.[551] However, this brings us back to the concern that labour law is meant to a) bring non-marketised work into the market economic or b) expand labour law beyond the market to social economic production. Both proposals have consequences beyond individual rights for workers. The proliferation of legislation to protect care-workers or precarious work, for example, may reinforce existing false contingencies in labour law unless labour law and labour market are de-coupled from each other. Moreover, extending protection to care-workers does not address the underlying issue of what makes one's labour intelligible and valued in society: society being a) the dominant market economy or b) the actual in-common of persons interacting and relating together.

Noah Zatz argues that the future direction of labour law must extend to market and non-market work because of the 'displacement of protected employees by other unprotected workers.' Such changes are managed through a 'relational flexibility of work.'[552] This relational flexibility manages a broad scope of work, away from

[550] Sarah van Walsum pursues the question, where does family life end and exploitation (that begs attention from labour law and protections) begin? This question was broached in a case in the European Court of Human Rights: *Siliadin v France*, App No. 73316/91, Judgment of 26 July 2005. Discussed in Virginia Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers' *Industrial Law Journal* 35:4 (2006) 395-414.

[551] Alan Supiot, quoted in J. Fudge, "Labour as a Fictive Commodity", 126.

[552] Noah Zatz, 'The Impossibility of Work Law' in Guy Davidov and Brian Langille, eds., *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), 234-255: 235.

'paradigmatic market relationships.'[553] Meanwhile, the market relationships were always grounded in pre-determined distributions of value and power based more on the social status of workers than on their actual production or the social importance of their work.[554] If labour law seeks to frame labour, and non-traditional flexible labour, as within the market (market-labour or 'market-enabling labour'), socially valuable work is made 'an accessory of the [market] economic system.'[555] The market economic system is neither concerned with fair regulation, nor with the emotional requirements of care-work. It is a system embedded in the process of neoliberalisation that values financial capital profit maximization on a purportedly global, universal scale. I will develop this further in the next chapter.

Conclusion

The false contingency of labour law returning to the individual, ideal workers, in the market economic system persists even in alternative proposals for 21st century labour law. The methodological approach drawing on Nancy does not suggest originary sociality as an end point. It is not about seeing a broader social sphere, but about grounding our approach and critique of existing structures and frameworks to re-think what it means to come together and form a limit. Eco-technics draw attention to the way that processes of sociality continue, but this way can only be described as *incommensurable.* Giving attention to those who are exscribed from the practice of labour law, illuminates the false contingency that underlies international law's universal claim. Moreover, law's universal claim assumes that law can encompass every-body, and that a failure for law to have this scope is 'random, accidental and arbitrary'.[556] But if we are critical of the false contingency—categories and their predetermined mould that inscribes meaning—then the alternative is to think of law as negotiating the categories with and against the exscription.

[553] Zatz, "The Impossibility", 240.

[554] Zatz, "The Impossibility", 235.

[555] Polanyi, *The Great Transformation,* 79.

[556] Marks, "False Contingency", 20.

Labour is integral to our basic sociality—how we relate together through our action and participation in relationships of exchange and production. While immigration is the administration of populations across fictional borders and territorial boundaries, labour is at the root of how the co-appearance of being together happens in our world and sociality. However, the language that speaks of labour and labour power is managed through a political-juridical system that frames membership in a sociality through the lens of citizenship, as the previous chapters have identified. Broadly, citizenship can refer to a formal legal status that entitles one to rights in the nation-state. Citizenship, in action, identifies accepted membership in a community of value, where value is related to social, cultural norms as well as financial productivity and status. The contested nature of citizenship betrays the false contingency informing frameworks of belonging in the nation-state. IML is a term that inscribes a non-regular, non-citizen labour force without interrogating the underlying factors that condition labour market participation and accepted participation in a so-called national community.

Labour law can function exclusively within a limited framework where, in spite of inclusive language, legislation differentiates labour relationships and influences a differentiated legal subjectivity. Limited definitions of employment relationships exclude labour in spite of it being recognised within the labour market. Labour law and labour markets together privilege a hierarchy of legal subjectivity under the subject/citizen/state-community/sovereignty paradigm. Exclusion from labour protection is constructed as 'random, arbitrary or accidental,'[557] emphasised through the label, irregular migrant labour. Precarious work that is excluded from employment law categories is not necessarily excluded from the labour market. In fact it is vital to a neoliberal, capitalist, economic market. The economic system that is prioritised by the UK government relies on the exploitation of labour. These labour practices happen in legal grey areas of national labour laws. This is a historically conditioned, specific distribution of labour laws that in the past has acted to 'sustain citizens' privilege through asymmetrical policies, namely the colonial and neo-colonial division of labour ensuring privileged access to primary commodities in the process of industrial transformation.'[558] Labour laws privilege 'domestic' 'regular'

[557] Marks, "False Contingency", 20.

[558] Blackett, "Emancipation", 428.

labour and distinguish this from labour that is carried out by those considered IML, relegated to positions of sub-citizenship.

The relationship between labour law and labour markets, and resulting labour practices, reveal discrepancies between the injustices that labour law purports to address and market economic goals that privilege differential citizenship and limited regulatory power. According to Karl Polanyi, before the nineteenth century, the market was but one facet of a broader socio-economic system.[559] Once labour power was disciplined into an economic market, the market became the primary recognised mode of economic organisation. The belief in the primacy of the market has shaped the development of labour law in the twentieth century, particularly in the latter decades. Labour law's mandate continues however as a 'mix of repression, habituation, co-optation and co-operation, all of which have to be organised not only within the workplace but through society at large.'[560] Consequently, participation in the market economy became an indication of one's 'good' participation, in society, much like Anderson's Good Citizen in the community of value discussed in the first chapter.

Undeniably precarious forms of labour and employment are increasingly characterizing labour, employment and work relationships. Precarious employment, decentralized labour regulations, global economic markets and transnational firms are a challenge to labour law's constitutive narrative in the UK. Many labour law scholars argue that labour law as a regulatory legal instrument, and a normative tool of social welfare and justice, is undergoing an identity crisis. IML exemplifies the reason for this crisis. Labour law as law incarnate opens the possibility of thinking of law differently. The political-juridical-ecotechnical approach suggests we look at why labour law is unable to address IML: the historically specific, false contingency of contract law (the standard contractual employment relationship) and the market model. Moreover, the ecotechnics of labour, the struction of work, productivity and the *making sense* of our being in common in economies here and now in spite of

[559] As mentioned above, writing in the mid-twentieth century, Karl Polanyi discusses the emergence of the market economy and the self-regulating market. He suggests that prior to the nineteenth century (the same century during which the nation-state comes to dominate Europe), what was considered the 'economic order' was "merely a function of the social order." Polanyi, *The Great Transformation*, 52.

[560] David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Culture* (Oxford: Blackwell, 1990), 123.

immigration controls and other regulatory systems that seek to differentiate and separate, illuminates the option for labour law to look beyond the division of private versus public, or non-market versus market labour. Labour law, as law incarnate, has the potential to be a site for re-thinking value not based on a new or alternative ideology (of justice, rights or citizenship), but through thinking of what we do, how we labour, in our very being in-common. Again, as discussed earlier in this chapter, Amartya Sen's capabilities approach may be seen to parallel this attention to the basic being in common. However, as above, Sen argues that economic growth can be sustained through supporting individual capabilities, developing broader understanding and the role of human capital. Poverty, conversely, is seen as capability deprivation.[561] The capabilities approach looks at what are existing capabilities and what basic elements are necessary to allow an individual to fulfil their capabilities. If basic needs are provided for, according to this approach, individuals would be enabled to participate in social production and the economic market. However the capabilities approach relies on an ideology of individual freedom of the subject. According to Sen, the freedom that the individual has is the 'freedom and capability to do something'.[562] Capabilities are recognised based on individual capacity to provide for oneself. Once one has enabled their capabilities, then they are believed to participate through their labour in the economic market system. The extensive reach of the capabilities approach, according to Sen, is possible 'because the freedoms of persons can be judged through explicit reference to outcomes and processes that they have reason to value and seek.'[563] Yet in this way, the capabilities approach does not provide for persons who are dependent on support from others, where outcomes and value exceed the market economic frame. Moreover, what is valued and sought can be based on false contingency if disconnected from material needs as well as conditions of social reproduction that exceed quantified economic value. Thus individual capability to achieve and express ones needs are only one part of the sociality that *is* the sense of the world. What is *exscribed* from the market must also be incorporated into what is presented as alternative frameworks of labour law and participation, such as suggested by bringing attention to the movement and materialty of ecotechnics.

[561] Sen, *Development As Freedom*, 87.

[562] Sen, *Development As Freedom*, 284.

[563] Sen, *Development As Freedom*, 86.

Currently we have a crisis of the social contract because within the nation-state some citizens are treated as a dispensable population. IML, in low-waged, low-skilled work are treated as firstly migrant and therefore outside the standard of Good Citizenship and secondly, as replaceable labourers. The stability of the economic market system is built on the instability of the labour force. The process of de-familiarising the market economic system as well as the notion of citizenship that is intricately bound up in it, is necessary to expose the prevalence of instability and precariousness, as embedded in the nation-state, citizenship and the labour market. Far from the contrary public perception, this precariousness and instability is not the fault of individuals labelled 'irregular migrant labourers'. Rather as Nancy's work reveals—through deconstruction via a bodily ontology—precariousness is not only a regular state of the neoliberal market system, but is the material experience of being in the singular plural. The universality of the individual 'I' as the autonomous liberal subject (Good, 'regular' Citizen) is a myth. The material experience in the sociality does not constitute individuals in independent spaces as imagined by liberal thought. The material experience, the being singular plural, when we try and conceive of it away from categories of recognition and belonging, is messy. Indeed we are left with a notion that lacks a familiar foundation, and thus even the thought of such experience and being is unstable and precarious. This disruption is, however, unavoidable because the stability and security that is presented by modern liberal philosophy as the ideal is itself incommensurable with the ecotechnics of being. Because being is constantly transgressing the categories that attempt to frame what, or who, is the Good Citizen, and the 'full' legal subject. Moreover, the categories (and supporting philosophical heritage) are incommensurable due to the historical specificity of our understanding of Being. Modern philosophy has been built on a colonial, racialised and gendered notion of the 'I': the autonomous, individual legal subject and citizen. The categories that have been constructed as necessary to the legal framework are predetermined from within the false contingency of modern philosophy. These categories consequently determine legal subjectivity and render a heterogeneous population of workers from various sectors, experiences and citizenships under a label as IML, but not as a natural distinction. The false contingency of modern philosophy can be traced back to the very construction of the foundational notion of the 'I', as an

individual singularity. The 'I' is central to *modern* philosophical questions arguably, as Hegel affirmed, since Descartes.[564] However, Dussel highlights foundations that preceded Descartes, which set the philosophical question as one concerned with the individual mind and body, as constructed against the colonial non-European other.[565] The false necessity of 'I' as the basis of modern thought is supported by false contingency (limited conditions of possibility) whereby what is excluded from modernity's fold, what is outside recognition within 'I', are those 'others' who are deemed not-quite-there: backwards, underdeveloped, primitive and irregular. The 'I' can be traced in the construct of the Good Citizen, which leaves the 'others' as Failed or Sub- Citizens. Dussel sums up what may be understood as the false contingency of modern philosophy by making reference to the writing of Bartolomé de las Casas (1484-1566): 'Bartolomé refutes, a) the claim of superiority of Western culture, from which the barbarism of indigenous cultures was deduced.'[566] Indeed the modern philosophical framework justified the violence of conquest by juxtaposing the 'truth' of the European against the savage and underdeveloped 'truth' of the 'Indian'.

According to Dussel, 'the entirety of Modernity, during five centuries, would remain in this state of "lethargy" of *ethical political unconsciousness,* as if "asleep", without "feeling" toward the pain of the peripheral world of the South.[567] From this lethargy, therefore, political and legal subjectivity has evolved to include the primacy of the citizen. The citizen-subject reaffirms the idealised autonomous being, as one that is necessarily though to relate to, and represent, a universal political and legal system.[568] The fundamental ontological question that I draw from Nancy's *sense* and *ecotechnics* enables me to address the specificity of the citizen-subject construct, where the sub-Citizen is embedded as the marginalised other ('irregular'). By questioning the ontological foundations, it becomes evident that the idea of the Good 'regular' citizen and legal subject, obscures the circulation of bodies that sustains the neoliberal economic market system.

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[564] Dussel, 15.

[565] Dussel, with reference to the writing of Ginés de Sepúlveda (+1793) and the justification for 'just war' in the colonial enterprise, 17, 22-23, 27.

[566] Dussel, 28.

[567] Dussel, 27. I would include, however, that this lethargy is as well towards all others that do not conform to the male, individual ideal, including women and slaves.

[568] In Hegel and in Kant, but who build on Socrates and Plato, the citizen is held up as the role for men in community, society and world. See Derrida and Dufourmantelle, *Of Hospitality.*

Chapter 5. Thinking Alternatives Differently: States of Incommensurability

In this chapter I explore how to attend to the exscription, beyond what is written into the text of Irregular Migrant Labour (IML). The exscribed of IML challenges the false contingency, perpetuated through immigration law and labour law, that sustains this labour phenomenon. Jean-Luc Nancy's *bodily ontology*, explored through his *corpus*—the matter of bodies within the body of knowledge that has structured Western thought, the *corpus* of Western modern philosophy—questions ontology at the level of our physical, material presence and actual, factual, experiences.[569] Nancy writes from within the *corpus* and his own *corpus,* not by suggesting that there is, somewhere somehow, an external or limit-less/pure, perspective. The bodily ontology is exscribed from the dominant discourses (political, legal e.g. citizenship, the legal subject) that claim to tell 'us' what 'we' are.[570] However, the body is nevertheless a material presence that may resist signification through clear categories, but is *sensed*. The presence that Nancy is attuned to and tries to articulate *is* the relation of singular plural beings. However the experience of this relation happens through existing language and frameworks that are inseparable from hierarchies of power and biopolitical governance. Thus experiences of coming together include, in spite of *exscription* and *inscription*, writing of the experiences of sub-citizenship, where people, bodies, are judged against an ideal construct of the Good Citizen. As discussed in previous chapters, against this ideal construct, persons are marginalised according to categories of race, class, gender and ability, but collectively as 'irregular'. The suggested alternatives to re-think the nation-state, citizenship and labour, law and social reproduction, gesture towards re-creating

[569] See Appendix A, Explanation of terms, 'Bodily ontology'. I use this particular term as used by Ian James in *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006), 91.

[570] Ian James, 'The Just Measure' in *Jean-Luc Nancy: Justice, Legality, World* Benjamin Hutchens, ed., (London: Continuum, 2012), 42.

political discourses and legal categories to reflect the experienced movement and labour of individuals in action. Yet the challenge, as Susan Marks explains, is to resist re-creating the same frameworks and repeating false contingency that perpetuate race/class/gender-based categories of legal subjectivity as a consequence of not excavating the presumptions and predetermination that restrict conditions of possibility.

Attention to false contingency takes concerted, reflective consideration of how and what is being examined and problematised. It is not only Marks who identifies the contemporary need, or urgency, to think differently. The exponential forms of precariousness affecting people not only in the UK but worldwide, compel us to consider how traditional, dominant legal categories of labour and immigration fail to encompass our individual and common experiences. Theorist Boaventura de Sousa Santos suggests that the need in the current climate of globalised market economics is not alternative thinking, but 'alternative thinking of alternatives'.[571] To think "big" is to step away from traditional paradigms of citizenship, identity and subjectivity.[572] A bodily ontology, recruited to help us think about what is happening in IML and neoliberalisation processes beyond false contingency, opens onto the 'amassing' of experiences. Nancy refers to this 'amassing' as *struction*, that is both the circulation of life in the work and its technical management.

Struction is Nancy's attempt to speak following what he identifies as a contemporary phenomenon of overconstruction. In overconstruction, words, frameworks and expanding categories take us further away from the sense of what is materially and concretely *happening*. Nancy searches, in his work and most recently with the term, struction, for a way to think of the happening without determination. This approach calls on *sense,* which may be understood as the concept before the concept. Sense devotes attention to the eco-technics of our being singular plural: our being together. It is from within this shifted texture, a shifted attention, where we can begin an alternative thinking of alternatives, and resist, as Nancy does, determination

[571] Boaventura de Sousa Santos, 'Public Sphere and Epistemologies of the South.' *Africa Development* 37: 1 (2012): 43-67.

[572] There are different ways to conceive of thinking alternatives differently. For instance, scholars of decoloniality call for a decolonisation of philosophy. This compelling discussion and rich literature is a crucial next step for thinking of bodily ontology, citizenship and legal subjectivity, however is beyond the scope of this present analysis and thesis. Enrique Dussel, 'Anti-Cartesian Meditations: On The Origin of the Philosophical Anti-Discourse of Modernity' *Journal for Culture and Religious Theory* 13:1 Winter 2014. p. 11-52.

according to pre-determined, unexamined categories. Yet, what does it mean to think alternatives differently—an alternative thinking of alternatives? For Boaventura de Sousa Santos, this means looking to epistemologies of the global South. Where, as a consequence of narratives systematically written out of modern philosophical framework, 'impossible objects must be turned into possible objects, absent objects into present objects.' [573] This revolution, so to speak, intrinsically challenges the limits of subjectivity and expands possibilities for being and relating in common. Nancy's work takes into account how *exscription* constitutes our being in-common, in the world. 'Being', however, is a concept that stems from a Western (modern) philosophical tradition, as discussed at the end of the previous chapter. Indeed, this is the tradition to which Nancy speaks. Nevertheless, the fundamental questioning of ontology that Nancy proposes, and the re-thinking of our being in the singular plural, invite us to re-visit the dominant paradigms of thought to negatively expose our drive for categories, consequently opening onto an alternative thinking of alternatives.

This thinking involves paying attention to the *sense* of the world. to what is *happening* in front of us, in spite of operative categories and established legal definitions. The happening of people moving across territorial borders and working, is the sense of our world. The *sense* includes both the neo-liberal economics that drive demand for low-waged labour and the common that is created when singular beings are in a space together. Ultimately, *sense* challenges the limits of the citizen-subject and modern philosophical thought, discussed above with regards to the 'I'. *Sense* opens up the 'I' with its attention to the matter of materiality: there is, concretely, more than the modern legal subject. For instance, when we pay attention to sense, the 'irregular' is regular, and precariousness is a condition of our being.

It is difficult to write or suggest how thinking in terms of sense would materialise in our world. Yet as an intellectual starting point, in order to enable thinking of alternatives to political, juridical and economic problems or impasses, alternative thinking must take into account how thought is pursued. This is a different question from where thought frameworks come from in that how thought is pursed shifts focus from critical analyses troubling historically specific paradigms to how these paradigms are perpetuated and repeated. Thinking of thinking in order to speak

[573] de Sousa Santos, 'Public Sphere and Epistemologies of the South' *Africa Development* 37:1 (2012): 43-67, 52.

to political, juridical or economic problems can seem a futile exercise, unless it is a response to experience that is material: hence, a bodily experience of persons working in irregular situations not solely because of their immigration status, but due to a systemic and interlocking 'global' market economic system and processes of neoliberalisation, which are manifest in how we conceive of legal categories, recognition and legal subjectivity. The false contingency of this system allows the perpetuation of marginalisation, exploitation, abuse and suffering of those rendered 'sub-citizens', with limited legal subjectivity, by the exscription of these experiences from notions of 'regular' work and citizenship; the 'irregular' is accounted for by being homogenised and marginalised. The inscription of the 'IML' serves a purpose by encompassing the excess, a legal grey area and ambiguous status, while the regularity of the irregular, and the heterogeneity of experiences within this constructed demographic is exscribed. Nancy's work opens onto alternative thinking of alternatives at the starting point of the material presence (*happening*) of physical (technical) circulation of bodies within 'an eco'. The *corpus* is at once contained in the Western colonial, patriarchal tale of modernity and exceeds it: the *corpus* is leaky, messy and physical. The *corpus* has within itself the ecotechnical circulation, as will be explained in more detail below. Thus, the circulation of material presence happens before and after it is capitalised and made intelligible to the labour market and economics, and subsumed into processes of neoliberalisation that dominate immigration and labour law. As such, the bodies labelled IML are in circulation and are part of the sociality that forms the need for law, but are inscribed as irregular by the political-juridical market economic processes that reduce persons to precarious forms of citizenship and subjectivity. The false contingencies bolstering immigration and labour law support this inscription, as well as the very labour market economic system that renders persons 'irregular' and precarious, without clear legal status. Nancy's *corpus,* which I refer to as a bodily ontology, works to unsettle IML at its core.

The political-juridical-ecotechnical approach exposes false contingency underlying the labour market system, which is embedded in existing legal (immigration and labour) frameworks. But after this exposure, overturning or providing a difference through attention to 'sense' and circulation away from established categories of intelligibility is an altogether different challenge.

Ecotechnics draws attention to the practices that create and transgress the frameworks, which for instance spark political attention to IML. To illustrate further what Nancy's perspective offers to analyses of IML, in the latter part of this chapter I take a closer look at what is exscribed in labour migration law: care work. Care work challenges existing paradigms of labour law and migration because, while it is part of processes of neoliberalisation (marketised), 'care' is exscribed. I differentiate between 'care' and 'care work', where care is the broader action and relationship of caring for others—this is non-paid and not quantified. When care-workers migrate to work in the care industry to a country where they are neither national nor permanent residents, they are no longer able to provide care in their home country, often the un-marketised and un-calculated care of members of their family. Care work is a term used to refer to the work done by family members and by privately employed, waged carers whose legal subjectivity is not necessarily recognised within the standard labour categories. However, definitions of care and work blur where some 'care' is quantified by the state, where 'carers' receive benefits and tax deduction.[574] Moreover, care, in practice, as bodily material experience, happens everywhere (what feminist economists refer to as social reproduction) and is written out of the text of law. Perhaps this is necessarily so; the *sense* of care is elemental to our sociality and the sense that *is* the world. Like sense it cannot but be exscribed. The eco-technics of care can be seen as an example where the dominant eco-nomic market model is dismantled.[575] Thus care illustrates the potential for a bodily ontology, via Nancy's thinking, to be an alternative thinking of alternatives for IML, citizenship and migration labour law, but an alternative that also coincides closely with the neoliberalisation processes. In the movement of neoliberalisation, labour and labourers are flexible, above and beyond legal contracts and formal citizenship boundaries. Nancy's ecotechnics draws attention to the happening that is exploited, but resists incorporation into legal categories.

[574] Carers in the UK, as defined by Carers UK, are unpaid persons looking after 'an ill, frail or disabled family member, friend or partner' and while 12 percent of the adult population in the UK are carers, there is also a large proportion of young adults, mainly from minority ethnic backgrounds, who are also carers. See Jonathan Herring, *Caring and the Law* (Oxford: Hart Publishing, 2013), 6.

[575] What happens in the eco-technē forever exceeds the categories that have been inscribed by Western philosophical frameworks that proclaim universality and citizenship against the experience of bodies on the ground/in the world. Richard Parry, '*Episteme* and *Technē*' Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition). <http://plato.stanford.edu/archives/fall2014/entries/episteme-technē/>.

Re-thinking Irregular Migrant Labour: Political, Juridical, Ecotechnical

The label of IML used in policy and political discourse, as well as the reality of persons living and working on the condition that they are included-as-excluded, demonstrate how processes of neoliberalisation in both governance and employment capitalise on the practical circulation of bodies and the historically embedded discriminations that have created the ideal, and ostensibly universal, Good Citizen subject. Persons, bodies-at-work, are engaged in production, consumption and reproduction. These are essential to the circulation of sociability, which form the need for economics: the law or management of the household. Currently, migration across borders and to different regions may be a consequence of market forces and labour demand. However, the movement of resources is not necessarily a market force and furthermore predates markets being named and identified as pivotal to economic and social existence. Resources that are vital to basic, social and biological reproduction have been claimed, identified and given value as capital. Neoliberalisation has permeated social existence to the extent that it is difficult for us as critical theorists to disentangle the ontological questions with which Nancy engages, from the epistemological questions of economics and market.

Keeping the market happy is a false necessity, and market measures and values are false contingencies determining work, production and reproduction. The options, the possibilities, to think of economics differently remain within a sociality known through the exchange of supply and demand based on ostensibly global financial measures. Moreover, this is a sociality where individuals are known (recognised) through their citizenship, which enables legitimate market participation. Following from this, the question remains of how law, especially labour law as discussed in the previous chapter, can be re-thought in order to resist or challenge this false contingency. As I have emphasised in previous chapters, political and juridical discourses are unable to reflect the tracing of our plurality as singular beings as long as they are embedded in the economic market model. The false contingency of market mechanisms, as if the market was the only site for the recognition of ones citizenship or status, underpins dominant understandings of the law, the nation-state and citizenship. The market, which privileges capital economic growth, has been constructed to appear as if it were the only possibility for imagining our being as

bodies in work and movement across territory. The market economic system presupposes the contingencies that would result from persons participating, not as migrants, but as people working (production and reproduction) indeterminate of the framework of citizenship and the nation-state. Whilst the label of IML purports to extend to persons beyond regular legal categories, IML captures the movement and work of contemporary labour markets in action only insofar as it captures to obscure: includes-to-exclude. If not for the label, IML, the diverse people moving, living and working could not be distinguished from the regular non-migrant employee worker, and differentiated based on an elusive border of the nation-state and its community of value. IML, instrumentalised as a category identifying a policy concern, continues to subjugate workers into labour situations where they are vulnerable to abuse and exploitation, but beneficial to the market. Without this differentiation, the entire paradigm of the modern nation-state would be fundamentally disrupted.

The unpredictable decision of *Autoclenz* or the controversial application of the doctrine of illegality that was used in *Hounga* [2012/2014], reflect the tension of law practiced within the dominant political-juridical system. Legal definitions and categories inscribed through statute and judicial decisions that speak of protection of vulnerable workers and rights exscribe the influence of market economic priorities. Market priorities are written out of the text, but are nevertheless guiding considerations for policy makers and legislators.[576] The inability of the Supreme Court in *Hounga* [2014] to agree conclusively to overrule the doctrine of illegality in cases concerning immigration illegality reaffirms a political and juridical focus on nation-borders and border control, which in spite of being policed are left malleable and permeable enough to allow for labour market flexibility.

The question troubling ontology that is central to Nancy's body of work (*corpus*) strikes at the core of Western philosophical thinking of the subject: its relationship to the plurality of other beings and what it means to have a "collective" as a foundation of the economic system. Critical deconstructions of a ground—the nation-state (Catherine Dauvergne) or citizenship (Seyla Benhabib) (as discussed in chapter three)—must avoid reverting back to the same false contingency of

[576] Market participation judged according to a hierarchy of worth in the community of value (disguised as citizenship) is a false contingency of legal subjectivity.

citizenship referring to legal subjectivity, recognition and belonging via the nation-state if they are meant to offer an alternative. However, our legal academic vocabulary lacks the language for us to be able to express conventionally the precariousness that is present within each claim to citizenship as well as every claim of legality (against an illegality, or a lack of legal recognition and sub-subjectivity). Yet precariousness is the only commonality that 'we' have against the claim of a universal truth. In other words, all that 'we' claims to be and to encompass is precarious; it is without ground. The universal is a historically specific, conditioned and constructed notion that has within it its deconstruction. The ecotechnics reveal this deconstruction. If we eliminate the faith in a fundamental universal, which inscribes legal subjectivity through the exscribed values of belonging according to economic productivity and market forces (in other words, that being a legal subject-as-citizen is the ultimate privileged form of recognition), then what we have is the 'abandonment'[577] to the fact that the 'we' and the 'I' are both ground-less. The 'we' *is* groundless but for the false contingency. And yet, Nancy insists that there still *is* circulation that is sense*,* whether identified as the concretisation of sense, ecotechnics or struction. These terms all move towards the same 'sense' in Nancy's work: the sense of the *corpus* inscribed and exscribed in modern-colonial Western philosophy and consequently, its legal categories and language. This bodily ontology, therefore, speaks to what is unspoken and excessive in labour migration categories and discourses.[578]

Ecotechnics involves attention to sense. Sense itself is not a 'schema of construction or to one of destruction and reconstruction.'[579] Rather it defers and differs, in movement towards and away from signification.[580] This is similar to Derrida's movement of deconstruction and justice as deconstruction. Yet by bringing ontology to the material, corporeal sense that we experience on a daily basis, Nancy identifies our precariousness as the only *common* that our coming together in-common can rely on. Bodies at work, labouring in production and reproduction, and

[577] Nancy, 'Abandoned Being' in *Birth to Presence,* 36.

[578] What remains beyond even this current deconstruction is that in the *sense,* not everything may be attributable to the social and to a sociality. This is beyond the scope of the current discussion, but worth pursuing in future research.

[579] Nancy, 'Of Struction', VI.

[580] See Appendix A, Explanation of terms, 'Sense'.

bodies in movement, crossing, transgressing, contesting boundaries and borders are 'all that is' and is happening. In doing this, Nancy's work exposes the 'irregular', the IML, as an intruder already, and always, inside.[581] Interrogation of the problematic label of IML begs us to consider a legal-political-ethical terrain where the irregular interrupts constantly; it interrupts regularly. Thus troubling IML necessitates that we imagine and re-imagine law as speaking to what is happening as eco-technics in circulation—capital and neoliberalisation, as well as its challenge and transgression. In this legal-political-ethical terrain, law is incommensurable: it traces our singular plurality which is the (k)not politics of people: moving, needing work, agreeing to low-wages, working with visas, without visas, formally declaring or being paid by cash, finding work through agencies, signing contracts for full-time long-term work but as self-employed workers and so on.[582] Politics, understood in this way, is a continuous tying of the politics of the (k)not—a knot that is never neat, tied and fixed. The eco-technics of labour ties exclusively, while never being tied and thereby always including. Simultaneously, labour market practices that further processes of neoliberalisation but are exscribed, written out, of legal categories are also a politics of (k)nots. (K)not politics feed the market demand for cheap, temporary, flexible—irregular and precarious—bodies at work, but only insofar as they are 'irregular' and their precarity is affirmed through privileging a system that (falsely) promises stability and security. Consequently, as discussed in previous chapters, the privileged signification according to dominant constructions of the nation-state and market economics (that hold governance power) inscribe the irregular to allow the regular to persist as an ideal.

The label IML and experiences of individuals in precarious work, emphasise the incommensurability of law. Law is no*thing* but for the interests that instrumentalise the regulatory force of law—the market priorities of the UK government—and the traditional idea, or mythology, of law enacting, or being the voice of, justice. But what justice means in the context of *being* law depends on the authors, those whose 'coming together' creates the space for defining and instrumentalising law. The incommensurability that defines law, according to readings of Nancy's work in law as both juridical and existential law, is derived from

[581] Jean-Luc Nancy, *L'Intrus* trans. Susan Hanson (Michigan: Michigan State University Press, 2002).

[582] See Appendix A, Explanation of terms 'incommensurability' and '(k)not politics'.

the confrontation 'with' others, in the singular plural constitution of being and of sociality, that is groundless—but this groundlessness is the 'secret of *being-with*'.[583] In other words, law's existence as no-thing is consistent because no single foundation can be found to collectively ground being and world.[584] Therefore law cannot 'be' something. Law *makes sense* nonetheless because the *sense* that is the world, Nancy's sense of the world, is without a single, unitary foundation or comprehension. It is ontological only insofar as this ontology is materially lived and experienced through physical bodily being. Consequently, within every claim to a ground the framework itself is precarious. This is demonstrated in citizenship, whether it is citizenship imagined in the nation-state, idealised within the community of value or proposed as cosmopolitan/disaggregated citizenship.

The belief in a broader proto-political community, introduced in chapter one, affirmed through claims of rights and international directives and conventions inevitably comes up against its precarity as an ideological, historically bounded idea. This precariousness is revealed through the inherent impossibility that any inscription be all encompassing. There is always an exscription in any inscription, which is not its opposite but its possibility of being otherwise. However, there is *something* that is the world. The only truth in this precarity and groundlessness is the irrefutable material presence of our bodies—the bodies that labour, that form and participate in economies and are interpreted to fit into the categories and labels. Categories and labels meanwhile are neither natural nor inevitable. They have been developed through historically specific understandings of politics and instrumental uses of law. In the eco-technical manifestation of law with regard to IML (juridical law in action, practiced as a regulatory instrument), incommensurability is not acknowledged as within law, but is diverted onto 'migrants', outsiders, and those who are treated as sub-citizens through legal and social forms of control.

[583] Jean-Luc Nancy, 'The Confronted Community' trans., Amanda Macdonald *Post-Colonial Studies* 6:1 (2003): 23-36, 33: 'It falls on us to think from this starting point: without god or master, without common substance, what is the secret of 'community' or *being-with*?'

[584] See Appendix A Explanation of Terms, 'Law'.

Bodily Ontology: Law and Incommensurability

As mentioned above, Nancy's bodily ontology re-visits 'being' by giving attention to the physical, material presence of bodies as the basis of our sociality. But, contrary to phenomenology, this is not by privileging body as interior, or interiorising, Being. The body is something outside, which is always turned inside out.[585] Nancy's bodily ontology does not endeavour to conceptually place the body as the site, or locus, of identity. Rather, a focus on body, what it does and does not do, enables us to touch on the exteriority of being: here the being singular plural is an alternative thinking of alternatives wherein we know our body only by being externalised from anything that 'it' may be. For instance, when I am conscious of my body, it is often only because my body is acting in a way that seems to be independent of me—I know my body only to the extent that it is different from 'me'; I only ever touch myself externally from 'myself'. A body cannot be touched from inside, even if it is 'my own'.[586] Following from this, bodies are ex-istence—their being is ex-scribed through the inscription of 'being' and an inscription of *corpus*. And thus, they inevitably always exscribe their prescribed characterisation. Demands of the market economic system and processes of neoliberalisation capitalise on this exscription by inscribing a heterogenous demographic (that is not even a cohesive demographic) under an elusive, marginalising label of 'irregular' 'migrant' labour.

Bodies are known only through experience and their exscription beyond claims to individuality, autonomy and even subjectivity. Bodies as physical, physiological and anatomical masses, in spite of all the physical and philosophical efforts to contain and define them, are unruly. Bodies are, for the most part, unknown. Nevertheless, bodies can be thought of as being the 'with' of originary sociality, especially in the context of labour because they are, traditionally and materially, how we enact our labour. Within the contemporary information-technology world, bodies continue to be all that we are in that their material presence matters.[587] Yet the way in

[585] Morin, *Jean-Luc Nancy*, 128.

[586] Nancy, *Corpus* ('58 Indices on the Body'), 150-160.

[587] For instance, even in IT physical presence matters; IT and cyber data is physical. The person working in 'IT' still goes to work, is present in a work place and physically at a computer. Every web-based transaction is recorded, etched, inscribed onto physical material. Similarly, 'cyber crime' aka hacking, is investigated and recorded based on physical appropriation of hard drives and computer materials. The 'hacker' is apprehended and physically taken into custody.

which bodies are ordered and categorised limit the communication of experiences as they happen. We can say that bodies bring sense to the world, but insofar as bodies are not the signification of sense because bodies sense and are sensed more than any signification can identify or confine. Bodies, their well-being, sustenance, production and reproduction, impel development, industry and markets. Bodies and our bodily needs underlie the reason for work, wages, and income—in spite of the unruliness, the transgression and our inability to truly know or 'be' the totality of a body. And yet, the transgressiveness of bodies reveals the impossibility of universality and exposes interlocking systems of oppression that maintain persons as sub-citizens (and *subjectum,* as discussed in chapter three).

The world and our sense of the world, like the body, 'happens as that which remains outside of, or resists signification.'[588] There is no closed circuit that is stable, fixed sense or meaning.[589] For Nancy, the processes of thinking, what I refer to as an alternative thinking of alternatives, borrowing de Sousa Santos' term, entails fundamentally questioning ontology because of what the body is and is not. If this is an ontological starting point, a bodily ontology, it is not to bring transcendent thought ' "back into" immanence' but to demonstrate that the ' "transcendence" of thought and world' is produced 'through the exposure of infinite sense.'[590] In other words, bodily ontology *is* the limit of a transcendent, or what I have called a total or universal, claim, such as the totalising claim of the (full) subject-citizen. Bodies are the limit of Western modern-colonial thought and their daily, bodily materiality *is* the breakdown—deconstruction or indeed struction—of philosophy, subjectivity and our operative legal categories.

As discussed in chapter three, the IML is *subjectus*, not recognised as a subject who is both *subjectum* and *subjectus*. Such partial subjectivity is manifest through experiences of sub-citizenship, as explored in previous chapters, where individuals are excluded from the community of value (not-quite or less deserving citizens) from the starting point of their subjectivity. Diminished, partial or lesser subjectivity is, nonetheless, a consequence of being subjected to the law. The reference point remains

[588] Morin, *Jean-Luc Nancy*, 132.

[589] Ian James, *The New French Philosophy*, (Cambridge: Polity Press 2012), 46.

[590] James, *The Fragmentary Demand*, 182.

the regular, autonomous, individual. Therefore, the idea of the subject is based on a false contingency of a being as something that precedes or comes before the inscription, or speaking, of the law. The 'I', 'ego' has been falsely (as if it were natural, necessary and contingent) taken *as* the enunciation, rather than the result of enunciation.[591] Meanwhile, the false contingency has been incorporated into law. Law, instrumentalised as a regulatory regime of the nation-state, functions in favour of those who full-fill the subject, 'I', as the basis of legal recognition and rights. For instance, the contracting individual who enters into a legal contract, or standard employment relationship, is the autonomous, individual citizen-subject. Any departures from this ideal spiral down a hierarchy of recognition, towards irregularity and precarity.

Nancy resists this false contingency when he emphasises that, by being *no*thing, law demands *nothing* prior to law being instrumentalised into a regulatory order. Thus law traces the limit of what we can know as ecotechnics: the experiences simultaneously part of the market economic system and the exscribed of the legal system, marketised value and claims to grounded economic order. This explains the difficulty for the law to intervene or speak to IML, where the regulation of what is purportedly 'inside'—legally recognised categories of employment, high-skilled immigrants and Good Citizen workers—simultaneously sanctions the subjugated treatment of those included as excluded, as if they were outside. By interrogating how this 'outside' is constituted and who it is that is considered to be outside, IML, referring to persons who are included-as-excluded, demonstrates that the only outside that is exterior to the law and the dominant market economic system is the body: 'limit upon which self is exposed.'[592] The exteriority, therefore, is not *legal* but existential at the same time that it is wholly physical. It is existential in that what is 'outside' is the way that we know what we are, and the limits of what we are is the limit of our material bodies, which come together as bodies in common. This is sense: sensual, sensed, experienced and known away from the canon of modern (colonial, Western etc) intelligibility. The limit is not a legal definition because the legal 'citizen' or 'employee' is a category that is constantly being transgressed, mainly by

[591] Morin, *Jean-Luc Nancy*, 126.

[592] Morin, *Jean-Luc Nancy*, 148.

those in positions of power to inscribe, to speak, the law.[593] For Nancy, the limit, the exteriority is where the self 'feels itself existing', and he refers to terms such as differánce to speak of this space of embodied movement, where the very elemental being plural is 'feeling the world according to its opening'.[594] This opening is the sense of groundlessness or indeterminacy that comes from contingencies that are not presupposed and predetermined.

Nancy captures the significance of re-thinking labour, migration, citizenship and law in his exploration of the *sense of the world.* The sense of the world, referred to above and in chapter two, is the way that we are in-common with one another: in our labour, our production and reproduction. The sense of the world brings together the eco-technics of our being: the technical capital circulation that is currently maintained through governance, regulation, economic market exchange and capitalism, as well as the circulation that happens beyond these categories. Beyond is the exscription, the experiences that are sensed, but moreover are materially known through a bodily ontology and through the technical experience of material production. Again, this exscription is about the sensing of bodies, and in our deconstructive methodology bringing attention to what bodies are doing and how they come together as persons forming law (that becomes regulatory instruments), forming economics (that becomes the market system) and community (that becomes the nation-state), before the categories that shape these experiences. The *heaping* of experience that is grasped in Nancy's term, struction*,* aims to speak of what happens as a naked indeterminate sense of the world, as it precedes, follows and is ever beyond categories.

After unearthing false contingency, body and being as bodies (bodily ontology) is laid bare through struction. Struction refers to a passage and a space for contingency, invention and possibility[595] This alternative thinking of alternatives, and of our constitution as beings, where subjectivity and movement beyond (or before) the subject are embodied and enacted in the daily relations of labour and work and

[593] Butler and Spivak, *Who Sings the Nation-State?* (New York, London, Calcutta: Seagull Books, 2010).

[594] Morin, *Jean-Luc Nancy*, 150. Moreover, attention to bodies—and in Nancy's work often this discussion turns to art—is not a turn to consider new concepts or ideas for thinking of 'bodies' and/or 'art'. Rather attention to bodies is an attempt to touch on the body's materiality. Morin, *Jean-Luc Nancy*, 125.

[595] Struction 'offers a dis-order that is neither the contrary, nor the destruction or ruin of order.' Nancy, "Of Struction", VI.

ordered through law, is identified as the initial site for dismantling legal frameworks. Law is simultaneously juridical and existential: both the technique of order and regulation and the trace of labour and work that are part of our being. Rethinking law involves rethinking our relationship and treatment of body—physical body, and body of thought.[596] The *corpus* is incommensurable as it is always within a moving, circulating and historically-understood (made intelligible, recognised), *corpus*. Yet the potential contingent possibilities, the conditions beyond intelligibility—what language, recognition, categories—are the contingencies waiting to be sensed.

It is problematic to speak of what law might be in alternatives since, as noted, law is not a *thing,* but law traces the 'amassing' experiences—inscribed and exscribed. Further, it is difficult to imagine what openness to new contingencies and conditions of possibility might look like without action or embodiment. Indeed a bodily ontology is precisely what bodies are about, as weight, as presence, as happening, not about what they *should* be or should do.[597] Nancy's fundamental ontological questioning does not pursue what alternative law will 'be' or how it will be written. Rather, the issue is that there is law as a consequence of processes whereby singular beings come together to form plurality—a sociality, an economy—and they are together. There, 'law inscribes the uninscribable in inscription itself. It exscribes.' [598] Through law, inappropriable experience is inscribed. This inappropriable experience is presence, and it is materiality and body. Thus law *is* sense and incommensurability always in the processes of eco-technics. Eco-technics as a focus of analysis can help to locate what is present as we mine for false contingencies that limit thought of how and what our experiences and systems signify. The technics and the ecology of existence reveal an experience of de-familiarisation because it is ex-ternal or ex-scribed from what is taken, assumed, to be natural and necessary (the false contingencies). It is complicated to speak about the exscribed, because it pertains to exactly what escapes signification. Thus, if law traces both the inscription and exscription, then law is incommensurable with the categories that attempt to give legal status and fixed legal order. Law-as-incommensurable appears to

[596] 'Body' here extends beyond the physical to what Nancy refers to as Corpus, meaning the physical body of the person, the body of text, the body of material …

[597] Nancy, *Corpus*, 101.

[598] Derrida, *On Touching*, 298.

fall short in the face of the present political problem of IML. However, the politics of migration and labour, contestations of citizenship, processes of neoliberalisation and the precariatisation of labour are a politics of the (k)not. This, as a political experience, interrupts the notion that politics bring an end or adheres to a strict, progressive narrative. Subsequently it is impossible for law to be conclusive. Again, this does not discount other analyses that search for short-term solutions to speak to immediate, specific needs. However, when we consider the phenomenon of labour migration as a whole, which persists in spite of attempts to address 'irregular' migration and labour, then grappling with the incommensurability of these politics is an unknown, but important, conceptual step.

Nancy's work interrogates underlying paradigms of thought that dominate how we *make* sense.[599] Notwithstanding the difficulties for standard legal frameworks to 'make sense' of labour and migration in the twenty-first century, in Nancy's work, 'sense is the concept of the concept.'[600] Thus the way in which sense is 'made' ('making sense') through legal categories and citizenship in the nation-state is uprooted by first questioning what concept creates the concept. What, for instance, are the parameters of intelligibility that formed the contingent possibilities? IML reveals a paradox within law when citizenship is shown to be a contested and inconclusive category that purportedly mediates belonging in the nation-state through immigration, but practices of labour demonstrate that citizenship does not mediate membership and participation along clearly 'legal' lines. As the previous chapters have discussed, this mediation functions through ambiguous and precarious notions of belonging in a community of value and economic market participation. The tensions that labour law scholars identify between regulating and protecting labour rights (Core Labour Rights and international labour directives) and encouraging a transnational labour supply for a global, capital oriented, economic market result in a flexible, transnational labour force where labourers, whether citizens or non-citizens, are compelled to be IML. This process appears inevitable, and yet it is not clear; it does not *make sense*. But the underlying false contingency of the market and the nation-state, as the concept of the concept of citizenship—once identified as false contingency—opens onto sense.

[599] This is Nancy's 'fundamental ontological questioning'. James, *The Fragmentary Demand*, 4.

[600] Nancy, A *Finite Thinking,* Simon Sparks ed., (Stanford: Stanford University Press, 2003), 5.

Making Sense of Sense

Sense, like the being singular plural, is not a marker of substance or matter. Sense nevertheless concerns 'matter' because it concerns what is happening, sensed, present beyond presence. Sense is a paradoxical logic that does not involve choosing between presentation or withdrawal or oscillating between one and the other. Nancy's use of the term 'sense' shares a gesture suggested within post-structuralist terms such as 'aporia' 'differance'.[601] Through 'sense', Nancy affirms exscription, the experience, but paradoxically the need to write, to keep writing, in order that we may touch-on thinking but not determine thought. According to Nancy, categories and frameworks are constructed not in opposition to *sense,* but as an attempt to comprehend the world (make it intelligible), to make sense. Yet we must not stop *making* sense. The critique of sense, like the retreat of the political discussed in chapter two, is not a denial or de-activation. Instead Nancy's attention is to the continuation of coming together: the sense of the world is the sense of the bodily ontology. This is the ongoing becoming, which drives the work of writing rather than the pursuit of an end or an answer. Nancy writes to resist a theoretical discourse that insists on appropriating sense.[602] He writes of sense as not what is communicated, but 'that there is communication.'[603] Further, because writing is inscription, new false contingencies are unavoidable.[604] This catch, together with the previous discussion using terms such as paradoxical, incommensurable and impossible is what lies

[601] Derrida's notion of differance, 'is precisely that here there is neither "sensing oneself" nor "knowing oneself" in the sense of an appropriation or revelation.' Nancy, *Sense of the World*, 35. Derrida and Nancy share an approach that Morin identifies as putting 'community into erasure'. Marie-Eve Morin, "Putting Community under Erasure: The Dialogue between Jacques Derrida and Jean-Luc Nancy on the Plurality of Singularities" *Culture Machine* 8 (2006), 1. However Derrida insists on separation. Deconstruction, for Derrida, is a process of undecidability and the incalculable within the calculable. He maintains a distance from problematic terms in favour of marking the différance and deconstructive thinking. Nancy, meanwhile, writes of world disclosure, opening into sense and sensory experience of being as co-existence and not separation. James, 'The Just Measure', 43.

[602] Ben Hutchens, 'Archi-Ethics, Justice and the Suspension of History in the Writing of Jean-Luc Nancy' (129-142) in Peter Gratton and Marie-Eve Morin, *Jean-Luc Nancy and Plural Thinking* (New York: SUNY Press, 2012), suggests that 'the imperative to write impels a *praxis* of writing that incessantly interrupts philosophical discourses. In particular, it interrupts the practical desire to be practical, subverting all efforts to crystallise philosophy into conceptual patterns vulnerable to political subsumption.' Hutchens speaks thus of an archi-ethical philosophical writing that is inspired by literary ethics, in resistance to discourses that close community and 'the individuation of the singularity.' (Gratton and Morin, 135).

[603] Nancy, *Sense of the World*, 117.

[604] Marks is clear that the critique of false contingencies is not suggesting ever being able to avoid creating new false contingency.

beneath IML. The incommensurability at the core of these concepts and the attempt of words and language to capture experience is what is happening with migrant labour considered to be irregular.

Sense brings us to what *is* the world without recourse to determined existence.[605] Thus we return to the previous discussion: the world is the body, our bodies. For Nancy, in bodily ontology, the body and bodies are co-originary with sense. This co-appearance of the physical body and the sense that is exscribed escapes signification, because body is 'certitude' of modernity and paradigms of philosophy and law, 'shattered.'[606] As explained above, bodies are in the world as material presence,[607] which is never 'the' singular body.[608] To write 'the body', is to affirm it as 'a technical product of the eco-technical.'[609] Meanwhile the weight or materiality of our physical bodies, and the plurality of singular bodies, make the experience that is also the eco-technics of the world. Eco-technics, unlike the dominant categories and legal frames, is made up of bodies in movement. 'Creation', and subsequent economic, political and social production and reproduction, is technē of bodies where bodies are technical objects and withdraw from transcendental or immanent signification. For this reason, the bodies and world of bodies have to be taken into account when considering how and why there is a need for law to trace the limit of persons coming together in an originary sociality. But also why ecotechnics touches on processes of neoliberalisation. The technē of bodies is the variety of ways by which 'we' are *exposed together.*[610] This is the circulation that neoliberalisation, as a free-market ideology, capitalises on: the historically embedded paradigms along discriminatory constructions of race, gender and class (that provide cheaper labourers), as well as practices the reproduce the falsity of economic markets and the Good Citizen by pursuing only false contingency. Recognition and citizenship is

[605] Nancy argues, 'we must respond to the world as it is without recourse to transcendental discourses, including the still-theological discourses of modernity operating within the logic of Christianity and its messianism.' Gratton and Morin, *Jean-Luc Nancy,* 2.

[606] '… Blown to bits. Nothing is more proper; nothing is more foreign to our old world'. Nancy, *Corpus,* 5.

[607] Nancy, *A Finite Thinking*, 3.

[608] '*il n'y a pas 'le' corps*' Nancy, *Corpus*, 2008, 104. According to J. Hillis Miller, 'the organic unity model has had a tenacious hold on thinking in the West from the Greeks and the Bible down to Heidegger and present-day eco-poets and extollers of "the body."' J. Hillis Miller, "Ecotechnics Ecotechnological Odradek" *Telemorphosis: Theory in the Era of Climate Change, Vol. 1* Tom Cohen ed., (2011).

[609] J. Hillis Miller, "Ecotechnics Ecotechnological Odradek" in *Telemorphosis: Theory in the Era of Climate Change, Vol. 1* Tom Cohen ed., (2011).

[610] Nancy, *Corpus*, 89.

sought for persons in exploited and vulnerable situations, but recognition from and citizenship within the 'I'. However, this 'I' and the 'we' will only ever recognise the other as 'irregular' and 'migrant' while benefitting from their labour.

Accordingly, we do not know the 'other', but neither do we *know* 'we' or 'I'. Moreover, all that we *know* has been labelled, quantified, categorised through the canon of Western modern-colonial thought. Thus the experience, is that there is another body, that the world is a world-of-bodies,[611] shifts unto groundlessness. The world is heavy with the technē of bodies in 'an amassing and archi-tectonic drift of all macro/micro-cosmos ... where each body, spacing itself, also splits and degrades all spaces'[612], all categories, labels that have become the contingencies of spaces of Being. Bodies are simultaneously creative and destructive, dis-location, dis-localisation, consumption and degradation, in what Nancy terms 'a double suspension of sense'.[613] Bodies em-body the 'self-same worldliness and corporeality: sense's excretion, sense exscribed'[614] because they are constantly moving beyond categories and limits. Our beings as bodies sense the limit of language, legal regulatory tools and definitions. All are incapable of grasping how we relate to each other in the world. The technical imperative of sociality, interpreted by the dominant political and juridical structures that order and regulate our sociality, frame the work of bodies into categories according to a (neo)liberal ideology embedded in the mythology of the nation-state. The violence of current processes of neoliberalisation, normalised by categories that prescribe recognition and exscribe the excess of these categories (labelled 'irregular'), render certain persons less deserving of recognition as (Good) citizens in order that the market economic system may benefit from their labour.

[611] Nancy, *Corpus*, 31.

[612] Nancy, *Corpus*, 105.

[613] Nancy, *Corpus*, 105.

[614] Nancy, *Corpus*, 109.

L'intrus/ The Intruder

In his essay, 'L'intrus,' Nancy writes of the intruder within.[615] Introducing the notion of 'intruder' into the conversation concerning migrant labour, typically leads us to link IML with intrusion. However, the individuals rendered IML must not be considered unwelcome intruders because of their undeniable participation in the economy and labour market. Formally, their entry into the country can be legal and their presence and employment is economically preferred, if not overtly welcomed. Therefore, as discussed in previous chapters, it is not an explicit transgression of legal rules that signals exclusion from the community of value (which presumes itself not to be precarious). IML is not a label signifying persons who have blatantly transgressed legal rules. Rather, precarious employment and treatment as sub-citizens due to intersecting forms of discrimination, be it gender, race, (dis)ability, nationality, education, income and socio-economic status, are characteristic of persons broadly considered IML. The labour market presence that the label IML represents—flexible, temporary, low-waged, insecure—and provides is, instead, the intrusion on the myth of the liberal nation-state. The irregular are identified against/in reference to normative categories of the 'regular' 'citizen' economically productive in a standard contractual employment relationship. As such, precarious labour has unwelcomed effects on the nation-state, even though it is a part of and is caused by the processes of neoliberalisation vital to the globalised economic system.

The precarious labourer, the 'irregular' not-quite Citizen represents 'disturbance and perturbation of intimacy.'[616] IML are not outside or external, but the precarity of identity and the unravelling of citizenship that IML represents is a strangeness-inside: 'A strangeness reveals itself "at the heart" of what is most familiar.'[617] Nancy describes strangeness inside as something that is inherent and always present to what is assumed to be familiar. If, as above, the market economic system is taken as a necessity (false) and legal subjectivity is equated with citizenship, a (false) contingency of value as citizenship and labour participation recognised in the

[615] L'intrus appears as a chapter towards the end of *Corpus* and has also been published independently (Jean-Luc Nancy, "L'Intrus" trans Susan Hanson (Michigan: Michigan State University Press, 2002). Nancy wrote this piece as a reflection on his own heart transplant.

[616] Nancy, "L'Intrus", 2.

[617] Nancy, "L'Intrus", 4.

nation-state, then the irregular functions at the heart of what is most familiar. The strangeness at the heart of what is most familiar is the experience, the sense of our sociality including those who do not fit into the pre-determined categories and ideals. As this interrogation of IML demonstrates, the intrusion is the realisation of the precariousness of ideological foundations and their limited contingencies.

How is the most familiar intrinsically unknown? For instance, who is the Good Citizen? Where is s/he? Strangely, in spite of ostensibly setting the goal for all others, how does this Good Citizen maintain the global economic system, save occupying a hegemonic position over the subjectivity of all others who are not-quite-Citizen? These questions unsettle the accepted false contingency of citizenship. Nancy's *sense of the world* activates, what other critical theory has called *defamiliarisation.*[618] Recognising the unfamiliar at the core of what seems familiar is the crux of confronting an alternative thinking beyond or before the ground. Nancy's 'intrus' as a term acts to defamiliarize the awkwardness between what is *sense* and what is the dominant, unquestioned ideal of the rights-bearing, autonomous individual citizen-subject. In addition, the term 'intrus' potently hints at the idea of home or the household. Nancy's 'intrus' (intruder) disrupts the notion that 'I' am the realisation of 'my' own 'self', in the stability of a fixed home-space where 'I' belong: be it home as private property, owned and inhabited, or a domestic national market economy. In either case, the home has within it, intrinsic to itself in stereotypical assumptions, the disruptive 'working' woman and the disruptive 'settled' migrant. Far from being a settled, stable space, the home as a space for the 'I' is nothing but a site of technologies that can be replaced, operated on, and fixed in order to prolong 'my' life or to fullfill a particular paradigm defining ecotechnics. For the person held within the label IML, the economic market system promises 'home' to those who participate as Good Citizens. In practice, the market system is a technique of production and reproduction where neoliberalisation engulfs the work of bodies into an insatiable capitalist system. Even the Good Citizen is 'irregular' in the market. A shifted focus on IML highlights the limit of legal recognition and subjectivity in and of itself. The origin, home, is not found—nation-state and citizenship—are constructs, contingencies that substitute meaning. Home is nothing but a confrontation with home-less-ness, in other words with precarity and groundlessness. For this reason,

[618] Braidotti, *The PostHuman*.

sociability and the relation that occurs at the level of the encounter of plurality of singular beings *is* originary, disruptive and strange every time.

Home, in conventional uses of the term, upholds ideals of Good Citizenship in a community of value. The home is a private space, where the individual (autonomous, citizen, property-holder) is protected and privileged, in contrast to 'his' public work and public engagement.[619] The predetermined condition of home is vital to form a common, and a sociality.[620] Home implies a site, or grounding, for economic practices (*eco-* household). Home also implies ownership, employment and property, which, like the classic model of labour discussed in the previous chapter as the industrial or male-breadwinner model, is a profoundly gendered notion of market economic participation.[621] The woman, in contrast to the property-owning male, is charged with maintaining the home and its privacy. However in experience, the home is rarely a settled place and is not clearly distinguishable from the 'public' 'political' sphere. The private and the public are not neatly definable, as many theorists have explicated.[622] Moreover, theories that explore relationality and the virtues of citizenship beyond the nation-state have identified hospitality as a key value, yet even in hospitality the distinction between 'guest' and 'host' is not always clear. The host is assumed to be the one with recognised participation in the community of value and the guest the one permitted entrance. Nevertheless, the 'guest' when not welcomed is always at risk of slipping into being an intruder, while the 'host' is in danger of losing her 'home' once the guest enters and makes herself 'at home'.[623] Within the community of value, persons considered citizens risk slipping from 'host' to 'guest', or to "not-quite-good-enough"[624] merely 'tolerated' citizen.[625] The proto-political community, citizenship and the market economic system obscure this precarity, necessarily in order for the Western, modern-colonial liberal ideology and economic market system to continue. Thus the theme of the intruder, the stranger, at its core

[619] Anderson, *Us and Them*, 4, 8.

[620] At the base of relating to others is the imperative, or the pursuit of home: place and belonging—a ground from which to stand. Luce Irigaray, 'Toward a Mutual Hospitality' in Tomas Claviez ed., *The Conditions of Hospitality: Ethics, Politics, and Aesthetics on the Threshold of the Possible* (New York: Fordham University Press, 2013), 47.

[621] Judith Still, *Derrida and Hospitality: Theory and Practice* (Edinburgh: Edinburgh University Press, 2010).

[622] For instance, Judith Butler and Spivak's criticism of Arendt in *Who Sings the Nation-State?*

[623] A. Tataryn, *Law Text Culture* (2013).

[624] Anderson, *Us and Them*, 6.

[625] Anderson, *Us and Them*, 89 & 93.

intrudes not only on epistemic categories, but intrudes at the very core of 'our' idea of moral correctness. The intruder is at the heart of Being. Good Citizens are *meant* to be welcoming, according to liberal democratic 'humanitarian' values. But this moral correctness, or political correctness, cannot address the *intrus* because the irregular is not a guest; the irregular is already within—a defamiliarisation that is always already happening:

> *'The theme of the intrus is inextricable from the truth of the stranger. Since moral correctness [correction morale] assumes that one receives the stranger by effacing his strangeness at the threshold, it would thus never have us receive him. But the stranger insists, and breaks in [fait intrusion]. This is what is not easy to receive, nor, perhaps, to conceive...'*[626]

'Breaking-in' disrupts the categories that inscribe ostensibly clear borders of belonging and citizenship. Yet the political, juridical, ecotechnics of circulation, when considered through attention to bodily materiality, render not the body of the stranger, the IML, as the intrusion, but the economic market, de-familiarised, comes into relief as the stranger inside. The market model and processes of neoliberalisation capitalise on bodies producing and reproducing, in spite of categories that claim to frame being. The frame is determined by the hegemonic dominance of those whose personhood is inscribed in the Western modern-colonial philosophico-juridical idea of the citizen subject and claim authorship over a universal sphere. Because the neoliberalising market prioritises capital and economic growth, it allows for the exscription in IML, and the intrusion on the movement of social and (k)notted political, economic, social reproduction. Bringing all of this to light, it is therefore the political and juridical (k)not embodied by the label IML that exposes and abandons us to the incommensurable. This abandonment even pushes us to think beyond all of Nancy's terms. In Nancy's words,

[626] Nancy, "L'Intrus".

> *'A moment arrives when one can no longer feel anything but anger, an absolute anger, against so many discourses, so many texts that have no other care than to make a little more sense, to redo or perfect delicate works of signification. That is why, if I speak here of birth, I will not try to make it into one more accretion of sense. I will rather leave it, if this is possible, as the lack of "sense" that it "is." I will leave it exposed, abandoned.'*[627]

Seeing Law Through Ecotechnics: Care/work

The bodies, amassed, weighted by their very presence in the technē of the world, without pre-determined categories have within themselves the intruder. The normalisation of citizenship through the label of 'irregular' (IML) reaffirmed and perpetuated in immigration and labour is the intruder inside the philosophical and juridical subject. The exscribed ex-perience, ex-istence, is the expression of the eco-technics that, ultimately, reveal no-*thing* except the art of bodies. Therefore, if our critical approach to IML strives to see law through ecotechnics then all we are is the coming together of persons in-common, in incommensurable, non-harmonious and often 'unrecognisable' ways. And law is the tracing of this movement. An approach via ecotechnics challenges, on the one hand, the capitalist appropriation as a linear, definitive (transcendent) experience that re-defines, or destroys, the radical (transformative) potential of labour action and social reproduction. On the other hand, through attention to ecotechnics (*sense* notwithstanding) we also see the counter-experiences that are at play as persons migrate, work and are made precarious. The experiences as they 'amass' and 'heap' interrupt categories and frames of recognition, and keep the law as an electric? *body* that is at once a limit, a regulation, and an instance of movement and circulation. This makes the irregular part of processes, not excluded or ignored. Therefore, recognition and remedy of the problem of IML is inseparable from a critique of the economic market and nation-state system. Following, and tracing, the ecotechnical circulation of capital and bodies shows us the

[627] Nancy, *Birth to Presence*, 5.

IML is 'irregular' not because of particular labour or immigration laws, but due to the paradigm in which modern nation-states, law and market economics are founded.

It is impossible to draw conclusions from Nancy's work for IML in a way that would suggest immediate changes for these persons that experience situations of sub-citizenship. Ecotechnics, for instance, does not lend itself easily to conversations with the critical approaches to migration, citizenship and labour law discussed in chapters three and four, without explicating the false contingency of ideas of citizenship as connected to the very foundations of notions of Being. Nevertheless, the glimmer that Harry Arthurs' suggestion offers, of labour law as law incarnate (discussed in chapter four), is the beginning of a deep questioning of law and the legal subject, which would necessitate change directed towards a greater reality of experience than presently. The main challenge for any approach is to, counterintuitively, resist appropriation into a fixed project orientation by deferring to the (k)not of interests and bodies involved. A new programme or prescription for progress would re-inscribe existing frames of reference that provide, or construct, a ground. For instance, regularisation programmes reaffirm the false sense that citizenship status brings equal, or fair, labour practices. Similarly, the notion that law, unhinged from the nation-state, can distribute a ground of justice and fairness derives from a false presumption that law is some*thing* of an entity in and of itself. Furthermore, ideals of disaggregate or cosmopolitan citizenships repeat the insistence on a universal and proto-political community and belonging. In labour law scholarship, proposals for justice-based labour law (Brian Langille) on the one hand, or personal employment contracts (Mark Freedland and Nicola Kountouris) on the other, reaffirm structures using current reference points of both the idea of universality and the current legal system. Given this, the exploitation of foreign, irregular workers is justified based on their inclusion-as-exclusion. Each of these grounds provides a false sense of resolution unless the contingent possibilities of thinking otherwise, different from the frames and ideals but based on material and sensed experience, are left open. For this reason, a future project along these lines could include a rigorous engagement with scholarship of decoloniality and decolonising philosophy.[628]

[628] Enrique Dussel, 'Anti-Cartesian Meditations: On The Origin of the Philosophical Anti-Discourse of Modernity' *Journal for Culture and Religious Theory* 13:1 Winter 2014, 11-52; Walter Mignolo, 'Delinking' *Cultural Studies* 21:2 (2007) 449-514.

The inscription and exscription of law is experienced on a daily basis and in legal practice. While the techniques of exclusion and exscription are part of the eco-technical circulation of capital, discursive categories do not reflect the *eco-technics* of a bodily ontology. The being marked as 'irregular' and 'migrant', lives and works next to a person considered to be a citizen-national. The categories are not as distinct as they seem. For this reason, my methodology questions why it is that one person is considered to be an IML, whilst the other is not, and how this differentiation serves a particular political, economic and/or legal purpose. This differentiation reinforces constructions of race, gender and class, but fundamentally, foundationally at the level of the construction of being, sociality and law.

IML, I have explained, is used to refer to persons who are living and working in low-waged, low-skilled labour situations where they are fully in compliance neither with traditional categories of employment nor with the dominant ethnic and racial demographic of the nation-state. In the UK, IML is not engaged in a standard contractual employment relationship and is for the most part assumed to be non 'white-British'. IML is identified as an issue of popular and political concern, in spite of the inability to isolate precisely who 'irregular' 'migrant' labourers are. Nevertheless, these are persons excluded from 'full' membership as citizens of a political, social and legal community. The existence of this demographic of labourers calls into question what citizenship or 'full membership' is, and whether this ideal is ever experienced or possible beyond a very specific hegemonic category (white, educated, able-bodied, English speaking, heterosexual male). Full membership implies a complete and enclosed, attainable, entity. The condition embodied in IML reveals the trouble with claims of predetermined community. Those whose activity vitally sustains the community can be excluded from legal categories and protections/regulations. According to Boaventura de Sousa Santos, 'all that is not recognised or legitimised by the canon is declared non-existent.'[629] And this 'non-existence is produced as a form of inferiority, insuperable inferiority' that, as insuperable, cannot be an alternative to the superior ones.[630] Similarly, as discussed in chapter one, benefit scroungers and IML are blamed for each other's transgression and both kept away from the desirable, Good Citizen. The included-as-excluded,

[629] de Sousa Santos, "Public Sphere", 52.

[630] de Sousa Santos, "Public Sphere", 53.

where exclusion is affirmed through practices recognizing the citizen as a 'viable actor,' are only such when their participation is deemed worthy according to the shared values of the elusive *community of value*.[631]

The community of value is not a legal space. It is part of what is exscribed away from the text of law—it is the practice of inclusion and exclusion that is beyond the text of the law, and enforced through forms of social control. In spite of immigration law's attempts to control and order the border between 'citizens' and 'non-citizens', citizenship and participation in society is based on ideologically charged notions of value and worth. These can be written into the law, but also are mediated beyond the confines of legal definitions and are therefore within the practice of participation in-common. The limits of the sayable are determined based on who is permitted speech as a legal subject and thereby admitted as a worthy citizen, as both *subjectum* and *subjectus*. The community of value is reserved for those who are 'regular' 'nationals' or 'citizens' without the hint, or implication, of foreign-ness. As such, persons considered 'irregular' and 'migrant' are external to the community of value.

Nonetheless, labour and labour markets are concerned with concrete action, production and reproduction, rather than with an act of speaking. For this reason, labour that is outside the limit of the sayable, the work done by IML, is exscribed, yet present. It is part of the sense of the world. At the same time, the sayable exscribes the experience that what is said is always limited and that full recognition is impossible. Harry Arthurs' vision of labour law as the incarnation of law requires that we interrogate the regulation of labour to discern how and why legal categories are both affirmed and contradicted. As labour is about action and activity that *happens*, labour law takes into account a broad context for law. Law cannot be seen as a purely nation-state centric jurisdiction when labour and labourers cross administrative/bureaucratic, political and territorial boundaries. Similarly, those who are not recognised as active, 'full', legal subjects are nevertheless subjected to the law. They are marginal in reference to the law, in legal grey areas. This law, I have shown, is practiced within

[631] According to Butler, 'The public sphere is constituted in part by what cannot be said and what cannot be shown. The limits of the sayable, the limits of what can appear, circumscribe the domain in which political speech operates and certain kinds of subjects appear as viable actors.' Judith Butler, *Precarious Life: The Powers of Mourning and Violence.* (London, New York: Verso, 2004), xvii.

the dominant (Western, modern-colonial) liberal nation-state epistemology, ideology and ontology. Here, lawmakers privilege a market economic system, and obscure the control mechanisms deployed through the mythology of the nation-state. The market economy is believed to be the only possible way of imagining labour demographics and labour markets. Law-makers and law-practitioners are influenced by labour market demands and priorities to sanction differential recognition of labour and citizenship. Limited recognition creates irregular situations and IML. As discussed in chapter one, IML and precarious work that is not recognised as 'employment' under labour law as well as practices that differentiate citizenship (the Good Citizen versus the Failed Citizen) allow businesses to demand cheaper, more temporary and precarious forms of labour in order to maintain economic market competitiveness on an ostensibly global scale.

The (k)not politics of IML open up to economic market exchanges where neoliberalisation is malleable and adapts to categories, labels, legal regulations, always with the aim of maximising economic competitiveness and (short-term) financial profit. 'Law' as we know it in immigration and labour, fails to recognise how neoliberalism operates. At the same time, law is in the hands of those in whose interest it remains to prioritise economic growth and forego protection, for fear of limiting or regulating a 'free' market. The appropriation of categories and frames of recognition exploits these movements of sociability, such that persons who are integral to the experience of coming together are the exscription of communities. This benefits the market economic system because their work (labour) can be relegated below the radar of existing legislation and protections, and thereby these workers supply cheaper, temporary (expendable) forms of labour. These practices, I have argued, can only be understood as a politics of the (k)not.

Care and care work present another illustration of (k)not politics. Just as the construct of IML exists in legal grey areas to serve the neo-liberal market, so too care and care work reinforce our recognition of the market as an intrusion which falsely frames our being. Care work, rather than accruing value on entering the labour market, maintains its stigma as a burden on the economic system. A shifted perspective on care and care-work gestures towards what feminist literature has

identified as recognising reproductive labour or social reproduction.[632] Work in social reproduction is the technē that maintains the 'house' in a broad sense, whether it is the neighbourhood, nation-state, or society. In the words of feminist theorist Silvia Federici, 'the reproduction of human beings is the foundation of every economic and political system ... the immense amount of paid and unpaid domestic work done by women in the home is what keeps the world moving.'[633] However, since shifts in labour dismantle an ideology that separates a public and a private domain, and women in the workplace as well as flexible, casual labour is no longer anomalous, the care work industry accounts for the provision of care related workers and increasingly relies on marketised, albeit precarious, irregular labour often performed by non-nationals'. Care-work and domestic work have become 'labour sectors'.

On the one hand, feminist activists and scholars have fought to be recognised within dominant political, juridical and economic frameworks because care and domestic work are part of ecotechnics: vital to the circulating sociability that forms our political, juridical, economic relations and systems. On the other hand, the commodification of care-work has not led to care, nor are its predominantly female and migrant labourers valued as equal to other labour sectors.[634] While gaining recognition through wages for persons disenfranchised in what previously was non-income generating work (work in the home, 'women's' work), the work recognised as 'care' is the exscription of marketised labour, and as such cannot be captured within the frame of the market, in spite of the market's insatiable attempts to manage and exploit a care-work industry.[635] Care is not exscribed for its reduction to a transcendent feminine quality. Rather, there is a *sense* of care that connects not to market value, but to our basic relationality, and similar to IML, processes of

[632] Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction.' *Feminist Legal Studies* 21:3 (2014) 1-23; Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge and New York: Cambridge University Press, 2002).

[633] Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (PM Press, 2012), 2.

[634] Federici, *Revolution,* 117: 'In England the government has given caregivers the right to demand flexible work schedules from employers, so they can "reconcile" waged work and care work. But the dismantling of the "welfare state" and the neoliberal insistence that reproduction is the workers' personal responsibility, have triggered a countertendency that is gaining momentum and the present economic crisis will undoubtedly accelerate.'

[635] Federici, *Revolution,* 110: 'Wage employment may be a necessity but it cannot be a coherent political strategy. As long as reproductive work is devalued, as long it is considered a private matter and women's responsibility, women will always confront capital and the state with less power than men, and in conditions of extreme social and economic vulnerability. It is also important to recognize that there are serious limits to the extent to which reproductive work can be reduced or reorganized on a market basis.'

neoliberalisation frame and capitalise on care being *exscribed* and yet vitally part of ecotechnics. The definition and limit of 'labour' and how law is to recognise and regulate within its limitations is a matter of debate amongst labour law scholars, as I discussed in chapter four. At their core, these debates question whether labour is a means or an end. Is it action itself that is labour, or is it action within a particular framework and paradigm? There is a plethora of actions that our sociability in common demands. I agree with Nancy that at times 'it seems as if the category of "labour" were extending and distending itself to the point of dilution, as if it were about to 'impregnate all spheres of existence'.'[636] Nancy is critical of a 'generalised becoming-laborious of social existence'.[637] To counteract this potential dilution of the significance of labour, the identification of eco-technics (household, home-practice, craft) highlights the ideology of the market system, which has sought to capitalise on social existence itself. Meanwhile the market is only one possibility of sociability, which has assumed a totalising presence based on historically specific ideology. The market *inscribes* participation of autonomous, able-bodied, individuals as the labour of Good Citizens in contrast to Failed Citizens or IML.

Non-marketised labour exists beyond what is measured according to monetary value. Nevertheless, the market is fundamentally reliant on this non-marketised work for social (and actual biological) reproduction. Thus while labour needs to be defined, and recognised for its use/value in the labour market economic system, where value is allocated through wages and inscribes social status in the community of value, the work and labour that is *exscribed* from market quantification also needs to be present to labour law. The purpose of such recognition is not to include and thereby re-write this excess. Rather the bodily, materiality of care is experienced and its recognized value can open possibilities of defiance to the false contingency of market economic productivity.

Work 'outside' the home, in the 'public' labour market is sustained by work (largely unrecognised) in the private 'home' where economically productive active citizens are reproduced and cultivated. As a result of shifts in the labour market the home has become a space of private labour markets, as demonstrated in the case law

[636] Nancy, *Sense of the World*, 96.

[637] Nancy, *Sense of the World*, 97.

detailed in the previous chapters, *Siliadin v. France* and *Hounga v. Allen.* In both cases, a non-national worker was working, providing care, in a private home. This rendering of care to the private home stems from false contingencies of citizenship and the (particular) legal subject. The home is at once private and public; it is outside the scope of standard employment categories but also elemental to the functioning and order of the public. The home is fundamental to market eco-nomics. The dominant market economic model has inscribed onto the idea of home the values of privacy, property and patriarchy.[638] Thus, where 'care' takes place appears to be as movement and relationality of 'home': home that can be thought of as the *sense* of being in the plural with multiple possibilities of an ungrounded 'home'.[639] Home, rethought, is constantly constituted and unconstituted within the eco-technical processes of production and reproduction. Here, care acts as a non-productive but essential part of the circulation of bodies and sense. Care, in the very material bodily practices, happens in the *sense* of the being singular plural. A bodily understanding of care exceeds capital circulation and poses a fundamental, ontological and *ecotechnical* challenge to neoliberalisation and the dominant economic market model, including the *sense* of the market.

The commodification of care-work and a care-work industry in the UK privatises social responsibility and the responsibility of the welfare state to provide for its citizens through social support. The shift to a professionalized care-work sector has both positive and negative effects, not least of which is that it radically shifts models of employment from classic workplace domains, with set hours of 'work' (public) in contrast to hours 'at home' (private). Care-workers are employees, but on non-traditional contracts and in jobs that previously would have been considered private work and outside the ambit of formal (public) labour/employment. The persons employed for this work are often employed through temporary work agencies, as self-employed and casual labourers, and are therefore engaged in 'contracts *of* services' without the protection of statutory employment protections. Especially in the case of live-in caregivers, labour and employment take on a very

[638] Luce Irigaray 'Toward a Mutual Hospitality', 42-54.

[639] I discuss home and hospitality through Nancy's work in more detail in my article, 'Revisiting Hospitality' *Law Text Culture* 17:1 2014, 184-210. My engagement with home in this article responds to Jacques Derrida's *Of Hospitality* and the relationship of the stranger, the migrant, to the home from which hospitality is extended or withheld.

different quality, with new sets of concerns and regulatory needs. This labour sector under trade in services, where women migrate to work as caregivers in homes, is characterised by 'constructed precariousness under temporary migrant schemes, limited community market access rules, and channels of perpetual irregularity.' [640]

Moreover, when care work persists in being under-paid and socially denigrated as work for 'irregular' employment, particularly for migrant labourers, those working as carers are often unable to provide the 'care' actually needed in order for the person needing support to thrive. Potentially, a notion such as Judy Fudge's 'care activation'[641] could mean that the work of care becomes a recognised aspect of economic life as it affects every-body's labour market participation and possibilities. Such a shift in the economic value of care and care work would only be possible if we dismantle the (false) contingencies of what is value(d), which underlie even the idea of market economics. Thinking of care, and care as vital to the circulation of sense, reminds us of what it is that *is* valuable to individual beings and the being singular plural (the being together) in the sense of the world, prior to economic markets and financial measures.

Through the issue of care-work and care as a responsibility that *is* an aspect of the originary sociability and not an imposed burden of individuals, labour law is forced to contend with the responsibility of being as singular plural, what Marie-Eve Morin calls *being more than one*. This recognition is similar to the 'ethical subjectivity' that feminist scholars such as Rosi Braidotti and Adriana Cavarero activate to bring attention to subjectivities from a perspective diverging from the dominant Western, masculine paradigm. Braidotti suggests that thinking of care and being together is thinking of 'living being prior to inscription into a cultural code; prior to its being fit into a specific order'.[642] This is not the traditional sociological notion of the 'ethics of care', which can essentialise the role of caring into a normative, female, stance. Rather, care is something that *is* a fact of our being singular plural *within* law, law as the trace of our originary sociality. Care is not something to be acquired or activated by law. And neither is 'it' ascribable to one

[640] Blackett, "Emancipation", 430.

[641] J. Fudge, "Labour as Fictive", 135.

[642] Rosi Braidotti, Foreward, *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* Adriana Caverero (New York: Polity Press, 1995), xvii.

category of gender and not others (such a classification moreover reinforces and naturalizes constructed categories of gender, race, class and so on). Thus the responsibilities of all labour market participants include the responsibilities of care, not as a programme but as the ecotechnics of the world of singular plural, which form the social, which is what forms the need for an economic system and the tracing that is the law.

What is 'care work'?

The nature of 'care-work' is difficult, if not impossible to measure according to market economic standards. Care work involves physical and emotional engagement as well as intimate work with bodies.[643] Bodies are messy, smelly, and uncontainable in their excess. As Nancy describes in *Corpus,* our physical bodies are bound by skin, structured by bones and weighted, heavy.[644] Yet bodies are a mess of fluids, organs and orifices that take place in between each other.[645] The established Western European framework, and current neoliberal market lens of understanding the citizen and the subject discussed in the previous chapters, emphasises the Good Citizen and the legal subject as an autonomous, able-bodied, individual: an individual whose body is "under control" (control of oneself and control by the state are melded as one and the same). This model imagines a fixed, defined, compartmentalised (dichotomous through the mind/body distinction) idealised body. A bodily ontology, in contrast, shifts away from thinking of this ideal as a fixed, attainable sculpture, towards seeing what we are: we are bodies. And bodies need care, and do care. Yet the body is not an object, it is a process of becoming that is a *body* of being.[646] Unpredictable and finite, the corporeal is 'an event at the limit of sense'[647], where bodily sense is thinking against idealism and abstraction.[648] The ideal and abstract is

[643] Julia Twigg, 'Carework as a form of bodywork' *Ageing and Society* 20 (2000): 389-411.

[644] Nancy, *Corpus*, 7.

[645] Nancy, *Corpus*, 35, 113, 121.

[646] "In this way the body is always open, always ready to think its form and its manner in terms of its own rejection and expulsion. The open body or the body-as-open is never a void, a blank page; it is an open calling for a double action or double movement: going inside to recover that which then, through its entrances, will be forced outside." James, *The Fragmentary Demand*, 131.

[647] James, *The Fragmentary Demand*, 131.

[648] James, *The Fragmentary Demand*, 132.

the standard, the measure of a Good Citizen in the community of value as well as the myth of a full legal subject: the able-bodied, economically productive subject.

Care work involves the body. In fact, the discursive focus on 'care' may be an attempt to sterilize or make palatable the bodily nature of this work.[649] Body work, and focusing on bodies-at-work[650], can refer to a broad range of activities, from the work that individuals put into their own bodies, as health regimes or beauty, to paid work done on the bodies of others: 'medical, therapeutic, pleasurable, aesthetic, erotic, hygienic, symbolic.'[651] Body work connects to a bodily ontology. Body work, more specifically, refers to the work that is done around bodies that is messy, 'dirty' (dealing often with 'human waste' and 'leaky bodies'[652]), private and hidden. The body, like the categories that we place bodies into, leaks out of the confines of the home and predetermined household and into the space of the IML and precarious legal subject. Body work is often carried out either by intimate (family) members, or the lowest paid, 'low-skilled', foreign workers. The *exscription* of care with regard to commodification in employment and labour is discussed in terms of the emotional and interpersonal elements that cannot be captured in standard employment or job descriptions.[653] However, I follow Twigg who writes of care work as body work where care deals with the 'negativities of the body—dirt, decay, decline and death.'[654] Care work exscribes the body, moreover the name (care work) euphemises as well as devalues the labour. The work involved in body work is physical and emotional—challenging the entrenched ideology of a body and mind separation, especially in work/labour. At this nexus of the material, physical body, and the emotional demand of care and intimacy, bodies interrupt and exceed dominant Western conceptualisation of the individual. Bodies cannot be inscribed within a market system. Moreover, even care work exceeds the market system because the work that is involved in 'caring' does not undo the body. In other words, the bodily exscription in constructions of

[649] Julia Twigg, "Carework as a form of bodywork" *Ageing and Society* 20 (2000): 389-411, 389; Ann Stewart, *Gender, Law and Justice in a Global Market* (Cambridge: Cambridge University Press, 2011), 20, 162.

[650] Wolkowitz defines body work as: 'the paid work that takes the body as its immediate site of labour, involving intimate, messy contact with the (frequently supine or naked) body, its orifices or products through touch or close proximity.' Carol Wolkowitz, *Bodies at Work* (Washington: Sage Publishing, 2006), 8.

[651] Julia Twigg, "Carework", 389.

[652] I borrow this term from Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (bio)ethics* (Routledge: Psychology Press, 1997).

[653] Twigg, "Carework", 394.

[654] Twigg, "Carework", 393.

labour, employment (contracts) is part of the market. Therefore care work is exscription of work.

Yet care work, in labour law and employment discourses, refers to the marketization of care and jobs that specifically require 'care' givers. This marketization has positive consequences of recognition of care in the dominant market employment model, as well as negative consequences. Care-givers who choose to care for their family members and/or lack the economic ability to pay for care-work support, as well as those who are precariously employed privately in households to 'care', are excluded from notions of active, Good Citizenship. The economic measures of productivity deem Good Citizens as those in standard employment relationships. An often migrant, referred to as irregular, labour force, supplying care work raises racial and gender issues. Care as a marketised labour sector and an industry may be liberating for women who are enabled, 'freed', to participate in the labour force as breadwinners; someone else can be hired to take care of the(eir) care-responsibilities. Their liberated situation simultaneously marginalises care responsibilities away from every-day experiences and off-loads 'care' onto para-professional workers whose economic disadvantage relegates them to the private sphere of foreign houses, often in foreign countries. Care responsibilities are seen as an individual burden that is emancipated through the market, a 'burden' that is placed onto global supply chains of foreign workers that supply care work in ostensibly 'economically productive' or 'economically active' (meaning, neoliberal) countries. Meanwhile, the foreign workers who migrate to supply care work in highly marketised countries leave behind a care-gap in their own families and countries of origin that is then filled by aging parents, siblings, or other carers. This is also part of the circulation of an apparently globalised market economic system, and the eco-technical circulation of capital and sense in the world.

The way that the ecotechnics currently guiding our world continue to devalue care work connects to the historically specific frameworks of labour and employment. Adelle Blackett and Judy Fudge both write about 'market-enabling' labour, labour which is outside of the dominant labour market, yet part of the market because it enables labour in the sphere of the market.[655] For example, domestic work

[655] Blackett, "Emancipation", 421.

(traditionally female) facilitates the participation of the (traditionally male) income-earner. The breakdown of the male-breadwinner model as a consequence of the feminization of labour, and especially in the twenty-first century the rise of precarious employment, has instigated scholarly awareness of the market-enabling work of care-givers by supporting the wage-earner(s) through their 'private' work. Fudge stipulates that 'dependent caretakers are part of the system of production and they engage in household production, producing workers of the future, and discharging the obligations everyone has to dependents.'[656] The narrow parameters of traditional labour law have constituted a care-work industry in response to the demand in working (double-income, dual breadwinner) households. The commodification of care work, which began as an issue of equality in employment in the latter part of the twentieth century, is credited with increasing women's employment rates. A 'care-work industry' has meant that care responsibilities that are characteristic of society, of sociability of persons in common, are marketised, placed within a market commodity (service) model. The market for care work predominantly constituted by the demand and supply of a female, migrant labour force. This is ironic because the care work industry emerged from a labour market model that stresses women's active participation in the 'public' market economy.[657]

No immediate marketable value emerges from the 'work' put into caring for another, especially because often the person needing care is not an 'active' economic producer. Therefore, care is undesirable labour. It is neither productive, nor rewarding in the eyes of the market economic system. Those who work as carers, predominantly women in both the care-work industry and those who have accepted personal responsibility as carers, are marginalised—they are not Good Citizens participating as productive, active, public members of the community. The former become sub-citizens for taking 'bottom-end' labour (low-waged, often with little demand for skills) that others do not want, and the latter for choosing to be care-givers, often in their own private home. Those who accept responsibilities are regarded as economically unproductive, living with a burden that is a consequence of their

[656] J. Fudge, "Labour as Fictive Commodity", 134.

[657] The demand for (female) foreign workers allows 'citizen workers' to participate in market economic labour as 'active citizens' without care responsibilities. This reinforces a neoliberal, as well as patriarchal notion that the ideal Good Citizen is without the 'burden' of care, or at least has sufficient income to pay for someone else to 'take care' for them. Bridget Anderson, *Doing the Dirty Work?: The Global Politics of Domestic Labour* (London, New York: Zed Books, 2000).

personal failure to keep up with the community of value and the expectations of the economic system. The rising precaritisation of labour in the UK, and the cuts to social services and social support, has resulted in increasing numbers of people who cannot meet the costs of care in the care-work industry, and have to care in addition to participating in the labour market economy.[658] Economically productive labour market participation is measured by productivity and output. In care-work the input is the direct output—there is no 'productivity enhancement' or reward that meets the goals of market economic growth when you are a care-giver.[659] In other words, most care-work, although valuable in terms of well-being, does not meet a progress narrative where the more work you do, the more market efficient you, as the care-giver, will become. Consequently, within the dominant market system it is not seen as being productive or efficient to be a care-worker. If you are able to be 'productive' in the labour market, presumably you will not return to care-giving/work, but will have the income means to pay someone else to carry out this labour and thereby support the market system. Furthermore, the discrepancy, or "penalty", in income for working in the care sector, or as an informal carer, is stronger for women. [660]

As was discussed in the previous chapters with regards to immigration and labour, the proliferation of legislation to protect care-workers will not be meaningful unless labour law and labour market are de-coupled from each other. Extending protection to care-workers does not address the underlying issue of what makes one's labour intelligible and valued in society: society being a) the dominant market economy or b) the actual in-common of persons interacting and relating together. Further, the commodification of care-work and a care-work industry privatises social responsibility and the responsibility of the welfare state to provide for its citizens through social support. However, even if the state, for instance the UK National Health Service (NHS), does fund care-workers, unless the measure/value of this work changes, care will continue to be under-valued.

[658] For this as a global phenomenon, see Federici's discussion of women as the 'shock absorbers of economic globalization'. Federici, *Revolution,* 108.

[659] Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' *Feminist Legal Studies* 21:3 (2014) 1-23.

[660] Paula England, Michelle Budig and Nancy Folbre, 'Wages of Virtue: The Relative Pay of Care Work' *Social Problems* 49:4 (2002) 455-473.

Yet, care and care work are vital to the ecotechnics of the market. Care work enables other labourers to be 'freed', but also reinforces a home space from which the public domain is enabled. We know that the home is false, but the exscription of care work, the body and bodily ontology, is elemental to ecotechnics of the world. Care, and indeed care-giving, touches on the sociality and relations in the social, which are not translatable into the dominant framework of labour law where the labour market (and market economic system) is bolstered as the only possible form of economic, and thereby social, organisation. On one level, care-work illuminates a larger problem in law: what is the relationship between law and market? By emphasising legal and market effects on care-giving and care-work, the question is not how law facilitates economic growth, but what is the role of law in negotiating or regulating an ethic of responsibility or our relationships/shared vulnerability as persons in-common with each other? Particularly when our in-common is, at its core understood as an originary sociality, 'original every time' without the set foundation that we seek through fixed notions of home, citizenship and law. What is the relationship between law and both the persons who cannot care for themselves (are dependent) and those who offer this support but consequently are excluded from measures of 'economic productivity'? On a second level, the eco-technics of care suggest that, like the IML, care begs to be thought of through the alternative thinking of bodily ontology, where all that we are is us as bodies (leaky, precarious, unstable, interacting, producing, consuming, reproducing, and dying), while simultaneously, incommensurably, we are so much more than our bodies.

Conclusion

Labour migration is not new. Neither is the differential treatment of workers believed to be migrant and foreign. What is new is the hyper mobility of labour characteristic of the twenty-first century that intersects with institutionalised uncertainty in the wake of heightened securitisation and border policing. The phenomenon of IML follows from a 'hyper labour mobility too often unmediated by labour law but heavily policed by 'protective' immigration law.'[661] The discourses of labour migration focus on the border of the nation-state and distinction based on citizenship. Yet immigration law falls short of capturing the factors that drive labour

[661] Blackett, "Emancipation", 430.

market demand for a 'migrant' labour force: hyper labour mobility is 'an ultimate re-presentation of contemporary labour market commoditisation.'[662]

A post-structuralist legal critique, which among critical legal scholars is often explored in reference to Jacques Derrida's ethical-juridical discussion in 'Force of Law', can be used to illuminate how immigration policies form and create irregular statuses in reference to a regular that is constituted by what is beyond the normative claim of law.[663] Studies that discuss semi-compliance in immigration statuses and employment relationships reveal an aporetic tension contained within law, between the imperative of the limit that is enforced through the *force* of law—the boundary of what is legal and what is illegal—and the drive for an ongoing recognition of the grey areas of 'irregular' precarious work, and processes of neoliberalisation. Such a perspective demonstrates the indeterminacy of law that exists in spite of law's positivist, and ostensibly determinate, claim. The aporia can be identified in common law practices where the indeterminate qualities of law are illuminated in case law. Even in the Supreme Court decisions of *Hounga* 2014, it is unclear whether in future cases the indeterminate ruling on the doctrine of illegality will result in judgements that continue to apply the doctrine based on the reasoning of the Court of Appeal decision 2012. Or, if the reasoning that found Miss Hounga's situation as one of forced labour will be sufficient to prevent the doctrine of illegality from being applied to persons who are exploited based on their 'illegal' immigration status.[664]

A critical legal analysis that limits itself to identifying the incommensurability at the heart of law, however, continues to struggle with the lack of available vocabulary. Indeed, language is limited and limiting. Writing is constantly enforcing a limit and exscribing. Derrida's discussion of the aporia, the tension between the force of law and the pursuit of justice, or the conditional and the unconditional may suggest an impasse. Within this impasse, it is difficult to see a practical movement forward with concepts such as law, justice or hospitality. Rather than an emptiness, this aporia addresses what may be understood as the world and our lived experience more than

[662] Blackett, "Emancipation", 430.

[663] Peter Fitzpatrick, 'Finding Normativity: Immigration Policy and Normative Formation', in Hans Lindahl ed., *A Right to Inclusion and Exclusion? Normative Thought Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishers, (2009), 118-135.

[664] *Hounga v. Allen* [2014] UKSC 47.

any signifier—text, word, vocabulary—can capture. I suggest that Nancy's fundamental ontological questioning that draws on ecotechnics, pushes this further to explore the notion of sense and being singular plural. Nancy's work in terms of migration and labour, allows me to speak of what it might mean to *write* in an effort to *communicate* the experience of this aporia and to trouble the incommensurability from its origins. The aporia will never be communicated. This impossibility of communicating the aporia is where Nancy's attention to bodily ontology departs from Derrida's work. To write, however, is to further sociality through literary communication. This effort brings to the fore of our thinking the experiences that are contestations of the categories and frameworks we assumed to be necessary, or contingencies that seem random or accidental. These categories are based on (false) contingencies that come from historically specific thinking that has ordered our being, our subjectivity, and our being-with each other in the world. Once this false contingency is unearthed and challenged, we are left with, in Nancy's words, being abandoned. Yet we are abandoned to law: law as no-thing.[665] Thus law and theorising law is the site of this practice.

Commonly, studies of immigration and labour conclude with solutions either to work within immigration law and the limit of the nation-state, or they suggest exploring more open policy or a turn towards international legal (human rights) instruments. These are proposed alternatives to what are identified as current immigration and labour laws, policies and practices. Boaventura de Sousa Santos, however, argues that we do not need more alternatives; we need alternative thinking of alternatives. To contend that IML are a category of immigration is to firstly, presuppose a community from the position of the inscribed law and secondly, to continue the false contingencies operative beneath categories of labour and citizenship. The contingencies of the state, the organisation of a population and citizens posit some as 'worthy' 'regular' citizen workers and others as 'undeserving' 'irregular' and 'precarious'. And these contested borders of worthiness are not clearly defined by immigration status or citizenship. The problematic of IML exposes how categories of immigration are used in the simultaneous experience of inscription and exscription in the nation-state and the labour market.

[665] Nancy, *The Birth to Presence*, 36. This abandonment is the 'spacing' that has 'the thought of transgression, but without being given to a subject who transgresses.' Pryor, "Law in Abandon", 284.

My work places the identification of the phenomenon of IML, discussed in labour migration literature and public policy particularly in the United Kingdom, in the context of Nancy's *eco-technics, sense of the world,* and *struction* (as amassing inscription and exscription). Nancy's exploration of what is the *sense* that is the world provides insight into an alternative way of exploring the 'irregular' 'migrant' 'labourer' and a fundamental rethinking of global economic market and nation-state categories. Further, in order to understand the purpose that a demographic of labourers identified as irregular and as migrant serve in the nation-state and a globalised, neoliberalising market economy, it is necessary to revisit how law allows categories of citizenship and labour market participation/recognition to maintain legal grey areas of persons in sub-citizen, irregular situations. The incommensurability of law can be recognised in immigration policy as a tension between deciding how to let some people in to fill labour demand in the economy, whilst keeping others 'out' (those seen as a drain on the economy). There is no definitive answer or resolution or fixed conclusion on either side; in fact, there are no 'sides'. As a consequence, when our discourses construct an in-between space, an irregular that needs to *become* regular, then logically academic and policy research is guided by a search for resolutions to make the irregular-regular. These resolutions remain part of the same configuration of inside versus outside, a 'logic of boundaries' that is incapable of recognising its foundational false contingencies. Therefore, the underlying contingencies that support systems of inequality are not questioned. Currently, in the twenty-first century, both immigration and labour discussions bring to light a crisis of the social contract that has created demographics considered to be dispensable populations. The so-called stability of the global market economic system is built on the instability of persons considered irregular migrant labourers. Yet, the stability is itself an illusion, as a bodily material analysis makes clear. The market is far from stable, the false necessity of the market has been re-written as contingency and has subjected everyone to the logic of the market. Thus everyone, citizens, non-citizens, *subjectum* and *subjectus* are operating within a state of anxiety. Precariousness, as above, is the only way that a commonality can be; but even in being, it ex-ists.

In Nancy's words, we 'wish to dress the wound with the usual tatters of worn-out finery: god or money, petrol or muscle, information or incantation, which always

ends up signifying one form or another of all-powerfulness and all-presence.'[666] The ground that is found or established through immigration law, and belief that citizenship provides the avenue of rights for people within fixed territorial boundaries, *patches* the *tatters* of a nation-state that is built on an idea of proto-political community, universality and citizenship as recognition of the subject. The *all-presence* and *all-powerfulness* assumed by the law in immigration and labour regulation is contradicted by the presence of precarious labour, or an irregular migrant labour force. Meanwhile, IML is created precisely because of the impossibility of all-presence, the impossibility of universality. It is impossible because it is always already limited by the position claimed by its authors. The outsider that is already inside, the labourers who are included-as-excluded, allow the global market, and the idea of the 'global', to exist as if it were some*thing*. The inscription of a labour demographic as IML, as 'irregular' emphasises what is exscribed, but is part of the eco-technics that is the *sense* that is the world. Who are irregular migrant labourers? Who, in the UK, are the migrants that are excluded because of their migrant status? This is not a cohesive, defined demographic. To refer to 'them' as a category, and as a category of 'Failed' or sub-citizens that, due to their own conduct have transgressed a common shared experience of value as Good Citizens, is to *dress the wound*. The *wound* that needs to be *dressed* is precisely the gaping wound of law, which purports to trace our being singular plural, but to trace the being singular plural is to trace the incommensurability of law, legal categories, and experiences that are in circulation, happening. The sociability itself may be untraceable, but it carries the imperative to be traced. The intrusion, inside, is the market system that encourages precarity and irregularity while obscuring the groundlessness that is the function (as precarious and irregular in reference to an idea of stability and regularity) of the originary sociality. This sociality is constantly unsettling our being in the plural, as the bodies that are in the world. Thus, within this production and reproduction of our originary sociality, the law is rendered no-*thing* but the tracing of our being with each other as singular plural beings.

Nancy's bodily ontology then, does not prescribe or resolve the dilemmas that we have observed and are highlighted by the creation of the illusory category of IML. Nonetheless, his insights and attention to ecotechnics as the circulation of sense in the

[666] Nancy, "Confronted Community", 24.

world would serve us well in rooting any alternative framework, be it for labour or immigration law, not in the steadfast sureties offered by false contingency. Bodily ontology accesses a different way of responding to our sociality, which like care, happens in spite of ourselves and our categories and subjectivity. Indeed, the body intrudes on Western modern-colonial philosophy because it *is* what we are in the world, material weight (physical and mental/thought) beyond false contingency. By thinking of IML ontologically, through fundamental ontological questioning, we cannot but think alternatively of alternatives. Bodily ontology rests only in the paradox of constant movement, where all there is *is* the encounter of bodies coming together as singular plural beings. In the coming together, then we cannot expect law to serve as definitive ordering, but rather as a temporary gesture, albeit electric, from what is 'seen' and 'said' to what is still to be 'seen' and 'spoken'. Law then speaks not from a position of fixity, but from a position of the (k)not: untying the claims of the market, the proto-political and neo-liberal and tying the un-tie-able materiality of bodies. Our bodies marked, as they are, by a 'system of over-signified bodies ... the twisting of muscles, bones, nerves' signified most on the bodies of the 'salaried, soiled bodies, toiling and earning as a closed ring of signification. Everything else is literature.'[667]

[667] Nancy, *Corpus*, 111.

Chapter 6. States of Incommensurability

In an introduction to her book on Judith Butler's work, Moya Lloyd comments on Butler's writing style: Butler poses questions in the place of normative assertions, 'to open a field rather than close it'.[668] Butler identifies and questions the normative violence where contingent foundations categorise bodies, people, as corporeal ontologies in a particular way. The normative categories imposed through this violence are the focus of political projects that seek recognition and 'agency' for persons or groups marginalised by the mainstream. Paradoxically, there is on the one hand, a political fight for subjugated identities and persons (bodies) to be recognised and not discriminated against within the existing system of categories and norms. On the other hand, the norms are based on contingent foundations, founded by a particular ontology that has created the system that subjugates difference. Within this paradigm, the recognition of persons who do not conform to the established norm will always be insufficient and limited. Juridical systems of power assign categories and align subjectivities according to normative categories that are assumed to be necessary and natural and, moreover, the only possibility for recognition. The norm is affirmed constantly through language, discourses and categories of identity, and failure to conform to the norm renders persons ab-normal, sub-normal, or in the language of this thesis, irregular. Furthermore, the fault of not conforming is attributed to the marginalised individual, not to the system allocating recognition. Where persons are identified as 'irregular' and 'migrant', these labels serve a purpose in the circulation of political, juridical, economic and technical processes.

Butler refers to the power authoring categories as normative violence. It is normalised violence that is hidden, such that the categories themselves become the goal and the political aim for advocacy groups and struggles for recognition.

[668] Moya Lloyd, *Judith Butler* (Cambridge: Polity Press, 2007), 22.

Although the chapters of this thesis have not used Butler's language and development of normative violence, debates concerning labour migration similarly reveal a normative violence of unexamined categories proliferating in immigration and labour law. Within the chapters of this thesis, I did not wish to undermine or negate the importance of political struggles for recognition, where legal categories are instrumentalised in order to improve the particular situations of persons living with precarious immigration status and/or in bottom-end, precarious employment. However, political and legal recognition, where legal categories are expanded in the hope of facilitating greater inclusion, is not the research interest of this thesis. The question is how and why these normative categories persist, and what their role is in prohibiting or preventing change. The project is an on-going challenge to unearth the normative violence—enforced through contingencies that are false in what they obscure from being a possibility—in order to think of who and what *is* happening in spite of categorisations, or in the spaces where we can resist immediate determination.

In migration and labour discussions the categories that recognise persons migrating for labour fail to encompass all the permutations and diverse experiences of labour migrants. This is unsurprising: once one is critical of the universalising *attempt* of modern law, one is aware that no amount of categorisations can ever capture 'all' experiences. However, the way that the shortcomings of labour migration categories create an excessive category of migrant labourers, identified as 'irregular', suggests that labour migration discourse (academic, policy, political and economic) attempts to capture 'all' experiences—through the term 'irregular'. When the excessive experience is precarious (potentially deviant as 'illegal') or 'undesirable' according to labour sector (low-waged, low-skilled), or the race, language or ethnic background of persons, they are identified as irregular migrant labour.

The normative implications of the terms *irregular, migrant* and *labour,* have compelled this thesis. While seemingly a better or more progressive term, which replaced more derogatory phrases such as 'illegal' 'undocumented', IML triggers foundational assumptions of what and who is 'regular', 'non-migrant' and what is valued participation in the labour market. By delving into the contingent foundations of labour migration discourse and examining the use and function of the term IML, this thesis follows in the spirit of Butler's work where a field is opened—by

theorising labour migration law—rather than closed with claims of new, normative assertions.

In the first chapter I explained why the category of irregular migrant labour needs to be theorised. I discussed the complexities of citizenship—on the one hand, a formal legal category and on the other hand, a much more limited membership determined by dominant values. Citizenship, and sub-citizenships, play a role in maintaining parameters of the nation-state and guiding demands within an obtuse globalised market economy. I reviewed literature that has analysed the complications within notions of 'migrant' versus 'citizen', particularly with regard to immigration statuses that can be ambiguously in semi-compliance with immigration and/or labour laws. Furthermore, I discussed the different issues arising in migration studies versus labour law as evidence of the need to examine closely the assumptions and pre-determined claims characteristic of labour migration debates carried out by policy makers, legal practitioners, public media, politicians and academics.

The idea of the legal subject and the citizen are at the crux of problems identified as arising from labour migration. Because of the primacy of the 'legal subject' and the 'citizen' in contemporary political-juridical frameworks, the problem identified as IML continues to be under-theorised and largely un-examined. Categories, built on false contingency, therefore need to be unearthed. Thus, I explore a political-juridical-ecotechnical approach to think differently about labour migration and what issues and intersections IML concern and obstruct. A citizen signifies one, someone, everyone, numerous unicities that traverse and share exteriority. Citizen presents itself as subject at the point of sense, or at the representation of sense.[669] Subject, understood as a self-maintaining, individual essence, is where the 'self' is the focal point of identificatory unity.[670] Through citizenship, the myth of the nation-state is substantiated in the figure, name and identity of the citizen. The citizen-subject status is pre- or post- supposed as the principle aim to end marginalisation. Yet, the citizen becomes the subject at the point where *community* gives itself (as) an interiority, when the nation-state and recognition within a particular legal system is the universal, total, recognition. Meanwhile, given the historical specificity of the

[669] Nancy, *Sense of the World*, 106.

[670] Nancy, *Sense of the World*, 104.

nation-state, citizenship and measures of deserving participation, recognition is not materially universal.

Chapter two is dedicated to explaining the reason for drawing on Jean-Luc Nancy's work in my methodology. Chapter three and four follow with an explication of the political-juridical-ecotechnical methodology as applied to issues concerning irregular labour migration in UK immigration law (three) and UK labour law (four). Only after tracing the theoretical, and practical political circumstances arising from the label, IML, could Chapter five provide a discussion of what it might mean, fundamentally, to rethink labour migration through a deconstruction of the regular/irregular, migrant/citizen and contingent foundations of labour. In chapter five I expanded on Nancy's bodily ontology to suggest that the embodied experience of labour and migration is closer to the experience of eco-technics that make up the world, than the legal categories that prescribe participation in a limited framework of participation and being/subjectivity.

Why Nancy?

Jean-Luc Nancy's work is most suited to my research question because Nancy opens up the social.[671] In chapter three, I considered the notion of the subject, as split between the *subjectum* and *subjectus*. Persons who do not conform to the normative categories remain in a lesser subjectivity, only ever as *subjectus,* belonging to the state and never with the state belonging to them. The idea of the subject and its constitution has long interested philosophers and thinkers. The enactment where one is formed as a subject interested John Austin, who argued that the Subject precedes speech, such that the performative act of speech brings out the pre-existing subject. Louis Althusser's view of the subject was the opposite: speech inaugurates the subject in an interpellation that forms the subject. Judith Butler suggested that while the subject is constructed and not pre-existing, the subject does not need to be

[671] Judith Butler is critical of Lacan: assumes the existence of an invariable structure (the Symbolic). Derrida: not enough attention to the social form (iterability is always social iterability). Lloyd and others, critical of Butler: not enough attention to the 'specific historical circumstances within which particular resignifications emerge.' Lloyd, *Judith Butler,* 125. Thus, it is a limited notion of the social. But what about Nancy then? Nancy opens up the social, but in a constant battle with determinacy.

interpellated as a subject in order to be subjected.[672] The subjectification happens not necessarily as a conscious event or encounter of the subject with the power or authority that it is subjected under, but as a social and historical experience of the power and force of juridical norms. Based on the above chapters and discussion of the differential subjectivity of persons considered to be irregular migrant labourers, I agree with Butler that the subject is formed in a way that is historically specific and socially constructed. However, Nancy's attention to the originary sociability and the being singular plural suggests that the need to be recognised as a subject (which Althusser, in the example of turning to the call of the policeman, suggests is the ideology, normalised even in oneself, of the state apparatus,[673] and Butler suggests is based on a socially and historically conditioned feeling of guilt), may be determined via juridical power, but prior to this determination, the subject is only ever known as a being: a singular plural being.

The turn to the call is therefore not *necessarily* a submission to power, even though I agree with elements of both Althusser and Butler's understanding of power. Nor is the turn a desire to confirm existence. Rather the turn to another's call, when thought of before that call is conditioned by pre-determined categories of who is calling and who is answering, is nothing more than the basic originary sociality where the singular being is known because of the plural. We exist because someone is affected by us. This does not have to be a 'call' that is heard; the affect exists because there is a plurality. The plurality is not an imposed plurality. This is a politically problematic assertion since undeniably, the way that 'we' know ourselves ('I' and others 'we') is infused with power enforced through normative categories and the practice of *making subjects.* Intersecting discrimination and marginalisation create a historically specific normative idea of who is the 'normal' dominant legal subject, the citizen and deserving member of a community of value.

Nevertheless, the very constitution of the social is re-thought in Nancy's work, such that the coming together of the singular plural is the sociality before the, at this point inevitable, force of power determines this relation. The *sense* that irregular

[672] Lloyd, *Judith Butler,* 117.

[673] Althusser: 'norms present themselves by way of an (interior) voice that interpellates me—as, precisely, a subject.' In intro by Jacques Bidet, to Louis Althusser, On the Reproduction of Capital: Ideology and Ideology State Apparatuses (London, New York: Verso, 2014), xxv.

migrants are actually regular, that precarious workers benefit the globalised economic system, that citizenship is an aspiration rather than a prescription to remedy marginalisation, and that legal categories are not reflective of actual experiences or even determinate of case law decisions in the UK, is known. It *is* what *is* the world. For this reason, Nancy offers an un-explored perspective on labour migration deemed irregular.

Nancy's writing on the social—as examined through terms such as *sense, being singular plural, originary sociality*—opens up the social in a constant battle with (not against) determinacy. A friend of mine commented once that Nancy writes like a woman. Over the past few years, I have reflected on what this might mean. And at the conclusion of this thesis, there are only textures to explain this *sense* of what it means: Nancy's work is a repertoire of gestures, all of which open and give birth to unknown possibilities. There is no call or assertion to radically change the composition of language and philosophy. Instead we have a sense of the need to work with what we have, *differently*. Nancy's thought is expression: it is sensual and in constant movement, not as staccato thoughts that are later contradicted (a style that might be used to illustrate Foucault's work), but as flow, rippling ribbons of thick fabric that are without a definite beginning or end, but neither do they form an identifiable circle. The sense of the social, based in an originary sociality, is open in the sense of an ex-static openness, but one that is ex-static only because it is embodied and corporeal. In this sense, the social is ungrounded and precarious. But within this ungroundedness comes a sense that the ecotechnics of the world is a more honest approach to consider how things circulate and work. In the five chapters of this thesis, I suggested that migration and the production and reproduction (economic, social, material) of labour are in constant motion—migration and labour are characteristics of existence. Labour migration, and the problems arising out of labour migration that are identified as 'irregular', are symbolic of the constitutive groundlessness of our being singular plural against the frameworks of political juridical and economic categories.

Undoubtedly, we confront potential shortcomings of Nancy's work when we

draw it into the conversation of migration and labour. In wider critical legal studies[674], some of Nancy's terms and discussions risk being interpreted as nihilistic, abstract or in denial of the practice and actual experience of law (the force, or violence, of law). Some reactions to Nancy's work oscillate between unease about the idea of a collective being-with, which is sometimes misinterpreted as advocating for spontaneous connections that 'should' lead to some sort of collective group-hug, and frustration with the indeterminacy of terms such as 'inoperative' or 'abandonment'. Especially for legal scholars, the terms inoperative and abandon may seem to undermine legal normativity and its force. Normative approaches to law are often believed to be inherent to the study of law and fundamental to the work of a legal scholar, no matter how 'critical'. Nancy's work is accused of undermining opposition or resistance to law, opposition which would replace the identified problematic law with a new normative solution. The claim that we are all 'abandoned to law' seems to disable critical analyses of the violence enforced through sovereignty and the state, and the potential for resistance.[675] It is difficult to find the language to speak of what escapes language. Consequently, any term or phrase does inevitably reproduce signification and conceptual frameworks in precisely the way that Nancy highlights and tries to resist.

However, it is vital to understand that for Nancy, thinking of the singular plural, and the originary sociality is not about searching, or striving for, more authentic belonging. The coming together, that is what he speaks of as 'being-with' or community, is a confrontation of 'separation, difference, sharing and abandonment'[676] that is the very ordinary of everyday life. Nancy's fundamental ontological questioning is mundane in its focus, and is best understood as an intervention at the level of how thought is formed and communicated. There is no replacement ontology or new norm; rather our reliance on ontological coherence and on normative categories underlies the questioning. Without new normative assertions, this project is therefore about unfolding a field of inquiry—one that embarks on the ribbon of ecotechnical circulation without definitive end or beginning but nonetheless with

[674] Jean-Luc Nancy's work has captured the attention of legal scholars such as Gilbert Leung, 'Illegal Fictions' (in Hutchens) and Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon, New York: Routledge-Cavendish, 2007).

[675] Leung, "Abandonment", pg n/a.

[676] Pryor, "Law in Abandon", 275.

vivid and real consequences. We encounter frustration and disappointment when legal and political attempts to remedy exploitation and marginalisation continuously fail to bring about sustained change. Projects that claim difference and alternatives can easily reinforce categories that restrict change and limit recognition. My project therefore does not claim change, but suggests a shift in focus at the basis—a shift at the level of how we understand our sociality, and consequently what we expect from the law, or the categories (allegiance, communities) that we place on ourselves and onto others.

The exigencies that trouble social-political-economic structures, from the local to global level, and a pervasive lack of responsibility, accountability and communal care or compassion, may render a rethinking of ontology as 'being-with' and attention to ecotechnics ostensibly impractical, esoteric. However, that is exactly where my political-juridical-ecotechnical approach is vital: the lack of responsibility, accountability and communal care is a consequence of expectations that existing structures built on ideological systems will facilitate sociality. Rather the sociality takes place, first. Political and juridical systems, the dominant and regular, are founded not as a consequence of a sociality, but as an ideology against an Other, the 'irregular' that is the ideologically less desired, un-deserving or non-public. Thus, my approach is not to search for pragmatic results within an operative progress-oriented paradigm, but to dismantle that very paradigm.[677] Drawing on Nancy's work, the question of this thesis is: what is it, away from categories and operative frameworks, which forms, and is, our world. Nancy's ontological understanding of 'being with' and the singular plural reorients our thinking about law, justice and legal critique. The level of engagement therefore is not about how contested citizenships create alternative legal techniques, for example, or how irregular status can be politically useful or strategic for labourers. Asking how and why of law at the level of ontology and being, propells us beyond false contingency embedded in proposed alternatives. Nancy's re-thinking of community as inoperative/desouvrement has also been criticised for being contradictory. This term, community, conjures notions of

[677] Critics of paradigm: decoloniality and other intersectional (gender, race, class) critiques would argue that someone like Nancy is part of the paradigm, the canon, and therefore cannot make a break from this framework. Yet, we all speak this language as academics especially those of us involved in critical legal theory. Nancy is driven by the imperative to question the canon by questioning fundamental philosophical questions—namely, ontology itself.

predetermined communitarian programmes or social models.[678] Critics accuse Nancy of proposing (through the inoperative, or unworking, community) an alternate, more 'authentic' community whilst purportedly subverting the project-oriented normative framework.[679] However, Nancy's being singular plural, and the exscription, do not re-define transcendence.[680] The being singular plural opens up to the becoming, the process of "common" "being-with" or "being-together". That is, the ecotechnics even more addresses the exchange, the circulation, the processes of market neoliberalisation as well as being and ex-istence (the *eco* and *technē*) beyond the frames provided by these terms and systems. In this way, Nancy's theory has practical application, materially engaging with how 'we' form meaning and value.

Nevertheless, the political-juridical-ecotechnical approach is difficult to maintain without slipping into programme oriented or normative critique. It is difficult to avoid prescribing a 'better' solution or arguing for a way that this theory and fundamental ontological questioning can be applied to a legal issue. However, specifically and significantly, I maintain that the methodological approach is neither meant to be, nor can be, applied as a prescription or solution.[681] I aim not to think of alternatives but to think alternatives differently.[682] I do not propose a pragmatic alternative under notions of practicality and pragmatism meaning something productive and applicable towards a pre-determined end.[683] This work may be normative insofar as, with Nancy, a retreat from normative categories and a direct critique of their power, can be interpreted as advocating a break from solutions as the only realistic measure of value and possibility to access what is *happening* in the world, and the world's problems. A retreat from conventional discussions creates a

[678] Pryor "Law in Abandon", 275.

[679] Along similar lines, Derrida was uncomfortable with Nancy's use of the term 'fraternity' which he uses to speak of 'equality in the freedom and sharing of the incommensurable.' Fraterity risks, in Morin's words, sliding 'towards a genealogisation and leads us back to autochthony, nation, birth.' Morin, *Jean-Luc Nancy*, 112.

[680] Rather, 'The *exscription* of a text is the *existence* of its inscription, its existence in the world and in the community: and it is in existence, and only therein, that the text decides/reaches its decision.' Nancy, *The Birth to Presence*, 107.

[681] I do not propose a new theory of law according to Nancy. Nancy is not 'interested in the unifying function of theory or the explanation of dispersed events by reference to a homogenizing discourse that might place them or render them more sensible for the subject who can see things from a theoretical perspective.' In fact, 'to insist everywhere on the essencelessness of relation, as Nancy everywhere does, is to rule out the possibility of the imposition of a "halo of theory".' Pryor, "Law in Abandon", 262, ft 7.

[682] I borrow this phrase from Boaventura de Sousa Santos, "Public Sphere and Epistemologies of the South," *Africa Development* 37, no. 1 (2012): 43-67.

[683] For example that would adhere to a Critical Realist school of thought: Morris Dickstein, ed., *The Revival of Pragmatism: New Essays on Social Thought, Law and Culture* (Durham: Duke University Press, 1998).

space to ask what it is that we are 'after' through our work—specifically through the discourses on migration, labour and irregular, precarious employment. What is it that our work, our critique and our drive for pragmatic solutions try to remedy or access?

Within the context of IML these questions address the impasse of existing immigration law and labour law efforts to recognise and remedy the precarious and vulnerable situation of persons considered IML. Fundamentally questioning the false necessity and false contingency of legal solutions highlights conceptual frameworks that define citizenship and labour participation, and how these frameworks are seen as the only possible condition. In the labour market, inequality is '"naturalised" ... with[in] structures of legally enforced inequality and unequal and excessive risk-burdening."'[684] When market economic growth is deemed the priority for government policies, inequalities produced and sustained by lax labour regulations, for example, are justified. Workers who are non-nationals and/or considered to be IML and thus excluded from full protection of national laws, may be seen as regrettable casualties of economic growth. The ambiguous legal recognition and status of persons considered IML exacerbates the vulnerability of all workers. Migrants who are denied citizenship status are seen as external to the community and citizenship in the nation-state. Labour, when carried out in the margins of the employment relationship (standard contractual employment), is considered to be external to the legal categories that define employment and labour relations 'desired' and 'worthy' of protection from, and by, the community—the sovereign nation-state. Meanwhile, the participation and constitutive presence, in fact the very eco-technical circulation, is exscribed.

This study contributes to future research in law, critical legal studies, immigration studies and labour law. For law, this work poses a challenge to think of what it is that we seek when we ask the law to do something, or improve a given situation of exploitation or abuse. What is 'the law'? This thesis suggests that the law is no *thing,* but is a constituted border, or limit of a sociality. This sociality is predetermined, based on elements of society and membership that we take for granted as necessary, natural and normal: the nation-state and citizenship. But the sociality

[684] Charles Woolfson – response to Alain Supiot in Emilios Christodoulidis and Ruth Dukes et al., 'Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot' *Social Legal Studies* 19: 2 (June 2010) 217-252, 230.

does not have to be predetermined. It can be an encounter that resists pre-determination. Therefore, the law traces both what is predetermined, by fitting people and experiences into existing categories, and that which sparks from the encounter as a originary consequence of the persons forming that sociality. If we think about law in this way, then the impasse of what to do with persons who seem to exist in legal grey areas, is not an impasse but a situation of law's movement and volatility. This is not a purely abstract or theoretical exercise. Rather, there is no knowing the consequences on the legal and political process as we know it now, if law were to take into account how persons relating on the ground (producing, interacting, consuming) transcend categories of identity or recognition on a daily basis. Because immigration and labour studies are fixed in a historically specific paradigm of categories and recognition, it induces anxiety to think away from it. Nevertheless, when perhaps the only normative claim that we can make is that the current system of abuse and exploitation *should* end, this paradigm shift in thought is essential.

Appendix 1. Explanation of Terms

Jean-Luc Nancy's Terms

Nancy challenges the production and signification of meaning. He pursues certain terms, contemplating, without resolution, their function, their role. What are these words after? What do they capture and omit? Nancy does not create new words, but focuses on words that have ostensibly lost their meaning (*community, society, being, world*), ultimately in order to contribute to their continued sense and signification. In spite of thinking away from locating an overarching unity or totality, Nancy writes with exactitude.[685] Nancy speaks to exactly what is unanswerable. He 'shows how exact you are' when what you are 'isn't exactly.'[686] This 'isn't exactly', Derrida argues in his explication of Nancy's work in *On Touching*, hits at the heart of being and of thought. Nancy enables a meditation on the gaps in our philosophy, at an ontological level.

Nancy writes to resist a theoretical discourse that insists on appropriating the sense of being and the world into known signifiers. For this reason, I interpret Nancy's writing of sense as motion, as movement that is not in direct contrast or opposition to fixed 'signification'. Sense differs in texture and quality from any fixity and containment. Nancy's work develops from deconstruction, notably in Jacques Derrida's work, which has been used in critical legal studies to identify paradoxes of law and community. Nancy persistently resists remaining in dichotomies or frameworks. In doing so, Nancy's work can itself be sensed as a work of art—a dance—that moves, shapes, reshapes and doubles back on itself, tipping off balance just as balance is secured: repulsive, frightening, seductive and honest, without beat, on beat and off beat.

[685] Derrida, *On Touching,* 293.

[686] Derrida, *On Touching*, 294.

a. **Abandonment**: an ontological 'state' or recognition of a space where what 'we' share is the moral or metaphysical abandonment to a *sense* that knows that we are groundless and precarious. In other words, abandonment is 'exhaustion of transcendentals' (Gilbert Leung, *Nancy Dictionary*). We are abandoned after deconstructing false contingencies and determinate categories. But what remains? Are 'we' abandoned to our bodies? Our materiality? Our being singular plural? Are any of these 'things' that we can claim to know, to hold and to have? This, for Nancy, is why abandonment is all that we have. Meanwhile, we cannot 'know' abandonment—where knowing would involve conceptual grasping, or at the very least a *making present* of something.
    i. According to Nancy, we are abandoned to law. Being abandoned to law is to be abandoned to the exscription, where law is open to its violation in an incommensurable relationality. Nancy refers to this opening to violation as *freedom*. We are abandoned to law as/because the exscription of law opens to freedom: freedom being the lack of determination, the naked happening of existence. Here law is *nothing,* but is also potentially everything, as law is the limit or order where existence is happening. From this 'abandonment' being is thrown out into all possibilities of thinking.

b. **Aporia:** from ἀπορία: without passage. A word most notably used by Jacques Derrida to describe the paradox or impasse within notions (determinate and indeterminate). Derrida writes of aporias within ideas of hospitality, forgiveness, mourning and law.

c. **Being singular plural**: is Nancy's ontological understanding that a being is only ever known because of the plural—the plurality of singular beings that makes up the world. 'I' experience my own singularity, in the experience of being with others. I am a singular

being that knows my singularity because I exist in the plural (amidst other singularities). Sharing in a sociality, a multiplicity of bodies, makes this experience of 'my' singularity an experience of a plural. Singularity is not, however, the same thing as individuality. 'My' being singular is not 'my own', but is a shared experience with other singularities. Meanwhile an individual is 'I' closed upon 'itself.' Individuality implies a self-fulfilling totality and independence where the individual, 'my' 'self,' is the fulfilment of its own essence. Singularity attempts to capture an experience of the materiality of bodies, away from the ideologically charged notion of the 'individual'.[687] In Nancy's ontological thought, the singular being exists at the limit of being: 'It is neither inside nor outside ... but it is essentially ex-posed, turned inside out.'[688] Singularities are always about exposure; they are never together in one another, nor enclosed in and of themselves. Each singularity is a 'stroke of existence.'[689] These strokes of existence are what Nancy understands as the configuration of the world. The limited recognition allowed through categories of subject and citizen implicitly denies the singular plural. Consequently, the 'subject', the 'citizen', as well as the 'law' are burdened with a demand to be a totality. They are, fundamentally, unable to meet this demand because our existence is the incommensurability of being with, as an indeterminate relation of singular plural.

d. **Bodily ontology**: Jean-Luc Nancy's bodily ontology is his exploration of *corpus*—the matter of bodies, within the body of knowledge that has structured Western thought, as well as the weight (matter, body) of thought. The *corpus* of Western modern philosophy pushes Nancy to question ontology at the level of our physical, material presence and experiences (sense). Nancy writes from within the *corpus,* not by

[687] This distinction, and attention to singularities rather than individuals, is applicable to re-thinking of labour and migration, where labour can be re-thought of as more than the employment relationship where labour refers as well to the work of bodies producing, reproducing and participating in sociability together.

[688] Marie-Eve Morin, "Putting Community under Erasure: The Dialogue between Jacques Derrida and Jean-Luc Nancy on the Plurality of Singularities," *Culture Machine* 8 (2006), 5.

[689] Morin, "Putting Community under Erasure", 6.

suggesting that there is, somewhere somehow, an external or limitless/pure, perspective. Yet the bodily ontology[690] is exscribed from the dominant discourses (political, legal e.g. citizenship, the legal subject) that claim to tell 'us' what 'we' are.[691] As exscribed, the body is nevertheless very much present and remains present, as categories that claim to recognise presence are uprooted. Nancy's bodily ontology revisits 'being' by giving attention to the physical, material presence of bodies as the basis of originary sociality. Contrary to phenomenology, however, a bodily ontology is not a matter of privileging body as interior, or interiorising, Being. The notion of *Corpus* does not endeavour to conceptually place the body as the site, or locus, of identity. Rather through thinking of the body ontologically, what it does and does not do, our thinking is able to touch on the exteriority of being; here the being singular plural is an alternative thinking of alternatives wherein we know our body only by being externalised from anything that 'it' may be. The body itself is something outside, which is always turned inside out.[692] Precisely, bodily ontology is what bodies are about, as weight, as presence, as happening, not about what they *should* be or should do. Furthermore, 'each thought is a body'[693]

i. According to Danielle Rugo, it is through Spinoza that Nancy finds a model where the body is consigned neither to pure materiality nor to the simple extension of the mind, but inhabits a space that is incommensurable to one or the other, opening both from within and making a clear distinction problematic: 'soul and faeces are what the body is and what the body is not.'[694] The inability for the Cartesian mind and body split to be distinct is constituted by the difference of the body to itself,

690 Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006), 91.

691 James, 'The Just Measure' in *Jean-Luc Nancy: Justice, Legality, World* Benjamin Hutchens, ed., (London: Continuum, 2012), 42.

692 Morin, *Jean-Luc Nancy*, 128.

693 Nancy, *Corpus*, 113.

694 Daniele Rugo, *Powers of Existence: The Question of Otherness in the Philosophy of Jean-Luc Nancy*. Doctoral thesis, Goldsmiths, University of London, 2013. [Thesis]: Goldsmiths Research Online. Available at: http://research.gold.ac.uk/2643/ , 90.

> 'in and of itself, a body is also its consumption, its degradation, even as stinking pus or paralysis.'[695] The Cartesian mind-body split, and subsequently modern philosophy's explication of the Rational Man, is one of the fundamental tenets of modern thought—the *corpus* of Western, modern-colonial philosophy has silenced (exscribed) the irrationality and the materiality of the same rational man (plus everything that happens around and in him, which exceeds the individual frame). [696]

e. **Concretization**: the making material of sense, coming into matter.

f. **Determination**: pre-conceived framework defining contingencies and possibilities for a given identification, recognition or conceptualisation.

g. **Eco-technics**: Eco (from οικος) -technics (from τέχνη) refers to the *eco*, home (economic, ecology, also the body, the biology), and *technē*, the technical praxis that orders and *makes sense of* the interruptive, incoherent and incommensurable. It is the ecology of technical circulation, understood these days as the circulation of capital; but this is both the capital that is the financial monetary system of value, and the capital that is beings, relations, social reproduction and non-material values. Eco-technics works as the technical reduction of pluralities to equivalences of capital, but simultaneously exposes the intersection of sense, without which there would be no circulation and no capital. Capital is not synonymous with capitalism, but capital means the bodies at work, in Nancy's wors, 'a system of over-signified bodies.'[697] In order to understand eco-technics, it is important to note that sense is a material experience, the materiality is the experience tied to the technē or technical processes which then is the concretisation in the world (see *sense of the world*).

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[695] Nancy, *Corpus*, 105.

[696] Dusserl, 2014.

[697] Nancy, *Corpus*, 111.

h. **Experience of freedom**: the interruption of form and determination where we are *abandoned* to our groundlessness, and possibilities are open and contingencies raw and unknown.

i. **Exscription**: circulation of meaning, where language has its own force and weight, where the material happening that is written out of the text—in some sense 'formally' unaccounted for—but is irredeemably part of the happening. The *exscribed* forms part of the body of the text, but by being placed away from the 'text'.

j. **Freedom**: found in indeterminacy; in naked existence. Crucial to understanding Nancy's work is to see that he bases his thinking in the absence of the determined condition (ground). This space away from determinancy, for Nancy, is freedom; to transgress is freedom, freeing. Therefore, law, strictly understood as inscribed laws, is un-freedom. If law is tracing the limit of experiences then the freedom within law is the infinite possible finite pluralities at this limit. Freedom is without contingency; it is not an alternative space or other experience. Freedom is the experience, sensed, that jolts what has been inscribed.[698]

k. **Incommensurability**: could also be thought of as the *aporia*. The incommensurability of being is a co-appearance of a limit and the *exscription* of that limit, which renders the 'thing' unsignifiable or inoperative. For instance, law can be seen as incommensurable with justice but moreover, law is incommensurability itself because it is no*thing* that can be definitely determined.

[698] With regard to the IML, freedom is the question of the 'irregular' that is in fact a regular presence in the labour market. Furthermore, the question asks how the presence of IML, who are not necessarily 'migrant' and not 'irregular', challenge (interrupt) legal categories and notions of citizenship and the nation-state.

l. **Inoperative**/***désoeuvrement***: unworking, unravelling, untying pre-determined, programme-oriented categories and frameworks. Writing (literature) and thought (communication) as processes are inoperative. Nancy's use of the term 'inoperative' has been criticised for being a prescription to un-work existing frameworks without providing a resolution for real political concerns demanding attention.

m. **Indeterminate**: without determination.

n. **Inscription**: written into the text, but is not the complete text—is inseparable, and *incommensurable*, with the *exscription*.

o. **L'intrus**: the intruder that is within. L'intrus appears as a chapter towards the end of *Corpus* (2008) and has also been published independently (Jean-Luc Nancy, "L'Intrus" trans Susan Hanson (Michigan: Michigan State University Press, 2002). Nancy wrote this piece as a reflection on his own heart transplant. The 'intruder' is what remains a stranger, strange at the heart (core) of what is most familiar.

p. **Law**: a technique of tracing at the limit of the sociality, which is the coming together of singular plural beings in sociabilities that are originary every time. *EF*

    i. **my use of the term:** The paradox of law is law's incommensurability. It is both a movement and a fixed limit. *Incommensurability* suggests that although juridical law is guided by categories that provide order and definition, these categories can only offer a limited order due to an ever-shifting existential law, and vice versa. This paradox causes the ambiguous legal grey areas where persons are considered IML. Nancy's existential law, on the one hand, mandates that there be a law recognising those living and working in a given territory. The limited frames of recognition necessary for a

limit and definition to exist are instrumentalised by juridical law, on the other hand, and bound by citizenship such that openness to all bodies living and working in a given territory is prevented/impossible. The way that this tension of juridical and existential law is played out is not prescribed or predetermined, but is seized by neoliberalisation and economic market values. Law is instrumentalised in the nation-state system and market economy, but importantly, this structure is not inherent to law itself. Rather it is a condition of law's authors. Law itself, juridical and existential (juridical law is imposed onto a subject, while the existential law *is*: it imposes itself upon itself), is no-*thing* until it is given value and meaning by those who speak it and are subjected to it, including those who resist 'it' (both *subjectum* and *subjectus*). Law does not address the totality of our existence if it is the trace of sociality, but comes from the sociality itself. The sociality gives it form—the sociality inscribes the law as law. Law, instead, is a tracing movement of the singular plural beings that are relating and forming a limit. However, within the current circulation of beings (*eco-technics*), capital production and economic market systems operate a limit within a specific ideological paradigm that names privileged legal subjects while obscuring the participation of others. Yet 'law' as a constituting limit and the force of this limit is not limited to these particular vocabularies and ideology.[699] Nancy's call to 'do justice to existence' means thinking of 'Law without law or a right before all rights.'[700] Law has no independent foundation; it is 'a *technē* without a goal as long as it is not supported by the model of

[699] In chapters three and four, the indeterminacy of some judicial decisions with regards to 'irregular' migration and labour/employment, demonstrates that law, by what it ultimately permits, traces the eco-technics more so than it firmly re-enforces rigid frameworks of existing legal categories or is consistent in offering the protection mandated by legislation.

sovereignty.'[701] In fact, law and sovereignty are implicated in a tautology and Nancy questions their very basis.[702]

q. **Ontology**: the overarching framework through which our *being* is explained and understood.[703]

r. **Originary sociality**: the raw, naked social that happens every time a singularity is reminded of its singularity in the plural. Originary, not as 'first' or 'pure', but because every encounter is a repetition of the singular plural that has never happened before. The encounter, and constitution of the singular plural, is originary every single time. The originary sociality is the coming together of singular beings into a plurality of singularities.

s. **Politics**: juridically enforced system (and its contestation) of governance (bio-governance) authorship, and power over normative categories Contestation can only be recognised insofar as it conforms to the dominant paradigm, and thereby sacrifices the possibility of ever being recognised as anything but *irregular*.

   i. **The political**: the space of being with, the common that is constituted by the amassing of the sociality. The political space is a retreat of the political, a withdrawal from politics, where the relation cannot be presupposed because it is impossible that the plurality (bsp) can be reduced to a single origin or unity. Therefore, the political is a (k)not, an absence of totality claimed as the name of community.

   ii. **Politics of the (k)not**: politics understood as an indeterminate tying and untying of interests, agendas, reasoning, experiences,

[700] Devisch, *Jean-Luc Nancy*, 132.

[701] Devisch, *Jean-Luc Nancy*, 140.

[702] Morin, *Jean-Luc Nancy*, 107. Thus, Nancy is justified in wondering: could sovereignty itself be 'a revolt of the people?' Jean-Luc Nancy, *Creation Of The World Or Globalisation,* trans., Francois Raffoul and David Pettigrew (Albany: SUNY Press, 2007), 109.

[703] Nancy's work has been referred to as a 'fundamental ontological questioning' by Ian James (2006) and pursuing a 'bodily/corporeal ontology'. Marie-Eve Morin (2012) refers to Nancy's work as an 'ontology of the singular plural'.

arguments, fixed boundaries and constructions. It is determinate and indeterminate, like tying a knot that is always already unravelling. This is a politics of the tying, rather than setting, or conforming to, pre-determining categories. This is a politics of sense, of being singular plural, where the imperative of the limit, that is law, and the decision, are constantly in process and motion.

t. **Sense**: the sensed—sensual, felt, experienced, *happening*—presence in the world. Nancy writes of sense as 'the concept of the concept.'[704] *Sense* is what escapes signification, but still *is* part of experience and part of what is the world. Sense is not simply a practice or a technē, but it is *eco*-technē. It is the concept of the concept before the concept, but pivotal to what we come to understand as eco-logical and eco-nomical production and reproduction. Nancy's notion of *sense* does not *make* sense, because it resists signification.[705] Nevertheless, it *is* what does not signify itself. In other words, sense defers itself and 'will differ always from all that you will seize, from all philosophy, and yet you will have had a sense of it.'[706] We construct categories and frames not in opposition to *sense,* but to try and comprehend the world by making it intelligible. Nancy does not say, therefore, that we must stop *making* sense. The critique of sense is not a denial or de-activating. Nancy acknowledges his subject position, ostensibly self mocking as he re-inscribes words and arguments that have already been said: 'There should be some legal restraint aimed against inept and useless writers, as there is against vagabonds and idlers. Both I and a hundred others would be banished from the hands of our people.'[707] Yet nonetheless he continues writing.

    i. ***Making*** **sense** or **signification**: *Sense* is different from signification, yet sense is made to *make sense* when formed

[704] Jean-Luc Nancy, *A Finite Thinking,* Simon Sparks ed., (Stanford: Stanford University Press, 2003), 5.

[705] Nancy, *Sense of the World*, 35.

[706] Nancy, *Sense of the World*, 90.

[707] Jean-Luc Nancy and Katherine Lydon, "Exscription," *Yale French Studies* 78 (1990): 47-65, 56.

into intelligible systems and frames. Signification is what makes up determinate meaning, whereas sense is not the opposite of determinacy, but is an essence that is always deferring and differing.

ii. **Sense of the world**: the sense that is concretised in various ways such that we know the world is some*thing* that cannot be fixed or truly known. And yet there is a world. So much exceeds the categories and constructs that we rely on to *know* the world; this excess is the sense of the world. *Sense* and *world* are different, but structure each other.

u. **Struction**: Resisting destruction and construction, struction calls attention to the material reality as it is experienced. The 'naked contingency of existence' that is never fully in presence, but is present.[708] In the word, 'struction', Nancy aims to identify what is the result of an intellectual paradigm shift away from overconstruction of terms, categories and signification.

v. **Technē**: technique, praxis: from the Greek τέχνη, meaning the craft of knowledge that is connected to experience and practice. For Nancy, techne is the technical structure that orders and 'makes sense of' the interruptive, incoherent and incommensurable. 'Creation', and subsequent economic, political and social production and reproduction, is technē of bodies where bodies are technical objects and withdraw from transcendental or immanent signification. For this reason, bodies have to be taken into account when considering the need for law to trace the limit of persons coming together in an originary sociality. And also why ecotechnics touches on processes of neoliberalisation. The technē of bodies is the variety of ways by which 'we' are exposed together.

[708] Jean-Luc Nancy and Aurélien Barrau, *What's These Worlds Coming To?* Trans. Travis Holloway and Flor Méchain, (Fordham University Press, 2014), 54.

w. **Touch/touching:** touches the untouchable. It is 'not so much proximity as separation'.[709] Touch is not only physical, but includes writing as well, and exscription is writing touching on the untouchable.

Other Commonly Used Terms

a. Citizenship

i. **Formal**: recognised through legal membership in a nation-state, identified through a passport or identity document.

ii. **Good Citizen**: reflects values of the nation-state, in the case of the UK this involves the liberal values of individual strength/entrepreneurship, economic participation, family (nuclear) life. Contrasts with the **Failed Citizen**, who cannot 'keep up', failing in some way—could be health, dependence on others, criminalised activities, or otherwise demonstrates activities that are not 'socially acceptable'.

iii. **Sub-citizenship**: a position for those persons who are not-quite-there as Good Citizens and have a limited subjectivity because they do not fit into the ideal citizen. This could be due to limited economic participation, dependence, care-needs or responsibilities.

b. **Community of value** (*Bridget Anderson*): shared values dictating a community limited by a particular ideology, meanwhile ostensibly encompassing the collective community of the nation-state. In the UK, these values are based on liberal, and neoliberal, ideology of the autonomous, economically successful, upwardly mobile individual. Many qualities are adapted from traditional Christian (Church of England) values of family, work and community.

c. **Economic market**

[709] Marie-Eve Morin, 'Touch' In *The Nancy Dictionary*, edited by Paul Gratton and Marie-Eve Morin (Edinburgh: University of Edinburgh Press, forthcoming 2015).

i. **Economic**: (eco- from οικος, meaning 'house', and used in eco-nomic, eco-logy, but connects also the body, the biology; nomos- from νομος, 'law' 'code')
ii. **Market**: system of exchange based on supply and demand.
iii. **Globalized market economic system**: based on an ostensibly global, universal market where all nations and individuals are believed to participate according to neo-liberal economic market measures and values.
    a. **Free-market capitalism**: according to Oxford English Dictionary is an economic system where prices are determined by unrestricted competition (amongst privately owned, rather than state, businesses).

d. **Irregular Migrant Labour**: working in low-waged, low-skilled labour. Bottom-end, precarious work.
    i. **Precarious**: lack of security—income, employment, access to legal productions, employment tribunal, or questionable immigration status at risk of deportation or removal.

e. **False contingency** (*Susan Marks*): contingencies that are made to seem as if they were the only possible conditions of possibility.

f. **False necessity** (*Susan Marks/Roberto Unger*): conditions that are historically specific but made to seem as if they were not only necessary, but also natural.

g. Neoliberalism
    i. Neoliberalism, according to the Oxford English Dictionary, is a modified form of liberalism, developed in the 1930s, to favour free market capitalism.
    ii. Neoliberalisation, according to Jaime Peck et al., refers to neoliberalism as an on-going process that cannot be understood

as a monolithic force. It is by definition a regulatory transformation that is uneven and chronically unstable. Thus, it is difficult to definitively say what neoliberalism and neoliberalisation is, because it takes on the economic belief in the free-market, but has become a term to refer to concerns of how individuals are organised and controlled according to amorphous, yet hegemonic, financial markets.

h. **Proto-political community** (*Hans Lindahl*): the pre-state community, global universal. A proto-political community presupposes the bounded political of the nation-state and membership identified through citizenship. This proto-political community reflects a tendency towards universal thinking embedded within conceptualisations of pre-determined community belonging. The ostensible existence of a proto-political community justifies exclusive nation-state membership mediated through a shared community of value; those excluded belong elsewhere in a broader, proto-political universal. Nevertheless, a lack of belonging does not prohibit employment in de-valued, denigrated and dangerous labour situations without the protection or regulation proffered by national labour legislation and international labour regulations.

i. Subject and subjectivity: Subject (*Costas Douzinas/Juliette Rogers*): Regular' citizens (male, Western) are seen as subjects of the law. They are *subjectum:* state belongs to them. In contrast, marginalised beings are subjected to the law. They are *subjectus:* they belong to the state.

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