

Pashukanis and the 'Commodity Form Theory': A Reply to Warrington

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General Remarks

Since the rediscovery and republication of Pashukanis's *General Theory of Law and Marxism* (1978), there has been much enthusiasm for the "commodity exchange theory of law", qualified nonetheless by a number of criticisms of it. Warrington, in his essay (1981), has done the service of bringing many of these criticisms together, and this paper is a response to it [1].

Warrington writes that the *General Theory* is a "powerful, but enigmatic work" containing "some interesting insights" which are not vitiated by the "limitations" of the work as a whole. Yet, the *General Theory* contains "several major flaws which mar its appeal" and which ultimately "may be so strong as to make the theory unusable". Thus, the thrust of the article is highly critical of Pashukanis and his theory. Where Warrington applauds the positive qualities of the work, he ought not to, for any value that the work has is based upon the "commodity exchange theory", and this itself is subjected to trenchant criticism. Thus its "major breakthrough" in emphasizing "the need to examine form as well as substance", based on the view that the form of law is inherently bourgeois as well as its content is no breakthrough at all if, as Warrington argues, the commodity exchange theory is itself untenable. The effect of Warrington's article is to consign the *General Theory* to being "at best, ... only ... a part of any jurisprudential analysis" (p. 15), and given the perceived problems with the "commodity exchange theory", only a very minor one at that. The implication of the essay is that Pashukanis's work should be accorded the status of a bold but ultimately wrongheaded experiment, the object of ritual obeisance in the pantheon of forerunners of modern theory.

Not sharing what I take to be this limited conception of the significance of Pashukanis, I want to analyse the apparently destructive criticisms that

Warrington makes of his work. As a caveat, I should make it clear that I do not intend to defend the text of the *General Theory* itself, but rather the theory as a whole. Warrington is at least correct when he (unlike many other critics) acknowledges that the general theory "always remained a preliminary draft". On the other hand, defending the theory often entails defending Pashukanis himself as its "creator", and this especially since in my view Warrington on more than one occasion makes his point by quoting Pashukanis out of context.

Epistemological Issues

There are a number of interrelated questions concerning epistemology and the relationship between theory and practice for which Warrington takes Pashukanis to task. First, regarding the relationship between politics and knowledge, Warrington quotes a passage from the *General Theory* in which Pashukanis writes that the legal form

exists for the sole purpose of being utterly spent [and that] the task of Marxist theory consists of verifying this general conclusion ... (Pashukanis, 1978, p. 133).

This passage suggests to Warrington that rather than having as its object an "objective" analysis of law, the *General Theory* is better seen as a political child of its time, as propaganda from a particular political, not scientific, viewpoint (p. 2). Thus at the very beginning of the analysis, we are invited to question the significance of the work. Of course Pashukanis was not a neutral commentator on the events of his time, but there are two points to be made against Warrington's comments.

First, the quotation that he uses suggests that what came first for Pashukanis was a political goal, that his analysis derived from that goal, drawing its validity therefrom. Yet the passage he quotes comes at the very end of the two chapters (chapters 3 and 4) in which Pashukanis develops his theory of the relationship between law and commodity exchange, and only on the basis of which does he conclude that the legal form "exists for the sole purpose of being utterly spent". What Warrington suggests is a political *starting point* for a theoretical deduction is in fact the political *conclusion* from Pashukanis's theoretical analysis.

Secondly, and more importantly, accepting the political nature of Pashukanis's work, this does not entail the charge that it is "purely political" unless one discards the possibility of a unity between theory and practice (cf. Colletti, 1972; Bhaskar, 1975). Pashukanis himself clearly saw his analysis as being scientific in the same way as Marx presented his analysis of Capital (see below), and to present it as being "designed to meet a purely political end" (p. 2) misrepresents both the intention and the potential of his work.

The second difference I have with Warrington concerns the subsection of

his essay entitled "Theory and Reality". There are a number of interrelated points to make about this passage, but first let me present its meaning: Pashukanis's theory is, according to Warrington, "obsessed with 'facts'" (p. 4). He wrote that "Scientific, that is, theoretical study can reckon only with facts" (Pashukanis, 1978, p. 88). Against bourgeois theorists such as Kelsen, he claimed "that his own theory matched up to reality, whilst theirs did not". They, the normative theorists, proposed a different *method of analysis* in which logical deduction was the most significant means of formulating theory. He, on the other hand, proposed a sociological analysis which would study law as it actually existed as a social institution. He was therefore concerned with the fit between theory and reality, whereas they were concerned with the logical coherence of theory alone.

So far, I am at a loss to know why this position should be the subject of criticism. It seems to me to encapsulate the habitual distinction made by most theorists between social scientific and philosophical approaches to law; between law "as it is and as it ought to be". If such a distinction is untenable, Warrington does not say why. Particularly in the light of the developments achieved by realist philosophers of science in recent years (Bhaskar, 1975; 1979; Keat & Urry, 1975; Benton, 1977), Warrington must explain why Pashukanis's insistence that theory correspond with reality is invalid.

Warrington does in fact produce two arguments against Pashukanis's insistence on scientific realism. First, he takes up a position similar to that of Althusser in his critique of empiricism. Pashukanis too easily assumes that facts exist and are self evident, whereas facts are only known within theory, and have no independent existence. He "treats facts as totally unquestionable" (p. 4).

This charge is, however, without substance, for Pashukanis makes it clear that the study of law is *not* simply concerned with "the facts" in any crude empirical way. Law is no immediate given that can be analysed in its concrete actuality, it is the product "of many determinations and relations" (1978, p. 66) which it is the role of theoretical analysis to uncover. Science deals with reality not in an empiricist way, but through an analysis of its structured and determined development which can only be discovered by theoretical elucidation (see 1978, pp. 65-66). Pashukanis has no obsession with facts. When he does talk of "scientific theory reckoning only with facts", he is not making a general methodological pronouncement about the nature of science, but only about the contrasting methods of sciences based upon the divergent premises of *a priori* deduction on the one hand, and empirical induction and reference on the other.

Conflated with the argument against empiricism, there is a second argument: theoretical systems produce facts, and different theoretical systems produce different facts. Since all facts are theory dependent and theories are no more than structures in thought, there can be no independent criterion for adjudicating between different theories:

Othello actually thought he saw the handkerchief he gave Desdemona in Cassio's hand. He thought he 'saw' a 'fact'. The problem was how to interpret it. Whilst the contract is, for a Marxist concerned with the 'fact' of exploitation, the sale of labour power for an equivalent which is precisely not an equivalent, for bourgeois theorists a contract of employment is the 'fact' of the free meeting of minds of equally uncoerced parties. These two 'factual' positions cannot be reconciled, and they may be equally valid from the position they occupy within their own theoretical systems (pp. 4-5).

Is this necessarily correct? Is theoretical relativism (again a product, one suspects, of 'Althusserianism') inevitable? Surely it is, at least in principle, possible to decide whether one theoretical position is superior to another? Either the contract is or is not a "free meeting of minds of equally uncoerced parties". Either the handkerchief was, or it was not, in Cassio's hand. It might be impossible to persuade one's protagonist that his or her theory is wrong but that is a matter for psychological (or sociological) investigation rather than epistemological or ontological concern: Othello was a jealous man. It is not self-evidently wrong to argue, as do the realists, that theoretical premises are referable to events in the real world; relativism is by no means a foregone conclusion.

It has been suggested that in his analysis of *Capital*, Marx adopts a realist methodology (Keat & Urry, 1975; Benton, 1977; Bhaskar, 1979) and as Pashukanis consciously acknowledges Marx's method in the *General Theory*, it seems safe to suggest that he too is in practice adopting a similar course. If so, his repudiation of relativism (pursuit of truth) is not self-evidently a defect in his work.

Commodity Exchange and Law: Questions of Priority

In this section, I include certain criticisms which pertain to the nature of the legal form as a derivation from the commodity form: criticisms that seem to go to the heart of the "commodity exchange theory".

Warrington argues that Pashukanis's position "that the commodity exchange form of social relations exists both historically and logically prior to law is extremely suspect", indeed unacceptable (p. 9). As I understand it, the criticism here is that commodity exchange (the exchange of property as commodities) is presented by Pashukanis as a prior realm of activity to law, yet such exchange and such property could not exist *without* law: there is a logical contradiction in deriving law from commodity exchange when commodity exchange itself presupposes law: "The property form itself is inchoate without the legal form" (p. 9).

To show that there is no substance in this criticism, let me quote the passage in *Capital*, where Marx lays the basis for the commodity exchange theory of law:

In order that (commodities) may enter into relation with each other . . . , their guardians must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognise in each other the rights of private proprietors. This juridical relation, which thus expresses itself in a contract; whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two (Marx, 1954, p. 88).

What is clear from this passage is that logically, the juridical moment is not antecedent to a prior economic moment, but is a constitutive part of it. Exchange, an economic activity, involves at the same time, a juridical moment, without which there would be no exchange. Marx does not imagine for a moment that exchange is logically prior to the juridical, and the charge should accordingly not be directed at Pashukanis, who follows, and directly quotes, him (1978, p. 114).

The logical relationship between exchange and the juridical form is not one of onesided priority: it is one of true symbiosis, in which exchange presupposes the juridical moment, and vice versa. Historically, this is true too. Pashukanis did write that "it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim", but he *also* sketches the historical necessity of a concrete system of law as a complement to "systematic commodity circulation" (1978, p. 115). The development of the abstract legal subject required not only the existence of generalized commodity exchange, but also

the consolidation of social ties and the growing force of social organization, that is, of organisation into classes, which culminates in the 'well-ordered' bourgeois state (1978, p. 115).

Capitalism was a product of both developments, neither of which historically was independent of, or in any pure way prior to, the other.

It is perhaps worth mentioning here Hirst's version of this argument, since it goes slightly further than Warrington's. (See Hirst, 1979, 1980).

He argues that the commodity exchange theory, through giving "priority" to the economic forgets that law *constitutes* economic subjects *prior* to the operation of economic relations. For example, the limited liability company is constituted by law before ever it enters into economic relationships. Thus the theory inverts the true relation between law and economics. Once again, however, this argument is based on a misconceived idea of the relationship between law and commodity exchange within Pashukanis's theory. The relationship is *not* one of ontological priority for exchange. Logically, there can be no exchange without the presence of a juridical relation, and historically very little exchange (depending upon the very limited existence of social

harmony in societies with institutions of private property) without the existence of concrete legal rules and concepts, however rudimentary. Both logically, and historically, the relationship between law and exchange is one of mutual entailment. Hence, the question whether the state recognizes the juridical subject as a concrete legal subject in one guise (the human subject) or another (the corporate entity) does not affect the basic validity of the "commodity exchange theory", for the theory already presupposes the constitution of the juridical subject by the state in one way or another [2].

So far in this section I have dealt with the criticism of the commodity exchange theory in relation to the question of the *priority of the economic over the juridical*. Before turning to my next major point, this time about the *priority of exchange over coercion* in Pashukanis's theory of law it is necessary to digress briefly to consider the relationship of property and theft in Pashukanis's work.

Warrington also accuses Pashukanis of failing "to articulate the concept of theft without having a developed concept of property" (p. 9). This simply seems to me to be wrong. Why is there the need for a "developed concept of property" before a concept of theft? What is required is an idea of personal appropriation as a norm from which theft deviates? This is what Pashukanis had in mind when he wrote that

non-acquiescence to the norm, violation of the norm, rupture of normal intercourse and resulting conflict, is the point of departure and main content of archaic legislation (1978, p. 167).

As regards the existence of such a primitive concept of property, Pashukanis clearly concedes its logical priority to the existence of a law of theft. The question of the concrete historical existence of law, however, may entail, as he argues, the precedence of a law of theft over that of any developed concept of a law of property.

A similar confusion between logic and history is apparent in Warrington's discussion of the priority of exchange over coercion, to which I now turn. Warrington writes that

Pashukanis excludes coercion almost by definition. As legal relations are but the expression of commodity exchange, and as by definition commodity exchange for Pashukanis takes place on the basis of the free meeting of minds, coercion must be relegated to a very minor role if not eliminated entirely (pp. 11-12).

What Warrington has done here is to conflate the logical with the historical elements in Pashukanis's theory. It is of course correct that *logically, as presented by Marx in Capital, the relationship between the exchangers of commodities is one of mutual recognition and respect, but this does not mean that the exchange of commodities can occur historically without the threat of coercion as the guarantee of exchange relations*. Far from it, and indeed, the very existence of the state as a legal apparatus possessing the 'monopoly of

legitimate violence' is sufficient indication that the logically harmonious relationship between commodity exchangers has little (if any) historical reality.

Further, Pashukanis is quite clear that coercion and power *are integral elements of law*. "Legal intercourse", he writes "does not 'naturally' presuppose a state of peace, just as trade does not, in the first instance, preclude armed robbery, but goes hand in hand with it" (1978, p. 134). Or, as Marx put it, "even club law is law":

Therefore, whenever people . . . equate law with legal order, they forget, in so doing, that this order is actually a mere tendency and end result (by no means perfected at that), but never the point of departure and prerequisite of legal intercourse (1978, p. 135).

What, then, of Warrington's claim that "Pashukanis writes of coercion actually *contradicting* the conditions necessary for the free and equal exchange of commodities . . ." (p. 12, emphasis added) which he notes as support of his view that coercion is of little significance in the theory? It is true that Pashukanis does write in these terms (see 1979, p. 143) but he is not thereby saying that coercion is not an important part of law. What he is saying is that coercion in a society based on commodity exchange must take a particular form, that of abstract state power, and cannot appear as coercion or subjection of one commodity owner by another. It is *not* that coercive power is inimical to commodity exchange, as Warrington suggests, but that it must appear as "emanating from an abstract collective person . . . in the interest of all parties to legal transactions" (1978, p. 143). Again, Warrington has quoted Pashukanis out of context.

Warrington further claims that a linked defect in Pashukanis's theory is that he ignores the division of capitalist society into classes (p. 12). While it is certainly true that Pashukanis concentrated on "bourgeois notions of equivalents" he did so only because law is full of such notions itself. Indeed, one of the major thrusts of his work is the two-sided nature of capitalist society as in reality class society, whilst in appearance and self presentation a society of equals (*cf.* Arthur, 1978, pp. 24-31).

Legal Form and Legal Function

In this section, I include Warrington's criticisms of the "Dominance of Exchange" (pp. 10-11) and the "Misreading of Marx" (pp. 14-16). What is at stake in these criticisms is an inability to separate out the questions of legal *form* and legal *function*. Of the dominance of exchange, Warrington writes that Pashukanis concentrates too much on the process of exchange, forgetting that this process

is not all that is involved. Capitalism is a process of production, and exchange is merely a part of that process. Legal history must be concerned

with production as with exchange. Yet Pashukanis appears to have written production out of the law ... (pp. 10-11).

It must be conceded that Pashukanis does concentrate on the relationship between exchange and law in the *General Theory*. However, the correct question is, does this mean that the theory is therefore logically incapable of dealing with the nature of capitalist society as a unity of exchange and production relations? To answer this, it is as well to consider what Pashukanis is arguing in the *General Theory*. As regards the relationship between exchange and law, there is a threefold connection: *form*, *function*, and *content*. I will deal with the question of content in the next section and will here confine myself to the interrelation between form and function. Exchange relations give rise to and require juridical relations. The legal form, involving an abstract general subject, free to act, and able to exchange is both product and prerequisite of the generalized exchange of commodities. The legal *form* therefore derives from the commodity form. The *function* of law in the circulation of commodities is to guarantee their exchange and to protect those juridical subjects who exchange them. Juridical subjects act as commodity exchangers, and law guarantees their activity.

This means that law has a two-fold connection with exchange, but *only* in relation to its *form* is there a necessarily *intrinsic* connection with it. The question of the *function* of the law is generalizable (and historically is generalized) to many other areas of social life, and this includes the regulation and reproduction (the guarantee) of productive relations. Law in its form directly expresses the nature of commodity exchange; in its function, however, commodity exchange is but one, albeit an historically central, area of legal regulation (see Pashukanis 1978, p. 118).

The important point, then, is that the commodity exchange theory is only logically limited to exchange in the sense that the legal form is initially developed from it. Law as a system of social regulation, however, functions to control whichever area the state deems necessary. Thus, law may regulate productive relations, as it does, for example, with the Factories Acts, as well as the reproduction of productive relations, as it does with criminal and family law. These are its *functions*, and ones that are only secondarily concerned with the control of exchange relations themselves. Yet in *form*, such laws assume the habitual juridical guise of a direction to responsible rational actors, abstracted and isolated from social relations, i.e. they assume the legal form, derived from the nature of the exchange relation. Once a distinction between form and function is made, the point that the *General Theory* concentrates unduly on exchange relations is relevant only as a textual criticism and not as a logical criticism of the theory.

I come now to the question of the "misreading of Marx". There are two arguments here. The first is the one we have just considered: the alleged inability of Pashukanis to move beyond the sphere of exchange to the sphere of

production. Warrington is saying that Pashukanis has misunderstood Marx in remaining at the level of exchange. I have argued that Pashukanis only remains at the level of exchange in that the legal form is derived therefrom. In its functioning, the legal form may move far beyond that level. Nor has Pashukanis misread Marx on this point, for Marx himself argues that the sphere of exchange alone is the juridical sphere, and one quite different from the sphere of production. There, quite different economic laws pertain, and a quite different mode of social life is generated from that of the freedom and equality of the market place (Marx, 1954, p. 172). That this more vicious mode of life may be regulated by law, of course, neither Marx nor Pashukanis denied.

However, a second argument is slightly different. It is that capitalist society is a society based on the "production, circulation, and distribution" of surplus value and

it is just the aspect of socially produced surplus that is missing from Pashukanis's work. Pashukanis centres his analysis on isolated individuals who might have been valid subjects for analysis of pre-capitalist commodity production, but who are much less important ... when it comes to the laws of the social production of surpluses in the developed capitalist form. So when Pashukanis writes, "commodity exchange presupposes an atomised economy" he is incorrect. Commodity exchange in its world dominant stage presupposes a highly developed socially intertwined state and eventually world economy (p. 15).

In fact, it is Warrington who is incorrect and he has ironically fallen into the exact trap of which he accuses Pashukanis: he talks of capitalism as being a commodity exchange society. It is *not* commodity exchange that enjoys a "world dominant stage", but capitalism in its monopoly and imperialist phase, one consequence of which is the globalization of commodity exchange. Capitalism is only world dominant in the age of the dominance of finance capital, and of its export abroad, i.e. in the age of imperialism. The point is that commodity exchange *does* logically presuppose an atomized economy, and this conception appears to be reflected, more or less, in the era of competitive *laissez faire* capitalism; whereas in the era of monopoly capitalism the form of exchange appears to be in contradiction with the requirements of the monopoly system. In that period, the legal form does not accurately reflect even the appearance of social relations, and comes under attack as being unrealistic, unsocial, and so on [3].

Warrington is at least correct when he states that capitalism entails "a highly developed socially intertwined state and eventually world economy", and that capitalism cannot be presented as an atomized social system, but Pashukanis makes this point himself towards the end of Chapter 4 of the *General Theory*. It is wrong for Warrington to suggest that he has ignored the cohesive "socialistic" form of capitalism in its monopoly phase (see

Pashukanis, 1978, p. 129). The *General Theory*, even if it does not itself give us a detailed analysis of such developments, does at least lay the theoretical basis for further study of them.

The Form and Content of Law

Warrington draws a useful parallel between the two-sided nature of the commodity and what he sees as Pashukanis's one-sided presentation of the nature of law. The commodity is both use value and exchange value, and "just as the market almost ignores use values and concentrates on the socially embodied labour-time in a commodity, where equivalent amounts of labour time are exchanged", so does law, for Pashukanis, deal "only with the formal equality of citizens (i.e. the analogue of the exchange value)" whilst ignoring "the substantive inequalities between citizens (i.e. the analogue of the use value)" (p. 12).

However, "this may be incorrect" for two reasons (and here, I invert Warrington's order): first, if one takes, say, contract,

the actual object of contracts is not the exchange of equivalent exchange values, i.e. equal sums of money (a pointless exercise), but the passing between the parties of use values. The court is and must be concerned with this substantive aspect of contract if legal mediation is to be of relevance (p.13).

Similarly, to take employment law,

what Pashukanis and his adherents ignore, is that substantively the law *does* recognise employer and employee as such. That is, it takes into account the fact that the two parties only appear before it because they are in the substantive and legal relation of employer and employee, and therefore the law inevitably accommodates their true position (ibid.).

Is this a fair criticism of Pashukanis? Warrington is saying that just as a commodity is both form (exchange value) and content (use value), so is law. Law is both form (the abstract juridical individual) *and* content (the substantive relationship the individual enters into). As a textual criticism of the *General Theory*, it is valid to say that the work concentrates almost entirely on the question of form, but this is not a logical criticism of the theory itself, for Pashukanis was the first to acknowledge that his work was one-sided; that he had concentrated on "particular aspects of the problem which appear to be crucial" (1978, p. 37). He did not thereby deny the question of the content of legal norms, he merely wished to redress what he saw as an important imbalance in previous analysis (see 1978, p. 54).

If Pashukanis were to deny the existence of content (which he does not) he would have found himself in a very odd position, for he would have been left to proclaim the existence of law as pure form: a world of juridical subjects in

search of some action. His emphasis in the *General Theory* must only, however, be taken to be a textual one-sidedness, as the following passing comment, in which he talks of the relationship between the state, the form *and* the content of law (here, the law of contract) indicates:

Political power can, with the aid of laws, regulate, alter, condition and concretize the form and content of [the] legal transaction [of contract], in the most diverse manner. The law can determine in great detail what may be bought and sold, how, under what conditions and by whom (1978, p. 93) [4].

This quotation leads me on to Warrington's second line of criticism. In many areas,

statute has intervened in most common law countries to try to redress the substantive imbalance, at least to an extent. In landlord and tenant cases, for example, a vast amount of legislation since before 1914 has altered the purely common law balance between the parties . . . The law then does not actually disregard substantive differences in many areas.

Warrington is here describing the shift in state policy since the end of the 19th century away from *laissez faire* towards social reform, in which the formal equality of juridical subjects, but substantive inequality, is replaced by a move to substantive equality with a concomitant formal inequality. Again, law deals here with the content of juridical relations. Is this a valid criticism of Pashukanis?

Social reform was historically the domestic effect of monopoly capitalism and imperialism (Semmel, 1960). In the age of monopolies, the labour aristocracies in the metropolitan countries were won over to imperialist policies through a combination of relatively high wages and social reforms. These reforms entailed a limited degree of "socialization" of individualistic relations, including the imposition of a measure of (very limited) substantive equality, where before only formal equality had existed.

Pashukanis alludes to this development when he talks of the "practical modification of the legal fabric" in the modern era: a modification which leads to criticism of legal individualism and the propagation of "elements of a new 'social' legal theory [apparently - A.N.] corresponding to the interests of the proletariat" (1978, p. 130). Here, if you like, capitalism is moving away (but not very much) from an abstract appraisal of the individual as the possessor and seller of a commodity to that of the individual as the concrete owner of a particular commodity (labour power), and thus to a view of the substantive individual in a given social environment. This is an exceptionally important move, an awareness of which is absolutely vital for understanding the role of law in the 20th century, particularly in the welfare state, but the recognition of such developments does not require an abandonment of the *General Theory*, rather a development of the important insights in it.

Law, Capitalism, and Communism

The final section of Warrington's paper concerns the question of the "withering away of law" in a socialist society. Here, I do not wish to discuss the question of the relationship between the theory and the development of the Soviet state in the late 20s and early 30s. Such a discussion would require much more space than it is possible to give it here, and Warrington himself only touches on it anyway. What I do want to take up are two concrete criticisms that Warrington makes of Pashukanis's theory which relate to the question of the *bourgeois* nature of law.

First, the commodity form theory is the basis for Pashukanis's commitment to the withering away of the law under communism. The form of law is a product of commodity exchange, and therefore "if the commodity form theory is to be coherent, it must postulate that only commodity production society has legal systems" (p. 20). But this leads to immense problems in terms of an interpretation of pre-capitalist societies. To be consistent, Pashukanis must argue, as Warrington says,

that social arrangements prior to the commodity form of society were not legal. Thus he wrote of the middle ages having 'no abstract concept of the legal subject' ... (p. 16).

According to Warrington, this is a "gross oversimplification" maintained only to protect the theory's coherence. Yet, if the theory's coherence is only achieved through the adoption of an untenable proposition then implicitly, something is seriously wrong not only with the theory but also with the commitment to law's withering away. How significant is this objection?

Note first that Pashukanis did *not* say (*cf.* Jessop, 1980, p. 349) that there was *no* law in the middle ages. He said there was no conception of the *abstract* legal subject, but that there *were* "embryonic legal forms" in existence at that time (1978, p. 58). Thus Pashukanis did not say that law was a peculiarly capitalist problem. What he said was that law in its purest and most developed form - containing the concepts of the abstract legal subject and the clear antithesis between private and public law - was a peculiarly capitalist phenomenon. He maintained that "the relations between commodity producers generate the most highly developed, most universal, and most consummate legal mediation" (1978, p. 44) whilst noting that "a developed and consummate form does not of course exclude undeveloped and rudimentary forms, rather to the contrary, it presupposes them" (*ibid.*).

The implication then is that commodity exchange is *but one* economic form from which legal relations are developed, and not the only one, although it is the economic form which gives rise to the most sophisticated concept of law. Does this mean, as Warrington implies, that Pashukanis then loses his contrast between the juridical relations of capitalism and the nonjuridical relations of communism - the withering away of law? The answer is, not if the

true contrast should be not just between capitalism and communism, but between all previous modes of production and communism. If all previous modes of production are distinguished by economic relations that give rise to legal relations, and communism does not entail such relations, then it will still be possible for Pashukanis to argue for the withering away of law. What then do previous modes of production have in common that differentiate them from communism? In his *Preface* to the Second Russian Edition, Pashukanis suggests an answer. As Warrington points out, the essence of the *General Theory* is the existence of property relations as the basis for juridical relations, and in the following passage, Pashukanis draws a parallel between the historical development of legal relations and that of private property:

This is the way it is, for instance, with private property: only the aspect of free alienation fully reveals the fundamental nature of this institution, although property as appropriation undoubtedly existed earlier than, not just the developed form, but also the most embryonic forms of exchange. Property as appropriation is the natural consequence of every mode of production; but only within a particular social formation does property take on its logically simplest and universal form as private property, determined by the simplest precondition of the uninterrupted circulation of value according to the formula C-M-C (1978, pp. 44-45).

The essence of commodity exchange is that it entails the "simplest and most universal" form of appropriation of private property. To it, there therefore corresponds the purest and most universal legal form. Feudalism, which entails the appropriation of property "privately", but in a particularistic and crudely complex way, also entails the existence of a particularistic and crude legal form. Thus the true basis for the "commodity exchange theory" (a term that, to my knowledge, Pashukanis does not himself use, at least in the *General Theory*) may not be commodity exchange *per se* but private appropriation of use values as property, of which commodity exchange is one, but not the only, form.

If so, then it is not necessary to argue that only capitalism gives rise to legal regulations, in order to maintain that communism involves the non-existence of law, for under communism, there is no private appropriation of property, and therefore no basis for law. Perhaps, then, we need a new, more general name, for the "commodity exchange theory".

The second point that I wish to take up here concerns Pashukanis's treatment of criminal law. Here, perhaps more than anywhere else, the *General Theory* has been subjected to trenchant criticism both by Warrington and others (e.g. Hunt, 1981). Warrington writes that, for Pashukanis,

The categorizations of crime and criminal punishment are derived from the overwhelming requirements of the law of exchange of equivalents ... This argument then points to a future society where relations are not dominated by the threat of the criminal process (p. 18).

But Pashukanis contradicts himself. He writes that "Only the complete disappearance of classes will make possible the creation of a system of penal policy which lacks any element of antagonism" (1978, p. 175). Warrington comments:

Pashukanis is calling for a society that has transcended the requirements of criminal law and yet talks of criminal punishment in that new society. But Pashukanis does not explain how he contemplates penal systems, the results of commodity societies, in the future society of which he speaks (p. 19).

I think that the only confusion here is Warrington's. Pashukanis is simply saying that under communism, penal policy will not take the form of what Foucault would call "juridical punishment". He is not saying that there will be no penal policy, but that there will be no penal policy taking a legal form. Further, he does explain what he means by this (see 1978, p. 185).

But it is Warrington's further comments that I would particularly like to consider concerning the connection between the theory of criminal law and the theory of law in general. First, he states that

criminal law, even more than history, fits uncomfortably into Pashukanis's project. Pashukanis's theory is really concerned with private civil law and the chapter on criminal law is only added to attempt a spurious theoretical consistency (p. 19).

This was certainly not Pashukanis's intention, since he explicitly denied that his theory was relevant only to private civil law, asserting that the *General Theory* was what its title suggested, a theory applicable to all areas of law (1978, pp. 39-40).

Secondly, specifically, Warrington goes on to state that "the theory of equivalent punishment is faintly comic . . . It is of course the result of trying to apply his theory . . . mechanistically" (p. 19). This amusing quality of the theory is apparently self-evident since we are not told why it is faintly comic. In the absence of reasons, let us consider Pashukanis's argument.

Pashukanis argues that there is an interconnection between the basic economic form of equivalence in the exchange of commodities and the equivalence that manifests itself in the "tariff system" of criminal punishment. Hunt has recently criticized this aspect of Pashukanis's theory, stating that it proposes "nothing more than the verbal equation achieved by the dual usage of equivalence and the assertion that the verbal correspondence evidences a real correspondence" (1981, p. 67). But his criticism fails to make allowance for the introductory, and consequently schematic, nature of his work, and the question remains whether there are good independent grounds for accepting the equation.

Ignatieff (1981) has written that as regards the idea of equivalence, "Beccaria, Howard and Bentham certainly do not appear to have grasped the

connection between the exchange form and their idea of proportional punishment". This is true but, as he himself acknowledges, it is not a decisive objection to Pashukanis, since one would not necessarily expect those who live within ideology to penetrate its material basis. However, even if there is no direct statement of the connection between the two forms of equivalence to be found in these writers' work, can we not at least consider the overall structure of their ideas as at least suggesting a connection?

Halevy has written of the utilitarian philosophy as containing "a bourgeois morality, devised for working artisans and shrewd tradesmen, teaching subjects to take up the defence of their interests; it is a reasoning, calculating and prosaic morality" (1972, pp. 477-478). In short, "the morality of the Utilitarians is their economic psychology put into the imperative." As Ignatieff himself notes, crime for Bentham was the result of ignoring the "long term cost of short term gratifications"; of "improper calculation" (Ignatieff, 1978, p. 67). Now, if crime is the result of "improper calculation", then the obvious remedy, and that chosen by both Bentham and Beccaria, was a system of well publicized laws indicating clearly the relationship between cause and effect, between crime and punishment. Their assumption was that given such a system, proper calculation of costs and benefits would be possible. Bentham's first fundamental rule of punishment was to see that "the evil of the punishment exceeds the profit of the offence" (Halevy, 1972, p. 68).

The analogy is becoming clear, even if it is not specifically identified. The decision whether to commit a crime or not is based upon the same criterion of a cost benefit analysis as is employed in the market place. Similarly, Beccaria argues that punishment must be in proportion to crime or there would be no incentive to commit a lesser rather than a greater crime (Beccaria, 1964, p. 64).

The connection, then, between the two forms of equivalence is a sort of functional analogy between the commission of criminal acts and the undertaking of economic exchanges. For reformers like Bentham and Beccaria [5], it was the market, regulating the action of individual rational agents through the calculation of costs and benefits, that imposed its categories upon their minds. If the market could regulate the behaviour of law abiding citizens, why should not the same principle regulate the behaviour of the law breaking elements of society, provided that crime was simply the result of a bad calculation by otherwise rational actors?

If one looks at the overall structure of the work of Bentham and Beccaria, then, there appear to be grounds for at least claiming a *general* connection between the exchange of commodities and the exchange of crime for punishment. If these writers "effectively transferred the concepts of economic liberalism into the realm of punishment" (Garland, 1981, p. 31), then why should we not *reverse* the burden of proof onto those who wish to claim no connection between the equivalence of the market place and the equivalence of punishment? If the equation can be made in the general case, why not in the

specific?

But we can go further than this, for there is at least one philosopher [6] who explicitly equates punishment and commodity exchange. The value of Hegel's Philosophy of Right is precisely that it "exposes in paragraph after paragraph the social and economic under-structure of [its] philosophical concepts" (Marcuse, 1941, p. 184. *cf.* Engels, 1968, p. 596). When Hegel discusses the nature of the proportionality between crime and punishment, he writes (against the phenomenalism of Kant who equated the two directly through the *Ius Talionis*) that their equivalence

is not an equality between the specific character of the crime and that of its negation; on the contrary, the two injuries are equal only in respect of their implicit character, i.e. in respect of their 'value' ... (Hegel, 1952, p. 71).

And he goes on to explain what he means by "value" as follows:

Value, as the inner equality of things which in their outward existence are specifically different from one another in every way, is a category which has appeared already in connection with contracts, and also in connection with injuries that are the subject of civil suits; and by means of it our idea of a thing is raised above its immediate character to its universality ... [T]here is a plain inequality between theft and robbery on the one hand, and fines, imprisonment, etc., on the other. In respect of their 'value', however, i.e. in respect of their universal property of being injuries, they are comparable (Hegel, 1952, p. 72, emphasis added).

Hegel then provides us with the specific equation to complement the general analogies of the penal reformers. There are, then, I would suggest, good grounds for taking seriously Pashukanis's claim that his is a general theory of law, and not one illicitly generalized from private civil law, and also for the particular view that there is nothing even "faintly amusing" about Pashukanis's theory of equivalence.

Conclusion

Warrington's article is important if for no other reason that it is the first generally critical account of Pashukanis's work. It draws together many of the strands of criticism that have appeared in previous publications over the last two years, as well as providing some new ones. Theoretical study only develops through a process of argumentation, and it is hoped that in disputing nearly all Warrington's points (some of which I think simply misrepresent Pashukanis) a clearer view may emerge of the nature and implication of his work.

If I have been positive by 'negating the negation', I have also tried to develop some views myself. First, the distinctions between form and function and form and content, though hardly profound, do appear to require to be

stated in order to overcome confusions, and to facilitate the use and development of the *General Theory*. Pashukanis did, as I have pointed out, himself acknowledge the one-sidedness of his work, and this is true of his emphasis on form to the exclusion of other matters. It would be ridiculous to consider the *General Theory* as some kind of bible for the sociology of law, but that is not to say that it is not an important starting point for future work. It is certainly not to say that the book is in itself so severely flawed as "to make the theory unusable". Once those objections to Pashukanis's work that are, in my view, incorrect, have been dealt with, we can perhaps start thinking of ways in which it can be developed to overcome its one-sidedness, and allow its application to the present.

Secondly, I have suggested that the designation of the *General Theory* as the "commodity exchange theory of law" is limiting and limited in its usefulness, for two reasons. One is that the term shuts off our analysis of law in periods where exchange was either extremely limited or at least not a central element in the mode of production, such as in feudalism. Pashukanis did not intend this to be an effect of his work, and drew attention to the broader connection between the legal form of property and the private appropriation of use values as property, of which commodity exchange is but one, albeit a very important, form. The other reason is that the term limits our appreciation not of the past, but of the present. Law in the age of monopoly capitalism, with the very important role of the state as a regulative and interventionist body, requires an awareness of the way in which the state has "overreached" the legal form as an expression of commodity exchange, without at the same time having transcended it.

Thirdly, I wish to suggest the importance of the *General Theory* to a study of crime and criminal law, although here I have restricted myself to the presentation of an initial case in support of the material basis of the "tariff system" for the awarding of punishment, the principle of equivalence.

It will be clear that my view of Pashukanis is a positive one. I believe that the central elements of his theory can be defended against the sorts of criticism I have considered here. His work seems to me to present us with both the richest of resources and the most demanding of challenges. I hope here to have helped in the explication and defence of that resource, and to have, in a limited way, taken up that challenge.

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Notes

- 1 Since I repeatedly quote from his article, I will simply give a page reference after each quotation for the sake of economy. All other quotations will be cited in the normal way.
- 2 It seems to me that the imagined problem of the "priority" of the economy over law stems from the kind of positivistic separation of the instances of a social formation occasioned by the use of a base-superstructure metaphor, however much the basic metaphor may itself have been modified. With Kinsey, I would argue that the implication of Pashukanis's work is that "any separation of the legal expression and the social economic relation is wholly artificial" (Kinsey, 1978, p. 206).
- 3 I do not mean to suggest that law automatically changes to reflect social and economic developments. We are concerned here, somewhat schematically, with the tendency of the state to operate in a corporatist, or "socialistic" fashion in the age of monopoly capitalism, thereby negating the rule of law (Winkler, 1975, p. 118); heralding in a "widespread crisis in law and legal ideology" (Kamenka & Tay, 1975, p. 127); and leading to a concern amongst lawyers about the discretionary nature of much of the activity of the modern state (Daintith, 1976; Atiyah, 1978).
- 4 Fine (1979) also takes Pashukanis to task for ignoring the question of the content of law. However, as well as ignoring Pashukanis's own statements about the one-sided nature of his work, he also collapses the question of the nature of the content of law into that of the content of exchange relations (1979, pp. 42-43), thereby ignoring the specificity of law in itself.
- 5 For obvious reasons, I exclude Howard from this discussion. (See Ignatieff, 1978, p. 67).
- 6 Since writing this paper, I have come across the following passage from Adam Smith's Lectures on Jurisprudence:

But it was found by a late decree of the Court of Session in the case of one [Malloch], a[n exciseman] who murdered a smuggler without sufficient cause that the royal pardon, tho it extended to the capital punishment, could not however free him from what is called the assyhtment . . . due to the friends of the deceased. Tho the King could pardon the capitall punishment due to himself, as any other man can forgive debts due to himself, yet he could not pardon that satisfaction due to the friends of the deceased, any more than he could excuse them (sic) from any other debt due to them. For it is really and truly a debt as any other due from contract (Smith, 1978, p. 109.)

See also the discussion on p. 120 of rape as a "void" "contract or obligation" for which the only "sufficient compensation" is the death penalty.

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