

Private Law's Estranged Bedfellows: Why Pashukanis Should Worry Contemporary Formalists

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The critique of bourgeois jurisprudence . . . must, above all, venture into enemy territory. It should not throw aside the generalisations and abstractions elaborated by bourgeois jurists, whose starting point was the needs of their class and of their times. Rather, by analysing these abstract categories, it should demonstrate their true significance and lay bare the historically limited nature of the legal form.¹

The title of this article betrays a seemingly ironic if not altogether improbable thesis—that the legal thought of Evgeny Pashukanis shares important assumptions of the “bourgeois” legal philosophy that it was intended to refute. More specifically, I submit that Pashukanis shares more in common with the neo-Kantian representatives of legal formalism than he or his contemporary advocates and detractors have cared to acknowledge. In what follows, I maintain that the peculiar interest in Evgeny Pashukanis among contemporary neo-Kantian legal formalists can be explained by his inadvertent fetishization of private law in general and property law in particular. While at first glance the continuing interest in Pashukanis’s theory presents a promising road for rapprochement between contemporary formalists and Marxists, this road proves illusory and dangerous for all those concerned. Marxists should be wary of endorsing the underlying premises of Pashukanis’s theory while formalists should reconsider what is at stake when they commend Pashukanis’s original account of the legal form but dismiss his forceful critique of formalism. I begin by outlining the history of Pashukanis’s reception in the West and account for his enduring legacy. After showing important and counterintuitive affinities between Pashukanis and contemporary neo-Kantian formalists, I critically examine Arthur Ripstein’s formalist account of private right as interpreted through the normative standpoint of the *sui iuris*. I argue that Ripstein’s account, while laudatory for its concern with the problem of *personal* domination, neglects a major wrong that occurs squarely within the ambit of private right, namely the wrong of *impersonal* class domination. By omitting this wrong, Ripstein falls prey to the most vigorous

I wish to thank Chris Arthur, Bill Bowring, Alan Brudner, Hanoch Dagan, Ilija Mondovski, Ben Ohavi, Umüt Özsu, Hamish Stewart, Jacob Weinrib, Allen Wood, as well as an anonymous reviewer at the *Canadian Journal of Law & Jurisprudence* for helpful comments and criticisms on earlier drafts of this article.

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1. Evgeny B Pashukanis, *The General Theory of Law and Marxism*, translated by Barbara Einhorn (InkLinks, 1978) at 64 [Pashukanis, *The General Theory*].

dimensions of Pashukanis's critique of formalism—its fetishization of commodity exchange and conceptual blindness to class domination. Pashukanis is shown to offer the most serious challenge to contemporary formalism precisely because he questions its coherence while still sharing many of its assumptions. Taken together, the theoretical shortcomings of Pashukanis and his estranged bedfellows provide a renewed opportunity for reconsidering the significance of private right, its relation to public right, and the normative challenges that capitalist relations of production and exchange continue to pose for both.

I. Pashukanis's Reception in the West: Between Marxism and Formalism

Among the various ill-fated representatives of Soviet legal philosophy, there is one theorist whose name has not only been rehabilitated but consistently revalued in the West: Evgeny Pashukanis.² How does one account for the continued interest in Pashukanis's work so many years after he was denounced as a "Trotskyist saboteur" and swiftly executed?³ This question will occupy us for the remainder of the article as we bring into sharper relief Pashukanis's counter-intuitive affinities with a particular strand of neo-Kantian legal formalism that he sought to discredit. Upon re-reading Pashukanis's *General Theory of Law and Marxism*, along with its defenders and detractors in the Marxist tradition, one learns that Pashukanis earned an equally impressive reputation among liberal legal theorists. The earliest and most glowing assessment of Pashukanis's work came from Lon Fuller, who became the token critic of legal positivism in the twentieth century. It is worth noting that Fuller reviewed Pashukanis's work alongside his merciless critic and successor, Andrey Vyshinsky.⁴ In retrospect, any jurist would likely fare better than Vyshinsky on both the scholarly and moral fronts. After all, Vyshinsky was the architect of the forced confession innovation in Soviet law, which was instrumental in establishing the guilt of Joseph Stalin's political rivals. Under Vyshinsky's tenure as General Procurator of the USSR, the law became at once an instrument of state terror and a basis by which such terror

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2. For an excellent selection of translated writings by prominent Soviet legal philosophers (Stuchka, Pashukanis, Vyshinsky, among others), see John N Hazard, ed, *Soviet Legal Philosophy*, translated by Hugh Babb (Harvard University Press, 1951).
 3. Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (Routledge, 2008) at 15. Pashukanis's reputation must have been so firmly established in Soviet circles that the elusive P Yudin found it necessary to denounce him as a "crafty rascal and enemy of the people"—a charge that would replay itself in the history of Soviet legal philosophy. See P Yudin, "Socialism and Law" in Hazard, *supra* note 2 at 288.
 4. Rehearsing the Stalinist trope of Pashukanis as wrecker, Vyshinsky wrote: "From the standpoint of such an understanding of law as that held by Stuchka and Pashukanis, soviet law was doomed from its very emergence to fade away and to die out. . . . and individual institutes of soviet law, designed to protect, confirm, and develop new socialist relationships were rendered powerless to develop." Andrey Vyshinsky, "Fundamental Tasks of Soviet Law" in Hazard, *supra* note 2 at 330-31. Vyshinsky's remarks above underscore Pashukanis's unyielding commitment to the withering away of law and also evidence the perils of paying lip service to invocations of socialist legality and rights for the purposes of justifying political terror and repression.

was legitimized.⁵ Needless to say, Fuller's positive reappraisal of Pashukanis extended beyond a superficial comparison of Pashukanis's merits with Vyshinsky's demerits. Writing in the early years of the Cold War, Fuller derides Vyshinsky's account of Soviet law for its "vacuity, its abusiveness, and its platitudes".⁶ He regards Vyshinsky's intervention in Soviet jurisprudence as representing the most extreme positivist apologia for the Soviet state, coupled as his work was with a grossly reductionist conception of law as the instrument of the ruling class. In the Soviet context, this ruling class was nominally the working class, whose collective interests were ostensibly represented by the Communist Party of the Soviet Union. Judged from this angle, it makes sense why Fuller sought to counterpose Vyshinsky's positivist and class instrumentalist orientation with Pashukanis's original and rigorous treatment of the legal form; the latter view was far more amenable to Fuller's own. For these reasons, Fuller went further than any of his predecessors in praising Pashukanis in the following terms:

Pashukanis expounds with clarity and coherence an ingenious development of Marxist theory that has been called the 'Commodity Exchange Theory of Law.' His work is in the best tradition of Marxism. It is the product of thorough scholarship and wide reading . . . it is the kind of book that any open-minded scholar can read with real profit, however little he may be convinced by its main thesis.⁷

What was it about Pashukanis's theory that garnered such praise from Fuller? For one thing, it should be noted that Pashukanis was among the few members of the Soviet Commissariat of Justice who possessed specialized legal training. Pashukanis studied law and political economy at the University of Munich, where he earned a doctorate before returning to Russia as a committed Bolshevik.⁸ In Munich, Pashukanis would have cultivated knowledge of Roman law and grasped the rich tradition of private law that dominated German jurisprudence. In addition to his academic credentials, Pashukanis was an original thinker who revived Marxist jurisprudence from its stagnant and dogmatic slumber, and he did so in the midst of revolutionary upheaval and terror. Unfortunately, Pashukanis's principled adherence to his theory's radical conclusions also cost him his life, more about which in the penultimate section.

In *The General Theory of Law and Marxism*, Pashukanis sought to unearth the historically-limited *form* of law while also bringing to bear its relation to the impersonal nature of domination under capitalism. In the process, Pashukanis crafted thoughtful criticisms of two opposing theoretical orientations in Marxist debates about law: neo-Kantian formalism and class instrumentalism.

5. For a helpful discussion of Vyshinsky's ascendance and Pashukanis's abrupt demise during Stalin's campaign to legitimize centralized state power against residual elements of the "anti-law perspective", see Peter H Solomon Jr, *Soviet Criminal Justice Under Stalin* (Cambridge University Press, 1996) at 194.

6. Lon L Fuller, "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory" (1949) 47:8 Mich L Rev 1157 at 1159.

7. *Ibid.*

8. Head, *supra* note 3 at 158.

Pashukanis was merciless in his critique of the neo-Kantian formalists, particularly of Hans Kelsen and Rudolf Stammler. One could say that Pashukanis's critique of Kelsen, and proponents of his pure theory of law, is that they never get around to explaining the *form* of law because they abstract from history and treat legal phenomena as pristine and timeless conceptual facts.⁹ Pashukanis concludes that Kelsen's pure theory of law "explains nothing, and turns its back from the outset on the facts of reality, that is of social life, busying itself with norms without being in the least interested in their origin (a meta-judicial question!)."¹⁰ Pashukanis holds Stammler's legal theory in even lower regard, castigating it in another context as "nothing other than a Kantian ideological thesis embodied in the context of Stammler's legal stupidity."¹¹ Needless to say, Pashukanis identified the neo-Kantian formalists as his enemies of choice and sought to refute their theoretical pronouncements, especially in connection with the lively debates that were taking place in the aftermath of the Russian Revolution about the nature and fate of law.¹²

It is worth noting that Hans Kelsen wrote a polemical rejoinder to Pashukanis's critique, which formed a significant part of *The Communist Theory of Law*. In this rejoinder, Kelsen grants Pashukanis's claim that the categories of liberal jurisprudence are pervaded with antinomies and ideological distortions. However, he insists that these antinomies and distortions are not insurmountable in the ways suggested by Pashukanis. Rather, Kelsen traces the relevant deficiencies of liberal jurisprudence to a specific strand of German jurisprudence that anchored the concept of law in private property and in the domain of private law that gives it its form and justificatory basis. What is telling for our purposes is that Kelsen takes Pashukanis to task for uncritically subscribing to this very same strand of German jurisprudence. He writes: "Pashukanis declares that only private law—as a relationship between isolated individuals, subjects of egotistic interest—is law in the true sense of the term."¹³ What is true for Pashukanis was equally true for conservative jurists in Germany. Kelsen submits:

The doctrine that only private law, not public law, is true law, because the state as a meta-legal fact cannot be conceived of as objected to law and hence not as a legal subject, is by no means a specifically Marxist doctrine. Many 'bourgeois' writers and especially German jurists of a highly conservative attitude have advocated this doctrine, at the basis of which is the dualism of private and public law, closely connected with the dualism of law and state, subjective law (right) and objective law.

9. Pashukanis, *The General Theory*, *supra* note 1 at 52.

10. *Ibid.*

11. Evgeny Pashukanis, "The Marxist Theory of State and Law" in Piers Beirne & Robert Sharlet, eds, *Evgeny Pashukanis: Selected Writings on Marxism and Law*, translated by Peter B Maggs (Academic Press, 1980) at 283.

12. See Michael Head, "The Passionate Legal Debates of the Early Years of the Russian Revolution" (2001) 14:1 *Can JL & Jur* 3.

13. Hans Kelsen, *The Communist Theory of Law* (Stevens, 1955) at 93.

And these dualisms are a characteristic element of certain legal theories developed by bourgeois writers.¹⁴

For better or worse, Kelsen did not take his critique of Pashukanis far enough, opting instead to resolve the distortions of liberal jurisprudence with recourse to his overarching concept of the *Grundnorm*, which assumes something akin to a prime mover in Kelsen's legal theory. The trouble with the retrospective *Grundnorm* is that it rests on a circularity that imbues the concept being explained with quasi-mystical qualities.¹⁵ Although Kelsen was a neo-Kantian positivist, he shared the contemporary formalist insistence on treating law on its own terms, that is, unadulterated by history, politics, and economics, which was the precise target of Pashukanis's (non-instrumentalist) critique of formalism. To be sure, while neo-Kantian formalism comes in different varieties (e.g. positivist and naturalist), all formalist theories ascribe to law a wholly independent or autonomous ideational existence. Notwithstanding Pashukanis's distaste for neo-Kantian formalism, he was equally opposed to Marxist theories that reduced law to the *instrument* of the ruling capitalist class and to the content of class domination more generally. Although theories of this sort find rhetorical support in the *Communist Manifesto*, they encounter difficulties when it comes to explaining *why* the ruling class does not actually rule, as say in some pre-capitalist social formations. To the class instrumentalists, Pashukanis poses a seemingly straightforward question: "why does class rule not remain what it is, the factual subjugation of one section of the population by the other?"¹⁶ Pashukanis was convinced that neither the formalists nor the class instrumentalists possessed theoretical resources for grasping the distinctiveness of what he calls the "legal form". While formalist theories abstract from social relations and succumb to a version of legal fetishism (i.e. hypostasizing law's autonomy and divorcing it entirely from social reality), even the most sophisticated class instrumentalists emphasize the class content of law without ever explaining its origins and distinctive form.

A Marxist theory of law was therefore in order, one that could explain the specificity of the legal form and account for why the law assumes an impersonal character that is distinct from direct class rule. Pashukanis was clear about his theoretical aims: "As a Marxist, I did not set myself the task of constructing a theory of pure jurisprudence, nor could I set myself such a task My aim was this: to present a sociological interpretation of the legal form and of the specific categories which express it."¹⁷ From the outset, Pashukanis rejects the generic definition of law as a system of authoritative rules. Such a definition is riddled with conceptual ambiguity and imprecision because it does not distinguish legal phenomena from other forms of social organization, including the

14. *Ibid* at 95.

15. For a thoughtful critique of Kelsen along these lines, see William E Conklin, "Hans Kelsen on Norm and Language" (2006) 19:1 *Ratio Juris* 101.

16. Pashukanis, *The General Theory*, *supra* note 1 at 139.

17. *Ibid* at 107.

military unit and the ecclesial order that are administered in an authoritarian manner.¹⁸ As a result, the law loses its specificity and becomes submerged in the broader milieu of social relations. In place of the generic formulation of law, Pashukanis offers an account of the legal form that fuses positive law and legal norms with the concept of juridical personhood. He submits:

The legal system differs from every other form of social system precisely in that it deals with private, isolated subjects. The legal norm acquires its *differentia specifica*, marking it out from the general mass of ethical, aesthetic, utilitarian and other such regulation, precisely because it presupposes a person endowed with rights on the basis of which he actively makes claims.¹⁹

The distinguishing feature of law, then, is the presence of atomized legal subjects who press rights against each other, and not just any rights, but the property rights of commodity owners.²⁰ Commodities cannot bring themselves to the market, as Marx demonstrates in *Capital*, because they require legal subjects who are not only actively engaged in commodity exchange but are recognized and respected in their status as abstract rights bearers. Formal or juridical equality is a basic precondition for entering into and exiting contracts, and this includes the contract between labour and capital. The idea of juridical personhood is central to liberal jurisprudence, although the concept traces its origins back to Roman law, where it was typically in contradiction with the empirical realities of the *servus* and the *pater familias*. The legal subject, or juridical persona, becomes the pivot of Pashukanis's general theory of law, and for good reason. This is all the more evident in the aftermath of Pashukanis's "self-criticisms" in the 1930s, which did nothing to alter his view of the legal subject as the most rudimentary and abstract category that lies at the heart of the liberal or "bourgeois" legal form. Pashukanis affirms: "My attempt [at identifying the abstract subject of exchange] made it possible to understand the bourgeois-juridic system from a single angle of vision—to survey all of it in its entirety, in all its ramifications, in all its parts, and in all the fields of law."²¹ It is telling that Pashukanis's elevation of the legal subject to such far-reaching heights mirrors the normative value assigned to it by contemporary neo-Kantian formalists, albeit for very different reasons²²

To be sure, Pashukanis's critique of the neo-Kantian formalists was aimed ultimately at unmasking relations of domination that are concealed beneath the juridical equality of commodity exchange, more about which in the final section. However, at no point does Pashukanis conclude from his critique that the abstract categories of liberal jurisprudence are somehow illusory constructs

18. *Ibid* at 101.

19. *Ibid*.

20. *Ibid* at 100-01.

21. Evgeny Pashukanis, "The Situation on the Legal Theory Front" in Hazard, *supra* note 2 at 255.

22. Indeed, as we will see in our closing discussion of Arthur Ripstein's recent formalist account of the private law of torts, the legal subject assumes the status of a *sui iuris*—the untrammelled owner of one's person and of their property.

that exist only in the minds of legal formalists and their pedestrian adherents.²³ Instead, Pashukanis argues that the legal form derives not only logically, but also historically, from the commodity form. On this view, the legal form and the accompanying phenomenon of legal fetishism are analogous to the commodity form and the fetishism of commodities as they are described by Marx in *Capital*.²⁴ Each of these respective fetishisms captures the complex reality of social life as it is experienced by individuals in capitalist society, where commodity production is oriented towards capital accumulation and the imperatives of profit. In the process of laying bare the liberal legal form, Pashukanis puts forward a series of foundational claims about the nature, function, and fate of law. Two of these claims had the unintentional consequence of bringing Pashukanis into bed with the neo-Kantian formalists with whom he would otherwise have no truck.

The first of Pashukanis's central claims is that a legal system is incomprehensible in the absence of generalized commodity exchange. Put simply, where there is commodity exchange there must be law, and where such exchange is absent, there can be no law. Another of Pashukanis's foundational claims is that the building blocks of law are to be found strictly within the bounds of private law, and that public law is, at best, a defective extension of private law.²⁵ Pashukanis writes that "no matter how ingeniously devised and unreal any one of the juridical constructs may appear, it is on firm ground so long as it remains within the domain of private law, and of property law in particular."²⁶ Pashukanis's third and most provocative claim (more provocative for liberal theorists than for orthodox Marxists) concerns the "withering away" of the legal form with the abolition of commodity exchange relations and the consolidation of planned production under full communism. Pashukanis maintains throughout his writings that "the problem of the withering away of law is the cornerstone by which we measure the degree of proximity of a jurist to Marxism. . . . one who does not admit that the planned organizational base eradicates the formal legal basis is, essentially speaking, convinced that the relationships of commodity-capitalist economy are eternal."²⁷ Once the means of production are socialized and production is planned with the aim of realizing human needs, administration would become a purely technical matter concerning the most efficient means for allocating collective ends, especially under conditions of material abundance.²⁸ *Technical regulation*—as distinct from *legal regulation*—would involve expediting the transport of trains and adopting the most effective techniques for healing sick persons, neither of which would warrant juridical or ethical judgements as far as Pashukanis was concerned.²⁹

23. Pashukanis, *The General Theory*, *supra* note 1 at 43-44.

24. Karl Marx, *Capital*, ed by Frederick Engels, translated by Samuel Moore and Edward Aveling (Progress Publishers, 1954) vol 1 at 78.

25. Pashukanis, *The General Theory*, *supra* note 1 at 106.

26. *Ibid* at 82.

27. Evgeny Pashukanis, "Economics and Legal Regulation" in Beirne & Sharlet, *supra* note 11 at 268-69.

28. Pashukanis, *The General Theory*, *supra* note 1 at 138, 158.

29. *Ibid* at 81-82.

Pashukanis's third claim brings us back to Fuller's positive reappraisal. After commending Pashukanis and excoriating Vyshinsky, Fuller reaches a conclusion that is now routinely rehearsed by liberal critics of Marxism, namely, that "the despised bourgeois virtues [legality and its seemingly inseparable connection with private property] turn out, in the end, not to be mere copybook maxims, but indispensable ways of getting things done, rooted in the very nature of the human animal."³⁰ Although the premises of Pashukanis's theory (foundational claims one and two) are sound, he erred in thinking that the liberal legal form was bound for the dustbin of history (claim three). Furthermore, the moral of the failed Soviet experiment and of Pashukanis's tragic demise, according to Fuller, is that legal regulation and commodity exchange are eternal features of human nature. So much for Pashukanis's daring venture into enemy territory with the aim of laying bare the historically limited and deficient liberal legal form.³¹

II. Pashukanis's Formalist Affinities and their Discontents

Fuller's qualified endorsement of Pashukanis's theory set a peculiar precedent among subsequent legal theorists, particularly among a strand of contemporary neo-Kantian formalists. It may be more accurate to refer to these theorists simply as Kantian formalists because their leading representatives are convicted that a comprehensive legal theory can be derived from Kant's *Doctrine of Right*.³² In his *Idea of Private Law*, Ernest Weinrib—the preeminent representative of legal formalism in the English-speaking world—refers to Pashukanis (admittedly in a footnote) as the most sophisticated representative of Marxist legal theory, who correctly recognized that "the relationship of law to economics should be understood not as the instrumentalism of the contemporary economic analysis of law, but as the congruence of juridical and economic form."³³ Pashukanis would have been aghast had he heard such praise from Weinrib the model formalist, whose goal has been to justify private law as a self-contained instantiation of corrective justice. Incidentally, for Weinrib as for Pashukanis, the distinguishing feature of private law is captured by the quintessential dispute between two litigious subjects who press their rights against each other in court with the aim of redressing a perceived private wrong. In both cases, the relation between legal subjects logically precedes the visible hand of the state and its redistributive policies. The irony here is that Pashukanis would have few resources for countering Weinrib's otherwise faithful depiction of his theory. Through a strange dialectical

30. Fuller, *supra* note 6 at 1165.

31. Pashukanis, *The General Theory*, *supra* note 1 at 64.

32. See in particular Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) [Ripstein, *Force and Freedom*].

33. Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) at 139. It is telling that Weinrib here commends Pashukanis's account of the congruence of commodity and legal form and elsewhere castigates Marx's derivation of legal relations from historically-specific relations of production as crudely instrumentalist. For Weinrib's interpretation of Marx as a crude instrumentalist, see Ernest Weinrib, "The Intelligibility of the Rule of Law" in Allan Hutchinson & Patrick Monahan, eds, *The Rule of Law: Ideal or Ideology?* (Carswell, 1987) at 63.

inversion, Pashukanis the token Marxist legal theorist has been transformed into the model formalist. How is this dialectical inversion to be explained, and why is the counter-intuitive alliance between Pashukanis and his contemporary formalist bedfellows illusory and dangerous for all those concerned?

Before this question can be answered, it pays to first consider Pashukanis's ambivalent legacy among Marxist legal scholars. In a recent attempt to sketch the broad outlines of a Marxist legal history, Christopher Tomlins identifies three distinct phases of Pashukanis's reception among legal scholars.³⁴ The earliest reception of Pashukanis was largely confined to assessments of his scholarly contributions by decidedly non-Marxist legal scholars in the West: John Hazard, Lon Fuller, and Hans Kelsen. It was not until the second phase in the late 1970s, according to Tomlins, that Anglophone Marxists like Christopher Arthur and Isaac Balbus "rediscovered" Pashukanis in the context of broader debates about ideology, state, and the law.³⁵ The third and most recent reception of Pashukanis has been inaugurated by China Miéville in the domain of international law and against the backdrop of the global "War on Terror".³⁶ While mostly on the mark, Tomlins's tripartite rendition of Pashukanis's reception misses a crucial thread that runs through his Marxist critics—a thread that Pashukanis, for his part, dutifully acknowledged. This was the critique, originally elaborated by Karl Korsch, of erroneously deriving legal relations not from historically-specific relations of production but from commodity exchange relations.³⁷ Pashukanis's derivation of the legal form from the commodity form barred the possibility of grappling with pre-capitalist and post-capitalist varieties of law and right. The undesirable consequence of Pashukanis's derivation of legal form from commodity form is that it absolutizes liberal private law while claiming to show its historically limited character.³⁸ For Pashukanis, as for many of his formalist counterparts, liberal private law exhausts the concept of law because there can be no independent understanding of public law without the background proliferation of generalized exchange relations and a regime of private property in the means of production. This myopic line of reasoning also led Pashukanis to fiercely oppose any attempts at theorizing socialist conceptions of law under alternative regimes of property.³⁹

Whether due to political pressures or out of reasoned persuasion, Pashukanis eventually conceded his erroneous conflation of the liberal legal form with the concept of law as such. By 1930, Pashukanis admits that his "basic mistake

34. Christopher Tomlins, "Marxist Legal History" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford University Press, 2018) at 530-31.

35. *Ibid.*

36. *Ibid.* at 534.

37. For a helpful elaboration of this point, see Robert Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (Pluto Press, 1984) at 157.

38. This critical deficiency in Pashukanis's thought has not been appreciated by some of his most fervent defenders. Raymond Koen's root and branch defence of Pashukanis is a good case in point. See Raymond Koen, "In Defence of Pashukanism" (2011) 14:4 *Potchefstroom Electronic L J* 104 at 117.

39. Pashukanis, *The General Theory*, *supra* note 1 at 61, 63.

was to confuse the specific *indicia* of the bourgeois juridic form with law in its entirety. These are far from being identical.”⁴⁰ One would think that a theoretical admission of this magnitude would reorient Pashukanis’s thinking about the different character that legal relations could potentially take under an alternative regime of property—above all, in the communist society towards which Pashukanis saw the Soviet Union moving. However, Pashukanis’s commitment to the withering away of law remained unshaken, so much so that he continued to attack invocations of proletarian/socialist law in the Soviet Union as conservative and characteristic of concealed formalist attempts at constructing a complete legal system in the face of rapidly changing political circumstances.⁴¹ In keeping with this line of reasoning, Pashukanis continued to profess uncritical faith in the untapped potential of *technical regulation*, which he was convinced would replace the legal form with the advent of full communism. It is true that Pashukanis sometimes qualifies his description of the otherwise rapid transition from legal to technical regulation. He notes on one occasion that “it would be completely false to suppose that where contract relationships are disappearing, law ends and pure technique alone begins.”⁴² However, Pashukanis’s residual qualifications about technical regulation are quickly eclipsed by his remarks about *the* correct way of conceiving the relationship between law and politics during the period of socialist reconstruction.

Pashukanis’s discussion of the place of law during socialist reconstruction cannot be understood in abstraction from the political-economic context in which he delivered his underappreciated 1930 address concerning “The Situation on the Legal Theory Front.” Pashukanis’s address was later published in *The Soviet State and the Revolution in Law*, a journal for which he was the lead editor. By the early 1930s, the New Economic Policy (NEP)—originally introduced by Vladimir Lenin to maintain a limited role for the market with the aim of stimulating productive output—came to a grinding halt with the inauguration of Joseph Stalin’s first Five Year Plan. Stalin’s plan was geared towards extirpating surviving elements of the NEP, imposing collectivization in the countryside, and “liquidating” the middling-peasants (the so-called “Kulaks”) as a class. Pashukanis’s address is situated in this turbulent political context, and it begins by praising Stalin’s state-led policies of collectivization and industrialization as being indispensable to the transformation of socialist relations of production and the forward march towards communism.⁴³ Pashukanis also takes the opportunity to denounce Leon Trotsky’s critique of Stalin’s plan of building socialism in one country, and admits his naïve inability to spot Nikolai Bukharin’s political opportunism. Beyond these superficial denunciations of the “Left” and “Right”

40. Pashukanis, “The Situation on the Legal Theory Front” in Hazard, *supra* note 2 at 261.

41. *Ibid* at 272.

42. *Ibid* at 273.

43. *Ibid* at 237. For a well-researched account of Pashukanis’s 1930 article on “The Situation on the Legal Theory Front” and his broader theoretical trajectory, see Bill Bowring, “The Theoretical Trajectory of Evgeniy Pashukanis” in *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge, 2013).

oppositions in the USSR, Pashukanis insists throughout his address that law ought to remain wholly subservient to political goals.⁴⁴

If one takes into account the political context just described, one could give Pashukanis the benefit of the doubt and interpret his remarks as reflecting the rapidly changing political winds under Stalin and as further evidence of Pashukanis's commitment to the withering away of law.⁴⁵ A sympathetic Marxist could even grant a version of Pashukanis's thesis that the relation between law and politics ought to be conceived differently under socialist reconstruction than in the typical way it is construed by liberal and especially formalist legal theorists. Pashukanis insists that "the relationship of law to policy and to economics is utterly different among us [Soviets] from what it is in bourgeois society. In bourgeois-capitalist society, the legal superstructure should have maximum immobility—maximum stability—because it represents a firm framework of the movement for the economic forces whose bearers are capitalist entrepreneurs."⁴⁶ It is from this theoretical vantage point that Pashukanis insists upon an inverse relation between law and politics under socialism, which requires "maximum elasticity" in the character of legislation.⁴⁷ Lest there be a shred of doubt, Pashukanis concludes his impassioned address by reiterating that "for us [Soviets] revolutionary legality is a problem which is 99 percent political."⁴⁸ Not only is it the case for Pashukanis that the legal form loses its importance under socialist reconstruction; it becomes a major fetter to further communist development.

The source of Pashukanis's one-sided embrace of politics and denigration of legality stems from his truncated view of law as rising and falling with commodity exchange. In the absence of commodity exchange, there could be nothing remotely resembling the legal form. Instead, Pashukanis envisioned that relations between mutually indifferent commodity owners in the market would be replaced by a robust community of associated producers whose interests would coincide under a settled plan. In this sense, Pashukanis never relinquished his original view of law as quintessentially bourgeois. Marxist scholars of law therefore stand to lose when allying with Pashukanis in that they too become mesmerised by the eternal character of the commodity form and its corollary legal form, a view that

44. Pashukanis, "The Situation on the Legal Theory Front" in Hazard, *supra* note 2 at 271. Beyond this transitional period of socialist reconstruction, law would wither away as a matter of course. Pashukanis was convinced that, for Marx, there could be no talk of proletarian/socialist law because the period of revolutionary transition in the Soviet Union did not represent a distinct mode of production.

45. The question of Pashukanis's loyalty to the Stalinist regime has been much debated. A case can be made for both sides (those who see Pashukanis as a loyal functionary and those who see him as a revolutionary Marxist who was principally committed to the withering away of law in the face of Stalin's dictatorship). In my view, Michael Head's *Pashukanis: A Critical Reappraisal* offers the most balanced position, one which refutes superficial criticisms of Pashukanis while holding him accountable for denouncing Stalin's rivals when it was politically expedient. For competing views on this question, see Antonio Negri, "Re-Reading Pashukanis: Discussion Notes" (2017) 5:2 *Stasis* 8; Bowring, *supra* note 43; John N Hazard, "Pashukanis is No Traitor" (1957) 51:2 *Am J Int'l L* 385.

46. Pashukanis, "The Situation on the Legal Theory Front" in Hazard, *supra* note 2 at 279.

47. *Ibid.*

48. *Ibid.* at 280.

Pashukanis shared with his formalist bedfellows until the bitter end. Moreover, by insisting that technical regulation would inevitably replace legal regulation, Pashukanis projected onto the communist future a collectivist “unity of social purpose” that was to be devoid of all ethical and juridical considerations.⁴⁹ The problem is that Pashukanis assigned the crucial task of determining technical *means* to specialized agencies and bureaus while depriving the associated producers of elementary formal rights that were afforded to them by liberal private law.⁵⁰ It does not help that Pashukanis’s alternative to the historically limited liberal legal form vested unrestrained power in the hands of technocrats (however well-intentioned), leaving Marxists with the ill-fated choice between embracing formalist fetishism or succumbing to Stalinist totalitarianism.⁵¹ Stubborn insistence upon maximum political elasticity in the absence of legal and ethical constraints can pave the way to a political regime in which law and rights are indeed robbed of all substance. Pashukanis’s error was theoretical in origin but its consequences were thoroughly practical and political. Through a tragic twist of fate, Pashukanis’s theory was hoist with its own petard.

A year before his disappearance and execution, Pashukanis was appointed to the team of legal experts who were responsible for drafting the so-called “Stalin Constitution of 1936”. In one of his last published articles, Pashukanis makes a complete reversal of views concerning the status of legality and rights under socialism. He now acknowledges that in his *Course on Soviet Economic Law*, which was taught as established doctrine in Soviet legal institutes, “there was almost no room for the working person, for man, because everything was absorbed by the problem of the relationship between economic units. Questions of civil law were almost absent.”⁵² Pashukanis then makes the surprising admission that “the problem of personal and property rights—and of their protection—is an immense theoretical and practical task.”⁵³ Unfortunately, no shortage of esoteric reading will ascertain which of Pashukanis’s recantations reflected a genuine change of mind and which were contrived for reasons of survival. What is certain is that Pashukanis learned all too swiftly that the alternative to a genuine system of socialist legality is the arbitrary caprice of a despot.

49. Pashukanis, *The General Theory*, *supra* note 1 at 81-82.

50. *Ibid.* For an engaging critique of Pashukanis’s devaluation of the safeguards provided by abstract legal personhood, see Peter Ramsay, “Pashukanis and Public Protection” in Markus D Dubber, ed, *Foundational Texts in Modern Criminal Law* (Oxford University Press, 2014) at 216-17. Ramsay calls for a renewed dialectical treatment of law that does not succumb to formalist fetishism or Pashukanis-style technocratic totalitarianism. Unfortunately, Ramsay does not elaborate in much depth on this promising theoretical alternative.

51. China Miéville, a leading exponent of Pashukanis, argues that Pashukanis’s problematic account of technical regulation does not invalidate his theory’s conclusion about the withering away of law. The trouble is that Miéville grossly overlooks the extent to which Pashukanis’s blind spots around technical regulation are the direct outcome of his commodity exchange theory of law. See China Miéville, “For Pashukanis: An Exposition and Defence of the Commodity-Form Theory of Law” in *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006) at 110.

52. Evgeny Pashukanis, “State and Law Under Socialism” in Beirne & Sharlet, *supra* note 11 at 359.

53. *Ibid.*

Though they may not know it, the neo-Kantian formalists also stand to lose from their estranged alliance with Pashukanis. It should make sense by now that the contemporary formalists are interested in Pashukanis's theory because it offers a mirror reflection of formalism's uncritical justification of private property. The decisive difference between Pashukanis and his estranged bedfellows is that his theory was aimed ultimately at discrediting rather than justifying liberal private law and the regime of private property that it upholds. In this sense, formalists have conveniently neglected Pashukanis's charge that their theories cannot help but reflect the status quo. Private law, at least as it has been theorized by prominent neo-Kantian formalists, lacks internal theoretical resources for addressing the impersonal wrong of class domination, which takes hold firmly within the domain of private law and which remains concealed by the juridical equality of the legal form.⁵⁴ Contemporary formalists such as Weinrib commend Pashukanis's grasp of the legal form but completely ignore his critique of that form as masking relations of domination and substituting a relationship between commodities for more robust relations among emancipated producers. On the Pashukanian critique, the formalists cannot have it both ways: either private law does not honour corrective justice or it must condemn private ownership in the means of production as a wrong on the very basis of private right.⁵⁵ However, neither of these alternatives will appeal to contemporary formalists, whose theories are based on rigid divides between public and private law, as well as halfway solutions to political-economic problems that risk subverting the coherence and normative justification of law, private and public. Arthur Ripstein's recent formalist account of the private law of torts provides a formidable case in point.

On the surface, Ripstein's influential *Private Wrongs* appears as a misplaced target for Pashukanian-inspired analogy or critique. After all, nowhere in his book does Ripstein make reference to Pashukanis, while his analysis of private law is confined to that of torts.⁵⁶ Yet appearances can be deceiving, and it just so happens that the normative foundation on which Ripstein reorients tort law extends to the domain of private law as a whole. While acknowledging

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54. I grant that Karl Marx would have likely avoided interpreting class domination in the morally-charged language of a wrong (not least because the contract between labour and capital is deemed just by the prevailing juridical standard of bourgeois right). However, Marx nonetheless entertained the view that class domination constitutes a universal wrong. He wrote: "[The proletariat] does not claim a *particular redress* because the wrong that is done to it is not a *particular wrong* but *wrong in general*." Karl Marx, "Contribution to the Critique of Hegel's Philosophy of Right: Introduction" in Robert C Tucker, ed, *Marx-Engels Reader* (Norton, 1978) at 64. My broader point is that the wrong of class domination can be shown to contradict the immanent juridical standard of private right.
55. The view of class domination as a wrong is not necessarily tethered to the labour theory of value. The domination of labour by capital has been interpreted by notable political theorists as enabling capitalists to deny labourers their human rights to the means of life and labour. See in particular CB Macpherson, "Human Rights as Property Rights" in CB Macpherson, ed, *The Rise and Fall of Economic Justice and Other Essays* (Oxford University Press, 2013) 67.
56. Ripstein engages critically with Marx and Pashukanis in his chapter, "Beyond Corrective and Retributive Justice? Marx and Pashukanis on the 'Narrow Horizons of Bourgeois Right'" in *Equality, Responsibility, and the Law* (Cambridge University Press, 1998) 246-63.

Weinrib's pioneering influence on his work, Ripstein chooses a different route to reach the same formalist objectives: the internal coherence and normative justification of private law. He writes: "I share his [Weinrib's] conception of wrongs as violations of rights and remedies as substitutive. But I defend these conclusions by a different route. Rather than working backward from a tort action, my account moves in the opposite direction, starting from the moral idea that no person is in charge of another."⁵⁷ Indeed, whereas Weinrib's account of corrective justice is built around the quintessential dispute between two litigious legal subjects and the actions they take to redress a perceived private wrong, Ripstein grounds tort law in the norm of the *sui iuris*. As with Pashukanis's *juridical persona* and closely attached to it, the *sui iuris* is the Roman law-inspired idea that individuals are sovereign owners of their bodies and of their property, that is to say, they are their own masters.⁵⁸ On this view, which Ripstein expounds with astounding clarity, a tort constitutes a private wrong that violates another person's rights as a *sui iuris*. It is crucial for Ripstein's view that the alleged private wrong is attributable to an identifiable empirical person. This insight is rooted in the republican tradition's account of domination as consisting in dependence on the arbitrary will of another individual.⁵⁹ It follows that the domain of private right as a whole (and not merely tort law) is concerned with redressing private wrongs and restoring private rights.

Although Ripstein's account is to be commended for its concern with the threat of personal domination, it remains conceptually blind to impersonal class domination—the domination of propertyless workers and others by owners of capital. This concealed form of domination, which remains very much alive in the twenty-first century, evades the formalist radar of private right because it is impersonal rather than personal in character. Private right actually sanctifies the wrong of class domination because, regardless of how dependent those without access to capital become on the arbitrary will of capitalists, they retain their individual capacities as *sui iuris*. The principled formalist can then conclude that no private wrong has occurred because none can be identified. To be sure, Ripstein may retort that such charges are wholly misplaced because his account of *Private Wrongs* is confined strictly to torts and not at all concerned with contracts. However, even if that is the case, it follows that the overarching norm of the *sui iuris* is either applied inconsistently within the ambit of private right or that private right does not vindicate the rights of those who do not own capital and whose lives depend on the arbitrary will of others. Ripstein can also point out that his formalist outlook is especially sensitive to the deleterious consequences of eco-

57. Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) at 6 [Ripstein, *Private Wrongs*].

58. *Ibid* at 33.

59. The neo-republican political theorist Philip Pettit claims that a market system *should not* be understood as a medium of domination. See Philip Pettit, "Freedom in the Market" (2006) 5:2 *Politics, Philosophy & Economics* 131. For an opposing view that considers the varied forms of domination that prevail under capitalism, see William Clare Roberts, *Marx's Inferno: The Political Theory of Capital* (Princeton University Press, 2017).

conomic inequality in liberal democratic societies. He cautions readers that his account of private wrongs should not be misconstrued as the libertarian contraction of state functions to the mere enforcement of contracts between competing legal subjects.⁶⁰ Rather, the role of the state is more expansive; it is oriented towards a legally-enforced system of cooperation, which ensures that every *citizen* (as distinct from abstract *legal subject*) becomes a full member of society. On Ripstein's formalist view, the liberal state has its eye on distributive justice, not corrective justice.⁶¹

Ripstein's attempt to contend with the issue of economic inequality, which he traces to voluntary transactions in the market run amuck, leads him to a rigid divide between public and private law that has become characteristic of formalism.⁶² He writes that such a system of legally-enforced cooperation is "designed to protect people from dreadful outcomes, and so to enable them to continue to be members of society. As public law requirements, they do not give rise to any private right, because the affirmative obligation to render assistance is part of a public system of cooperation."⁶³ However, the flipside of Ripstein's selective transition from private to public right—from "horizontal" to "vertical relations"—is that a wrong which occurs squarely within the ambit of private right is somehow to be rectified *externally* through public right, that is to say, through a coercive state that has the power to tax citizens with the broader aim of achieving distributive justice. Such a compartmentalized and politically elastic view of right has the added drawback of endowing the state with unprecedented redistributive powers, which militates against formalism's teaching about the internal coherence and autonomy of private right.⁶⁴ Ripstein's proposal for tackling economic inequality, not to mention impersonal class domination, is reminiscent of misguided attempts by liberal political economists to divorce questions of property ownership as they concern the organization of production from those of

60. Ripstein, *Private Wrongs*, *supra* note 57 at 288-89.

61. I do not doubt that a Kantian-inspired formalist state would have strong provisions for those who are disadvantaged by market outcomes, even if it does not at all address the vexing problem of class domination. See Ernest J Weinrib, "Poverty and Property in Kant's System of Rights" (2003) 78:3 *Notre Dame L Rev* 795.

62. Ripstein's account of market misfortunes is particularly jarring for its omission of the problems generated by commodity fetishism. It is jarring in part because Ripstein has previously written a learned article on the problem of commodity fetishism, in which he correctly observes that commodity fetishism is a sociological phenomenon that is specific to capitalism and should not be conceived as an epistemic error that is made by individuals living under capitalist economic arrangements. See Arthur Ripstein, "Commodity Fetishism" (1987) 17:4 *Canadian J Philosophy* 733 at 746.

63. Ripstein, *Private Wrongs*, *supra* note 57 at 292.

64. In fairness, Ripstein does specify limits to the redistributive powers of the state. See Ripstein, *Force and Freedom*, *supra* note 32 at 270. Nevertheless, my point here is that the rigid formalist divide between private and public right commits Ripstein to endorse conceptually the most unappealing features of both extremes. The critique of contemporary formalism's rigid compartmentalization of private and public right is not strictly Marxian in orientation. It can also be found among the Fullerian and Hegelian members of the "Toronto School." See David Dyzenhaus, "Liberty and Legal Form" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford University Press, 2015), as well as Alan Brudner & Jennifer M Nadler, *The Unity of the Common Law*, 2nd ed (Oxford University Press, 2013) at 29-35.

distribution.⁶⁵ Here Marx's critique of "bourgeois" political economists (even the most progressive among them) is particularly timely and instructive. Marx writes:

The aim [of bourgeois political economists] is, rather, to present production—see e.g. Mill—as distinct from distribution etc., as encased in eternal natural laws independent of history, at which opportunity *bourgeois* relations are then quietly smuggled in as the inviolable natural laws on which society in the abstract is founded. This is the more or less conscious purpose of the whole proceeding. In distribution, by contrast, humanity has allegedly permitted itself to be considerably more arbitrary.⁶⁶

The trouble for Ripstein and neo-Kantian formalists is that the wrong of impersonal class domination takes shape within the ambit of private right, and any meddling with private property in the means of production must result in the outright negation of private right. On the other hand, within public right, the formalist liberal state allows itself to be considerably more arbitrary over matters of redistribution. In the end, the proposed formalist remedies to economic inequality and class domination leave private right and public right in disarray.

III. Towards a Determinate Negation of Pashukanis and his Estranged Bedfellows

Strange as it may seem, the aporia which afflicts contemporary formalism's rigid divide between private and public law has the unintentional consequence of rehabilitating the rational kernel that is at the heart of Pashukanis' enduring critique of formalism. Following in Marx's footsteps, Pashukanis correctly observed that:

bourgeois property signifies more than the relationships of good possessors. It is at the same time [the] relationship of those possessing the means of production toward the producers. This relationship comprises—in a greatly disguised and qualitatively different form—the same relationship of dominance and subordination which openly comes out into first place in feudal property.⁶⁷

65. Ripstein's reference to public law as securing the "background conditions" for full membership in *Private Wrongs* is reminiscent of John Rawls's insistence upon realizing the background conditions for justice as fairness. However, one important difference between Ripstein and Rawls on this score is that the late Rawls critiques the welfare state for failing to deliver on this critical task and allows for alternative ways of restructuring property relations, which range from "property-owning democracy" to "liberal socialism." The realization of property-owning democracy or liberal socialism would be associated with considerable changes in the domain of private right. Ripstein's formalist outlook, with its rigid divide between private and public law, bars this Rawlsian possibility from the outset. Therein lies the difference between how Ripstein and Rawls understand what is involved in securing the background conditions for distributive justice. See John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Harvard University Press, 2001) at 135-50.

66. Karl Marx, *Grundrisse*, translated by Martin Nicolaus (Penguin, 1973) at 87 [Marx, *Grundrisse*].

67. Pashukanis, "The Situation on the Legal Theory Front" in Hazard, *supra* note 2 at 260.

Pashukanis's error consisted in his dismissal of the limited protections granted by private right and in his glorification of technical regulation. As we have seen, this dual error originated in his myopic view that the legal form emerges and withers away with the presence and absence of commodity exchange. Pashukanis would have been better placed to follow Marx's more plausible view that "every form of production creates its own legal relations."⁶⁸ That said, Pashukanis's error does not invalidate his otherwise incisive thesis that formalist theories conceal the distinctive structure of capitalist domination. The Pashukanian point is not that contemporary formalists are to be critiqued simply because they ignore relations of domination that are operative beneath the surface of market transactions. Rather, contemporary formalists cannot help but disregard such domination because their conceptual purview is necessarily limited to commodity exchange relations and the legal norms that give these relations their quintessential form and claims to coherence.

On Pashukanis's view, commodity exchange relations and juridical personhood are homologous conceptual categories because they are predicated on an abstract or formal conception of equality among mutually indifferent market actors.⁶⁹ Such an abstract conception of equality differs markedly from other historical political-economic formations in which arbitrary privilege and brute force characterized legal relations between "naturally" unequal individuals. The capitalist market order abstracts from concrete differences and inequalities between individuals by regarding individuals as abstract commodity owners and as bearers of equal formal rights. The dominance of such abstract categories is symptomatic of generalized capitalist market arrangements, and is best captured in formalist jurisprudence, prompting Pashukanis's remark that "juridical thought moves most freely and confidently in the realm of private law; its constructs assume perfect and well-ordered forms."⁷⁰ Contemporary formalism's fetishization of private law is part and parcel of its conceptual inability to see past the abstract equality of commodity exchange and the impersonal domination that it conceals.

To date, contemporary formalists have largely sought to settle accounts with rival instrumentalisms, whether that of the legal realists or the law and economics jurists. While acknowledging Pashukanis's original analysis of the legal form, contemporary formalists have conveniently sidestepped his critique of formalism. What makes Pashukanis's challenge to formalism particularly forceful is that he

68. Unlike Pashukanis, Marx further identifies an "organic" relation between forms of production and legal relations that bourgeois economists treat as "accidental" and "reflective," which demonstrates in his view their crudity and lack of conceptual understanding. Marx, *Grundrisse*, *supra* note 66 at 88. For a more elaborate analysis of Marx's account of law and rights, see Igor Shoikhet, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan, 2019).

69. For an excellent discussion of this point, albeit one that endeavours to show the ways in which liberal jurists can benefit from engaging with Pashukanis's analysis, see Nigel Simmonds, "Pashukanis and Liberal Jurisprudence" (1985) 12:2 *JL & Soc'y* 135.

70. Pashukanis, *The General Theory*, *supra* note 1 at 80.

ventures deeply into formalist territory and shares many of its fundamental premises concerning the homology of commodity and legal form, as well as the view that the specificity of the legal form is best captured by private law. The trouble is that Pashukanis cannot be dismissed by contemporary formalists as yet another crude instrumentalist, lacking conceptual resources for grasping the distinctiveness of the legal form. He not only puts forward a rigorous theory of the legal form but criticizes instrumentalist attempts at reducing law to its extrinsic content (e.g. class rule, political power, or psychological dispositions). Consequently, it is precisely because Pashukanis takes formalist concepts seriously, in ways that instrumentalists do not, that he offers the most serious challenge to contemporary formalism. At stake is not only the coherence of the liberal legal form but the formalist claim that it vindicates the innate right of the *sui iuris*. At his best, Pashukanis demonstrates that contemporary formalists fetishize commodity exchange relations between mutually indifferent persons and mask the reality of class domination, which is arguably the very opposite of vindicating the innate right of the *sui iuris*. Most troubling is Pashukanis's demonstration that formalist blindness to class domination is rooted *conceptually* in its one-sided embrace of abstract transactional equality. Once again, Pashukanis's aim is not merely to unmask the market as an arena of inequality and domination as against the formalist view; his point is that the formalist conceptual framework cannot help but accommodate itself to the status quo. This is because the formalist framework demands "maximum immobility" in private law's dealings and transactions, whose bearers and beneficiaries are primarily "capitalist entrepreneurs."⁷¹ It is therefore high time that contemporary formalists confront Pashukanis's formidable challenge.

Contemporary Marxist scholars of law, for their part, should follow through with Pashukanis's original quest to broach enemy formalist territory without succumbing to his one-sided rejection of law and its possible value beyond capitalism. Such a theoretical orientation could show, in ways contemporary formalism cannot, that the internal coherence and normative justification of liberal justice are undermined by capitalist relations of production and exchange. What is needed, then, is a determinate negation of Pashukanis and his estranged bedfellows. Such a determinate negation would negate Pashukanis's formalist-inspired derivation of legal form from the commodity form, as well as his uncritical endorsement of technical regulation, while positively retrieving his enduring critique of formalism.

Evidently, Pashukanis's theory still weighs heavily on the minds of contemporary Marxists and neo-Kantian formalists, though for different reasons. The benefit of historical hindsight should be accompanied by the critical insight that contemporary Marxists cannot afford to let history repeat itself on the legal theory front, whether as tragedy or as farce. Pashukanis's tragic demise reaffirms that legal theory is not merely a scholastic enterprise that ought to be ignored in favour

71. Pashukanis, "The Situation on the Legal Theory Front" in Hazard, *supra* note 2 at 271.

of more pressing political concerns; rather, it touches up the perennial question of how we ought to live our lives, which for Pashukanis was a question of life and death. Present-day Marxists and formalists should learn from Pashukanis's fatal errors without giving up on his rigorous quest to lay bare the historically limited character of the liberal legal form. A significant part of this ongoing quest involves saving Pashukanis from his estranged bedfellows and from himself.