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Pashukanis and Public Protection

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Towards a Critique of the Vulnerable Subject: Pashukanis and Public Protection

Peter Ramsay *

Abstract: This paper sets out some elements of a historical theory of the contemporary securitization of criminal law and expansion of state surveillance. I begin by demonstrating that recent criminal legislation permits the state to punish those identified as dangerous. Following Jonathan Simon, I argue that this legislative policy of public protection arises from the idea that the victim of crime is the representative subject of law, and that the vulnerability of potential victims provides the normative justification for coercing and punishing persons for their dangerousness. I then investigate why Evgeny Pashukanis, in the final chapter of his *General Theory of Law and Marxism*, explicitly excluded the possibility that penal law might be used to punish the dangerous. I argue that his account of the legal relation between the subjects of commodity exchange is one-sided. Correcting this one-sidedness demonstrates that the vulnerability of the subject is an inherent aspect of commodity exchange relations. On this basis I sketch a historical account of how the legal ideology has been inverted, displacing the abstractly free individual subject of classical legal ideology with the abstractly vulnerable individual subject of public protection. I consider the implications of this ideological reversal for abolitionist criminal law theory, and conclude by identifying the methodological error that led Pashukanis to his one-sided account of legal relations.

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INTRODUCTION

The ideas of Evgeny Pashukanis might seem to be of strictly historical interest to contemporary legal theorists. We might agree that Pashukanis's *General Theory of Law and Marxism* is an ambitious reconstruction of Karl Marx's fragmentary writings on the historical materialist theory of law. We might regard Pashukanis as Marxism's most significant legal thinker. Those of us who are drawn to the aim of ultimately abolishing state punishment might also agree that Pashukanis's theory allowed him not merely to argue normatively for abolition, but to explain how and why the criminal law came into being and, therefore, how and why it could be abolished in practice. Nevertheless, even if we could agree on all this, we should still be left with serious doubts about the contemporary relevance of a Marxist critique of law.

The practical political defeat of Marxism has been so complete that the entity which Marxism itself claimed as the basis of its doctrines, the revolutionary *movement* of the proletariat, has ceased to be. During the 1980s, the combination of decisive political defeats suffered by the trades unions of the advanced capitalist countries and the ideological surrender of Stalinism and social democracy proved to be fatal for working class politics.¹ While the politics of class may yet revive, their absence in the developed economies in the wake of the recent financial crisis and recession has been particularly striking. This historical reality might lead criminal law theorists, who must grapple with contemporary law, simply to disregard Marxism as a redundant set of ideas. However, notwithstanding the political marginalization of Marxism and of the working class, there are several good reasons to think again about Pashukanis.

Firstly, one important aspect of contemporary legal developments strikingly evokes Pashukanis's critique of criminal law. Chief among the challenges facing contemporary theorists is the recent legislative enthusiasm for reforming and extending criminal law, an enthusiasm that has tended to discount aspects of traditional liberal criminal justice on the grounds that the public deserves protection from the dangerous. It was just such a security policy that, as we shall see, Pashukanis thought would supersede liberal criminal justice norms in a proletarian state. This might be reason enough to think again about Pashukanis, but the really compelling aspect of the connection between him and the contemporary developments is that it is only since the 1990s, *after the defeat of the Marxist challenge to capitalism*, that the previous two centuries of slow and painstaking reform of criminal justice systems in the liberal direction that

¹ To be clear, the class of people who work for wages has not disappeared, nor have trades unions or nominally social-democratic or communist parties. No doubt, those who work for wages are now a larger proportion of the human population than they have ever been before. However, the remaining parties and unions have long ceased to constitute a political movement that promotes the specific interests of wage-labour as a social class, and that interest is not articulated by any significant section of the working class in the most developed economies.

Pashukanis criticized have been fully reversed in favour of a policy that he promoted. The apparently decisive victory of capitalism over socialism has been accompanied by the retreat of classical bourgeois-liberal institutions of criminal justice in the face of a policy rationale promoted by liberalism's socialist critic. At the very least this presents an intriguing irony that is in need of explanation.

This ironic conjuncture is compounded by a further twist in the story that supplies a second reason for thinking that revisiting Pashukanis might have something to offer to contemporary theory. Pashukanis's preference for public protection as the rationale for coercive regulation of individuals may have been endorsed in our own time, but that policy has not come to prominence in the form that Pashukanis expected. He argued that public protection would be the core principle of a new form of rational-technical regulation that was necessarily different from and opposed to what he regarded as the irrational form of law, a new form of regulation that he thought would *replace* criminal law entirely as a socialist society progressed towards the abolition of the state. What has happened in recent years, however, is that capitalist states have adapted the legal form to the needs of protecting the public from the dangerous, something that Pashukanis thought impossible. Exploring Pashukanis's error on this point reveals that his mistake is not to be found in the underlying historical materialist theory of law that he sought to give an account of. As we shall see, the historical materialist theory can explain the securitization of law. Pashukanis's error rather arises from the one-sided account of that theory that he gave.

Uncovering the one-sidedness in Pashukanis's theory of the legal form provides a third reason to think again about him. The legacy of Marxism is not irrelevant to contemporary abolitionist theorizing. On the one hand, the historical materialist theory still has explanatory power; on the other, received Marxist doctrine, and in particular its critique of the abstract legal subject, is a potential source of confusion and misdirection for anyone seeking a critical and abolitionist perspective on the contemporary law. If we confront his theory of criminal law with the content of the contemporary criminal law, we can correct the one-sidedness in Pashukanis's account of historical materialism. In the process, we will also see that persisting with the critique of abstract legal subjectivity and formal equality, without taking account of the new content and claims of law, can only serve to rationalize the contemporary practice of state repression, and to frustrate any endeavour to liberate humanity from the grim necessity of punishment and state repression.

My aim in this working paper is to clarify some elements of a materialist critique of criminal law that would be adequate to the contemporary criminal law and its contemporary ideology. As a result, my focus will be on the particular error in Pashukanis's theory that I have just identified. I will not review or discuss in detail the many other criticisms of Pashukanis's theory of law that have been

made,² although I will return briefly to some of them in the final section below. Nor will I attempt here to do more than set out *the form of the problem* that is presented to abolitionist and historical materialist theory by the changes to law's ideology that have occurred in recent decades. In particular, I will offer only the briefest sketch of a historical materialist explanation as to why the content of law changed in the way that it did in the twentieth century.

In the first section below I will explain Pashukanis's reasons for thinking that legal punishment of the dangerous was conceptually impossible; explore how the contemporary UK law does nevertheless punish subjects for being dangerous; and explain how this law is legitimated in the language of protecting vulnerable subjects, imagined as potential victims of crime. In the second section I will reconstruct Pashukanis's account of the historical materialist theory of criminal law and of its ideology. In the third section I will expose the one-sidedness of his account of legal ideology and show how correcting that one-sidedness can account for the contemporary law and its vulnerable subject. In the fourth section I will outline why the critique of ideology remains useful and how it helps to explain the prominence of the other side of law's ideology in the present. In the fifth section, I will indicate how this ideological reversal changes the task of a materialist abolitionist theory. The sixth and final section is an afterword that briefly identifies the source of Pashukanis's one-sidedness in his Stalinist political and intellectual outlook, and contrasts his outlook with the historical materialist method.

CRIMINALIZING DANGEROUSNESS

In the final chapter of his *General Theory of Law and Marxism*, Pashukanis argued that the aim of protecting society from the dangerous acts of criminals was a rational purpose that lay behind the state's coercive power.³ However, for Pashukanis, this rational purpose was contradicted by the very form of criminal law.⁴ Irrespective of the particular conduct proscribed by any particular offence, the form of criminal proceedings is to establish whether or not there is sufficient evidence of some past conduct and whether responsibility can be attributed to the defendant. If these tests are passed, a court then declares guilt and imposes a proportionate sentence. Pashukanis points out that 'a measure of social defence has no need for this'.⁵ That rational aim, if pursued in its own terms, would

² For a rebuttal of many of them see A Norrie, 'Pashukanis and the "commodity form theory": a reply to Warrington.' (1982) 10 *International Journal of the Sociology of Law* 419-37. For more recent discussions, see C Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006) Ch 3; M Head, *Evgeny Pashukanis: A Critical Reappraisal* (Routledge-Cavendish 2008) Ch 11.

³ E Pashukanis, *The General Theory of Law and Marxism* [1924] Ch 7, available at <http://www.marxists.org/archive/pashukanis/1924/law/>.

⁴ Ibid.

⁵ Ibid.

require only the ‘elimination of a dangerous member of society, or his correction’.⁶ For Pashukanis, incapacitation or reform are acts of ‘pure expediency’ that ‘may be regulated by technical rules’, and require no court case or verdict.⁷

Pashukanis’s point is that the concepts of guilt, responsibility and proportionality of punishment are irrelevant to the concept of social protection. They are oriented to the different, and for Pashukanis irrational, aim of retribution for wrongdoing: ‘One can make a man pay for an action, but it is senseless to make him pay for the fact that society has recognized him [...] to be dangerous.’⁸ In other words, a rational policy of social protection entailed moving beyond the legal form itself – to a different way of organizing society, one without law. Only by getting beyond the legal rituals of prosecutor and defendant, of proof of guilt and responsibility, of just and proportionate sentencing could the underlying rational purpose of identifying the dangerous and protecting ourselves from them be recognized and practiced for what it is. But that is not how it has turned out.

In recent years, many new offences have been enacted in the UK that threaten punishment for doing something that proves that the person doing it is a *dangerous person*, as opposed to threatening punishment for doing something that is intrinsically dangerous or harmful. The most obvious type of dangerousness offence directly punishes people for being perceived as a threat – for causing others to feel afraid. These recent fear offences are to be distinguished from older offences like common assault, where there is intention to cause another to apprehend *imminent* attack,⁹ or threat to kill, where there is an intention that others should believe in a really serious threat.¹⁰ It is enough in the new offences that others are caused or are likely to be caused ‘harassment, alarm or distress’.¹¹

UK law also now contains many ‘preinchoate’ offences that prohibit conduct that is not in itself dangerous but is remotely connected to another criminal harm in a way that identifies the subject who commits it as a dangerous subject.¹² There are, for example, offences that manifest the actor’s dangerousness because of the ulterior purpose with which some otherwise harmless conduct is done.¹³ Some of these offences can involve literally *any* preparatory conduct. There are offences that criminalize conduct that manifests a dangerous disposition in the person who

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Although even here the imminence requirement is loosening, see *R v Ireland; Burstow* [1998] AC 147.

¹⁰ Offences Against the Person Act 1861, s16.

¹¹ E.g., Public Order Act 1986, s5; Protection from Harassment Act 1997, s2.

¹² The term ‘preinchoate’ is intended to distinguish these offences from the properly inchoate offences of attempt, conspiracy and encouragement (see text at n 17 below). It has been used in related but slightly different ways by others, see M Dubber, ‘Legitimizing Penal Law’ (2007) 28(6) *Cardozo Law Review* 2597, 2606; MC Melia, ‘The Wrongfulness of Crimes of Unlawful Association’ (2008) 11 (4) *New Criminal Law Review* 563, 564; A Ashworth, ‘Criminal Law, Human Rights and Preventative Justice’, in B McSherry, A Norrie, and S Bronitt (eds), *Regulating Deviance* (Hart, 2009) 88–9.

¹³ Offences of intentionally preparing another offence are to be found in respect of terrorism (Terrorism Act 2006, s5), child sex offences (Sexual Offences Act 2003, s14), criminal damage (Criminal Damage Act 1971, s3), burglary (Theft Act 1968, s25) and attempted fraud (Fraud Act 2006 s2 Criminal Attempts Act 1981, s1).

does it because it either facilitates or is a necessary precondition of a later offence that may or may not occur as a consequence of the precursor activity.¹⁴ Finally, there are offences that criminalize conduct that manifests dangerousness because the particular *person* who commits it has been specifically prohibited from doing so by a court. These offences occur when preventive court orders are breached. These orders are imposed on people whom, on the basis of past conduct, a court assesses to represent a risk of committing an offence in the future. The orders contain individualized pre-emptive offences that prohibit their subjects from doing *anything* that it is deemed ‘necessary’ to prohibit if the particular subject is to be prevented from committing the offence or offences that they are thought to be at risk of committing.¹⁵ These orders cover a vast range of conduct.¹⁶

Notwithstanding their diversity, all these offences permit conviction and punishment for conduct that is not itself dangerous but rather marks the person who does it as a dangerous person in some way. They are to be distinguished from offences of concrete endangerment, and from attempts or conspiracy, offences that in English law at least prohibit conduct that is *intrinsically dangerous*.¹⁷ Preinchoate offences punish people for intrinsically harmless conduct on the ground that what they have done might lead on to other offences. A critical point to bear in mind about preinchoate offences is that *they discount the formal agency or personhood of offenders*, by discounting the possibility that such offenders may yet change their minds before they have done anything that is actually dangerous or harmful but allegedly pre-empted by these preinchoate offences.¹⁸ This discounting of formal agency represents a qualitative expansion in the state’s coercive power that extinguishes the traditional liberal commitment to formal freedom and challenges the liberal claims made for much existing criminal law doctrine. This is clearly demonstrated by two effects of these offences.

First, the preinchoate offences are justified as pre-empting criminal wrongdoing, but the state is not required to prove that an offence has in fact been pre-empted. It would not be possible to prove it. All that the prosecution is

¹⁴ Examples of such offences include possession of weapons (Firearms Act 1968, s1; Prevention of Crime Act 1953 s1; Criminal Justice Act 1988, s139); glorifying terrorism (Terrorism Act 2006, s1(1)-(3)); handling stolen goods (Theft Act 1968, s22) or money laundering (Proceeds of Crime Act 2002 Section 327); failure to report terrorism (Terrorism Act 2006 s38B) or failure to report money laundering (Proceeds of Crime Act 2002, s330).

¹⁵ Typically these will include curfews, movement restrictions, prohibiting possession of certain items or associating with specific named individuals.

¹⁶ Preventive orders can be imposed on those who have been involved in anything that a court deems ‘serious crime’ (Serious Crime Act 2007 s1-s37). Particular measures are also to be found in respect of terrorism (Terrorism Prevention and Investigation Measures Act 2011, s2-s4), child sex offences (Sexual Offences Act 2003 s104-s113; Sexual Offences Act 2003, s114-s112; Sexual Offences Act 2003, s123-s129), football hooliganism (Football Banning Order, Football (Disorder) Act 2000, Sched 1), alcohol-related disorder (Violent Crime Reduction Act 2006, s1-s14), domestic violence (Domestic Violence, Crime and Victims Act 2004, s1).

¹⁷ See P Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012) 142-43.

¹⁸ RA Duff, *Criminal Attempts* (Oxford University Press, 1996).

required to prove is some conduct that may or may not be a precursor to an eventual offence. The procedural burden of proof remains, but its function of requiring the state to prove that its suspicions are well founded before citizens can be punished is entirely subverted by the substantive law.¹⁹ Second, by extending the scope of the substantive law to cover almost any conduct that might provide evidence that a person constitutes a threat, preinchoate offences tend to imply a truly vast scope of legitimate surveillance by the police. The police have a power to arrest those whom they reasonably suspect of being about to commit an offence,²⁰ but a person who is about to commit a purely preparatory offence is a person who has not got further than *thinking* about the eventual offence to be pre-empted. Logically, this expansion of the scope of the substantive law tends in the direction of legitimating the surveillance of thoughts and opinions, to the point of eliminating entirely any private sphere that is free from state intrusion.²¹

This apparently illiberal power to control threats is not in itself an entirely new characteristic of the state's penal power. Markus Dubber identifies the control of those perceived as dangerous as characteristic of the 'police power'.²² The police power has a very long history indeed in all capitalist societies. In England, the power to bind over can be traced back to Anglo-Saxon times, while offences of public nuisance and vagrancy are almost as ancient.²³ It is striking that Pashukanis showed no interest in the police power when he came to thinking about state coercion in the *General Theory*, a point we shall return to below. However, the ancient powers were of dubious legal form and often relied on highly moralized judgments of behaviour or character. By contrast, the new offences referred to above have articulated the police power in a way that is much more rigorous in its formal legality than the ancient powers.²⁴ Most of the fear and precursor offences mentioned above contain clear definitions of prohibited conduct often with fault elements; all but one of them is governed by normal criminal procedure and evidence rules allowing legal representation, appeals and judicial review.²⁵ All of the criminal proceedings put a formal burden of proof on the prosecution. None of these offences has failed the test of legality in the various articles of the European Convention of Human Rights.

The problem for Pashukanis's theory is not simply the proliferation of these dangerousness offences in good legal form. Equally significant is that these new substantive offences are one aspect of a wider policy of public protection that is motivated in a specific normative language, that of victim protection. These

¹⁹ P Ramsay 'Democratic Limits to Preventive Criminal Law' in A Ashworth, L Zedner and P Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013).

²⁰ Police and Criminal Evidence Act 1984, s24(1)(c).

²¹ See Ramsay, n 19 above. At the time of writing, the practical reality of routine state surveillance of this scope appears to have been confirmed by the revelations of the American former intelligence contractor Edward Snowden.

²² See generally M Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press, 2005).

²³ See M Dubber, *ibid.*

²⁴ For a comparison see Ramsay n 17 above, Ch 8.

²⁵ The exception is the Terrorism Prevention and Investigation Measure, n 16 above.

offences amount to an official critique of the ‘fire brigade’ model of criminal law.²⁶ Why wait for someone to be victimized when it is possible to facilitate ‘early intervention’ with precursor offences of preparation, possession, breaching preventive orders, causing harassment, and so on? In this way, these offences serve to protect the interests of potential victims, people who will not be victimized in so far as these offences permit effective intervention against the dangerous subject. The prevalence of these offences over such a range of criminal conduct, therefore, serves to construct the normal representative interests of law-abiding members of the public as those of potential crime victims. In other words, these offences confirm the observation made by David Garland that the experience of victims of crime is now taken to be ‘representative [...] to be common and collective, rather than individual and atypical’.²⁷ Jonathan Simon draws out the significance of the point: ‘By writing law that implicitly and increasingly explicitly says that we are victims and potential victims, lawmakers have defined the crime victim as an idealized political subject, the model subject, whose circumstances and experiences have come to stand for the general good.’²⁸ The public of ‘public protection’ is *defined by its vulnerability to criminal victimization*.

The protection of the interests of victims has also had a more explicit effect in reforms to criminal procedure, criminal evidence rules and sentencing. There has been a ‘rebalancing’ of the trial process to promote the interests of victims over those of defendants. The burden of proof remains for the most part, but meeting it has been eased by numerous changes to evidence and procedural law.²⁹ In sentencing there have been experiments in restorative justice, on the one hand, offender registration and indeterminate sentencing, on the other; each *intended* in very different ways to protect victims: by therapeutic means in restorative justice, incapacitation of the dangerous in the other two. Rehabilitation, too, has been recruited to public protection in the ‘Rehabilitation Revolution’ proposed by the Ministry of Justice in 2010. Promoting this policy, the then Minister of Justice summed up the official approach:

The safety and security of the law-abiding citizen is a key priority of the Coalition Government. Everyone has a right to feel safe in their home and in their community. When that safety is threatened, those responsible should face a swift and effective response. We rely on the criminal justice system to

²⁶ See J Horder ‘Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation’ in GR Sullivan and I Dennis (eds) *Seeking Security* (Hart, 2012).

²⁷ D Garland, *Culture of Control* (Oxford University Press, 2001) 11.

²⁸ J Simon, *Governing Through Crime* (Oxford University Press, 2007) 110.

²⁹ For example, limiting the right to silence (Criminal Justice and Public Order Act 1994 s34-s37), the right to have witnesses’ evidence examined in court (Criminal Justice Act 2003, s114), relaxing restrictions on bad character evidence (Criminal Justice act 2003 s98-s113), and allowing for double jeopardy where there is fresh evidence (Criminal Justice Act 2003, Part 10).

deliver that response: punishing offenders, protecting the public and reducing reoffending.³⁰

Note that, in the minister's mind, it is those who are responsible for *threatening* the safety of others who should face 'a swift and effective response' from the criminal justice system. It is the dangerous, those who infringe the 'right to feel safe', that are the target of the criminal justice system. The law protects the public's right to security by targeting those who cause insecurity.³¹ Substantive law, procedure and evidence rules, punishment and rehabilitation are all part of the same security package.

Protecting *vulnerable* potential victims is the normative resource that the fear and precursor offences draw upon for their legitimacy. The rights of citizens constructed as potential victims are rights to security from victimization and these rights legitimize the imposition of criminal liability on all for being perceived as dangerous either by directly causing fear or at least engaging in some precursor activity that fails to reassure others about our future intentions so that pre-emptive coercion is necessitated.³² What could Pashukanis make of these offences that explicitly punish people who are proved in court to be guilty of offences that only demonstrate their dangerousness? Pashukanis was not wrong to suggest that non-legal methods of neutralizing the dangerous exist. Nor was he wrong to argue that in so far as social protection is the aim of the law then doctrinal insistence on proving individual responsibility constitutes an antithetical element.³³ He was wrong to assume that the objective of public protection necessarily 'appears in masked form in the legal forms determining punishment for certain crimes', and that people cannot be punished for being considered dangerous by others.³⁴ There is nothing masked about the preventive purpose of many contemporary offences, and punishment for being considered dangerous is exactly what they impose.

One response to his error would be to forgive him for not having a crystal ball, for not predicting the emergence of the victim as the representative citizen decades after he wrote. Having forgiven him, we could then consign his theory to history's garbage dump along with the Marxism that inspired it. However that would be to let Pashukanis off too lightly. His error in respect of public protection derives neither from subsequent contingent events nor from the historical materialist theory of law as such, but from a fundamental one-sidedness in his account of that theory. Rather than forgetting Pashukanis and moving on, abolitionist legal theory can learn something by restoring the other side of the materialist account of law, because that other side concerns security. I will give a

³⁰ K Clarke, Foreword to *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Ministry of Justice, Cm 7972, 2010) 1.

³¹ See Ramsay, n 17 above.

³² This is the difference between the perspective pursued here and Dubber's theory in which preventive police power is 'allegitimate', see M Dubber, 'Criminal Police and Criminal Law in the Rechtsstaat' in M Dubber and M Valverde (eds), *Police and the Liberal State* (Stanford University Press, 2008).

³³ See also HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 48-49.

³⁴ Pashukanis, n 3 above.

brief account of Pashukanis's theory of criminal law and then identify where the protection of the vulnerable that he overlooked fits into it.

ABSTRACT WILL: COMMODITY EXCHANGE AND THE CRIMINAL LAW

Although Pashukanis condemns the criminal law as organized 'class terror' against the working class, he also recognizes that, in form, the bourgeois-liberal order had tended to replace the crude penal methods of the feudal and early modern eras. In their place, had come fines and determinate sentences of imprisonment that appear to give 'numerical, mathematical expression' to the proportionality of the state's retaliation for the criminal injury.³⁵ Pashukanis contrasts the development of determinate prison sentences as a characteristic form of state punishment with the use of imprisonment in the Middle Ages, when prisoners were held for life or until they could buy their way out. Only in the later capitalist society was payment in a proportionate amount of time understood as the just punishment.

The proportionate use of imprisonment bears a particularly striking similarity to the character of economic relations in capitalist society. The fundamental characteristic of capitalism is the domination of society by commodity production: that is, by the production of goods and services for exchange, rather than for direct consumption by their producers, as had been the case in rural pre-capitalist societies. The capitalist exchange of commodities is mediated by the exchange of money. For Marxists, the price of a commodity was a measure of its value in terms of the socially necessary labour-time expended to produce it. Money prices serve to abstract this generic necessary labour-time from the concrete specific labour that any workers expended on its production, rendering all concrete human labour comparable in this abstract form, and all commodities tradable. Similarly, the institution of punishment as a proportionate deprivation of time or money becomes a currency of criminal justice that abstracts from the particular wrong done by any particular offence and equalizes the state's response to it. As a consequence, criminal law embodies the principle of equivalent recompense. This form is, Pashukanis argues, 'deeply, but unconsciously connected with the concept of the abstract man and of abstract human labour time'.³⁶

Criminal punishment gives form to the bourgeois-liberal idea of justice – but it does so in respect of a fair exchange of bads rather than goods. And this just punishment entails conceiving of human beings in the abstract, as *individuals* who are equal in their freedom from the particular statuses and privileges that belonged to the pre-capitalist order, just as the market in commodities 'frees' human labour

³⁵ Ibid.

³⁶ Ibid.

of its concrete particularity. Treated as of equal moral worth, the subjects of criminal law are conceived abstractly as moral subjects, and they can, therefore, be punished only if they are at fault for their wrongdoing. Pashukanis notes that this connection between guilt and psychological responsibility that characterizes modern criminal law doctrine, creates a ‘concept of strictly personal liability [that] corresponds to the radical individualism of bourgeois society’ and this contrasts with ancient rules that ‘were permeated by the principle of collective liability’.³⁷ This concept of individual responsibility is ‘a conception of liability that would be quite superfluous in a situation where punishment has lost the character of an equivalent’.³⁸

The abstract concept of the human being as a moral subject, a legal subject and an egoistic, economic subject – a subject of equal worth with all others and responsible for her choices and actions – is at the heart of modern criminal law doctrine.³⁹ The normative content of the criminal law, therefore, consists of violations of the duties that arise between morally free subjects. Pashukanis notes that the philosophical idea of these moral duties was formulated in Immanuel Kant’s categorical imperative.⁴⁰

According to Pashukanis, these ways of imagining human beings as free moral subjects, and, therefore, morality as we now understand it, can only become the rule when commodity exchange becomes the normal order of civil society. For commodities to circulate, their possessors must be able freely to enter into contracts with each other, and only subjects who are recognized as rational and formally free proprietors are able to do this. The form of law is, therefore, derived from private law: ‘contract is one of the central concepts of law [...] a component part in the idea of law’.⁴¹ The legal superstructure is elicited by ‘dispute’ and ‘conflict of interest’ between these formal equals: it is in a lawsuit, that ‘the parties engaged in economic activity [...] appear as parties, i.e., as participants in the legal superstructure; the court in its most primitive form – this is the legal superstructure *par excellence*’.⁴² The form of law may pre-exist capitalist society, but it only comes to dominate societies in which commodity exchange, and contractual relations between equals, replaces traditional hierarchies as the dominant social relations.

If law is predominant only in societies of commodity production and exchange, then the state’s penal power only acquires the form of criminal law and criminal justice, with its moral subject liable to proportionate punishment on a finding of guilt, in capitalist societies dominated by commodity exchange. The legal form arises as an inherent aspect of commodity exchange, and Pashukanis’s theory has, therefore, been called the commodity form theory of law.⁴³ An

³⁷ Ibid.

³⁸ Ibid.

³⁹ N. Lacey, ‘In Search of the Responsible Subject’ (2001) 64 *Modern Law Review* 350.

⁴⁰ Pashukanis n 3 above, Ch 6.

⁴¹ Ibid, Ch 4.

⁴² Ibid, Ch 6.

⁴³ Although Pashukanis himself did not call it this, see Norrie n 2 above.

immediate objection will be that the criminal law does not involve an action between private parties for a breach of a contract or even a civil wrong. Criminal litigation, by definition, concerns liability to punishment by the state. The criminal law is not elicited by the actions of private parties asserting their subjective rights as legal subjects. On the contrary, it is a set of imperative norms imposed and enforced by the state, which controls the initiative in criminal proceedings.⁴⁴

For Pashukanis, however, this view gets the historical cart before the horse. The role of the state in stabilizing social relations obscures the priority of private law. The existence of subjective rights appears to arise from the state's protection of them in the form of objective norms.⁴⁵ But the reason that the state protects subjective rights is that it is a state that governs a society of commodity owners who make their living by exchanging commodities. Indeed the juridical appearance that law arises from the state rather than from the relations of commodity owners is itself a consequence of a civil society based on commodity exchange since:

neither of two persons exchanging in the market may appear as an authoritative regulator of the exchange relationship; for this, some third person is required who embodies the mutual guarantee which the commodity owners as owners give to one another, and who is accordingly the personified rule of exchange between commodity owners.⁴⁶

A society made up of isolated property owners *whose interests are differentiated and opposed* necessitates a public authority to regulate their relations in the form of the legal guarantees of rights and the enforcement of obligations.⁴⁷ For this reason, Pashukanis regards both natural law and legal positivism as giving one-sided theories of law, but it is natural law that better accounts for law's form.⁴⁸

What is true for the enforcement of contracts is also true for maintaining the peace upon which the civil society of commodity exchange depends. Maintaining the peace is the responsibility of the state. That a society of commodity exchangers is reliant on the state for a guarantee of its social peace does not determine that the state organizes its coercion of threats to that peace in legal form. Rather, as a society dominated by commodity exchange institutionalizes the ideology of legal subjectivity that is the reflex of its exchange relations, that ideology will gradually influence all spheres of social life, eroding the remnants of the traditional pre-capitalist institutions so that more and more of the relations that comprise the totality of society come to be defined and regulated as legal relations. Although

⁴⁴ Pashukanis n 3 above, Ch 7.

⁴⁵ Ibid, Ch 3.

⁴⁶ Ibid, Ch 5.

⁴⁷ Although, as China Mieville argues, this appears to be a practical necessity, rather than an entailment of the legal form itself. For Pashukanis, international law is still law in so far as it treats states as equal subjects even if it depends on a balance of power rather than a superordinate authority. (See Mieville, n 2 above, 124-32).

⁴⁸ Pashukanis n 3 above Ch 5.

Pashukanis does not discuss it in detail, this is arguably the story of the relation between the state and its subjects that is governed by the criminal law.⁴⁹

Pashukanis's theory is a theory of the *form* of law, not a theory of its *content*. Many critics have misunderstood this, and taken his theory to be a (very bad) theory of law's content. The profound reason for this simple misreading by his critics is explained by Pashukanis himself when he notes that the question of the form of law that he is addressing never arises for 'bourgeois philosophy', for which law is simply 'an eternal and natural form of all human relations'.⁵⁰ Rather than asking about the historical relativity of its subject, legal philosophy 'identifies the legal relationship [...] as a voluntary relationship between people in general'.⁵¹ What legal philosophy fails to grasp is that it is only as a result of a specific historical development that this relation of wills escapes the regulation of traditional communal obligations or privileges and becomes the controlling basis of regulation – legal regulation. Moreover, legal philosophy is unable to countenance the possibility that society might reach a point at which neither law nor the state is any longer necessary. Like any Marxist, Pashukanis believed that point would come when a communist society developed humanity's productive forces so as to abolish material scarcity and with it the need for commodity exchange and the opposition of private interests.

Pashukanis argues that 'the opposition of private interests....is the logical premise of the legal form and the real cause of the development of the legal superstructure'.⁵² While 'the conduct of people may be regulated by the most complex rules [...] the legal element in this regulation begins where the individualization and opposition of interests begins'.⁵³ The capitalist state's penal coercion takes the form of law because it is the state that maintains a civil society organized on just such a differentiation and opposition of interests. The criminal *law* is one institutional form of the ideology of the moral subject that is a necessary aspect of a society based on the production of commodities.

It is this ideology that, for Pashukanis, necessarily masks the rational purpose of public protection in the irrational form of legal retribution for past wrongs, and from which the rational purpose needs to be extricated. Pashukanis conceives of the freedom of the abstract moral subject on the classical liberal model of her formal freedom of choice and responsibility for those choices – her formal agency. Only wrongs against that formal agency will be the subject of expiation and retribution. Being perceived as dangerous cannot amount to a wrong against another's formal agency. However dangerous a person is thought to be, others remain free to do as they will. Only trespasses against the person or property of others will amount to a wrong against others' formal agency.

⁴⁹ The mediations between penal power and liberal legal form in English criminal law were supplied by the formal democratization of the state, see P Ramsay 'The Responsible Subject as Citizen' (2006) 69(1) *Modern Law Review* 29.

⁵⁰ Pashukanis n 3 above, Ch 2.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

Note that although Pashukanis's larger theory is a theory of the *form* of law, his claim about dangerousness is a claim about the law's normative *content*, specifically about a content that, according to him, cannot take legal form. As we have seen, this claim turned out to be wrong. Not only do we have laws that hold people criminally responsible for actions that manifest their dangerousness, but in so doing these laws discount the very formal agency that Pashukanis thought lay at the heart of the legal form. His error, however, is not a result of the theory that law is the institutional *form* of relations between abstract individual subjects. Rather, his error arises from his one-sided reading of those relations. We can see this one-sidedness clearly if we consider the private law of contract that Pashukanis regarded as central to law's development.

VULNERABILITY: THE OTHER SIDE OF COMMODITY EXCHANGE

Contract law was, as Pashukanis argued, an institutional form in which possessors of commodities were constructed as free and equal proprietors with a right to exchange what they owned at will. The freedom of contract was, however, never the whole story of contract law. Since capitalism's early days, contracts were subject to judicial or legislative interference and, in the period since Pashukanis wrote, contract law has been hugely affected by regulatory interference, much of it intended to make up for the failure of purely formal equality to achieve what is nowadays called 'social justice'.⁵⁴ Like the police power, this legal regulation of contract is absent from Pashukanis's story. However, *even in the absence of such regulation*, contractual obligations are always inherently a form of protection extended to free and equal proprietors, protection from the effects of their vulnerability to the will of the other party.

In any contract where two proprietors have agreed to exchange goods or services both are simultaneously in the position of promisor (they have promised to do something) and promisee (the other party has agreed to do something in return). If there is a legal dispute between proprietors over the performance of a contract, then this is a consequence of one of the parties in the position of promisee complaining about the non-performance of the other in the position of promisor. The promisee is seeking damages for a breach of contract because the promisor has not performed what was promised. In the legal theory of contract these two sides of a contractual agreement, the promise of the promisor and the reliance of the promisee, each form the basis of a different theory of contractual

⁵⁴ On the rise of freedom of contract, see P Atiyah, *Rise and Fall of the Freedom of Contract* (Oxford University Press, 1985). On twentieth century interference in pursuit of welfare goals, see Atiyah, *ibid*; H Collins, *Regulating Contracts*, (Oxford University Press 2002); R Goodin, *Protecting the Vulnerable* (Chicago University Press, 1985) 61.

obligation that seeks to explain contract law: promissory theory and reliance theory.⁵⁵ In promissory theory, the promisor is legally bound to perform by virtue of having voluntarily made the promise; in reliance theory, by virtue of the promisee's reliance on the promise.

Robert Goodin in his 1985 book, *Protecting the Vulnerable*, adopted the reliance theory to support the view of Adam Smith that 'A promise is a declaration of your desire that the person for whom you promise should depend on you for the performance of it. Of consequence the promise produces an obligation, and the breach of it an injury.'⁵⁶ For Goodin, the source of the obligation of the promisor is, therefore, not that making the promise was a voluntary act, the promisor being bound by her own act of will. Rather it is the *reliance* of the promisee, which is to say, the vulnerability of the promisee, in so far as the latter has based her subsequent actions on the expectation that the promise will be performed.

It is not necessary to adopt the detail of the reliance theory of contract, or to go as far as Goodin does, to see that when the law of contract holds the promisor accountable for her voluntary acts of will, it is in the same moment protecting the vulnerable expectations of the promisee. The promisee's expectations are always vulnerable to the non-performance of the promisor, and what distinguishes a legally binding contractual promise from a non-binding promise is precisely that the state will protect the promisee's vulnerable expectations by enforcing the promisor's broken promise against her in the form of damages.⁵⁷

This other side of legal relations is inherent to them since, as Pashukanis argued, the rule of law arises in a society of differentiated and opposed interests. Logically, these interests are vulnerable to the lack of any shared interest. Subjects are conceived on the model of individual proprietors, who are *both* free and vulnerable to the freedom of other proprietors in the same moment. Private law can be understood not only as institutionalizing the abstract freedom of atomistic proprietors but also as protecting the 'expectations generated by interdependence' between them.⁵⁸ Vulnerability to others' non-performance of a contractual obligation is the inherent other side of the individual liberty to enter into such an obligation at will. Indeed it is just this problem in commodity exchange that necessitates the rule of *law* as a solution. Legal relations arise on the model of natural law because they are respectful of the inherent formal equality of their subjects. But by enforcing contractual promises in the form of state-backed positive law, legal relations serve to secure the otherwise vulnerable expectations of those formally free and equal proprietors. Without this element of vulnerability, private relations of commodity exchange *as such* would have no need for enforceable *legal* relations. Protecting the vulnerability of the individual subject

⁵⁵ See S Smith, *Contract Theory* (Oxford University Press, 2004) 43-44.

⁵⁶ A Smith 'Lectures on Justice, Police, Revenue and Arms' cited in Goodin, n 54 above, 43.

⁵⁷ Damages are calculated so as to put the claimant in the position she would have been in had the contract been performed, that is the position she would have had good reason to expect to be in had the contract been performed. See *Robinson v Harman* (1848) 1 Ex 850.

⁵⁸ R Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983) 82-3.

from the prospect of others' non-performance of a contractual promise is, therefore, a fundamental aspect of the form of private law.

In the classical liberal ideology the security of vulnerable expectations was guaranteed by the availability of legal action after a breach of obligation. Similarly, the classical model of criminal law was one of punishment after a trespass against another's person or property. Our present practice of criminalizing dangerousness represents a critique of that model, premised on the belief that it is irrational to wait for a trespass and only punish after the fact. Instead, obligations not to be dangerous are created, establishing norms that identify the interests of the representative subject with those of someone who has actually been the victim of a breach of obligation. This is certainly a radical reversal of the legal ideology. It is, as we shall see below, a reversal that constitutes a threat to the continued survival of civil society.⁵⁹ Nevertheless, the punishment of the dangerous that this radical reversal implies is able to take legal form because this legal content is derived from a fundamental aspect of commodity relations.

Pashukanis seems not to have considered this other side of the commodity exchange relation, and it did not occur to him that control of the dangerous might acquire the form of criminal *law*. This is particularly striking given that Marx had famously argued that 'security is the highest concept of civil society'. Moreover, Marx thought that the reason for this ultimate priority of security was that for the bourgeois order of differentiated private interests and opposed wills, 'the whole of society exists only in order to guarantee to each of its members the preservation of his person, his rights, and his property'.⁶⁰ No doubt Pashukanis regarded this security as achieved by the threats of state punishment, backed up by the practice of punishment, through which the criminal law exercised its class terror. However, as we have seen, the fundamental vulnerability of the legal subject of civil society makes possible a more radical incorporation of security interests into the content of law than Pashukanis allowed for, giving the lie to his claim that control of the dangerous could not take legal form.

Marx had deployed the 'weapon of critique' to expose the police power that lay in the background of the liberals' rights of man. Today that image is reversed. Critique is faced with the transformation of the old ideology: the law foregrounds its claim to secure our vulnerability from the lurking danger represented by others' free will. This is an ideological reversal that could be achieved without abandoning the legal form because it is a reversal that is consistent with a regime of commodity exchange. However, showing that the current legal order is a conceptual possibility from the historical materialist standpoint does little to

⁵⁹ See text at n 76 below.

⁶⁰ K Marx, 'On the Jewish Question', available at <http://www.marxists.org/archive/marx/works/1844/jewish-question/>. My thanks to Lindsay Farmer for reminding me of this. See also M Neocleous, *Critique of Security* (Edinburgh University Press, 2008) Ch 1.

explain how and why it came into being, something a historical materialist theory must be able to do.

THE IDEOLOGY OF PUBLIC PROTECTION

I cannot here attempt anything approaching a fully argued historical account of the social processes that have tended towards the inversion of the legal ideology. I can, however, sketch its basic elements, if only to show that in principle such an argument could be made. I will do that by critically revisiting Pashukanis's account of ideology.

Ideology has become an unfashionable concept that seems to belong to the past. However, as we shall shortly see, if we critique the ruling ideas of the present as ideology, we can identify the historical conditions that explain why they rule, which is to say, their historical relativity. This makes it possible to free ourselves from 'the imaginative grip of actuality' that the ruling ideas otherwise impose on us,⁶¹ an essential task for anyone who would seek to abolish the actuality that is the continuing necessity of penal repression. By contrast, the idea that the era of ideology has ended is, as Susan Marks points out, itself an ideological proposition insofar as it precludes the possibility that the ruling ideas of our own time are historically relative, and, therefore, rationalizes existing 'relations of domination'.⁶²

Pashukanis's understanding of the moral and legal subject as *ideological* forms taken by the social relation of commodity production attributes a quite specific meaning to ideology. Ideological concepts are not simply false. Rather they are concepts that are 'adequate for only one specific social relationship, and reflect it only abstractly and therefore one-sidedly'.⁶³ This means that 'the discovery that these concepts [are] ideological [is] another aspect of the process of discovering that they [are] true'.⁶⁴ The critique of legal doctrines as ideological doctrines is, therefore, a means towards establishing the other side of social reality that the doctrine obscures, and the critique of ideology guides us towards the historical circumstances in which the world appears in this one-sided way, systematically privileging one aspect of social relations at the expense of another.

To understand the historically specific circumstances that we find ourselves in, we can ask to what social relations is the new ideology adequate, and how is it a one-sided representation of those social relations? We can clarify the answer by first specifying more precisely the social relation to which the old classical liberal ideology, the one critiqued by Pashukanis, was adequate. For Marxists, the legal ideology of abstract subjectivity gave an adequate account of the sphere of commodity *exchange*, 'within whose boundaries the sale and purchase of [the

⁶¹ S Marks, *The Riddle of All Constitutions* (Oxford University Press, 2003), 26.

⁶² Ibid, 17-18.

⁶³ Pashukanis n 3 above, Ch 6.

⁶⁴ Ibid.

commodity] labour-power goes on', and which 'is in fact a very Eden of the innate rights of man [...] because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will'.⁶⁵ What the legal ideology nevertheless obscured was the despotism of the employer of labour-power in the sphere of commodity *production*, where the commodity purchased with wages is used to produce commodities for the employer's profit, and where exploitation and alienation reign. For Pashukanis, this ideology was, therefore, intellectually 'adequate' to capitalist social relations in so far as it gave a one-sided expression to those relations, emphasizing the aspect of freedom and justice while obscuring the aspect of compulsion.

Here again, however, we need to go further than Pashukanis's account. Ideology is always more than a mere theory. In its one-sidedness, it is a 'practical discourse', adequate to particular social relations because it explains them to 'practical consciousness' in such a way that the interests of one particular group are represented as the interests of all.⁶⁶ In the Marxist account, this universalizing aspect of an ideology serves to legitimize the social relations that it one-sidedly represents.⁶⁷ Classical liberalism was in this way *politically* adequate in so far as its one-sided representation of capitalist social relations successfully legitimated law by representing the particular interests of proprietors as the interests of all. However, in this political sense, classical liberalism was adequate to the social relations of capitalism only for as long as the workers had no political influence.

Most workers, who actually experienced the compulsion and exploitation of the workplace, and the low wages and dire conditions that characterized classical liberalism's nineteenth century heyday, were never much impressed by the ideological claims made for the individual as proprietor. They tried instead to improve their negotiating position by combining together into trades unions that aimed to monopolize the supply of labour. Moreover workers' organizations and their activists tended to be drawn to various critiques of classical liberalism and the free market: to various types of socialism and communism, and to reformist social democracy. These provided the ideological basis of mass political parties and this democratization transformed the ideological landscape of capitalist societies. Elites responded to the socialist threat with the development of social liberal parties and conservative and nationalist parties that sought to mobilize the population with forms of mass solidarity that could rival those of the socialist movement.

In the first half of the twentieth century, the classical liberal ideology was squeezed out by the competing claims of these new ideologies. By 1945 the conflicts engendered by the competition between international communism and capitalism, on the one hand, and between the rival imperialist nationalisms, on the other, had been fought to a standstill. Capitalism in Europe and East Asia lay

⁶⁵ K Marx, *Capital* [1867], Ch 6, available at <http://www.marxists.org/archive/marx/works/1867-c1/>.

⁶⁶ See I Meszaros, *The Power of Ideology* (Harvester Wheatsheaf, 1989) 10-12.

⁶⁷ See also Marks, n 61 above, 19-20.

literally in ruins. The international communist movement had been reduced to a pawn in the foreign policy of a repressive and defensive Soviet Union. In the West, organized labour and capital compromised with each other around the ideology of social liberalism: the nation state as a democratic welfare state.

Each of these new ideologies proposed an alternative to the interest of the individual proprietor to represent the interests of all, and thereby to legitimize state coercion. Indeed each posed a different *collective* subject as the source of political legitimacy: the international working class, the Fatherland (or King and country in its British version), the democratic welfare state. And all of these rival collective subjects arose together as expressions of, or reactions to, the emergence of the mass of working people as self-conscious political subjects of history. As a consequence of this existential interdependence between the different collective subjects, the defeat and disappearance of the political movement of working people in the class struggles of the 1970s and 1980s removed the rationale for *all* of these collective subjectivities as a basis of political legitimacy. The cause of each is still pursued at the margins by the remaining Marxists, social democrats or national supremacists but none has any mass political influence.

In their place, 'neoliberalism' has triumphed. However, as the market's more thoughtful advocates have recognized, there cannot be a simple return to classical liberal ideology.⁶⁸ On the contrary, the demise of the old collective subjects has taken legal form in the inversion of the classical liberal ideology.⁶⁹ Laws are no longer justified in terms of the freedom of the individual who enjoys an atomized independence of others so that she may choose as she wills, but, as we saw above, in the regulatory terms of the vulnerability of the individual who endures a relational dependence on others so that she needs protection from the potential consequences of their formal freedom.⁷⁰ The subject's formal agency now appears as a still necessary but presumptively suspect aspect of market relations.

If the old ideology was politically adequate to capitalist social relations, but only *before* the workers movement gave political force to the critique of the market, the new ideology is also 'adequate' to the capitalist social relation, but only *after* the workers challenge to market relations has been seen off and all collective political subjectivity has declined. The ideological movement between these two periods, through the intervening period in which the democratic welfare state provided the source of political legitimacy, was articulated by the transformation of liberalism from classical liberalism through social liberalism to neoliberalism.⁷¹ The present ideology of public protection, with its representative subject who is vulnerable in

⁶⁸ Friedrich Hayek always argued that the free market needed supplementing with traditional religious sources of moral authority, and, as neoconservative Irving Kristol pointed out, these sources are now sorely lacking in practical influence. The turn to vulnerability as a legitimating discourse is the consequence. For a discussion see Ramsay, n 17 above, Ch 5.

⁶⁹ Hence the name - *neoliberalism*.

⁷⁰ As Richard Ericson put it, 'the neoliberal subject becomes a risk-avoider rather than a risk-taker' (see R Ericson, *Crime in an Insecure World* (Polity, 2007) 217).

⁷¹ For my still fragmentary account of the relationship between the ideologies of the welfare state period and of the present in the development of criminal law, see Ramsay n 17 above, 86-88, 96-105, 202-10, 238-41.

the abstract, was incubated in the welfare state, which promised autonomy by offering *social security* to those whose particular vulnerabilities to poverty, unemployment, poor health, ignorance and so on (vulnerabilities arising from their concrete position in the social relations of capitalist society) constituted a threat to their autonomous participation in social life.⁷²

Many of the contemporary arguments over criminal justice policy reflect the tension between providing security from the effects of the abstract universal vulnerability that lies at the heart of the ideology of public protection and protecting people from the effects of the concrete particular vulnerabilities emphasized by social liberalism. The school of thought that is conventionally referred to as penal ‘liberalism’ tends to emphasize the concrete vulnerabilities of offenders drawn into the criminal justice system, while penal ‘neoliberals’ emphasize the universal vulnerability in the abstract of the representative subject as potential victim.⁷³ Both the conceptual relation of concrete and abstract vulnerability, and the history of their political mobilization in the rise and fall of the welfare state, need more detailed development than I can give them here.⁷⁴ For present purposes, it is more important to emphasize the way in which the new ideology of public protection constitutes a one-sided representation of the specific characteristics of the capitalist order after the disappearance of collective political subjects, an ideology that could only arise from the social relations of this time.

In the first place the new ideology gives form to the disappearance of the old collective subjects. As the common interests asserted by the old ideologies waned, subjects were reconstructed ideologically as beings who are systematically vulnerable to others’ free will, engendering our current political climate of systematic suspicion about others’ unregulated wills. The interests of the law’s vulnerable subjects appear to lie in state surveillance of other subjects’ formal freedom and, where necessary, ‘early intervention’ against those identified as dangerous. In the same process, the power of subjects to achieve *collective* political ends is obscured, for this is a power that is dependent on the formal freedom of others.⁷⁵ Vulnerable subjects are ideologically constructed as needing protection *by the state* from other subjects, precluding the imaginative possibility of combining

⁷² The welfare state was a system of regulatory public law institutionalizing the protection of more specific concrete vulnerabilities, (see Goodin n 54 above, 61). As Goodin points out, it also had huge implications for the private law of contract (ibid), which has arguably been transformed if not ‘disintegrated’ by the process (see Collins, n 54 above). For an attempt to understand the regulatory law in Pashukanis’s framework, see Mieville n 2 above.

⁷³ The equivocal character of the concept of vulnerability has been noted by Kate Brown, see K Brown, ‘Vulnerability: Handle with Care’ (2011) 5(3) *Journal of Ethics and Social Welfare* 313. The potentially repressive and exclusionary effects of the deployment of the category of vulnerability on those who experience particular concrete vulnerabilities themselves have been observed by J Edstrom, ‘Time to Call the Bluff: (De)-constructing “Women’s Vulnerability”, HIV and Sexual Health’ (2010) 53(2) *Development* 215; V Munro and J Scoular, ‘Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK’, (2012) 20(3) *Feminist Legal Studies* 189; K Brown, ‘Remoralizing “vulnerability”’ (2012) 6(1) *People, Place & Policy Online* 41.

⁷⁴ For some more detailed discussion, see Ramsay, n 17 above, 124-30. See also n 90 below.

⁷⁵ See Ramsay n 19 above.

politically with other subjects to achieve liberation *from the state*. Moreover, the expansion of the scope of the state's penal reach that is legitimized in the name of public protection, gives ideological form to a second aspect of the contemporary social order – the state's diminished political authority.

Actual victims are people who have experienced the state's failure to prevent criminal violations of civil order. 'The victim' is, therefore, the person who has reason to doubt the state's claims to maintain civil peace and civil order. To institutionalize the victim as the *representative subject* of law, as legislators have done, implies that the law's norms are not routinely obeyed, so that victimization is a normal social experience. It implies that the law's moral norms are not the norm in the sociological sense. This truly extraordinary *official promotion of anomie* threatens to unravel civil society.⁷⁶ It is an admission by the state of diminished political authority, and it indicates the degree of political sclerosis afflicting capitalist societies that have seen off the working class challenge but in the process destroyed all collective political projects, dramatically reducing the flow of authorizing political blood through the veins and arteries of the democratic process.⁷⁷ Citizens have in consequence been ideologically reconstructed as vulnerable victims, expressing the decline of the state's authority in the mystifying form of an expansion of the state's coercive powers.

That law should find itself discounting the formal individual freedom on which its rule is founded, and tacitly conceding its own lack of authority in the process, is not an especially remarkable finding for a historical materialist theory, premised as it is on grasping the dialectical unity of the contradictory tendencies to be found in any social phenomenon. It does, however, require us to rethink what might constitute a historical materialist critique of the legal ideology.

TOWARDS A CRITIQUE OF THE VULNERABLE SUBJECT

The ideology of criminal law is being turned inside out. The old ideological images will not be quickly or entirely erased. Much of existing criminal law doctrine was developed at a time before the current ideological development was established, and it will continue to inform particular decisions,⁷⁸ especially in the case law concerning longstanding complete offences.⁷⁹ But formal freedom will, for the present at least, tend to be understood from the perspective of its abstract vulnerability. Where the classical liberal ideology valued abstract individual

⁷⁶ See Ericson, n 70 above, 213; and Ramsay, n 17 above, Ch 10.

⁷⁷ The evidence is summarized in C Hay, *Why We Hate Politics* (Polity, 2007) 11–39.

⁷⁸ Particular legal decisions will be subject to conflicting legal principles produced by different ideological emphases and will not be objectively determinable. But the conditions of that conflict of legal principles are subject to determinable historical shifts producing the dominance of one principle or another at different times.

⁷⁹ Although the new ideology has had influence even here, see the discussion of theft and assault in Ramsay, n 17 above, Ch 7.

freedom while obscuring the practical compulsion experienced by a class of formally free individuals, the ideology of public protection, or ‘vulnerable autonomy’, highlights the compulsion of fear and anxiety experienced by formally free individuals and in the process casts suspicion on abstract individual freedom.⁸⁰ Where the classical liberal legal order sought to protect abstract individual freedom notwithstanding its effects on vulnerable others, the contemporary order seeks to protect subjects from the effects of their vulnerability notwithstanding the impact of that protection on others’ individual freedom. Where the classical liberal order proclaimed the authority of the state on the basis of its ideological institutionalization of the individual subject’s freedom, the contemporary order concedes the decline of state authority by ideologically institutionalizing the subject’s vulnerability.

On the one hand, the contemporary criminal law can still be understood as the form of state coercion appropriate to the social relations of commodity exchange, as Pashukanis argued. On the other, the social and political circumstances in which commodity exchange takes place have changed radically, and with them law’s content and ideology. An abolitionist theory of law needs to take this radical alteration of law’s content and ideology into account. To develop an effective critique of the securitization of law we cannot simply apply the concepts provided by doctrines developed to explain different circumstances. We need to begin with the historically specific circumstances that we, the subjects of law and the makers of history, have inherited from the conflicts of the past and from the terms of their resolution.

A historically specific critique of the contemporary order therefore requires a radical shift of perspective. The rationale of contemporary legal coercion is *not* an aggressive *individualism* founding state authority on the promise of individual freedom. On the contrary, the rationale of legal coercion is a defensive *relational* ideology that tacitly concedes the state’s lack of political authority. It is no critique of the new ideology to draw attention to law’s individualism and authoritarianism. And it is not simply that such an approach would miss its target. When the criminal law’s ideology itself endorses a critique of the freedom of the abstract will in the name of the vulnerable subject, continuing with an unmediated criticism of abstract individual freedom risks simply refining the justification of the existing powers of coercion. A materialist critique of the new ideology entails a critique of the concept through which the law’s assault on formal agency succeeds in occluding both the state’s underlying weakness and the capacity of its subjects collectively to overcome the repression that characterizes a weak state: that is, a critique of the vulnerable subject.⁸¹

⁸⁰ The historical materialist theory implies that the individual freedom of the abstract legal subject remains a necessary aspect of a system of commodity exchange, however problematic that freedom appears. See J Heartfield, *The Death of the Subject Explained* (Sheffield Hallam University Press, 2003) 5-7.

⁸¹ There is a growing literature on the vulnerable subject but a systematic historical theory of its current predominance remains underdeveloped. For favourable theoretical elaborations of the idea of the

At the same time, the critique of the vulnerable subject will be itself one-sided, and ultimately futile, if it simply returns to a liberal/libertarian defence of the freedom of the abstract individual subject as a proprietor of commodities. It will be one-sided because, as we have seen, the abstract will entails the vulnerability of the subject. Such a critique will be futile because it will be grounded on nothing more than the other side of vulnerability. In other words, it will rely on the very category that is the basis of the law that it seeks to critique – the subject of commodity exchange.

It is the logic of commodity exchange, of *securing* the conditions of *equality between antagonistic individual wills*, the logic of justice and fairness that underpins the development of the law. The present normative priority given to the security of the abstractly vulnerable subject is a reversal of the classical ideological presentation of commodity exchange as the liberty of the abstract individual legal subject. To respond to this repressive mobilization of vulnerability, to this securitization of law, by merely insisting on the claims of individual liberty over those of the vulnerable is to do no more than reverse the reversed ideology once again. A historically specific materialist theory of contemporary penal repression entails neither a dogmatic critique of the Enlightenment's abstract individual subject nor an ahistorical defence of him. It requires instead a critique of the contemporary critique of the abstract subject, a critique that exposes the historical transience of the vulnerable subject and the ideology of public protection. This paper is intended as a contribution to that critique.

AFTERWORD: PASHUKANIS THE ORTHODOX STALINIST

There are at least two other ways in which Pashukanis's theory is one-sided, in addition to his one-sided account of commodity exchange relations.⁸² Though his account of the connection between the form of commodity exchange and of criminal justice is compelling,⁸³ he paid no attention to the administrative police powers that the capitalist states of his own time also wielded and that were oriented to the neutralization of the dangerous. In so far as Pashukanis's theory was a theory of the form of *law*, it might not matter much that the coercive power

vulnerable subject, see Bryan Turner's theory of human rights in *Vulnerability and Human Rights* (University Park: Penn State Press, 2006); Martha Fineman's theory of the responsive state in 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-2009) 20 *Yale Journal of Law and Feminism* 1, and, in a more indirect form, Robert Goodin's theory of moral and political obligations in *Protecting the Vulnerable*, n 54 above. Critical and historically minded contributions include Frank Furedi's phenomenology of the vulnerable self in *Therapy Culture: Cultivating Vulnerability in an Uncertain Age* (Routledge, 2003); Jonathan Simon's historical taxonomy of representative subjects in *Governing Through Crime*, n 28 above; Stuart Waiton's critique of the social construction of anti-social behaviour, *The Politics of Anti-Social Behaviour: Amoral Panics* (Routledge, 2008); my own account of the 'theory of vulnerable autonomy' in *The Insecurity State*, n 17 above.

⁸² See D Garland, *Punishment and Welfare* (Oxford University Press, 1990) 116-17.

⁸³ Notwithstanding the derision aimed at it by radical commentators, see Norrie n 2 above.

of capitalist states can take *non-legal* forms of police power. But it matters a lot when he moves on to an argument for replacing law with technical regulation of the dangerous – a practice long pursued by the deployment of police power in the ‘bourgeois states’.⁸⁴ More striking still is his omission to point out that penal *law* offers some minimal protection to workers considered as individuals even as it permits state repression against them as a class, a point that would have been an entirely orthodox element of a Marxist critique of law as ideology.⁸⁵

These theoretical errors were truly disastrous in the particular historical context in which Pashukanis made them: disastrous both for the abolitionist cause and for Pashukanis. His proposal to replace bourgeois criminal law with rational technical regulation was a proposal to eliminate the limited protections afforded by law and to replace them with the most discretionary of police powers. And it was not merely a theoretical proposition. Pashukanis was not a revolutionary trying to inspire the overthrow of a capitalist state, but one of the leading legal thinkers of a state that had arisen out of just such an overthrow. He was, therefore, able to put his ideas into practice in the form of draft penal codes that were influential in the education of legal cadres for the Soviet state and actually adopted in some of the Soviet republics.⁸⁶

Pashukanis’s codes dispensed with a detailed special part containing clearly defined offences. Instead they allowed for maximum flexibility in targeting those who violated a vague ‘Soviet criminal policy’.⁸⁷ His purported Marxist rationale for this was that the proletarian revolution was in the process of ending class conflict in the Soviet Union and with it the need for the state and law. The codes were supposed to be part of the transition to the technical regulation that Pashukanis believed was an aspect of the withering away of legal coercion. The idea of replacing law with the technical regulation of persons was, in any case, a paradoxically technocratic interpretation of the withering away of the state that owed more to Pashukanis’s revisionist endorsement of utilitarianism than it did to Marx,⁸⁸ who conceived of the withering away of the state as a process of radical democratization.⁸⁹ This was not Pashukanis’s only departure from orthodox Marxist doctrine.⁹⁰ In the context of the Soviet Union, however, Pashukanis’s

⁸⁴ See Dubber, n 22 above.

⁸⁵ See discussion at n 65 above, and R Fine, *Democracy and the Rule of Law* (Pluto, 1984) 158-59.

⁸⁶ P Beirne and R Sharlet, *Introduction to Pashukanis* [1979], available at <http://www.marxists.org/archive/pashukanis/biog/biogintro.htm>.

⁸⁷ Ibid.

⁸⁸ On utilitarianism see Pashukanis, n 3 above, Ch 6.

⁸⁹ See Fine, n 85 above, 169.

⁹⁰ Karl Korsch noted significant equivocations in the *General Theory* on the eventual elimination of coercion and morality in a communist society, and questioned his focus on exchange relations without any real attention to capitalist production relations and the class content of law (see Review of the 1929 German edition, reprinted in E Pashukanis, *General Theory of Law and Marxism* (Pluto, 1978) 190-91. Robert Fine takes up Korsch’s critique of Pashukanis’s formalism, arguing that Pashukanis’s one-sided hostility to law arises from it (see Fine, n 85 above). This criticism is an important one. The connection between exchange relations and production relations is a potentially significant question in developing a full account of the relation between concrete and abstract vulnerability, but I cannot pursue it here.

belief was not only un-Marxist, it was also ‘illusory’, as Karl Korsch put it, because it was derived not from an analysis of the concrete historical conditions but from loyalty to the subjective goal of the ruling political party.⁹¹ There was in fact no sign of the Soviet state withering away at the time that Pashukanis was writing. The international proletarian revolution had stalled in the 1920s and most of the Soviet workers who had backed the 1917 revolution had been physically destroyed fighting the civil war and Allied invasions that followed it. All the evidence pointed to the consolidation of the power of state bureaucracies as the Soviet Union, with an underdeveloped rural economy and surrounded by enemies, struggled to survive. Moreover, Pashukanis was an energetic contributor to that consolidation.

While Josef Stalin’s terror against the peasantry was in full swing in the early 1930s, Pashukanis was loyally struggling to eliminate any remaining protection provided to ‘abstract’ individuals by the ‘irrational’ intricacies of ‘bourgeois’ criminal law and helping to consolidate the ‘jurisprudence of terror’ with his criminal codes.⁹² By the mid-1930s, however, Stalin had secured dictatorial control over the state that Pashukanis had helped him to build, and, as dictator, Stalin no longer wished to claim that this state was going to wither away. Pashukanis’s insistence that Marxism envisaged the eventual abolition of law now ceased to be useful. Despite desperate efforts to adapt to the new demands, he disappeared in the Great Purge of party officials during 1936-37.⁹³

Pashukanis’s one-sided account of criminal law is characteristic of an ‘orthodox Stalinist’, as one contemporary dubbed him.⁹⁴ Whatever his intentions, his intellectual method was the opposite of Marx’s. Rather than developing an immanent critique of Soviet law from an analysis of the historically specific circumstances that confronted the Soviet Union in the 1920s, he set out from an insightful but one-sided reconstruction of Marx’s critique of law, mechanically applying his interpretation of the master to Soviet society.⁹⁵ This doctrinaire approach permitted Pashukanis to substitute sentimental loyalty to the subjective aims of the Soviet party for sober consideration of the objective historical circumstances that the working class movement confronted, and to do so in the name of Marxism. And the consequence of his dogmatic hostility to legality and to the legal subject was not the abolition of state and law, but the consolidation of a highly repressive state and the abolition of Pashukanis.

His story might be thought of as tragic. He recovered important elements of Marx’s theory and put them in the service of Stalin’s liquidation of Marxism and Marxists. In the name of liberation from the state, he contributed to the building of Stalin’s state. By grasping the Stalinist character of Pashukanis’s policy of

⁹¹ Korsch, *ibid*, 193.

⁹² Beirne and Sharlet, n 86 above.

⁹³ See Head, n 2 above, Ch 8.

⁹⁴ L. Trotsky, *The Bonapartist Philosophy of the State* [1939], available at <http://www.marxists.org/archive/trotsky/1939/05/bonapartism.htm>. See also B Bowring ‘Positivism versus self-determination: the contradictions of Soviet International Law’ in S Marks (ed), *International Law on the Left* (Cambridge University Press, 2011) 151.

⁹⁵ Korsch, n 90 above, 193-94.

regulating the dangerous, we can better understand the ironic paradox, from which we set out, of neoliberalism now adopting the same approach. Like early Stalinism, neoliberalism expands state coercion in the name of liberation from the state.⁹⁶ Moreover, the objective historical circumstances in which both Stalinism and neoliberalism experience their political success share a common feature: they both arise as a consequence of the defeat of the democratic movement of working people (albeit at different moments of that defeat).

Pashukanis's theory was itself an aspect of the Stalinist ideology of socialism in one country, during the period of Stalinism's rise to power. His overstating of the opposition of law and regulation, and his overlooking of the underlying commitment of bourgeois civil society to security, made it possible for him to present the technocratic deployment of state power in the service of security as an aspect of the eventual abolition of the state. In this way, Pashukanis's theory permitted the interests of the developing bureaucracy of the Soviet state to be represented in an apparently Marxist language as the interests of humanity as a whole. That this was possible might seem absurd and grotesque to us now. However to persist with a one-sided, Marxist-inspired critique of the abstract legal subject in the present would be to run the risk of farcically repeating Pashukanis's tragedy. Those interested in a materialist and abolitionist critique of criminal justice can avoid that risk by avoiding his methodological error. We should avoid dogmatically imposing the Marxist critique of the legal subject onto the present as a substitute for the immanent critique of contemporary social relations that Marx himself practiced.

Unlike Pashukanis, we must first and foremost try to grasp the tendencies of development in the historically specific circumstances that we have inherited from the past. The ideas of the thinkers who influenced the people who bequeathed us these circumstances are only important in so far as they inform this primary task.

⁹⁶ My thanks to Pat O'Malley for the thought.