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LESSONS OF SOVIET JURISPRUDENCE: LAW FOR SOCIAL CHANGE VERSUS INDIVIDUAL RIGHTS

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> It is of the essence of reason and morality that they cannot result from legal compulsion but can only be achieved in freedom. This wrecked enlightened despotism, which constituted another form of individualism, for it wanted to serve the individuals—serve them even against their wills—and to enforce the unenforceable—reason and morality.[1]

Lawyers hope to be more than mere bureaucratic manipulators of legal rules; they aspire to membership in a learned profession. This requires some understanding of the chief differences between the Anglo-American legal systems and the other major legal systems in the world. Few American lawyers expect to have much professional contact with these other legal systems, especially the Marxian socialist ones. Hence the practical need for familiarity with these legal systems in detail is limited. The significance of the Marxian socialist legal systems for the average American lawyer lies not in the realm of legal practice, but in the realm of legal ideas. In this realm these legal systems are significant indeed, not only for general understanding of the operation of law in Communist countries and lesser developed ones torn between Marxian socialism and liberal democracy, but for understanding current rhetoric about law in the streets of America as well.

Unwittingly, American legal education has created an obstacle to understanding the larger implications of Marxian socialist law. Heretofore, American law schools have emphasized a particular method of learning legal rules and dealing with them. It

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[1]Radbruch, *Rechtsphilosophie*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 43, 99 (1950).

consists largely of verbal analysis of executive, legislative, or judicial documents as applied to specific fact situations. This educational procedure nourishes a tendency to consider larger ideas about law as useless and unknowable. It is easy to dismiss serious thought about them with the comment "whatever that means." Larger ideas about law are not always studied best in judicial opinions of actual cases or document-oriented descriptions of legal institutions. Sometimes jurisprudential ideas may be studied most profitably in their most obvious form: prose written for the primary purpose of purveying ideas. For example, an American lawyer may absorb from his legal culture sufficient ideas about liberal democracy to deal with the fundamental concepts of American constitutional law without reading the *Federalist Papers*. If he wants to understand the Islamic legal systems, however, and consider the lessons of Islamic jurisprudence, he should have some familiarity with the basic ideas in the Koran. Similarly, understanding the Marxian socialist legal systems and the implications of Marxian socialist jurisprudence requires some familiarity with the Marxist-Soviet classics as a system of foreign jurisprudence.

This inquiry need not detract from the study, using traditional methods and materials, of the Soviet legal system as a system of foreign law. Such study purports to understand the operation in practice of the Soviet legal system and its legal institutions. Nor need a study of Soviet jurisprudence interfere with the development of a sociology of Soviet law to determine the actual interrelations of Soviet law and Soviet society. In fact, these three studies may complement each other, and full understanding eventually requires knowledge of all three: Soviet jurisprudence, Soviet law as such, and the sociology of Soviet law. Nevertheless, American lawyers may begin by analyzing Marxist-Soviet ideas as a system of Soviet jurisprudence.[2] Armed with a notion of what Soviet jurists say they want law to do, the American lawyer is then in a better position to assess the practical operation of the Soviet legal system.

Much Soviet jurisprudence criticizes as "bourgeois law" the law of capitalist countries preceding the communist revolution. Soviet jurists consider this law as mere superstructure, the re-

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[2]On Soviet jurisprudence, see W. FRIEDMANN, LEGAL THEORY 367-86 (5th ed. 1967); H. KELSEN, THE COMMUNIST THEORY OF LAW (1955); R. SCHLES-

sult of material forces of production. Another major portion of Soviet jurisprudence deals with socialist legality, which justifies support of the state during the dictatorship of the proletariat. This Article focuses on the third major subdivision of Soviet jurisprudence: the role of socialist law, in the period of the dictatorship of the proletariat, in preparing Soviet man for the withering away of the state and the advent of communism. This portion of Soviet jurisprudence is particularly instructive for American lawyers in furnishing an extreme example of a seemingly necessary interrelation between two major functions of law in any legal system.[3] The parental or educational function of law in Soviet jurisprudence is to change mankind in preparation for the withering away of the state.[4] The result of this authoritative program is an increase in the allocation of power to Soviet law-

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INGER, SOVIET LEGAL THEORY (2d ed. 1950); J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 490-515 (1966); Gsovski, *The Soviet Concept of Law*, 7 FORDHAM L. REV. 1 (1938); Hampsch, *Marxist Jurisprudence in the Soviet Union*, 35 NOTRE DAME LAW. 525 (1960).

[3]*See generally* Funk, *Major Functions of Law in Modern Society*, 23 CASE W. RES. L. REV. 257 (1972). "The seventh major function of law is to serve as an instrument of conscious change, either of society or of particular individuals in that society." *Id.* at 288. "The second major function of law is to allocate governmental power in society." *Id.* at 279.

[4]H. BERMAN, JUSTICE IN THE U.S.S.R. 284 (rev. ed. 1963) observed:

> It is apparent that the Soviet emphasis on the educational role of law presupposes a new conception of man. The Soviet citizen is considered to be a member of a growing, unfinished, still immature society, which is moving toward a new and higher phase of development. As a subject of law, or a litigant in court, he is like a child or youth to be trained, guided, disciplined, protected. The judge plays the part of a parent or guardian; indeed the whole legal system is parental.

See also Hazard, *The Trend of Law in the U.S.S.R.*, 1947 WIS. L. REV. 223. One of the two categories into which the aspects of Soviet law may be placed is "the measures necessary to guide society toward that goal of economic abundance and inherently disciplined living on the part of every citizen which will make the state as an apparatus of compulsion unnecessary." *Id.* at 224.

Soviet jurists have been divided into two broad categories, the proceduralists and the paternalists. Campbell, *The Legal Scene: Proceduralists and Paternalists*, SURVEY, Oct. 1965, at 56 *passim*. The proceduralists emphasize "socialist legality" in the sense of the expansion of individual rights and "the prevention, where possible, of wholly arbitrary actions." Ginsburgs, *The Political Undercurrents of the Legal Dialogue*, 15 U.C.L.A.L. REV. 1226 (1968). *See* I. LAPENNA, STATE AND LAW 51 (1964). For the traditional mean-

makers and a corresponding decrease in individual rights protected by the rule of law.[5] This result is a theoretical impediment to the withering away of the state and law and a warning to Western reformers who rely on law for social engineering.[6] There is a lesson, too, for young American radicals currently attracted to the antilegal, revolutionary rhetoric of Marxism and the idyllic anarchy of communism. They need to consider more carefully the jurisprudential implications of the intervening stage —the dictatorship of the proletariat. This Article will attempt to elucidate this major lesson of Soviet jurisprudence. First, it will summarize the Marxist-Soviet doctrine of the educational function of law. Next, it will test this jurisprudential position against modern educational theory and rule of law doctrines. Finally, it will demonstrate the conflict between the educational function of law and the rule of law in specific Soviet legal institutions and indicate the theoretical impediment that this conflict poses for the withering away of the state and law.

I. The Educational Function of Socialist Law in Soviet Jurisprudence

The materials of Soviet jurisprudence present a special difficulty since the classical Marxist-Soviet statements concerning law are scattered throughout a vast polemical literature. Once these statements are extracted and assembled, the educational function of socialist law in Soviet jurisprudence comprises a relatively harmonious jurisprudential point of view. This portion of Soviet jurisprudence includes four basic doctrines, each of which will be considered in turn. 1) The dictatorship of the proletariat established after the revolution is to wither away and usher in the ultimate goal, communism. 2) Though there is to be no state or law in communist society, some continuing administration of things, with law-like rules, remains. 3) The role of socialist law

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ing of socialist legality, see note 113 *infra*. This Article deals solely with the paternalist program and its implications.

[5]*See* text accompanying notes 185-215 *infra*.

[6]Funk, *supra* note 3, at 290-92. Ancient and modern jurisprudents who advocate using law to change society or individuals, from the "social engineering" of Dean Pound to the rechanneling of conduct along new lines of Professor Llewellyn, are liberal democrats for the most part, not Marxists. Careful analysis of Soviet jurisprudence, however, suggests the necessity of adequate rules of control even in their liberal democratic proposals of reform.

during the dictatorship of the proletariat is to educate people so the state can wither away and be replaced by a mere administration of things. 4) Socialist law is to perform this role by habituating people to behave correctly without the necessity of state compulsion so that law, as such, will no longer be necessary. Each of these doctrines may be found in the classical materials of Soviet jurisprudence.

A. The Withering Away of the State and Law

The educational function of socialist law in Soviet jurisprudence can be understood only in relation to its ultimate goal—the withering away of the state and law and the advent of communism. Karl Marx predicted that there would be substituted for the old civil society "an association which will exclude classes and their antagonism, and there will no longer be any political power."[7] In the *Communist Manifesto,* he described a vast association of the whole nation with the public power losing its political character.[8] He referred to the conversion of the functions of the state into a mere superintendence of production[9] and finally observed that all social and political inequality arising from class distinctions would disappear of itself.[10]

Friedrich Engels described the transition to communism as the dying out of the state. He indicated that political authority would disappear as a result of the coming social revolution, that is, that public functions would lose their political character.[11] He wrote of "the future conversion of political rule over men into an administration of things and a direction of processes of production—that is to say, the 'abolition of the state,' about which recently there has been so much noise."[12] His famous prediction

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[7]Marx, *Excerpt from Poverty of Philosophy,* in SELECTED WRITINGS IN SOCIOLOGY AND POLITICAL PHILOSOPHY 239 (T. Bottomore & M. Rubel eds. 1956).

[8]Marx & Engels, *Manifesto of the Communist Party,* in 1 K. MARX & F. ENGELS, SELECTED WORKS 21, 54 (Moscow ed. 1962).

[9]*Id.* at 63.

[10]Marx, *Critique of the Gotha Programme,* in 2 K. MARX & F. ENGELS, SELECTED WORKS 13, 30 (Moscow ed. 1962).

[11]Engels, *On Authority,* in 1 K. MARX & F. ENGELS, SELECTED WORKS 636, 639 (Moscow ed. 1962).

[12]Engels, *Socialism: Utopian and Scientific,* in 2 K. MARX & F. ENGELS, SELECTED WORKS 93, 123 (Moscow ed. 1962).

follows, that "[s]tate interference in social relations becomes, in one domain after another, superfluous, and then dies out of itself; the government of persons is replaced by the administration of things, and by the conduct of processes of production. The state is not 'abolished.' It dies out."[13]

Vladimir Ilich Lenin further developed the doctrine of the withering away of the state and law. He claimed that "once the majority of the people, *itself* suppresses its oppressors, a 'special force' for suppression is no longer necessary [and] [i]n this sense the state *begins to wither away.*"[14] He expected the role of state officials to be reduced to that of carrying out the orders of the armed workers as moderately paid managers, and that the beginning of a revolution on this basis

> of itself leads to the gradual "withering away" of all bureaucracy, to the gradual creation of a new order, an order without quotation marks, an order which has nothing to do with wage slavery, an order in which the more and more simplified functions of control and accounting will be performed by each in turn, will then become a habit, and will finally die out as special functions of a special stratum of the population.[15]

He expected that everybody, without exception, would be able to perform state functions, and this would "lead to a *complete withering away* of every state in general."[16] Lenin considered the Paris Commune of 1871 to be a close approximation of a state about to wither away. He observed that:

> [The Commune departed from] the state in its proper sense. And had the Commune asserted itself as a lasting power, remnants of the state would of themselves have "withered away" within it; it would not have been necessary to "abolish" its institutions; they would have ceased to function in proportion as less and less was left for them to do.[17]

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[13] *Id.* at 151.

[14] V. LENIN, *State and Revolution*, in 2 SELECTED WORKS 301, 335 (Moscow ed. 1960).

[15] *Id.* at 341.

[16] *Id.* at 397.

[17] *Id.* at 354.

Lenin reported that the revolution had already established in Russia, "although in a weak and embryonic form, precisely this new type of 'state.'"[18] Further, this was "*no longer* a state in the proper sense of the term, for in some parts of Russia . . . contingents of armed men are *the people themselves,* the entire people, and not certain privileged persons placed over the people, and divorced from the people, and irremovable in practice."[19] Later, Lenin claimed that "we really have an organization of power which clearly indicates the transition to the complete abolition of any power, of any state. This will be possible when every trace of exploitation has been abolished, that is, in socialist society."[20] Thus, Lenin described tendencies in the Paris Commune and the Soviet state which lead to the eventual withering process. Such descriptions of developing tendencies give further indication of the specific processes during the dictatorship of the proletariat that are to lead eventually to the withering of the state and law. Lenin did not explain in any greater detail, however, the processes which are to produce this result or the specific results implied by these processes.

Soviet jurists during the 1920's dealt more specifically with the doctrine of the withering away of the state as applied to law. M. A. Reisner anticipated that law would die out forever[21] and explained:

> *The formula which economically and in reality assures that which is unequal to each unequal person* [i.e. gives to each according to his needs], and furthermore guarantees without any sort of contest and without any subjective importunity, as well as without the compromise which crowns the real correlationship of struggling forces with its ideology of a contract—*this formula will kill all law.*[22]

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[18]V. LENIN, *The Tasks of the Proletariat in Our Revolution,* in 2 SELECTED WORKS 53, 81 (Moscow ed. 1960).

[19]*Id.*

[20]V. LENIN, *Report on the Activities of the Council of Peoples' Commissars Jan. 11, 1918,* in 2 SELECTED WORKS 585, 594-95 (Moscow ed. 1960).

[21]Reisner, *Law, Our Law, Foreign Law, General Law,* in SOVIET LEGAL PHILOSOPHY 83, 108 (H. Babb transl. 1951).

[22]*Id.* at 108-09.

E. B. Pashukanis discussed the legal implications of Marxism and expressly equated the dying out of the state and the dying out of law. He referred to the dying out of law in general[23] and the gradual disappearance of the juridic element in human relations in terms strongly suggestive of the statements of Engels and Lenin on the withering away of the state.[24] He included the doctrine of the dying out of law and therewith of the state in his discussions of Marx and Lenin.[25] Although the withering away of law and legal institutions is the logical consequence of the withering away of the state, Reisner and Pashukanis explicitly recognized this relationship. Whatever else of organization remains in communism, at least one cannot expect enforcement by legal institutions of social norms formulated in laws.

Strictly speaking, the idea of withering, as applied to the state and law, is only an analogy to plant life and cannot apply literally to a state. The application of this term to the state and law, however, at least suggests that withering is a gradual process which is a natural result of other actions. Thus, it appears to be an automatic process, so that in the end nothing need be done to the state to cause the state and law to disappear. The withering away of the state and law by a process analogous to natural decay provides one preview of communist society in Soviet jurisprudential thought. There will be no political power or public power with a political character. The state will become superfluous and unnecessary, disappear, cease to function, wither away and die out; and so will law.

B. The Continuing Administration of Things

The second major doctrine of Soviet jurisprudence envisions a continuing administration remaining even after the state and law have withered away. This implies law-like rules, at least, in communist society. Marx foresaw an association of the whole

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[23]Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 111, 121 (H. Babb transl. 1951).

[24]*Id.*

[25]*Id.* at 123. For a typical recent statement, see Kerimov, *Liberty, Law and the Legal Order*, 58 NW. U.L. REV. 643, 656 (1963). In the coming society "there will be need neither of government nor of law. In that society law will be replaced by the rules of communist society, the observation and fulfillment of which will be realized by highly conscious and fully free people without governmental compulsion." *Id.*

nation[26] and the continuing superintendence of production.[27] Engels added the administration of things[28] and the conduct of processes of production.[29] Lenin envisioned performance of state functions even after the state withered.[30] Already communist society does not sound like complete anarchy.

Some social order can be inferred from the distributive principle that in communism each person will contribute according to his ability and receive according to his needs.[31] Even assuming that each person is perfectly amenable to this program and knows perfectly his own ability and needs, there remains a Herculean task of organization to carry out the exchange. There is no reason to assume that the total goods and services contributed according to ability will exactly match the total goods and services needed. If there is a deficiency, the amount of it must be ascertained and each person must know what portion of his own needs he may satisfy. If there is a surplus, and it is not to be wasted, someone must decide how it is to be distributed.

Marx did not deal with problems of total surplus or deficit, since he was only sketching the outlines of communist society. Nevertheless, he did foresee an association for continuing superintendence of production.[32] Marx and Engels admitted that this conversion of the functions of the state into a mere superintendence of production was then Utopian due to the very undeveloped state of the proletariat.[33] Marx finally stated that the labor of superintendence and management is a kind of productive labor which must be performed in every mode of cooperative produc-

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[26]*See* note 8 *supra.*

[27]*See* note 9 *supra.*

[28]*See* note 12 *supra.*

[29]*See* note 13 *supra.*

[30]*See* note 16 *supra.*

[31]Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 85-86 & n.5 (1941), observed that "[t]here is a notorious contradiction between the economic and political theory of Marxian socialism" in that "[t]he norms of the socialistic ordering of the economic life can only appear in the form of commands directed by individuals to individuals, a 'government over individuals.'"

[32]*See* notes 8-9 *supra.*

[33]Marx & Engels, *supra* note 8, at 63.

tion.[34] He observed that "[a]ll work in which many individuals cooperate, necessarily requires for the co-ordination and unity of the process a directing will, and functions which are not concerned with fragmentary operations but with the total activity of the workshop, similar to those of the conductor of an orchestra."[35] Thus, superintendence was considered a universal necessity, though its degree was said to be proportional to the class antagonisms in the economic system. Apparently, less superintendence would be required in communism than in precommunistic societies.

Engels, possibly from his experience as a manufacturer, likewise saw that some superintendence is required for the operation of modern industry and anticipated a need for direction of the processes of production.[36] He used the specific example of a cotton spinning mill after the revolution and concluded in this respect, that "[w]anting to abolish authority in large-scale industry is tantamount to wanting to abolish industry itself, to destroy the power loom in order to return to the spinning wheel."[37] Engels contrasted this continuing administration of things[38] with the anarchy of social production under capitalism. He foresaw the replacement of capitalism after the revolution by systematic, definite organization[39] and a predetermined plan.[40] Public functions then would be transformed into the simple administrative functions of watching over the true interests of society.[41] He criticized an anarchist for equating authority with the state and ab-

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[34]Marx, 3 *Capital*, in SELECTED WRITINGS IN SOCIOLOGY AND SOCIAL PHILOSOPHY 150 (T. Bottomore & M. Rubel eds. 1956).

[35]*Id.* Marx apparently adopted the common notion that the individual members of an orchestra produce the music and the conductor merely coordinates their efforts. It may also be said that musical interpretation is the key element, not the production of sounds, so that the conductor alone is playing the music through the actions of the individual musicians. The truth lies somewhere in between.

[36]*See* note 12 *supra*.

[37]Engels, *supra* note 11, at 637.

[38]*See* notes 12-13 *supra*.

[39]Engels, *supra* note 12, at 153.

[40]*Id.* at 155.

[41]Engels, *supra* note 11, at 639.

solute evil, and concluded, "Indeed, how these people propose to run a factory, operate a railway or steer a ship without having in the last resort one deciding will, without single management, they, of course, do not tell us."[42] In discussing the continuing superintendence in communist society, Engels thus recognized the necessities of modern industry. Administration of things and direction of the processes of production imply authority, systematic organization, predetermined plan, deciding will and management. Though the state and law are to die out, obviously much organization and authority will remain. If this is not law supported by state compulsion, however, it is fair to ask more specifically what sort of law-like nonlaw it is.

Lenin furnished many more specific examples, though he did not explicitly apply them to communist society. He often described the contrast between bourgeois society and the dictatorship of the proletariat, along with the tendencies developing during the dictatorship of the proletariat just prior to the advent of communism. The order continuing under communism, however, is not simply the further development of these tendencies; Lenin carefully indicated that communism is somehow different. Nevertheless, the language he used with respect to the dictatorship of the proletariat suggests additional features of the administration which is to remain in communism after the state and law have withered away. Lenin clearly divided history into the periods of bourgeois society, the revolution, the dictatorship of the proletariat, and communism. Sometimes, however, he used "socialism," or the "first phase of communism," as synonyms for the dictatorship of the proletariat. Similarly, he sometimes used the "higher phase of communism" as another name for the final period of communism. In any event, he indicated some specific institutions to be abolished, as he contrasted bourgeois society and the dictatorship of the proletariat. Apparently these institutions, at least, will not be part of the continuing administration after the state and law wither away.

A consistent theme of Lenin's writings is that the police, army, and bureaucracy[43] of bourgeois society will be replaced by

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[42]Letter from F. Engels to T. Cuno, January 24, 1872, in 2 K. MARX & F. ENGELS, SELECTED WORKS 467, 469 (Moscow ed. 1962). The anarchist referred to is Mikhail Alexandrovich Bakunin.

[43]V. LENIN, *The Tasks of the Proletariat in the Present Revolution*, in 2 SELECTED WORKS 43, 47 (Moscow ed. 1960).

the armed masses[44] of the people. The objection to the police is not spelled out, except that it is part of the oppressive apparatus.[45] The additional objection to the army, or at least a standing army,[46] is that it is divorced from the people.[47] The objection to the bureaucracy, in addition to its being the third component of the chiefly oppressive apparatus,[48] is that it is privileged.[49] So important are these three bourgeois institutions that Lenin claimed that the state apparatus consists primarily of the standing army, the police, and the bureaucracy.[50]

In contrast to this bourgeois state apparatus, Lenin described a new state apparatus[51] to be established by the proletariat. In place of the old police, army, and bureaucracy,[52] there will be the arming of the whole people,[53] sometimes characterized as the armed workers and peasants themselves,[54] the universally armed people themselves,[55] the armed masses of the population,[56] the universally armed people,[57] or the organized and armed masses of the proletariat and peasantry.[58] The key consideration is that these armed workers and peasants are not divorced from the people.[59] These terms already display the tension observed in

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[44]V. LENIN, *supra* note 14, at 374.

[45]V. LENIN, *Can the Bolsheviks Retain State Power?*, in 2 SELECTED WORKS 421, 438 (Moscow ed. 1960).

[46]*Id.*

[47]V. LENIN, *supra* note 43, at 67.

[48]V. LENIN, *supra* note 45, at 438.

[49]V. LENIN, *supra* note 43, at 67.

[50]V. LENIN, *supra* note 45, at 434.

[51]*Id.* at 435.

[52]V. LENIN, *supra* note 43, at 47.

[53]*Id.*

[54]V. LENIN, *The Dual Power*, in 2 SELECTED WORKS 50 (Moscow ed. 1960).

[55]*Id.*

[56]V. LENIN, *supra* note 18, at 58.

[57]*Id.* at 67.

[58]V. LENIN, *Resolution on the Current Situation*, in 2 SELECTED WORKS 146, 148 (Moscow ed. 1960).

[59]V. LENIN, *supra* note 18, at 67.

Marx and Engels, between "state and law," which are to wither away, and a law-like "administration" which is to continue without state compulsion. Lenin's emphasis on direct action of the masses suggests direct, informal, spontaneous action without any legal compulsion, whereas the army analogy suggests the most extreme organization and structured authority.

The new society also will differ from the old bourgeois society with respect to control, supervision, and accounting.[60] The very key to all control, according to Lenin, is the abolition of commercial secrecy.[61] In bourgeois society this leads to the "extremely complex, involved and wily tricks that are resorted to in drawing up balance sheets, in founding fictitious enterprises and subsidiaries, [and] in resorting to the services of figureheads."[62] This makes the income tax very largely a fiction in bourgeois society, he claimed, due to concealment of property and incomes.[63] The dictatorship of the proletariat will remedy this by "investing every group of citizens of substantial democratic numerical strength (1,000 or 10,000 voters, let us say) with the right to examine *all* the documents of any large enterprise."[64] This would develop popular initiative in control[65] and make this control effective and democratic.[66] At the same time, institution of the fullest, strictest, and most detailed accountancy,[67] with weekly reports and amalgamation of disunited establishments into a single syndicate,[68] is expected to enable the economy to attain tremendous proportions.[69] In the process of eliminating the deceptive complications resulting from commercial secrecy,

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[60] V. LENIN, *The Impending Catastrophe and How to Combat It*, in 2 SELECTED WORKS 251, 256 (Moscow ed. 1960).

[61] *Id.* at 269.

[62] *Id.* at 262.

[63] *Id.*

[64] *Id.* at 270.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 274.

[68] *Id.*

[69] *Id.*

accountancy and control become reduced to simple entries that anyone can make.[70] Lenin saw this as the essence of the socialist transformation and the chief measure for eliminating waste.[71] First, there will be unity of accounting, then control, and finally regulation of economic life, through nationwide accounting and control. Again, the same basic tension appears. On the one hand, inspection of accounts by large masses of voters and elimination of tricks so that any literate person is able to understand business operations represents an informed, stateless, lawless element. On the other hand, weekly reports and nationwide control imply supervision of the economy, and all that goes on in it, through unified and extremely detailed accounting, which in turn implies a vast network of law-like rules of administration.

Turning to the general institutional arrangements of government, Lenin placed great emphasis on direct democracy.[72] This is variously phrased as direct initiative of the people,[73] direct rule of people themselves,[74] direct expression of the mind and will of the majority,[75] the obvious and indisputable support of the majority,[76] and direct, open force.[77] Presumably this is in the spirit of the November 5, 1917, message to the population:

> Comrade toilers: Remember that now *you yourselves* are at the helm of the state. No one will help you if you yourselves do not unite and take into *your* hands *all affairs* of the state. . . . Get on with the job yourselves; begin right at the bottom, do not wait for anyone . . . .[78]

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[70] V. LENIN, *supra* note 14, at 364.

[71] V. LENIN, *supra* note 60, at 266.

[72] *See, e.g.*, V. LENIN, *supra* note 45, at 435-36.

[73] V. LENIN, *supra* note 43, at 50.

[74] *Id.* at 51.

[75] *Id.* at 52.

[76] V. LENIN, *supra* note 18, at 58.

[77] Speech by V. Lenin, Seventh (April) All-Russian Conference of the R.S.D.L.P. (B.), in 2 SELECTED WORKS 91, 104 (Moscow ed. 1960).

[78] V. LENIN, *To the Population*, in 2 SELECTED WORKS 529, 530 (Moscow ed. 1960).

On the other hand, Lenin also considered the Soviets as a new state apparatus[79] modeled after the Paris Commune. The Soviet state is described as not a state in the proper sense of the term,[80] but a transition[81] state, a harbinger of the withering away of the state in every form,[82] the first steps towards socialism,[83] and the first stage of a socialist society.[84] Again, Lenin juxtaposed withering away of the state and law with continuing organization. His emphasis on direct action of the masses implies statelessness; but the organization by Soviets as a first step in the transition, though not a state in the proper sense, is also labelled a new state apparatus. This implies some continuing organization of the Paris Commune type, at least up to the beginning of communism.

Early writings of Lenin discussing the continuing administration under the dictatorship of the proletariat, with his assumption that anyone may be an administrator, imply that universal administration may be another characteristic of society after the withering of the state. Prior to the spring of 1918, Lenin was convinced that administration could be carried out by any literate person,[85] and therefore the poor were to be drawn into administration.[86] The accounting and control functions were fully within the abilities of all,[87] though Lenin saw that some rudimentary training would be required.[88] Even in his early writings, however, Lenin admitted that specialists and technicians, as distinguished from general administrators, were necessary. He referred

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[79]V. LENIN, *supra* note 45, at 435.

[80]V. LENIN, *supra* note 18, at 81.

[81]Speech by V. Lenin, First All-Russian Congress of Soviets of Workers' and Soldiers' Deputies: On the Attitude Towards the Provisional Government, in 2 SELECTED WORKS 175, 177 (Moscow ed. 1960).

[82]V. LENIN, *supra* note 18, at 81.

[83]V. LENIN, *supra* note 77, at 106.

[84]*Id.*

[85]V. LENIN, *supra* note 45, at 439.

[86]*Id.* at 443.

[87]V. LENIN, *How to Organize Emulation*, in 2 SELECTED WORKS 559, 564, 566 (Moscow ed. 1960).

[88]V. LENIN, *supra* note 45, at 444.

specifically to the need for trained agronomists,[89] engineers,[90] and economists.[91] After 1918, moreover, Lenin began to emphasize the necessity for training even general administrators. His later writings stress the art of administration,[92] characteristics of good administrators[93] and bureaucrats,[94] and finding the right man for the right place.[95] Finally, tests are advocated so that better government workers may be selected.[96] Again, the early attitude toward administrators anticipates the stateless aspect of communism: state functions can be performed by everyone, though the state and law have withered. Later emphasis on trained administrators, however, suggests selection, hierarchy, and order in the continuing administration.

One early jurist provided explicit examples of the laws which are to die with the withering of the state and those which are to continue under the administration of things. E. B. Pashukanis drew a distinction between legal regulation, which will die out, and technical regulation, which will actually increase,[97] and pointed to railroad timetables as examples of merely technical regulation. A railroad timetable is, indeed, a product of rules, but these rules are technical ones imposed in the interests of attain-

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[89]Speech by V. Lenin, First All-Russian Congress of Peasants' Deputies: Speech on the Agrarian Question, in 2 SELECTED WORKS 153, 171 (Moscow ed. 1960).

[90]V. LENIN, *supra* note 45, at 449.

[91]*Id.*

[92]V. LENIN, *The Immediate Tasks of the Soviet Government*, in 2 SELECTED WORKS 695, 706 (Moscow ed. 1960).

[93]V. LENIN, *The Tax in Kind: The Significance of the New Policy and Its Conditions*, in 3 SELECTED WORKS 634, 665 (Moscow ed. 1960).

[94]V. LENIN, *Once Again On the Trade Unions, The Present Situation and the Mistakes of Comrades Trotsky and Burkharin*, in 3 SELECTED WORKS 561, 572 (Moscow ed. 1960).

[95]V. LENIN, *Eleventh Congress of the R.C.P. (B.), March 27—April 2, 1922: Political Report of the Central Committee of the R.C.P. (B.), March 27*, in 3 SELECTED WORKS 725, 762 (Moscow ed. 1960).

[96]V. LENIN, *How We Should Organize the Workers' and Peasants' Inspection: Recommendation to the Twelfth Party Congress*, in 3 SELECTED WORKS 824, 825 (Moscow ed. 1960); V. LENIN, *Better Fewer, But Better*, in 3 SELECTED WORKS 829, 832-33 (Moscow ed. 1960).

[97]Paskukanis, *supra* note 23, at 135-36.

ing maximum hauling capacity. Similar rules in other industries contribute to the construction of a single, planned economy. This is immediate, "administrative-technical-direction in the form of subordination to a general economic plan."[98] Instead of withering, this type of regulation will signify the gradual dying out of the other type—juridic regulation. Pashukanis pointed to railroad liability, in contrast to railroad timetables, as an example of juridic regulation. So long as the market economy continues, juridic regulation will continue also; but when a single planned economy is achieved, the juridic form of regulation is to die out. As a further example, he cited a table of military organization as mere administrative-technical regulation, in contrast to a draft law, which is a form of juridic regulation.[99] Thus, Pashukanis saw juridic regulation, presupposing an individual market economy, as dying out in communism, while technical administrative regulation will continue and increase.

The two initial doctrines of Soviet jurisprudence are, therefore, interrelated. The ultimate goal of state and law is communism, which has two contrasting features. The state and law are to wither; but administration under law-like rules without state compulsion is to continue in the realm of production.[100]

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[98] *Id.* at 178.

[99] *Id.* at 135-36.

[100] Only a few Western authors have attempted to piece together an extended description of conditions under communism as set forth in Marxist socialist writings. A notable exception is T. DENNO, THE COMMUNIST MILLENIUM (1964), which attempts "a description of the Communist future according to the Communist doctrine, a description which no Communist, as far as the author can determine, has ever attempted." *Id.* at viii. *Compare* Dr. Denno's description *with* FUNDAMENTALS OF MARXISM-LENINISM 698-717 (2d ed. O. Kuusinen 1963). The present author likewise found no Communist author, at least in English translation, who had attempted a similar description of doctrine bearing on law. After the tedious task of collection and analysis of materials was completed, the present author found, like Dr. Denno, that "[i]t is possible to trace a more or less consistent pattern regarding the future through all Communist thought from Marx down to Khrushchev" and concurs that "[i]n fact most of the material is so consistent that it is, characteristically, extremely repetitive . . . ." T. DENNO, supra at viii. A second notable attempt to describe extensively all features of communist society reflected in communist writings is referred to in the selected bibliography of Dr. Denno. *Id.* at 159-64. This attempt is a series of six unpublished Master's theses submitted to the Russian Institute at Columbia University between 1950 and 1956: W. Beachner, Lenin's View of the Future Commun-

There is no suggestion of a mechanism for enforcement of these rules to replace state compulsion. Man, as presently known, seems to require some compulsion to insure that he will obey rules. Therefore, the next step in Soviet jurisprudence follows: man must somehow be changed or educated to observe the norms required by the continuing administration without any state compulsion. This becomes a task of socialist law during the dictatorship of the proletariat and gives rise to the third fundamental doctrine of Soviet jurisprudence.

C. The Educational Role of Socialist Legal Institutions

The third fundamental doctrine of Soviet jurisprudence is that socialist legal institutions must educate man in preparation for the withering away of the state and law. Basic legislation, defining powers and duties of the Soviet court system, incorporates this doctrine in its statement of purposes as follows:

> The court by all of its activity is educating U.S.S.R. citizens in a spirit of devotion to their fatherland and to the cause of socialism in a spirit of unswerving precision in carrying out soviet laws, of care for socialist property, of labor discipline, of an honorable attitude towards state and social duty, and of respect for the rules of socialist life together.[101]

The implicit goal is to prepare citizens, during the period of socialism, so that the transition to communism may proceed, since

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ist Society, 1956; T. Farrelly, Trotsky's Conception of the Future Communist Society, 1955; D. Nelson, The Views of N. Bukharin on the Future Communist Society, 1952; H. Cole, Stalin's Views of the Future Good Society, 1901—January 1924, 1950; and T. Rothchild, The Highest Phase of Communism According to the Works of Joseph Stalin, 1924-1936, 1950. *See also* F. GERLICH, DER KOMMUNISMUS ALS LEHRE VON 1000-JAHRIGEN REICH (1920); Robinson, *Stalin's Vision of Utopia—The Future Communist Society*, 99 PROC. OF AM. PHILOSOPHICAL SOC'Y 11 (1955).

[101]Law Concerning the Judicial System of the U.S.S.R. and the Union and Autonomous Republics, art. 3 (1938), *translated in* Golunskii & Strogovich, *The Theory of State and Law*, in SOVIET LEGAL PHILOSOPHY 351, 381 (H. Babb transl. 1951). The present author is indebted to Hildebrand, *The Sociology of Soviet Law: The Heuristic and "Parental" Functions*, 22 CASE W. RES. L. REV. 157, 196 (1971), for correcting the citation to this legislation. *Cf.* D. Funk, Law as Schoolmaster: Rule of Law Implications and Soviet Theory 70, 1968 (unpublished thesis in the Ohio State University Library and Harvard and Columbia Law School libraries).

this is the ultimate end of Soviet law itself. This educational role of law was anticipated in the Marxist classics and made explicit by Lenin. Marx had described the educational function of the state during the dictatorship of the proletariat,[102] but did not expressly extend this doctrine to law. His requirement of a transition state, however, implied that such a state, at least in some way, prepares people for the transition to communism, and Marx and Engels clearly distinguished themselves from the anarchists on that score.[103] Lenin applied this doctrine to legal institutions in describing how the bourgeois court, with its function of exploitation, was scrapped to make way for a people's court. He claimed to have transformed the court from an instrument of exploitation into an instrument of education on the firm foundations of socialist society.[104] He saw the courts as an instrument for inculcating labor discipline to eradicate the outlook of a small proprietor who thinks, "I'll grab all I can for myself; what do I care about the rest?"[105]

One early Soviet jurist, E. B. Pashukanis, saw the educative function of law exemplified primarily in the treatment of criminals. He argued that Soviet law should get away from the bourgeois notion of punishment as an equivalent for a wrong, since the whole juridic idea of equivalency, of *quid pro quo,* must die out.[106] In communism, he observed, there is to be merely administrative-technical direction, and people will not look at things from an individual point of view. Instead of seeking to exact equivalents for themselves, people are to see social forces and individual forces as one; but in order to accomplish this, men must be re-educated in this spirit—the spirit of communism.[107]

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[102]Marx, *The Leading Article of No. 179 of Kolnische Zeitung,* in KARL MARX AND FRIEDRICH ENGELS: ON RELIGION 16, 28 (Moscow ed. 1957).

[103]Engels, *supra* note 12, at 150-51; Marx, *The Civil War in France,* in 1 K. MARX & F. ENGELS, SELECTED WORKS 473, 523 (Moscow ed. 1962); Marx & Engels, *supra* note 8, at 61-64.

[104]V. LENIN, *Report on the Activities of the Council of People's Commissars, January 11 (24), 1918,* in 2 SELECTED WORKS 585, 592-93 (Moscow ed. 1960).

[105]V. LENIN, *supra* note 92, at 723.

[106]Pashukanis, *supra* note 23, at 179. *See also* note 214 *infra.*

[107]*Id.* at 201.

One means of accomplishing this re-education is to use criminal law as a pedagogic measure.[108] Progressive criminologists, therefore, are to cease trying to equate the punishment with the crime. Instead, they are to think of punishment as re-education and seek to devise punishments which re-educate in the fashion required for the communist spirit.[109] The Marxian doctrine that bourgeois law is exploitative and mere superstructure[110] implies that law during the dictatorship of the proletariat somehow will be different. Pashukanis analyzed this difference in terms of juridic equivalency and the merging of individual and social forces. He saw equivalency as a reckoning by the individual of how much he is giving and how much he is to get. In the merging of individual and social forces, this is to become irrelevant. Thus criminal law, applied as a pedagogic measure, can help show that in communism, man has no need of this idea of equivalency with its associated concepts of responsibility and freedom of choice.[111]

Later Soviet jurists further developed the doctrine of the educational role of socialist legal institutions. Ivan T. Golyakov dealt specifically with the educational significance of the Soviet court.[112] The educational function of legal institutions in building the communist spirit and in eradicating crime is not limited to the support of the state through Soviet legality in its traditional sense of order.[113] Golyakov claimed that the Soviet court has ac-

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[108]*Id.* at 217.

[109]*Id.* at 219.

[110]*See, e.g.*, Marx, *Preface to a Contribution to the Critique of Political Economy*, in 1 K. Marx & F. Engels, Selected Works 361, 362-63 (Moscow ed. 1962). *But see* Marx, *Inaugural Address of the Working Men's International Association*, in 1 K. Marx & F. Engels, Selected Works 377, 382-83 (Moscow ed. 1962), advocating specific reform legislation in England since it allowed universal suffrage.

[111]Pashukanis, *supra* note 23, at 217.

[112]I. Golyakov, The Role of the Soviet Court (R. Kramer transl. 1948).

[113]*Id.* at 1-2, *passim*. "The most important task of the court [is] the rooting into the conscience of the broad masses of a respect for law and justice." *Id.* at 18.

In contrast to the Soviet doctrine of the educational role of law, the Soviet doctrine of socialist (or revolutionary) legality has had quite different meanings at different times. Immediately after the Bolshevik revolution, revolutionary legality was often contrasted with bourgeois legality. Law

tively assisted the Soviet state "in the great business of the fundamental rebuilding of society in the spirit of communism, the rooting into the consciousness of the broad masses [of] the principles of socialist legality and justice."[114] Moreover:

> The most important function of the socialistic state is the fundamental remaking of the conscience of the peo-

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meant primarily bourgeois law, whereas revolutionary legality was the direct power of the proletariat acting informally against class enemies. H. BERMAN, *supra* note 4, at 28; O. KIRCHHEIMER, POLITICAL JUSTICE 285-86 (1961); Kline, *The Withering Away of the State: Philosophy and Practice*, SURVEY, Oct. 1961, at 63, 67-68. As Lenin established orderly government, revolutionary legality meant that directives of the central revolutionary authorities must be obeyed in order to prevent decentralization of power and lack of coordination. O. KIRCHHEIMER, *supra* at 286. Joseph Stalin extended the doctrine of socialist legality to include complete obedience to the government. H. BERMAN, *supra* note 4, at 63-65; Kline, *supra* at 68; Hazard, Book Review, 77 HARV. L. REV. 1561, 1562 (1964). Thus Soviet socialist law was authoritatively defined during the Stalinist period as:

> [T]he totality of the rules of conduct, established in the form of legislation by the authoritative power of the toilers and expressing their will—the application of said rules being guaranteed by the entire coercive force of the socialist state to the end (a) of defending, securing and developing relationships and orders advantageous and agreeable to the toilers, and (b) of annihilating, completely and finally, capitalism and its survivals in the economy, manner of life, and consciousness of people, with the aim of building communist society.

A. VYSHINSKY, THE LAW OF THE SOVIET STATE 74 (H. Babb transl. 1948). Further, "the Soviet state, having abrogated bourgeois legality and created a new [socialist] legality, requires that all citizens, institutions, and officials observe Soviet laws precisely and without protest." *Id.* at 640. Golunskii & Strogovich, *supra* note 101, at 392, explained that socialist legality "is expressed in guaranteeing that all organs of the soviet state, official personages, and citizens strictly and unswervingly observe the legislation enacted by soviet authority." Trainin, *Comrade Stalin's Teaching on the Base and Superstructure and the Problem of Protecting the Socialist Economic System*, 4 CURRENT DIGEST OF THE SOVIET PRESS, No. 18, at 5, 6 (1952); I. GOLYAKOV, *supra* note 112, at 1. Following the death of Stalin in 1953, and especially after the Twentieth Party Congress in 1956, socialist legality came to include procedural rights of the individual against the Soviet state as protection against the excesses of Stalinism. H. BERMAN, *supra* note 4, at 66-71; O. KIRCHHEIMER, *supra* at 289-92. *See generally* Campbell, *supra* note 4, on the proceduralist program. By 1957, however, it was apparent that this new meaning of socialist legality would not be allowed to undermine the authority of the Soviet state. O. KIRCHHEIMER, *supra* at 290-91.

[114] I. GOLYAKOV, *supra* note 112, at 15.

> ple, of the toilers of the new society. A component part of this activity is the reification of justice which, while punishing criminals, at the same time influences the masses, promoting their education in the spirit of socialistic labor discipline and the observance of the rules of socialistic living. The success of such influencing is assured by the fact that crime, in its essence, is not native to a society constructed on new principles and free of contradictions and class antagonisms which give rise to crime.[115]

Another author maintained that Soviet law plays an important role in strengthening socialist labor discipline by inculcating a communist attitude to work.[116] Other authorities discussed the educating function of justice[117] and the great educational role of the Soviet court.[118] M. S. Strogovich explained more fully:

> Marxist-Leninist theory always centers its attention on the tasks of all-round development of the individual and satisfaction of his material and spiritual needs and interests, the education of the new man. This task, clearly formulated in the CPSU Program, demands for its solution a comprehensive system of measures—economic, political, educational, etc. An important place in this system is occupied by juridical, legal measures, the elaboration of which constitutes a direct duty of Soviet jurisprudence.[119]

Others express similar viewpoints. One claimed that Soviet state law has played, and continues to play, a revolutionary creative role in the development and consolidation of the social relations

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[115]*Id.* at 16.

[116]Chkhikvadze, *Socialist Law—Important Weapon in Fight for Communism,* 4 CURRENT DIGEST OF THE SOVIET PRESS, No. 27, at 2, 11 (1952).

[117]Polyansky, *The Soviet Criminal Court As a Conductor of the Policy of the Party and the Soviet Regime,* 4 CURRENT DIGEST OF THE SOVIET PRESS, No. 6, at 8 (1952).

[118]Pravda, *Review of the Press: Noble Task,* 3 CURRENT DIGEST OF THE SOVIET PRESS, No. 49, at 30 (1952); Tarasov, *Undeviatingly Observe Soviet Socialist Law,* 5 CURRENT DIGEST OF THE SOVIET PRESS, No. 15, at 7, 47 (1953).

[119]Strogovich, *Problems of Methodology in Jurisprudence,* 4 SOVIET LAW AND GOVERNMENT 13, 20 (1966).

and order desired by, and beneficial to, the working people.[120] Chairman Khrushchev reported to the Twenty-second Party Congress that the molding of the new man is influenced not only by the educational work of the Party, the Soviet state, the trade unions, and the Young Communist League but by the entire pattern of society's life, including legal regulations and judicial practice.[121] To the editors of *Soviet Justice* "the reorganization of the judicial system pursues the object of creating the most favorable conditions for the work of the people's courts in preventing and eradicating crime and in educating citizens in the spirit of steadfast compliance with Soviet laws and the rules of socialist society."[122] Many Soviet authors follow the lead of basic legislation defining the powers and duties of the court system, which derives from the Judiciary Act of 1933[123] and was authoritatively affirmed in 1936[124] and 1958.[125] It is not surprising, in view of this long history, to find this official phraseology adopted by jurists like Denisov and Kirichenko,[126] Lokhov,[127] Rasulov,[128] and

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[120]A. Denisov & M. Kirichenko, Soviet State Law 17 (Moscow ed. 1960).

[121]Khrushchev, *Report of the Central Committee of the CPSU to the 22nd Party Congress*, 13 Current Digest of the Soviet Press, No. 42, at 3, 20 (1961).

[122]Sovetskaya yustitsia, *Chairman of the District (City) Peoples' Court*, 13 Current Digest of the Soviet Press, No. 21, at 6 (1961).

[123]K. Gryzbowski, Soviet Legal Institutions 119-20 (1962).

[124]*See* note 101, *supra*. The language of this version is set forth in the text accompanying note 101 *supra*.

[125]Berman, *Introduction* to Soviet Criminal Law and Procedure 1, 95 (H. Berman & J. Spindler transl. 1966). *See also* K. Gryzbowski, *supra* note 123, at 120 n.19.

[126]A. Denisov & M. Kirichenko, *supra* note 120, at 301.

[127]Lokhov, *Some Questions on the Judicial System of the U.S.S.R., of the Union and of the Autonomous Republics*, in The Soviet Legal System pt. 1, 38 (J. Hazard & I. Shapiro eds. 1962).

[128]Rasulov, *On Drafts of Principles of Legislation On the Judicial System In the U.S.S.R. and the Union and Autonomus Republics, Statute On Military Tribunals and Principles of Criminal Trial Procedure In the U.S.S.R. and the Union Republics*, 11 Current Digest of the Soviet Press, No. 4, at 5, 6 (1959).

Chkhikvadze.[129] Others refer specifically to the educational influence of the trial upon the person before the court,[130] and claim that Soviet courts have an immense educative influence, not only on the accused but on the people in the courtroom.[131] Sometimes the courts of justice are said to inculcate a new social discipline in the masses[132] as part of "the creative role of the state and law and their countereffect on the base."[133] Thus, Soviet jurisprudence expects socialist legal institutions somehow to educate man and inculcate new attitudes required for an organization of production which dispenses with state and legal compulsion.

D. The Habituation Process

The fourth fundamental doctrine of Soviet jurisprudence specifies the method by which new attitudes are to be impressed on man by socialist law. Soviet jurists advocate an educational process in which man will become habituated to the observance of his social duties. Man is to acquire proper habits by becoming accustomed to them. Since the duties are fairly complex, a men-

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[129]Chkhikvadze & Kirichenko, *Criminal Law*, in FUNDAMENTALS OF SOVIET LAW 401, 413 (P. Romashkin ed. n.d.).

[130]Boldyrev, *quoted in* Berman, *supra*, note 125, at 96. Gutsenko, Dobrovolskaya & Raginsky, *Comrades' Courts are a Collective Educator*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 42, at 21, 22 (1959), considered the "chief purpose" of comrades' courts to be "the direct educational influence on the offender." U.S.S.R. Supreme Court, *Plenary Session*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 28, at 37 (1963), considered "[t]he educational and preventive significance of court trials." U.S.S.R. Supreme Soviet, *Principles of Criminal Procedure in the U.S.S.R. and the Union Republics*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 4, at 7 (1959), maintained that "[c]riminal porceedings should help to . . . educate citizens in a spirit of undeviating observances of Soviet laws and respect for the rules of socialist society."

[131]Gusev, *Defend, But Do Not Shield: Notes of a People's Assessor*, in 10 CURRENT DIGEST OF THE SOVIET PRESS, No. 40, at 20, 21 (1958). Boldyrev, *supra* note 130, at 96, commented on the educational influence of the trial "upon the person before the courts" and beyond "to other participants in the judicial examination and also to persons present in the courtroom." Dobrovol'skaia, *The Organization and Functioning of the Soviet Court in the Period of the Comprehensive Building of Communism*, 2 SOVIET LAW AND GOVERNMENT 45, 51 (1964), hoped to improve "the educational influence of the trial upon the defendant and the audience."

[132]Glizerman, *The Socialist State—Mighty Instrumentality for Building Communism*, 3 CURRENT DIGEST OF THE SOVIET PRESS, No. 41, at 7, 9 (1951).

[133]Izvestia, *Overcome the Lag in the Science of Law*, 5 CURRENT DIGEST OF THE SOVIET PRESS, No. 1, at 3, 5 (1953).

tal act is involved beyond mere conditioning or training. On the other hand, the habits acquired are not necessarily active ones interacting with the forces creating them. Rather, Soviet jurisprudence envisions a unidirectional process in which the Communist Party, as a relatively outside influence, acts through legal institutions to induce observance of new social norms. The citizen accommodates himself to this outside influence and becomes habituated to the prescribed norms.

Lenin explained the habituation process as follows:

> [V]ery soon the necessity of observing the simple, fundamental rules of every-day social life in common will have become a *habit*. The door will then be wide open for the transition from the first phase of communist society to its higher phase, and along with it to the complete withering away of the state.[134]

He claimed that in communism:

> [T]here will vanish all need for force, for the *subjection* of one man to another, since people will *grow accustomed* to the observance of the elementary rules of social life that have been known for centuries and repeated for thousands of years in all school books; they will become accustomed to observing them without force, without compulsion, without subordination, without the *special apparatus* for compulsion which is called the state.[135]

He maintained that the state will be able to wither away "when people have become accustomed to observe the fundamental rules of social life, and their labour is so productive that they voluntarily work according to their ability."[136] Finally, he indicated that "in communist society democracy will gradually change and become a habit, and finally *wither away*."[137]

Later Soviet jurists variously amplified the doctrine of habituation through law. Andrei Y. Vyshinsky observed that, in

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[134]V. LENIN, *supra* note 14, at 384.

[135]*Id.* at 373-74.

[136]*Id.* at 380.

[137]V. LENIN, *The Proletarian Revolution and the Renegade Kautsky*, in 3 SELECTED WORKS 71, 87 (Moscow ed. 1960).

the highest phase of communism, all will learn to get along without special rules defining the conduct of people under the threat of punishment and with the aid of constraint.[138] Moreover, people will be so accustomed to observe the fundamental rules of community life that they will fulfill them without constraint of any sort.[139] Others expected that in communist society:

> The rules of life in common will be observed without the restraint exerted by a state mechanism, solely by virtue of the conscious discipline of the communist social order, respect for each other and for their common interests, and established habits which have become part of a mode of living.[140]

One jurist, writing on communist society, emphasized that the rules of social behavior must become a habitual sense of collectivism and that one of the most important tasks of communist education is to instill collectivism until it becomes second nature;[141] comrades' courts and peoples' public order squads are seen as steps in this direction.[142] Another jurist foresaw that "[f]rom the time when all are administering social affairs on their own, the observation of the fundamental rules of human society will gradually come to be a universal habit, obviating the need for that apparatus of organized and systematic compulsion called the state."[143] It is admitted that "[t]he advance of Soviet

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[138]A. VYSHINSKY, *supra* note 113, at 52.

[139]*Id.*

[140]Golunskii & Strogovich, *supra* note 101, at 399. *But cf.* the assertion following that "communist morality and communist customs will stand in place of law," and that "it is custom (side by side with morality) that will regulate socialist relationship in place of law." *Id.* at 382-83. Custom implies continuing social pressure by the overwhelming majority against deviation from a social norm, whereas becoming accustomed implies internal habituation of the individual. Morality implies individual obligation but not habituation. Apparently, Golunskii and Strogovich expect custom and morality, as well as habituation, to function as controls in communist society.

[141]Shaknazarov, *When the State Has Withered Away*, 1 SOVIET REV. 54, 60-61 (1960).

[142]*Id.* at 62.

[143]Denisov, *On the Relationship of State and Society in the Period of Transition from Capitalism to Communism*, 12 CURRENT DIGEST OF THE SOVIET PRESS, No. 22, at 17, 19 (1960).

society toward communism requires steady intensification of educational work among the people and the creation of conditions that will make the observance of rules and regulations become a human habit, and work a vital human necessity."[144] One explanation of the replacement of compulsion by habituation after a process of re-education is the following:

> In socialist society compulsion . . . remains an important means of eradicating crime. Later on, of course every citizen will observe the laws [sic] voluntarily, out of deep inner conviction and awareness of moral duty, by force of habit.[145] But until they do, the state must uphold law and order by applying compulsion. It now becomes a matter not of rejecting compulsion but of gradually narrowing the sphere of its application, spearheading punitive measures against imperialist agents, confirmed criminals, dangerous recidivists and others who do not lend themselves to re-education.[146]

The 1961 New Program of the Communist Party announced that in communistic society rules will be a need and a habit for everyone,[147] and the duty to labor will become a habit too.[148] Finally, P. S. Romashkin observed that "the conscious and voluntary observance of the rules of socialist community—already second nature to most Soviet people—must become a habit with all members of society, making compulsion by the state superfluous."[149] He concluded that one of the necessary requisites of the emergence of the conditions necessary for communism is observance of the rules of the communist way of life as a matter of habit.[150]

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[144]Klyenov, *Public Participation in Settling Labor Disputes*, 2 SOVIET REV. 34 (1961).

[145]On the relation of morality and habituation, see note 140 *supra*.

[146]Mironov, *Persuasion and Compulsion in Combatting Anti-Social Acts*, 2 SOVIET REV. 54, 61 (1961).

[147]Communist Party of the Soviet Union, *The New Program of the Communist Party in the Soviet Union*, in ESSENTIAL WORKS OF MARXISM 371, 458 (A. Mendell ed. 1961).

[148]*Id.* at 466.

[149]Romashkin, *The Soviet State and Law at the Contemporary Stage*, in FUNDAMENTALS OF SOVIET LAW 7, 14 (P. Romashkin ed. n.d.).

[150]*Id.*

Though the materials of Soviet jurisprudence are scattered, fragmentary, and sometimes obscure, the foregoing reveals a relatively consistent viewpoint concerning the major role of Socialist law. Socialist legal institutions are to induce habits by which socialist man is to become accustomed to the observation of social norms required by communism. The Communist Party determines the specific norms necessary for the continuing administration of things in communism. Through a process of education, utilizing socialist legal institutions, man is to become habituated to these norms so that he will conform to them without any compulsion. State and law then wither away to achieve the ultimate goal, communism.

II. Authoritarian Education versus Rule of Law as a Critical Standpoint

Criticism of Soviet jurisprudence doctrines is aided by a clear understanding of the process of authoritarian education and its implications for the rule of law. Since the role of socialist law in Soviet jurisprudence is frankly educational, modern educational theory furnishes a theoretical framework within which to appraise Marxist doctrine. First, to speak of the educational role of law is to imply something more than mere conditioning or training. Training involves simple responses to external stimuli without the element of meaning to connect one external stimulus with a similar one; education, on the other hand, requires some mental act on the part of the recipient of the stimulus. This distinction has been explained as follows:

> The difference between an adjustment to a physical stimulus and a *mental* act is that the latter involves responses to a thing in its *meaning*; the former does not . . . . In both types of responsive adjustment, our activities are directed or controlled. But in the merely blind response, direction is also blind. There may be training, but there is no education.[151]

Legal processes are too complex, and their contacts with citizens too tenuous, to be characterized as simple stimulus-response training.[152] Hence, if law is to change people it must do so by some

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[151] J. Dewey, Democracy and Education 29 (1966).

[152] *Cf.* S. Nagel, The Legal Process From a Behavioral Perspective 5-11 (1969).

kind of educational process. One type, called habituation,[153] results when the person educated merely adjusts to the educational stimuli and does not affect the educational process.[154] The student in this unidirectional process does not acquire new active mental habits.[155] Education of the interactive type, on the other hand, creates habits in the student which involve some active use by him of his surroundings[156] and some mental growth as a result of this interaction.[157] The process of mental growth induced by education, however, may be arrested at some point by routinized habits, which put an end to plasticity and mark the close of the power to vary.[158] Thus, education is more than mere conditioning or training and may include the unidirectional process of habituation through mental acts, as well as the interactive process of creating active habits which may or may not become routinized.[159]

Three broad types of education have been distinguished. One philosopher of education delineated them as educational authoritarianism, educational laissez faire, and educational experimentalism.[160]

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[153]J. DEWEY, *supra* note 151, at 47.

[154]Sometimes education is thought of as "the acquisition of those habits that effect an adjustment of an individual to his environment." *Id.* at 46.

[155]*Id.* at 47.

[156]*Id.*

[157]*Id.* at 53, maintained that "growth is the characteristic of life, [and] education is all one with growing."

[158]*Id.* at 49.

[159]*Id.* at 76. The conclusion in the text agrees partially with J. DEWEY, *supra* note 151, at 76, that education is "that reconstruction or reorganization of experience which adds to the meaning of experience," but excludes the qualification that education must increase the "ability to direct the course of subsequent experience." *Id.* More apposite is the comment of Wynne that education "includes all activities that influence subsequent conduct in either desirable or undesirable ways." J. WYNNE, PHILOSOPHIES OF EDUCATION FROM THE STANDPOINT OF EXPERMENTATION 1 (1947).

[160]

> First, of the people who are interested in education, many are primarily interested in the maintenance and extension of order and authority. Since some of these seek such ends through external dictation and imposition, their position may probably be designated as *educational authoritarianism.* Second, there are always people who are primarily interested in the maintenance and extension of in-

Educational authoritarianism signifies the attitude assumed by all those who think, and act as though education were determined in all important respects by influences outside the individual, as well as by those who deliberately defend and support theories that justify such external control and direction.[161]

Educational laissez faire signifies the attitude assumed by all those who think, feel, and act as though education were determined in all important aspects by factors inherent within individuals themselves, as well as by all those who consciously defend and support theories that justify the direct expression, development, and realization of individual propensities.[162]

[From the point of view of educational experimentalism], education does not get its direction from the environment in isolation from the individual or from the individual in isolation from the environment. It gets its direction from factors that arise within experiences in which both the individual and the environment are functionally combined.[163]

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dividual freedom. Since some of this group seek these ends through direct self-development, expansion, or expression of the powers of the individual as they are prior to experience, their position may properly be designated as *educational laissez faire.* Third, there are those who reject, not only the extremes of educational authoritarianism and educational laissez faire, but any eclectic or middle-of-the road position which seeks a compromise between them. They find their standards neither in external authority nor in the individual apart from experience, but in experience itself. Since those who adopt this attitude toward desirable experience—education—in recent years have been given the intellectual support of the movement in philosophy now usually called experimentalism, their position may properly be designated as *educational experimentalism.*

J. WYNNE, *supra* note 159, at v.

[161] *Id.* at 4.

[162] *Id.* at 5.

[163] *Id.* at 7. Educational experimentalism could have been called interactive education.

Other philosophers of education have developed similar categories, though not so clearly as those set out in the text. Professor Dewey distinguished (1) "formation from without," (2) "recapitulation and retrospection" and the "unfolding of latent powers from within," and (3) "reconstruction" as

Such an analysis of the three basic educational processes aids in revealing those primary attributes of authoritarian education which distinguish it from the other processes. The relation of authoritarian teacher to student involves external dictation and imposition, formation by a superior from without by means of indoctrination to mold the student to conform to the model in the

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"a constant reorganizing or reconstructing of experience." J. DEWEY, *supra* note 151, at 69-80. These terms are redolent of authoritarian education, laissez faire education, and experimentalism, respectively. Professor Hook limited educational philosophies to two types. He described the first, authoritarian education, as follows:

> We shall therefore call those tendencies in education authoritarian, which, by blocking the roads of inquiry, prevent freedom of intellectual choice; which, by discouraging critical participation in the processes of learning, obstruct individual growth; which, by imposing dogmas of doctrine or program, blind students to revelant alternatives and encourage conformity rather than diversity; which, in short, fail to recognize that the supreme and ultimate authority, the final validating source of all other authorities in human experience is the self-critical authority of critical method—or intelligence.

Hook, *The Danger of Authoritarian Attitudes in Education*, in ISSUES IN EDUCATION 116, 117 (B. Johnson ed. 1964).

In contrast, Professor Hook described the second educational philosophy, the liberal democratic type, as follows: "Roughly speaking . . . we may say that the pervasive ideal of democratic education—or liberal education today—is to achieve a community of persons who, on the basis of reliable knowledge about themselves and the world in which they live, can develop freely in a free society." *Id.* Similarly, Professor Kallen contrasted laissez faire education, often called *libra examen*, and educational authoritarianism, which he described as follows:

> In the history of teaching, such words as "indoctrination," "instruction," "inculcation" give away the persistent relation of teacher to pupil, of adult to child. It is a relation of superior to inferior power, of hardness to plasticity, of authority to dependence. The primary activities upon which the later meanings of the words are variations, are activities of building in, stamping in, talking in. . . . [C]ommonly the doctrines of the inculcators are presented as self-evident ineluctable truths. But it must be obvious that if they were such, indoctrination would be unnecessary. If indoctrination is necessary, the doctrines can be neither self-evident, nor ineluctable.

H. KALLEN, THE EDUCATION OF FREE MEN 149 (1949). For another view of educational authoritarianism, see C. LEWIS, THE ABOLITION OF MAN 38-41 (1947), which maintained that "the man moulders," who will eventually be able to "cut out all posterity in what shape they please," will finally prove to be the "abolition of man."

mind of the teacher. The teacher, as superior or molder, necessarily recognizes no right in the student to resist or modify the molding. As John Dewey observes, the philosophy of authoritarian education "is eloquent about the duty of the teacher in instructing pupils; it is almost silent regarding the privilege of learning,"[164] or, one may add, of not learning.

Using law in an authoritarian educational process carries important implications for traditional rights associated with the rule of law. Much misunderstanding results from failure to distinguish clearly three fundamental clusters of ideas intermingled in rule of law doctrine. The first focuses on the form of legal rules without regard to their procedural or substantive content. It specifies that law consists of general rules and not specific dispositions of particular cases. Preference for a government of laws over a government of men traditionally has expressed this aspect of the rule of law.[165] The truth figuratively expressed in this formula, however, should not be obscured by a literal interpretation; any government of laws must utilize men.[166] Never-

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[164]J. DEWEY, *supra* note 151, at 71.

[165]Aristotle, *Politica*, in 10 THE WORKS OF ARISTOTLE § 1287a (W. Ross ed. B. Jowett transl. 1921), observed: "The rule of law, it is argued, is preferable to that of any individual." J. HARRINGTON, *The Commonwealth of Oceana*, in THE POLITICAL WRITINGS OF JAMES HARRINGTON 33, 41 (C. Blitzer ed. 1955), stated that government "is the empire of laws and not of men." D. HUME, *Of Civil Liberty*, in DAVID HUME'S POLITICAL ESSAYS 101, 106 (C. Hendel ed. 1953), affirmed of modern "civilized monarchies what was formerly said in praise of republics alone, *that they are a government of laws, not of men.*" The first Massachusetts Bill of Rights provided:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. BILL OF RIGHTS pt. I, art. XXX (1780), in DOCUMENTS OF AMERICAN HISTORY 107, 110 (3d ed. H. Commager ed. 1943). "The definition of good government as government by laws rather than by men has been a commonplace in Western political thought since the time of Aristotle." Blitzer, *Editorial Note* to THE POLITICAL WRITINGS OF JAMES HARRINGTON 41 n.2 (C. Blitzer ed. 1955).

[166]K. DAVIS, DISCRETIONARY JUSTICE 17 (1969), correctly observed that "[e]very government has always been *a government of laws and of men.*" W. GELLHORN, OMBUDSMAN AND OTHERS 438 (1966), commented that the ideal of government of laws and not of men "expresses utter silliness when

theless, expression in the form of general rules is one of the first requirements for laws.[167] Paradoxically, this requirement is not met if rules are too general, as in the case of general clauses which merely mask administrative measures taken under them.[168] Nor are there laws if rules are too specific, as in private legislation[169] and the judgment of a court in a particular case.[170] Obviously the

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taken to mean that men are not the central ingredient of good government." E. PATTERSON, JURISPRUDENCE 101 (1953), found this literal ideal unattainable because self-contradictory, adding "laws without officials would be prescriptions with no pharmacist to fill them."

[167]H. HART, THE CONCEPT OF LAW 21 (1961), required laws to be general with respect to the acts described and the persons subject to them. "[T]he quality of equal application of the rule to all persons within its scope is an attribute of every rule which is duly enforced . . . ." J. STONE, HUMAN LAW AND HUMAN JUSTICE 102 (1965). *Accord*, Neumann, *The Concept of Political Freedom*, 53 COLUM. L. REV. 901, 906 (1953). E. PATTERSON, *supra* note 166, at 97, considered "the generality of law . . . its most important characteristic." *See generally id.* 97-116; E. BODENHEIMER, JURISPRUDENCE 168-73 (1967). For a discussion of the conflict between general rules of law and administration, see Funk, *Pure Jurimetrics: The Measurement of Law in Decision-Regulations*, 34 U. PITT. L. REV. 375, 417-20 (1973). As Professor Patterson explained:

> The generality of a proposition depends upon the generality of its terms (or of at least one of its terms). A proposition of law is general because its terms refer to an indefinite number of individual instances, in contrast with a term which refers to an individual instance or a definite number of individual instances.

E. PATTERSON, *supra* note 166, at 110. *Cf. id.* at 97. W. FRIEDMANN, THE STATE AND THE RULE IN A MIXED ECONOMY 94 (1971), concluded that "[i]n a formal sense, the rule of law means any ordered structure of norms set and enforced by an authority in a given community."

[168]*See, e.g.*, W. FRIEDMANN, LEGAL THEORY 333 (5th ed. 1967); R. SCHLESINGER, COMPARATIVE LAW 344-91 (2d ed. 1959); Neumann, *The Change in the Function of Law in Modern Society*, in THE DEMOCRATIC AND THE AUTHORITARIAN STATE 22, 29 (1964); Rümelin, *Developments in Legal Theory and Teaching During My Lifetime*, in THE JURISPRUDENCE OF INTERESTS 1, 17 (M. Schoch ed. 1948). Of course, general clauses may become more specific through administrative regulations or judicial interpretation, and this is common with broad principles of constitutional law.

[169]*See, e.g.*, E. PATTERSON, *supra* note 166, at 112-13.

[170]*Id.* at 113. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 21 (1965), considered the command of the judge to be "occasional or particular, . . . [f]or he orders a specific punishment, as the consequence of a specific offense."

generality requirement for law is a matter of degree.[171] Thus, this aspect of the rule of law does not eliminate discretion altogether but circumscribes it[172] with rules to which private citizens, as well as other departments of government,[173] can appeal.[174]

Rule of law doctrine extends beyond the formal requirement of generality for laws to some prescriptions of content. A second cluster of ideas requires legal institutions to operate under procedural rules fundamentally fair to the citizens subject to them.[175] This is the Anglo-American requirement of due process

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[171]W. JENNINGS, THE LAW AND THE CONSTITUTION 282 (1959). The rule of law and discretion are conceptual opposites, like philosophic rationalism and empiricism or the nomothetic-ideographic dichotomy. On the former, see M. COHEN, LAW AND THE SOCIAL ORDER 263-67 (1967). On the latter, see 7 F. COPLESTON, A HISTORY OF PHILOSOPHY, pt. II, at 138 (1965); E. NAGEL, THE STRUCTURE OF SCIENCE 548 (1961). Despite this conceptual dichotomy, particular instances may be arranged in series according to the degree to which they satisfy one or the other of these concepts. K. DAVIS, *supra* note 166, at v; Goodheart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 949 (1958).

[172]As Radbruch observed, "[T]he natural law rule that whoever at the time holds power has the right to enact law is inseparable from the other natural law rule that that holder of power is bound by his own laws." G. RADBRUCH, *supra* note 1, at 205. Within the core of generally accepted meanings of law various interpretations are possible, but legal norms serve as a "frame" controlling the limits of interpretation. H. KELSON, PURE THEORY OF LAW 351 (1967). Thus, the possibility of court interpretation is limited by legislation to "a sphere of small diameter." W. JENNINGS, *supra* note 171, at 254. Rule skeptics may question the size of the sphere in practice, but should admit some circumscription nonetheless. W. RUMBLE, JR., AMERICAN LEGAL REALISM 95-103 (1968).

[173]The American doctrines of balance of powers and judicial supremacy may be compared with the German *Rechtsstaat*, "viz., the principle that the judicial power is subordinate to the legislative power." Rümelin, *supra* note 168, at 20.

[174]"The heart of the [rule of law] doctrine seems . . . to lie in the recognition by those in power that their power is wielded and tolerated only subject to the restraints of shared socio-ethical convictions." J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 619-20 (1966). "The generality of law is an important means of protecting the individual against official partiality and oppression." E. PATTERSON, *supra* note 166, at 102. *Cf.* G. RADBRUCH, *supra* note 1, at 206, "that law, while *class* law, is indeed class *law*, since it presents the interest of the ruling class not naked but in the garb of law, and since the form of law, no matter what the legal content, always, indeed, serves the suppressed."

[175]This aspect of rule of law doctrine is the rule of law in the "narrow" or "lawyer's sense." *See* D. LLOYD, THE IDEA OF LAW 162 (1964); J. STONE,

of law.[176] Whether in the ordinary courts or administrative agencies,[177] the procedural content of the rule of law guarantees, at

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supra note 167, at 104. In this sense "the rule of law is the machinery by which effect can be given to such basic rights as are recognized in any legal system." Goodheart, *supra* note 171, at 943. "By procedural rules I mean those rules which establish how those who hold the legislative power are determined and what steps they must follow in exercising this power, while the substantive rules are concerned with the subject matter which can be dealt with by the legislative body." *Id.* at 951. *Cf.* Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 151 (1958), that "[a]lthough I, too, think of the concept [of the rule of law] as a primarily procedural one, I am by no means sure that a meaningful rule of law has nothing whatever to say concerning the substantive content of legally enforced principles."

[176]D. LLOYD, *supra* note 175, at 162, defined "due process" as follows:

> This involves all such matters as ensuring the independence of the judiciary; providing for the speedy and fair trial of accused persons and for adequate judicial control over police and police methods of securing confessions from accused persons; providing adequate safeguards regarding arrest and detention pending trial; and providing adequate legal aid for those whose financial resources are not sufficient to obtain suitable legal defense. Moreover, since the rights of the individual here squarely confront those of the state, the accused must be entitled to refuse to make any statement which is calculated to incriminate himself, and those charged with the duty of advocacy must be free and independent and not subject to state pressure. Nor must the advocate be regarded as in any way an agent of the state itself or one whose duty is not so much to his client but to the administration of justice, as personified by the state . . . .

As Jones, *supra* note 175, at 145, saw it:

> The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court" . . . .

[177]To A.V. Dicey the rule of law meant that each citizen was amenable to the jurisdiction of "the ordinary tribunals," *i.e.*, courts rather than administrative agencies. A. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 193 & ch. XIII (10th ed. 1959). This distinction has been characterized as "not fundamental," "no longer acceptable" and "nonsense." *See* Wade, *Introduction to* A. DICEY, *supra*, at civ; W. FRIEDMAN, LAW IN A CHANGING SOCIETY 501 (2d ed. 1972); O'Toole, Book Review, 53 GEO. L.J. 854, 857 n.11 (1965). In Pound, *The Rule of Law and the Modern Social Welfare State*, 7 VAND. L. REV. 1, 30 (1953), on the other hand, the judicial and administrative processes are treated as "characteristically distinct." Dean Pound claimed:

> Four features of administrative justice are continually in evidence. One is a tendency to decide in advance of hearing and without

least, minimum rights to the weak to be heard effectively.[178] Like cases are to be treated alike procedurally, and unlike cases are to be treated differently; but with respect to procedure most cases are alike.[179]

Thirdly, rule of law has a substantive aspect. Again, like cases are to be treated alike and different cases differently, but most substantive rules emphasize unlike cases and different results.[180] The search for substantive rule of law standards, governing the division of cases into appropriate categories, is analogous to the search for specific content in natural law doctrines[181]

> hearing both sides, using the hearing when required by statute, as little more than a technical formal requirement. Second, there is a tendency to consult one side or hear statements or arguments from one side with no opportunity to refute accorded to the other. Third, action is taken upon grounds of which the party adversely affected has no notice and no opportunity to explain or refute . . . . Fourth, a serious feature of administrative justice is entrapment of individuals by advice and information given by officers, subordinates and local officials of the administrative agency and repudiated after allowing it to be acted on in good faith.

Id. Cf. F. HAYEK, THE ROAD TO SERFDOM 72-87 (1944). With the growth of state and federal administrative procedure acts in the United States, the validity of these criticisms today is problematical. As W. JENNINGS, *supra* note 171, at 313, observed, "administrative courts are as 'ordinary' as the civil courts" and what matters is their independence of administrative influence and control in fact.

[178]F. NEUMANN, BEHEMOTH 451 (1966).

[179]*Cf.* J. STONE, *supra* note 167, at 140, that "even within this narrow compass . . . no absolute indentification of equal liberty with justice is possible. Justice may still be thwarted by *de facto* inequality between the parties in their respective skills and resources in using the procedure for harassment, delay or attrition of the opponent."

[180]As W. JENNINGS, *supra* note 171, at 311-12, put it:

> "[E]quality before the law" in its most obvious sense means an equality of rights and duties. In this sense there is no equality. Pawnbrokers, money-lenders, landlords, drivers of motor-cars, infants, married women, and indeed most other classes, have special rights and duties. Nor is it possible to affirm that equality exists because any person can legally join one of these classes. A man cannot become a married woman or an infant; nor can anyone become a licensee of a public-house or a film exhibitor without the consent of someone else.

[181]W. FRIEDMANN, *supra* note 177, at 500-501, commented that "to give the 'rule of law' concept a universally acceptable ideological content is as

or ideas of justice.[182] The touchstone is that inequalities in substantive rules "shall be inequalities of function and service but shall not be derived from arbitrary distinctions based on race, religion or other personal attributes."[183]

Opinions may differ with respect to each aspect of rule of law doctrine developed above—its formal requirements and its procedural and substantive content. Nevertheless, there is a common element pervading all three aspects, regardless of individual differences concerning specific applications. Throughout, the rule of law doctrine provides an extragovernmental standard by which

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difficult as to achieve the same for 'natural law.' In fact, the two concepts converge." As Jones, *supra* note 175, at 151, put it:

> . . . I am by no means sure that a meaningful rule of law has nothing whatever to say concerning the substantive content of legally enforced principles. A good case can be made that the concepts of the rule of law and of natural law are at least fraternal twins; I would not foreclose the possibility that they may be identical twins.

Cf. Neumann, *supra* note 167, at 906, that "[t]he generality of the law may . . . be called secularized natural law."

[182]J. STONE, *supra* note 174, at 620 n.82b, referred to the substantive content of the rule of law as its "justice-reference." This is "the socioethical as distinct from [the] lawyers' law component in 'the rule of law' . . . ." *Id.* at 625 n.101. "[T]he ideal of 'the rule of law,' long worshipped in blind faith, is recognized as fruitful only if it says something intelligible about the justice embodied in 'the law.'" J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 12 (1964).

[183]W. FRIEDMANN, THE PLANNED STATE AND THE RULE OF LAW 8 (1948); W. FRIEDMANN, *supra* note 177, at 503. J. STONE, *supra* note 167, at 102 made a similar point as follows:

> The unjust might . . . be definable as "inequality without intrinsic differences." Arbitrariness on this head would consist in failing to apply equally to all members of society who *as regards the reason* (or *purpose* or *policy* or *end*) of that law are similarly situated; or, in other words, all laws would have to apply equally to all human beings unless there is good reason to the contrary.

To Western liberals the ultimate justification of substantive distinctions is the worth of the individual human being. For example, the basic value of W. FRIEDMANN, *supra* note 177, at 524, is "the fullest provision by the community of the conditions that enable the individual to develop into a morally and intellectually responsible person." This includes equality, liberty and democracy. *Id.* at 502, 503, 505. J. STONE, *supra* note 167, at 102 n.120, concluded that "the transcending principle thus governing both the areas of just equalities and just inequalities becomes the individual human life as an end in itself, 'human worth' as such regardless of 'merit.'"

the governed may judge the governors. The rule of law sets individual rights against state power.[184] Requirements of generality rather than specific decrees, procedural fairness, and reasonable justification of substantive differences may be utilized by one power-holder against another. More significantly, however, these doctrines may be utilized by the individual citizen against the entire governing group. This creates a theoretical conflict between the use of law in a program of authoritarian education and the rule of law. Authoritarian education involves external dictation from outside the individual, forming him, preventing free choice and individual growth, and indoctrinating him according to the will of the educator. The relation of teacher and pupil in this process can only be that of superior and inferior. There can be no standards in such a program to protect the individual who does not wish to be educated.

The implications for Soviet jurisprudence are clear; if law is used in the program of authoritarian education outlined in the Marxist-Soviet classics, the specific legal institutions chosen to carry out this program are bound to conflict with the rule of law. In fact, the course of contemporary Soviet jurisprudence demonstrates this choice and this conflict and finally reveals the theoretical impossibility of the entire Soviet program for socialist law.

III. The Conflict Exemplified in Specific Soviet Legal Institutions

Soviet jurists point to various legal institutions and procedures as specific examples of the educational role of socialist law in practice. One is the influence which a Soviet judge as teacher exerts on the accused during a criminal trial. The court is said to exercise the greatest possible influence on those who are called to a reckoning before it.[185] The claim is that the educational influence of the court on an accused is immense[186] and that the court directly influences defendants even in civil cases.[187]

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[184]Jones, *supra* note 175, at 145, observed that "the rule of law's great purpose is protection of the individual against state power-holders."

[185]I. Golyakov, *supra* note 112, at 17.

[186]Gusev, *supra* note 131, at 21.

[187]Gorshenin, *The Soviet Court and Its Role in Strengthening Soviet Law*, 7 Current Digest of the Soviet Press, No. 7, at 18, 22 (1955).

The "teaching sentence" is a second specific mechanism by which Soviet legal institutions are said to fulfill their educational role. A Soviet jurist explained:

> When the court individualizes penalties depending on the criminal's personality, when, after a public court hearing and a public reading of the sentence, all those present clearly understand why the court has chosen this particular measure of punishment, then peoples' faith in the administration of justice grows stronger. They begin to place a higher value on a conscientious attitude toward labor, on respectable behavior in society and on their place in the collective.[188]

A third instance of education by specific Soviet legal institutions is an increased use of criminal trials as object lessons to the rest of society. Trials are to be conducted according to the following principles:

> Trying the case in great detail, strictly observing the law, the court step by step discloses the whole picture of the crime or the civil dispute. It raises the explanations of the parties to a higher level, transforming the whole trial not into a spectacle, like the selfish bourgeois court does, but into a serious instructive school for educating those attending the session to observe and respect the laws and justice.
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> "We are taking it too little into account," said M. I. Kalinin in a speech on the tenth anniversary of the Supreme Court of the USSR, "that *the court has the greatest possible influence both on those who are called to a reckoning and upon those who merely attend the sessions.*

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[188]Starodubsky, *Only Through the Court*, 17 CURRENT DIGEST OF THE SOVIET PRESS, No. 36, at 17 (1965). *Cf.* Kulikov, *Enhancing the Educational Role of Socialist Justice and Reinforcing Legality in the Activities of Judicial Agencies*, 2 SOVIET LAW AND GOVERNMENT 33, 34 (1964), as follows:

> All court activity does not have an educative effect—only that which rests upon strict observance of legality in the activities of the courts, realization of the principle of the equality of all citizens before the law and the courts, and adherence to the requirement that court decisions be just, that is, severe with respect to malicious criminals, but lenient toward the individual who has accidentally strayed.

> The judge who directs the case well, skillfully, and in a Party manner, is also always able to secure a good audience. People will come to listen to him, to learn from him." The court is then transformed into an instrument of propaganda for Soviet law and the just foundations of our life; it teaches people how to live, work, and behave under the conditions of Soviet society.[189]

Another Soviet jurist explained that:

> [E]ach case of application (in the broad sense of this word) of the norms of socialist law can and must be employed not only to regulate the particular concrete situation in accordance with the requirements of the law, but also for its educative effect upon the people affected by this situation or aware of it.[190]

Some even advocate using the trial setting as a forum for government propaganda. For example, it is said that:

> The prosecutor's rostrum often turns into a political rostrum. "The prosecutor in the court," writes Academecian A. Ya. Vyshinsky, "is an agitator and propagandist in the interests of the Soviet regime. This determines the significance of the Soviet prosecution in the courts as a means of mass political-educational work."[191]

Others call for the increased use of speeches of public accusers and defenders during trials, apparently to point up the issues involved, in order to increase the educational effect on those hearing them.[192] Thus, it is claimed that the trial itself, if properly explained, may serve as an educative example to the public.

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[189]I. GOLYAKOV, *supra* note 112, at 17.

[190]Golunsky, *The Creative Revolutionary Role of Socialist Law in the Period of the Comprehensive Building of Communism*, 1 SOVIET LAW AND GOVERNMENT 13, 22 (1961).

[191]Polyansky, *supra* note 117, at 10.

[192]Izvestia, *U.S.S.R. Supreme Court, Plenary Session*, 14 CURRENT DIGEST OF THE SOVIET PRESS, No. 20, at 22-23 (1962); U.S.S.R. Supreme Soviet, Legislative Proposals Committees of the Council of the Union and the Council of Nationalities, *Draft: Law on Increasing the Role of the Public in Combatting Violations of Soviet Laws and the Rules of Socialist Society*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 43, at 13, 14 (1959); U.S.S.R. Supreme Court, Plenum, *Decree No. 3, June 19, 1959, On the Application*

Finally the comrades' court system is described as a new legal institution, educating citizens in preparation for the withering away of the state and law. The objective is to bring public influence to bear on a criminal offender to reform him so he will not violate social norms again. Thus, the criminal element in Soviet society is to be permanently reduced and, eventually, totally eliminated. Then all members of society, presumably, will conform to socialist social norms, and the coercion of state and law will no longer be necessary. The Russian Republic Supreme Court alluded to this argument in discussing the changes and additions aimed at improving the work of the comrades' courts in the communist upbringing of the working people.[193] One Soviet jurist claimed that in many instances the public, in a comradely court, exerts a much stronger influence on a wrongdoer than a people's court trial would.[194] The fact that a defendant frequently asks for the transfer of his case from the comrades' court to the people's court has been said to show graphically the great educational importance of comrades' courts and public influence.[195] It is said that comrades' courts should use warnings, public censure, and public apologies as specific measures of influence,[196] and, when a criminal can be reformed by measures of public influence, the case is to be transferred to the comrades' courts.[197]

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of Measures of Criminal Punishment by the Courts, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 41, at 14, 15 (1959); Berman, *supra* note 125, at 138.

[193]Russian Republic Supreme Court Presidium, *What Is New In Work of Commrades' Courts*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 43, at 29 (1963).

[194]Anashkin, *Concerning Public Courts*, 8 CURRENT DIGEST OF THE SOVIET PRESS, No. 50, at 27 (1956).

[195]Gutsenko, Dobrovolskaya & Raginsky, *supra* note 130, at 21.

[196]*Id.* at 22. These authors also applied the term "measures of influence," to fines and restitution for damages.

[197]Karev, *Criminal Procedure*, in FUNDAMENTALS OF SOVIET LAW 443, 446 (P. Romashkin ed. n.d.), which suggests as an alternative, however, transfer to a commission for minors. On the work of this social agency *cum* juvenile court, see, *e.g.*, U.S.S.R. Supreme Soviet, Legislative Proposals Committees of the Council of the Union and the Council of Nationalities, *Draft: Model Statute On Commissions For Cases Involving Minors*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 43, at 17-18 (1959). *Cf.* Min'kovskii, *The Special Features of Examining Cases of Crimes of Minors*, in THE SOVIET LEGAL SYSTEM, pt. I, at 109-11 (J. Hazard & I. Shapiro eds. 1962). Paradoxically,

These legal institutions are considered an effective form of moral influence upon violators of the rules of the socialist community.[198] In one collective it was observed that by degrees the comrades' court began to acquire greater weight and authority in the collective as people became convinced that measures of public influence had a stronger effect on violators of labor discipline than disciplinary fines.[199] A comrades' court is considered the court of public conscience,[200] so failure to transfer petty hooligan cases to it becomes a clear underestimation of the educative influence of public opinion.[201]

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this parental use of law in a nearly literal sense is part of the childhood socialization process whereby children are taught to assume their adult roles, and thus differs from the educational function of law in changing adult citizens. Nevertheless, the Soviet jurisprudential doctrine of the educational function of socialist law in socializing adults in preparation for communism may be considered a type of socialization after childhood. *See generally* R. DAWSON & K. PREWITT, POLITICAL SOCIALIZATION (1969); O. BRIM, JR., & S. WHEELER, SOCIALIZATION AFTER CHILDHOOD (1966); T. PARSONS, THE SOCIAL SYSTEM 201-48 (1964); Parsons, Shils & Olds, *Values, Motives, and Systems of Action*, in TOWARD A GENERAL THEORY OF ACTION 45, 223-33 (T. Parsons & E. Shils eds. 1962).

[198]Mironov, *Strengthen Legality and Law and Order*, 16 CURRENT DIGEST OF THE SOVIET PRESS, No. 19, at 17, 18 (1964).

[199]Petrov, *From the Experience of the Work of Comrades' Courts*, in THE SOVIET LEGAL SYSTEM, pt. I, at 22 (J. Hazard & I. Shapiro eds. 1962). *Accord*, Pokrovsky & Gershanov, *What Comrades' Courts Should Be Like*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 14, at 24, 25 (1959); Shomorov, *Is This a Private Affair?*, 12 CURRENT DIGEST OF THE SOVIET PRESS, No. 30, at 30, 31 (1960); Tikhunov, *There Will Be No Indulgence For Hooligans*, 18 CURRENT DIGEST OF THE SOVIET PRESS, No. 16, at 45 (1966).

[200]Mironov, *supra* note 198, at 18.

[201]Sovetskaya yustitsia, *A New Stage in the Functioning of the Comrade's Courts*, 3 SOVIET LAW AND GOVERNMENT 35 (1964).

An argument could be made that reliance on public influence in the comrades' courts deprives them of essential qualities of legal institutions, since they rely partially on social sanctions, such as public apology, warning and public censure. H. BERMAN, *supra* note 4, at 289. Comrades' courts, on the other hand, may impose fines up to ten rubles, propose job transfer, demotion, or eviction from living quarters, and require payment of damages up to fifty rubles. *Id.* at 290. *Statute on Comrades' Courts, July 3, 1961*, in THE SOVIET LEGAL SYSTEM, pt. I, at 17-21 (J. Hazard & I. Shapiro eds. 1962). Admittedly, comrades' courts rely exclusively on lay judges, though this is not unknown in the Soviet Union and elsewhere. Joras, *The Soviet Judge and the American Judge*, 5 BAYLOR L. REV. 18, 25 (1952), observed that the ordinary Soviet judge "is not required by statute to be a trained

Soviet jurists readily admit that the process in which these specific legal institutions and procedures[202] are being employed is

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lawyer, and the majority of Soviet judges do not possess the qualifications of legal training." H. BERMAN, *supra* note 4, at 300, estimated that in the 1949 election of peoples' court judges, "[a]pparently at least 30 per cent, and probably more, had no legal education." In the 1957 election, however, "[n]early all had either higher or intermediate legal education." *Id. Accord*, Hager, *Soviet Legal Education*, 5 DUQUESNE U.L. REV. 143, 145 (1966). On the European experience, see J. DAWSON, A HISTORY OF LAY JUDGES (1960). On balance, therefore, comrades' courts may be considered legal institutions, though more informal than most today. *See generally* F. BARGHOORN, POLITICS IN THE U.S.S.R. 344-46 (1966); Berman & Spindler, *Soviet Comrades' Courts*, 38 WASH. L. REV. 842 (1963); O'Connor, *Soviet Procedures in Civil Decisions: A Changing Balance Between Public and Civic Systems of Public Order*, in LAW IN THE SOVIET SOCIETY 51, 90-92 (W. LaFave ed. 1965).

[202]This article examines the jurisprudential implications of using Soviet legal institutions and procedures as educators in preparing man for communism. Soviet authors sometimes rely on other institutions and procedures to perform this task. For example, peoples' volunteer militia or public order squads are said to instill proper attitudes toward law and the state. *See, e.g.*, Shaknazarov, *supra* note 141, at 62. *See generally* Hildebrand, *supra* note 101, at 198-200. These organizations are a sort of auxiliary police. H. BERMAN, *supra* note 4, at 286-88. The educative effect here results from drawing many people into the police activities which these institutions perform. For present purposes these activities are considered part of law enforcement, and thus these institutions are not legal institutions in a strict sense. Second, release of criminal offenders on probation into the custody of collectives often is said to have an educative effect. *See, e.g.*, Gorkin, *The Power of Public Influence*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 51, at 33 (1960); Mironov, *supra* note 198, at 18; Sheinin, *Believe in Man*, 12 CURRENT DIGEST OF THE SOVIET PRESS, No. 3, at 30, 31 (1960). Sometimes this educative measure is limited to first offenders, minor offenses, those capable of reform, or minors. In any event, probation procedures involve penal institutions rather than legal institutions in the strict sense. Their educative effect probably may be investigated more profitably as penology rather than jurisprudence. The same may be said of the educative effect of particular penal procedures. *See, e.g.*, Mironov, *supra* note 146, at 63; Shaknazarov, *supra* note 141, at 62-63, on the educational effect of corrective labor in penal institutions in preparing the prisoner for return to a productive life. Some even advocate the direct "political education" of the prisoner to reform him. *See, e.g.*, Mironov, *supra* note 146, at 63. One Soviet jurist suggested the parole of prisoners to collectives before the expiration of their terms as an educative measure. Gorshenin, *Soviet Court Is Important Weapon for Strengthening Socialist Law*, 6 CURRENT DIGEST OF THE SOVIET PRESS, No. 45, at 12 (1954); Gorshenin, *supra* note 187, at 21. Again, these are penal measures. Sometimes an educational effect is attributed to lectures at public meetings and articles in the public press by judges and other court officials. *See, e.g.*, Gorshenin, *supra* note 187, at 22; Prusakov, *Sovetskaya*

one of authoritarian education. The Communist Party decides how man is to be remade for communism, and Soviet man is subjected to this process. Thus, the educational use of legal institutions in changing man is characterized commonly as a process of instilling[203] or inculcating[204] new discipline and new attitudes. Mold-

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Rossia Asks: What Is New In the Bar?, 14 CURRENT DIGEST OF THE SOVIET PRESS, No. 35, at 16 (1962); Sovietskaya yustitsia, *Eliminate Shortcomings in the Work of Lawyer's Collegiums*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 18, at 8-10 (1961). The speakers are personnel of legal institutions and the speeches are often on legal topics. Nevertheless, to a Westerner, at least, these educational activities seem analogous to those of bar association speaker's bureaus, rather than those of formal legal instiutions in the strict sense. Finally some Soviet jurists see simplification and propagation of the laws themselves as a significant educational measure. *See, e.g.*, Kudriavtsev, *The June Plenum of the C.P.S.U. Central Committee and Certain Questions Concerning Scientific Organization of the Struggle Against Crime*, 2 SOVIET LAW AND GOVERNMENT 13, 19 (1963); Turnanov, *Failure to Understand or Unwillingness to Understand: (On Harold Berman's* JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW), 3 SOVIET LAW AND GOVERNMENT 3, 8 (1965). It is perfectly proper to investigate the educative effect of legislation itself. *See, e.g.*, Funk, *International Laws as Integrators and Measurement in Human Rights Debates*, 3 CASE W. RES. J. INT'L L. 123 (1971); Funk, *From International Laws to International Economic Community Law*, 4 CASE W. RES. J. INT'L L. 3 (1971). The present inquiry, however, is limited to the educative effect in Soviet jurisprudence of law, in the sense of strictly legal institutions and procedures.

[203]Khrushchev, *supra* note 121, at 11, stated "[w]e must instill a respect for Soviet laws. . . ." Kudriavtsev, *The June Plenum of the C.P.S.U. Central Committee and Certain Questions Concerning Scientific Organization of the Struggle Against Crime*, 2 SOVIET LAW AND GOVERNMENT 13, 18 (1963), maintained that "[b]y its very content, legal literature instills irreconcilability toward violators of socialist law and order, thieves, loafers and money-grubbers, and a striving for justice, moral purity, and respect for Soviet laws." Vlasov, *Administrative Law*, in FUNDAMENTALS OF SOVIET LAW 105, 113 (P. Romashkin ed. n.d.), found that "[s]ocialist legality . . . instills into the masses new socialist concepts." I. GOLYAKOV, *supra* note 112, at 20, observed that "[b]y its educational role our court can only make the strictest application of the law that will help the state to instill in our citizens the ways of communistic living." A. VISHINSKY, SOVIET LAW 13-14 (Department of Government, University of Texas transl. 1950), admitted that the aim of Soviet law is "to promote the instillation of a new line of conduct in socialist society."

[204]Glizerman, *supra* note 132, at 9, found that legal institutions "inculcate a new social discipline in the masses." Chkhikvadze, *supra* note 116, at 11, saw Soviet law "inculcating a communist attitude to work." A. DENISOV & M. KIRICHENKO, *supra* note 120, at 301, claimed that Soviet law "inculcates

ing,[205] shaping,[206] and refashioning[207] the new man and embedding[208] or rooting in[209] the new ideas is readily admitted. Comrades' courts are said to play an indoctrinational role,[210] and Soviet law is to correct psychologically all the weaknesses inherent in what criminals have been taught.[211] Courts serve as educators and propagandists of Soviet laws, if the trial is well organized and the sentence is correct.[212] Finally, courts are to

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solicitude and concern for socialist property, strict labour discipline, and honest attitudes towards their duties to the state and society and respect for the rules of socialist intercourse." Ilyichev, *Current Tasks of the Party's Ideological Work*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 23, at 5, 10, 12 (1963), observed that Soviet law inculcates a new morality of labor discipline. Pokrovsky & Gershanov, *supra* note 199, at 25, saw comrades' courts "inculcating in citizens a respect for the laws and rules of socialist society." Sovetskoye gosudarstvo i pravo, *To Meet the 22nd Party Congress: Soviet Labor Law In the Period of the Full-Scale Building of Communism*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 37, at 18, 20 (1961), wanted law to "inculcate a communist attitude to work." The U.S.S.R. Supreme Soviet, *supra* note 192, at art. 3, 13, described law as "contributing to the inculcation in citizens of a spirit of a communist attitude toward labor and socialist property, the observance of the rules of socialist society and a respect for the dignity and honor of citizens."

[205]Khrushchev, *On the Program of the C.P.S.U.*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 45, at 17, 20 (1961), refered to "[t]he molding of the new man."

[206]Kommunist, *Jurisprudence Under the Conditions of the Building of Communism*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 49, at 19, 21 (1963), found it "no less important and no less necessary to carry legal knowledge to the masses, to shape the socialist law-consciousness of the working people."

[207]A. VYSHINSKY, *supra* note 113, at 640, found that Soviet laws "are a mighty instrument for . . . refashioning human consciousness."

[208]A. VYSHINSKY, *supra* note 203, at 11, maintained that through law "esteem for the new creative principles of socialist common-living is embedded."

[209]I. GOLYAKOV, *supra* note 112, at 18, called for "the rooting into the conscience of the broad masses of a respect for law and justice."

[210]Pokrovsky & Gershanov, *supra* note 199, at 25.

[211]A. VYSHINSKY, *supra* note 203, at 13.

[212]I. GOLYAKOV, *supra* note 112, at 17; Gorshenin, *supra* note 187, at 22. Strogovich, *When Sentence Is Pronounced*, 18 CURRENT DIGEST OF THE SOVIET PRESS, No. 30, at 29 (1966), maintained that the trial must be conducted so that it will "actively influence public opinion, organize it and channel it in the right direction."

continue their activity aimed at influencing people who do not submit to the rules of socialist society and who resist education.[213] These terms clearly reveal the authoritarian bias in the Soviet legal-educational process.[214]

Each specific legal institution and procedure relied on to further the educational role of socialist law tends to diminish the operation of the rule of law. In so far as a judge acts as an authoritarian lecturer, educator, or influencer of the defendant, he detracts from his role as the detached, independent adjudicator required by the rule of law. In so far as he selects sentences for individual criminal defendants to influence others in the courtroom or the general public, he departs from rules of punishment reasonably related to the offense. In so far as the particular court case is used as an object lesson or forum for propaganda, it is not being decided under preexisting rules. Finally, in so far as the Soviet legal system relies on social pressure, brought to bear by lay judges in the comrades' court system, it departs from decision by legal rules, in this instance, for lack of legal expertise

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[213]Khrushchev, *quoted in* Rudenko, *Intensify Struggle Against Especially Dangerous Crimes*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 18, at 21 (1961).

[214]A few Soviet jurists, however, characterize the educational use of legal institutions as "persuasion." Gutsenko, Dobrovalskaya & Raginsky, *supra* note 130, at 21, concerning the comrades' court system; Ilyichev, *supra* note 204, at 10. Tumanov, *supra* note 202, at 8, argued that the concept of the educational role of law applies only to criminal law. Letter from Harold J. Berman to David A. Funk, April 7, 1969.

Persuasion is sometimes contrasted with compulsion in the form of direct force applied by courts. Gorshenin, *Soviet Court Is Important Weapon For Strengthening Socialist Law*, 6 CURRENT DIGEST OF THE SOVIET PRESS, No. 45, at 12 (1954); Mironov, *supra* note 146, at 60; Romashkin, *Problems of the Development of the State and Law in the Draft Program of the C.P.S.U.*, 1 SOVIET LAW AND GOVERNMENT 3, 7 (1961). Nevertheless, the persuasion contemplated generally utilizes the propaganda methods of authoritarian education rather than open, interactive discussion. Zhogin, *Questions of Soviet Law: Abreast of the Times*, 16 CURRENT DIGEST OF THE SOVIET PRESS, No. 3, at 24, 25 (1964), asserted that "[t]he Marxist-Leninist science of law . . . must actively influence the consciousness of the working people and must propagandize and strengthen the democratic principles of life in Soviet society." *But see* Golunsky, *supra* note 190, at 22, that public discussion of draft laws not only "helps inculcate a socialist attitude toward the law," but also serves to achieve "a more complete and proper expression of the people's will in the laws."

if for no other reason.[215] Thus, legal institutions and procedures which exemplify the educational role of socialist law in practice tend to confirm the theoretical conflict between authoritarian education and the rule of law in this portion of Soviet jurisprudence.

IV. Remaking the Remakers and the Rule of Law

The relationship between an authoritarian role for socialist law and the rule of law finally demonstrates that the ultimate goal of Soviet jurisprudence is utopian.[216] Marxist-Soviet theory views man as a product of bourgeois society who must be remade before the state and law can wither away.[217] The Communist

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[215]*See generally* Berman & Spindler, *supra* note 201, at 902-05. Soviet jurists argue that comrades' courts not only educate the people to do without law but also herald the inception of the withering away of the state. In so far as comrades' courts embody spontaneous social pressure, it may be claimed that the educational process is not authoritarian and is, in fact, democratic. In practice, however, the Communist Party maintains sufficient controls to make this analysis unrealistic. Berman & Spindler, *supra* note 201, at 862, observed with respect to nominations of judges for comrades' courts, that "[i]n any event the Party would have ultimate control regardless of the nominating procedure established by statute . . . ." Also, "the procuracy, as general guardian of legality, has the power to protest decisions of Comrades' Courts, under the U.S.S.R. Statute on Procuracy Supervision," although ". . . as of 1963 it seems not to have exercised such power." *Id.* This seeming reluctance to intervene is probably explained by the relative triviality of the matters before the comrades' courts. *Id.* at 900. *But cf.* Maggs, *Commentary on Liberty, Law and the Social Order*, 58 Nw. U.L. Rev. 657, 662 (1963), on the Soviet claim of a considerable amount of government supervision in fact over the comrades' courts.

[216]J. Stone, *supra* note 174, ch. 10, argued that it is utopian to expect power holders during the dictatorship of the proletariat to abdicate, so the timetable for the withering away of the state and law will always be extended into an indefinite future. R. Schlesinger, *supra*, note 2, at 261; Kelsen, *supra* note 31, at 84-85; Shaffer, *Communism and Fascism: Two Peas In a Pod?*, in The Soviet System In Theory and Practice 28, 35 (H. Shaffer ed. 1965). J. Hazard, Communists and Their Law 198 (1969), described the goal of the withering away of the state as "[v]isionary." *But see* J. Hazard, The Soviet System of Government 6 (4th rev. ed. 1968).

[217]For Western comment on the general Marxist-Soviet doctrine of the withering away of the state and its implications, see, *e.g.*, T. Denno, *supra* note 100; S. Stumpf, Morality and the Law 45-85 (1966); Berman, *The Challenge of Soviet Law*, 62 Harv. L. Rev. 449 (1949); Berman, *supra* note 125, at 95-99 & 138-39; Campbell, *supra* note 4, at 56-66; Gsovski, *supra* note

Party, as the vanguard of the proletariat[218] and the architect of the new society, is to carry out the renovation program. The focus in Marxist-Soviet thought, however, is upon society in general, its present ills, how it can be remade, and the eventual idyllic future society. This cleverly leaves out of consideration the characteristics of the vanguard itself.[219] If man initially is the product of bourgeois society, the vanguard initially must be the product of that society too. Elite power-holders in bourgeois society are conspicuously reluctant to relinquish positions of power voluntarily. Yet this is just what must happen if the dictatorship of the proletariat is to give way to communism.[220]

The significant question is how the vanguard is to be changed during the dictatorship of the proletariat to prepare *it* for the withering away of the state. Here the relationship between using law in authoritarian education and the rule of law reveals a theoretical impediment to the withering away of the state and law. Using law in a process of authoritarian education tends to destroy the rule of law as a standard to which individuals may appeal to judge those in charge of legal processes. Moreover, elimination of rule of law standards removes the very mechanisms

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2; Hazard, *The Withering Away of the State: The Function of Law*, SURVEY: A JOURNAL OF SOVIET AND EAST EUROPEAN STUDIES, No. 38, at 72-79 (1961); Kelsen, *supra* note 31, at 84-86; Kline, *supra* note 113, at 63-71.

[218]J. STALIN, FOUNDATIONS OF LENINISM 109-11 (1939). CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 126, as amended by the first session of the Seventh Supreme Soviet of the U.S.S.R. (1967), calls the Communist Party of the Soviet Union "the vanguard of the working people in their struggle to build communist society and . . . the leading core of all organizations of the working people, both government and non-government."

[219]The Party claims that "it always thinks in terms of the interests of all the people and approaches each specific question from this viewpoint." FUNDAMENTALS OF MARXISM-LENINISM, *supra* note 100, at 687. To the present author, familiar only with bourgeois Western society, this seems highly unlikely and, at the least, completely unsupported. A more sympathetic author with actual experience in a Communist system shows this Party self-assessment to be simply false. M. DJILAS, THE NEW CLASS 37-69 (1957).

[220]"[W]hen classes disappear and the dictatorship of the proletariat withers away, the Party will also wither away." J. STALIN, *supra* note 218, at 119.

necessary to *remake the remakers* of society.[221] The rule of law is both a necessary check on the power of Communist Party leaders and a necessary condition for their continuing responsiveness and reform.

Without the controls of the rule of law and the hope it offers of reforming the law-making vanguard, the program of Soviet jurisprudence becomes locked into its second phase—the dictatorship of the proletariat. In fact, current glimmers of hope for the Soviet Union lie in some resuscitation of the very rule of law ideals which were the victims of Stalinist authoritarianism.[222] Rule of law ideals, however, conflict with the Soviet program of authoritarian education. Carried to a logical conclusion, admission of rule of law doctrines into Soviet jurisprudence would destroy the authoritarian educational use of socialist law and prevent the authoritative remaking of man admitted to be necessary for communism. In either case, the withering of the state and law cannot be achieved, at least by the means Soviet jurists propose. Those initially attracted to the professed goals of Soviet jurisprudence should consider this difficulty before they embark on the Marxist road toward the withering away of the state and the classless society.

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[221] *Cf.* G. LICHTHEIM, MARXISM 371 (2d rev. ed. 1965) that "[i]t was the emancipation of the Bolshevik party—ultimately the Soviet dictatorship —from all forms of democratic control that made possible the identification of 'planning' with the untrammelled rule of a new privileged class."

[222] As the paternalist writings of Soviet jurists cited *supra* tend to indicate, the proceduralist program referred to in notes 4 and 113 *supra* is not typical of Soviet legal thought.