The Sociology of Soviet Law: The Heuristic and "Parental" Functions

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Whoso would undertake to give institutions to a People must work with full consciousness that he has set himself to change, as it were, the very stuff of human nature; to transform each individual who, in isolation, is a complete but solitary whole, into a part of something greater than himself, from which, in a sense, he derives his life and his being; to substitute a communal and moral existence for the purely physical and independent life with which we are all of us endowed by nature.¹

I. INTRODUCTION

The sociology of law refers, broadly, to that area of inquiry which attempts to clarify the functions of the law and the legal system within an ongoing society. "The broad aim of legal sociology is the extension of knowledge regarding the foundations of legal order, the pattern of legal change and the contribution of law to the fulfillment of social needs and aspirations."² The sociology of Soviet law might thus be defined generally as the study of the social functions of law within the Soviet legal system. It is the purpose of this article to outline a sociological approach to the study of legal systems and a typology of the functions of law, providing the basis for an analysis of the Soviet legal system as well as other legal systems. The application of this typology in the analysis of the Soviet legal system will be limited, in this article, to the heuristic and "parental" functions of law and the underlying effect that an avowed ideology and political philosophy have on these functions.

II. THE SOCIOLOGICAL APPROACH

Sociological analysis opens up the boundaries of law and legal reasoning by emphasizing the primacy of the social context and by seeking to determine the distinctively legal either outside the formally recognized legal system or synergistically within the interaction between the formal legal system and the basically nonlegal socio-cultural system. This latter interactional system will be referred to herein as the sociolegal system.

The development of a sociological orientation within legal theory and legal systems analysis has been the product of the creative and constructive thinking of numerous jurists as well as sociologists. Most current sociologies of law, however, can be criticized for limiting their analysis to primitive or "prelegal" social systems, overlooking the need for the application of such analysis to modern sociolegal systems.

Sociological legal theory has arisen not merely as a protest against traditional concepts of natural right theory, but also as a reaction to the more formalistic attitudes of analytical jurisprudence. Analytical positivism, for example, takes as its starting point a given (empirically observed) legal order and distills from this legal order certain fundamental notions, concepts, and distinctions. This distillation may then be compared with similarly derived fundamental notions, concepts, and distinctions of other legal systems in order to ascertain common elements. As Professor Julius Stone has noted, analytical positivism is primarily interested in "an analysis of legal terms and an inquiry into the logical interrelations of legal propositions." But legal positivism may also take a sociological form:

3 Id. at 51.
5 J. STONE, THE PROVINCE AND FUNCTION OF LAW 31 (1961). As representative of this approach, see H.L.A. HART, THE CONCEPT OF LAW (1961). As the spokesman for a modernized form of analytical positivism, Professor H. L. A. Hart has tried to develop a "concept of law" more balanced than that presented by Austin and Kelsen (See generally J. AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954); Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 55 HARV. L. REV. 44 (1941)), by recognizing the element of centralized authority but also stressing the special qualities of obligation intrinsic to legal phenomena. As a criticism of Austin and Kelsen, Hart observed that even the most "positive" of legal systems is not a self-contained whole and that legal rules are often vague at their periphery. When the implementation or interpretation of legal values becomes unclear, recourse must be taken to considerations of social aim and policy. Professor Hart stated: "In every legal system a large and important field is left open for the exercise of discretion by courts
Sociological positivism undertakes to investigate and describe the various social forces which exercise an influence upon the making of positive law. It is concerned with analyzing not the legal rules produced by the state, but the sociological factors responsible for their enactment. It shares with analytical positivism a purely empirical attitude toward the law and a disinclination to search for and postulate ultimate values in the legal order.6

“How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?”7 These are questions asked by the analytical jurist. Why do people have legal rules and law ideas? How is their content formed? How and why does this content change? In what ways do legal rules and law ideas influence social conduct? “What actually happens in a community owing to the probability

and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.” H.L.A. HART, supra at 132.

Of course, vagueness and indeterminacy may serve a systemic function — for example, by allowing for change — and may be purposefully programmed into a legal system. “The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.” Id. Professor Hart has also stated:

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. Id. at 127.


It can be argued, however, that Hart’s analysis of the open texture of law and the application of the rule of law does not go far enough. In an attempt to justify a modernized version of Austin’s imperative legal theory, Hart views law entirely in terms of its formal source, rather than as a complex and interactional undertaking capable of varying degrees of success and evaluation. Concerning this aspect of Hart’s analysis, Professor Lon L. Fuller has stated:

There is no recognition [in H.L.A. Hart’s The Concept of Law] that there may be a continued public acceptance of a single source of legal power and yet that power may be so ineptly or corruptly exercised that an effective legal system is not achieved. Nor is there any recognition that some degree of “pathology” attends all legal systems, including the most exemplary. Even if one is interested only in shifts from one formal source of legal power to another, no realistic account can be given if problems of legal morality are excluded. In the course of history lawfully established governments have been overthrown [sic] in the name of law. The threat of lawless revolution can make it difficult to maintain lawfulness in the actions of a government genuinely dedicated to legality. L. FULLER, THE MORALITY OF LAW 157 (rev. ed. 1969).

See also G. GOTTLIEB, THE LOGIC OF CHOICE 125 (1968).

6 E. BODENHEIMER, supra note 4, at 93.
7 H.L.A. HART, supra note 5, at 13.
that persons participating in the communal activity, especially those wielding a socially relevant amount of power over the communal activity, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms?" These are questions asked by the sociological jurist.

Traditionally, law has been viewed as performing three major roles or functions in society: (1) the institutional role, which includes allocation of authority or power and provides for ascertaining rules of accepted behavior and the delimiting of sociolegal relationships; (2) the conflict resolution role, which provides for the orderly application of the legal rules; and (3) the interpretational role, which includes the provision for sociolegal change and the redefining of social relationships. But our analysis need not stop here since sociological and behavioralistic studies of and approaches to legal analysis may provide even greater insights into the synergistic or interactional aspects of law within a functioning and ongoing legal system, including such phenomena as the reciprocal nature of social control within a legal system, the relatively positive attributes of some forms of social deviance, the social function of reason, and the means for and the effects of progressive sociolegal change.


9 The major problem in the area of legal sociology continues to be the lack of a comprehensive integration of jurisprudence and social research. One commentator has noted: "Unless jurisprudential issues of the nature and functions of law, the relation of law and morals, the foundations of legality and fairness, and the role of social knowledge in law are addressed by modern investigators, the sociology of law can have only a peripheral intellectual importance." Selznick, supra note 2, at 56. See also Selznick, The Sociology of Law, in 1 Sociology Today: Problems and Prospects 115 (R. Merton, L. Broom & L. Cottrell eds. 1959).

Recent studies have been conducted concerning such topics as the law's role in creating social deviance and the relatively positive functions of social conflict. See, e.g., H. Becker, Outsiders: Studies in the Sociology of Deviance (1963); L. Coser, The Functions of Social Conflict (1956). See also D. Matza, Becoming Deviant (1959); Salem & Bowers, Severity of Formal Sanctions as a Deterrent to Deviant Behavior, 5 Law & Soc'y Rev. 21 (1970). Furthermore, increasingly new insights are being provided by sociological and anthropological studies concerning the law and social conduct of primitive peoples. See, e.g., Changing Law in Developing Countries (J. Anderson ed. 1963); M. Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (2d ed. 1967); M. Gluckman, Politics, Law and Ritual in Tribal Society (1965); A. Hoebel, The Law of Primitive Man (1954). See also Traditional and Modern Legal Institutions in Asia and Africa (D. Buxbaum ed. 1965). These and similar studies require assessment in terms of their significance for modern social development within a "rule of law." See generally T. Becker, Political Behavioralism and Modern Jurisprudence (1964); H. Blumer, Symbolic Interactionism: Perspective and Method (1969); Comparative Judicial Behavior (G. Schubert & D. Danelski eds. 1969); Functionalism in the Social Sciences: The Strength and Limits of Functionalism
As Professor Robert Merton has stated: "Sociology need not make men wise or even prudent. But, through its successive uncovering of latent social problems and through its clarification of manifest social problems, sociological inquiry does make men increasingly accountable for the outcome of their collective and institutionalized actions."  

For the most part the theories of sociological jurisprudence to date have treated law as a passive rather than an active agent in social change. From this perspective, law is viewed merely as responding to new circumstances and social pressures; it is not seen in its heuristic, educational, and opinion-creating roles. Obviously, this same feeling pervades the other schools of jurisprudential thought to an even greater degree. But such a view is becoming increasingly less tenable, especially in recent years, as the great social effects of legal change within the legal systems throughout the world have become too obvious to be ignored. The question is no longer whether law is a significant vehicle of social change; rather the questions are how it so functions, what the special problems are that arise, and how society can plan for optimal systemic legal change. In a sense, laws and legal change constitute an important social reality.  

In contradistinction to the "New Analytical Juristic Movement," which is developing with H. L. A. Hart as the avowed leader, a "new sociology of law," which emphasizes an "interactional theory
of law," is developing in the United States. It is the purpose of this article to further the understanding of the insights available from this latter jurisprudential development by providing an interactional interpretation of the heuristic and "parental" functions of certain aspects of Soviet law.

Today there is a need for a new synthesis springing from an interdisciplinary analysis of the sociology of law and for a new typology of the basic functions of a legal system. It may be useful, therefore, in understanding the sociological obligations inherent in a legal system, to expand the traditional view of the role and functions of law to include those functions of social change and social conformity which are made evident by viewing law and the legal system from a new sociological and human interactional perspective.

In constructing a new typology of legal functions, our concern lies not in whether the definitions of these sociolegal functions are necessarily "true" or "false," or even whether they exist as ideal types within the Soviet legal system, but rather in whether increased insights can be achieved through the application of such a sociolegal typology. The approach required for constructing a new typology is that of the conceptual pragmatist, which requires that questions "posed by any science as to the meaning of a term can be answered only if the intention is to ask what in this particular science ought to be understood by this particular term (or other symbol)."

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13 Recent publications of Professor Fuller reflect this new development in jurisprudence. See L. FULLER, supra note 5, at 193-95, 237; Fuller, Human Interaction and the Law, in LAW AND JUSTICE: AN INTERNATIONAL FORUM FOR LEGAL PHILOSOPHY (to be published); Fuller, Two Principles of Human Association, in 11 NOMOS, VOLUNTARY ASSOCIATIONS 3 (1969).

14 The Soviet writers do not use the phrase "parental law." However, there is great stress in Soviet legal literature on the educational role of Soviet law, and here the word "educational"... has a very wide connotation, implying rearing or upbringing. Whatever the particular word used, the crux of the matter is the focus on the role of law in the upbringing of the people. H. Berman, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 423 n.6 (rev. ed. 1963). Compare Tumanov, Failure to Understand or Unwillingness to Understand?: (On Harold Berman's Justice in the U.S.S.R.: An Interpretation of Soviet Law), Sovetskoe gosudarstvo i pravo, No. 8, 1965, translated in 4 SOVIET LAW AND GOVERNMENT, No. 3, Winter 1965, at 3, 8-9, with Berman, A Reply to V.A. Tumanov, 4 SOVIET LAW AND GOVERNMENT, No. 3 Winter 1965, at 11, 15.

15 H. KANTOROWICZ, THE DEFINITION OF LAW, 5 (A. Campbell ed. 1958). The term "conceptual pragmatism" was coined by Herman Kantorowicz, who carefully distinguished it from "pragmatism" as follows: "This 'conceptual pragmatism' must be distinguished from what is usually called 'pragmatism' (better 'propositional pragmatism'), that is the sophistical mischievous doctrine of tending to identify the truth of any proposition with its usefulness for some practical purpose." Id. at 90 n.8.
every definition ought to be taken as meaning "I propose to un-
derstand by this term such and such, and if, dear reader, you wish
to understand by the same term something else, you are free to do
so provided that you do not read your definition into my words.
The value of our respective definitions must be judged by their
comparative usefulness."16

Unlike the verbal realist, who is primarily concerned with whether a
definition is true or false, the conceptual pragmatist is interested in
whether a definition or, as in this case, a typology is useful or useless.

The sociological functions of law and the legal system can
be grouped under the following nine headings: (1) coercive role,
which can be divided into the proscriptive function of law — that
is, law as a statement of what not to do — and the prescriptive func-
tion — that is, law as a statement of how to act "rationally" within
the constructs of accepted communal behavior; (2) distributive
function — that is, law as a means for defining and delimiting
sociolegal relationships; (3) integrative function — that is, law as
a means for conflict resolution and the settlement of interpersonal
and intergroup disputes; (4) psychological function — that is, law
as a means for creating and maintaining the psychological and be-
havioral mentality or frame of reference necessary for the continu-
ance of the sociolegal system; (5) legitimizing function — that is,
law as a means for "legalizing" both the existing sociolegal system
and planned future systemic change; (6) homeostatic function —
that is, law as a means for pattern maintenance and for equilibrating
dysfunctional fluctuations caused by systemic change; (7) educa-
tional and "parental" function — that is, law as a means for chan-
nelling and rechanneling societal interests and values as well as a
means for guiding social behavior; (8) heuristic function — that is,
law as a force for creating and stimulating opinion; and (9) self-
actualizing function — that is, law as a means for the positive crea-
tion of a statement of rules for orderly sociolegal change and as a
means for goal attainment within the context of planned or pro-

Three main schools of modern pragmatism exist today: (1) "empirical pragmatism,"
which emphasizes the significance of immediate experience and views knowing as a
sufficient reading of one set of experiences into another set; (2) "instrumentalism,"
which ascribes a larger role to concepts and defines knowledge as consisting of patterns
of concepts that serve as tools for the satisfactory resolution of situations evoking ten-
sion; (3) "conceptual pragmatism," which draws more sharply the situations between
immediate experience and concepts and, viewing experience as fundamental, applies
pragmatic criteria only to the concepts. See T. Hill, Contemporary Theories of

grammed change. Obviously, within an ongoing sociolegal system these nine functions overlap one another as well as interact within the general typology presented here. Furthermore, the sociolegal system as a whole is greater, in the Gestalt sense, than the sum of its components. Nomothetically, and as shown in figure 1 below, these nine sociolegal functions can be divided into groups of three under the general headings of present-perspective, past-retentive, and future-directive, or, similarly, pragmatic, static, and dynamic. (Admittedly, this latter classification would be viscerally repugnant to the verbal realist.)

**Figure 1**

*Tentative Typology for the New Sociology of Law*

A. Present-Perspective
   (Pragmatic Aspect)
   1. Coercive Role
      a. Proscriptive Function
      b. Prescriptive Function
   2. Distributive Function
   3. Integrative Function

B. Past-Retentive
   (Static Aspect)
   1. Psychological Function
   2. Legitimizing Function
   3. Homeostatic Function

C. Future-Directive
   (Dynamic Aspect)
   1. Educational and "Parental" Function
   2. Heuristic Function
   3. Self-Actualizing

17 The terms "nomothetic" and "idiographic," originally coined by W. Windelband, are now frequently used to differentiate the general, systemic, or law-like from the individual, ego-referent, or unique. See G. ALLPORT, PATTERN AND GROWTH IN PERSONALITY 8-9 (1961), citing W. WINDELBAND, GESCHICHT UND NATURWISSENSCHAFT (1904).
The concern of the remainder of this discussion will be to clarify certain sociological implications inherent in the above typology, not only for an understanding of the Soviet legal system, but also for an increased awareness of the role and functions of law within any dynamic social system. Although the Soviet legal system is unique in the overt emphasis it places on the educational and guidance functions of law, it is submitted that heuristic and "parental" functions exist in all legal systems with varying degrees of prominence.¹⁸

The heuristic function of law is that aspect of a legal system by which individual or collective opinions concerning social and legal relationships are created or stimulated through the interaction that takes place between the law and social behavior. It might also be called the "propagandistic" function — in the positive as well as negative sense of the word. The ideology and avowed political philosophy of a social system, as well as its practiced variations, can affect to a large measure the heuristic function of law within that system.¹⁹

The extent to which the heuristic function is emphasized in a socio-

¹⁸ Professor Berman has noted that many of the most important features of the Soviet legal system "are neither uniquely socialist nor uniquely Russian but are rather a product of a social philosophy which — though entirely congenial to both socialism and the Russian heritage — is to be found in other nonsocialist countries as well." H. BERMAN, supra note 14, at 279.


With respect to the self-actualizing function, political ideology can also have a conservative effect on the systemic behavior of the sociolegal system; for example, the idealized tenets of a pluralistic democracy may create dilemmas in effectuating "legal" foreign policies as well as ideologically compatible domestic policies. See J. Hildebrand, SOVIET INTERNATIONAL LAW: AN EXEMPLAR FOR OPTIMAL DECISION THEORY ANALYSIS, chs. IV & VIII (1968); C. Lindblom, THE INTELLIGENCE OF DEMOCRACY (1965); Q. WRIGHT, PROBLEMS OF STABILITY AND PROGRESS IN INTERNATIONAL RELATIONS 275 n.6 (1954). For an analysis of the tendency of "legalistic thought" to assume, promote, and enforce an ideology of consensus and agreed-upon rules, see J. Shklar, LEGALISM (1964). See also Carlin & Howard, Legal Representation and Class Justice, 12 U.C.L.A. L. Rev. 381 (1965); Selznick, supra note 2, at 54; Swett, Cultural Bias in the American Legal System, 4 Law & Soc'y Rev. 79 (1969).
legal system depends upon the effect of ideological, cultural, and traditional constructs upon the "content" of law of the general societal system.

The notion of the educational and "parental" function of law focuses on the role of law as a guiding teacher and parent. The "parental" aspect of Soviet law and the Soviet legal system has been described by Professor Harold J. Berman as follows:

Implicit in the Soviet legal system is a new conception of the role of law in society and of the nature of the person who is the subject of law. The Soviet legislator, administrator, or judge plays the part of a parent or guardian or teacher; the individual before the law, "legal man," is treated as a child or youth to be guided and trained and made to behave. I have called this the "parental" aspect of Soviet law, though it should be understood at the outset that the concept of parentalism does not necessarily imply benevolence.20

Professor Berman's analysis of the "parental" nature of Soviet law provides an excellent — and to date unsurpassed — sociological description of that particular sociolegal function. As shown in figure 2 below, however, the "parental" or educational function can be viewed as either unidirectional, as it is generally conceived in the Soviet Union and in most other legal systems, or as interactional within the general societal system.

In this article, the concept of the "parental" function of law is not limited to the unidirectional and institutional concept of "parental" law — that is, the state being parent to the citizen — put forth by Professor Berman:

To speak of "parental law" is therefore not so much to describe the state which proclaims and applies the law as to describe the assumptions which are made regarding the nature of the citizen and his relationship to the state. To say that under Soviet law the state has extended the range of its interests and its powers is not enough. The state has sought in law a means of training people to fulfill the responsibilities now imposed on them — and it has made this function of law central to the whole legal system.21

In contrast, the "parental" function of law is conceived in this article as an interactional phenomenon, and it is submitted that this interactional perspective more closely approximates reality in almost any given legal system — the child is often father (or parent) to the man (or the state).

21 H. Berman, supra note 14, at 284.
When paradigmmed on a time-scale, the interactional perspective of the sociolegal system assumes an ever-increasing synthesis and integration as shown in figure 3 below. This effect is representative of sociolegal systemic change, or what Alfred Korzybski has referred to as man's time-binding capacity. 22

This increasing synthesis and integration, which is also the social function of reason, should not be limited in its goal to the technocratic slogan of "prediction and control," but ought to include reasoned moral choice—which, in the area of sociolegal change, further accentuates the interactional perspective. The Soviet legal sys-

22 See A. Korzybski, MANHOOD OF HUMANITY 91-92 (1921).

Admittedly, the time-scale representation in figure 3 lacks the general systems theory concept of goal-changing feedback, which Professor Karl W. Deutsch has defined as including "feedback readjustments . . . of those internal arrangements which implied [the system's] . . . original goal, so that the net will change its goal, or set itself new goals which it will now have to reach if its internal disequilibrium is to be lessened." Deutsch, Some Notes on Research on the Role of Models in the Natural and Social Sciences, 7 SYNTHESE 506, 515 (1948-1949). See also J. Hildebrand, supra note 19, at 102-03 n.333, 121-28; Maruyama, The Second Cybernetics: Deviation-Amplifying Mutual Causal Processes, 51 AM. SCIENTIST 164 (1963). Figure 3 could be modified to represent a simple systems analysis, however, by drawing feedback loops from Law, to Law, Law, and Behavior, and from Behavior, to Behavior, Behavior, and Law.
tem, like most Western legal systems, does not expressly recognize this social function of reason, but rather stresses (in the unidirectional sense) the role of "socialist law" in implementing preestablished ideological constructs.

In addition to the heuristic and "parental" functions, the Soviet legal system can also be characterized by the emphasis placed on the self-actualizing function of law, that is, the role of law as a means for the positive creation of a statement of rules for orderly sociolegal change and as a means for goal attainment within the context of planned or programmed systemic change. The ideology and political philosophy of Soviet-Marxism are based on a relative concept of the perfectability of man; and, to a certain extent, it is through the operation of the interim or transitional legal system of socialist law that the goal of "true" communism and public self-government is hoped to be attained in the Soviet Union. It should be stressed again that the concern herein is not whether the definitions of these sociolegal functions, such as the self-actualizing function, are necessarily "true" or "false," or even whether they exist as ideal types within the Soviet legal system. Our ultimate concern is whether increased understanding and new insights can be achieved through the application of this sociolegal typology.

To a large extent, the analysis of the heuristic and "parental" functions of law within the Soviet system, as presented herein, will be based on empirical and subjective observations made by Harold J. Berman, John N. Hazard, Vladimir Gsovski, George C. Guins, Rudolf Schlesinger, and other experts in the field of Soviet law and legal theory. The author is responsible, however, for the interpretation placed on these observations. This article does not pretend to be a comprehensive description of the Soviet legal system; rather it is meant to be an interpretation of a particular sociolegal aspect of that system.

III. THE MARXIAN CLASS CONCEPT OF LAW COMPARED WITH WEBER’S SOCIOLOGICAL CONCEPT OF LAW

The relative prominence of the heuristic and "parental" functions of law within a particular legal system can depend, to a large extent, upon the underlying and avowed ideology and political philosophy of the complex social system. This is also true of the self-actualizing function. Of course, other factors such as cultural heritage, national outlook, ethnocentricity, size, power, and even geographical posi-
tion can and do influence the functions of law within the particular system. The Soviet legal system with its avowed acceptance of the Marxian theory of law provides a useful context for describing the relationships which exist between an avowed ideology and the heuristic and "parental" functions of law within the particular socio-legal system.

An understanding of the Marxian concept of law is essential to understanding the Soviet adaptations and revisions of Marx's scientific approach to social problems and the effect that the resulting Soviet ideology has had on the domestic sociolegal system within the Soviet Union. The following statement by Professor Timothy A. Taracouzio provides an appropriate introduction to this discussion:

The communist rearrangement of the whole social order en large is one of its most important characteristics. In the non-proletarian revolutions the newly introduced economic forms are based on the familiar principles of the capitalistic interpretation of individualism, whereas the socialist revolution is confronted with the problem of a drastic transition from the capitalistic social order to the socialistic structure of a community of men, which problem is proportionally more difficult in a backward country. Confronted with the problem of a drastic reconstruction of the whole social order, the Soviet state had to disregard all existing principles of a capitalistic regime, and to invent its own rules for administering the new proletarian social order. It is needless to emphasize that a new conception of law had to be invented.23

The Marxian view of law as a product of evolving economic forces can be placed generally in the historical and evolutionary schools of jurisprudential thought. As did Hegel, Marxian theory views history and man's evolving social structure as a continuous struggle between opposing forces. These forces, however, are not ideas as under Hegelian theory; rather they are material forces.24


24 See E. Bodenheimer, supra note 4, at 79. For Marx an idea "is nothing else than the material world reflected by the human mind and translated into forms of thought." 1 K. Marx, Capital 25 (S. Moore & E. Aveling transls. 1906). Note also the following statement by Marx and Engels:

The question whether objective truth is an attribute of human thought — is not a theoretical but a practical question. Man must prove the truth, i.e., the reality and power, the "this-sidedness" of his thinking in practice. The dispute over the reality or non-reality of thinking that is isolated from practice is a purely scholastic question. K. Marx & F. Engels, The German Ideology 197 (R. Pascal ed. 1968).

For a discussion of Marx and Engels' concept of law, see H. Berman, supra note 14, at 15-24; G. Counts, The Challenge of Soviet Education 212-41 (1957); C. Friedrich, Legal Philosophy in Historical Perspective 143-53 (1958); 1 V. Gsovski,
According to Marx, all manifestations of social life, including legal relationships, result from economic phenomena, and law is an ideological superstructure erected above an economic basis.

At the risk of oversimplification, the following section will attempt to outline the theoretical bases of Marxian social theory as it relates to the Marxian concept of law. For the purposes of this discussion, Marxian legal theory will be separated into three important doctrines: (1) the economic determination of law; (2) Marxian class analysis and the class character of law; and (3) the withering away of state and law in the communist society. Although these doctrines have had varying degrees of influence on Soviet national and international legal theory, an awareness of each one of them is essential to understanding the sociology of Soviet law.

The sociological theories of law contrast sharply with the Marxian emphasis on history and evolving economic forces. Therefore, as a comparison with the Marxist concept of law and as a basis for discussing the heuristic and “parental” functions of Soviet law, Max Weber’s sociological concept of law will also be briefly outlined in this section.

A. The Economic Determination of Law

Marx viewed law as an ideological superstructure erected above an economic basis. He proposed the idea that legal relations as well as forms of the State could be neither understood by themselves, nor explained by the so-called general progress of the human mind, but they are rooted in the material conditions of life. . . . With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed.25

Engels made a similar statement regarding private law: "If the State

and public law are determined by economic relations, so, too, of course is private law, which indeed in essence only sanctions the existing economic relations between individuals which are normal in the given circumstances."26 Carried to the extreme, since the form and content of law are necessarily shaped by economic factors, decisions by judges and jurists can be viewed as nothing more than axiomatic reflexes to economic conditions.27

Engels admitted later in his life, however, that to a certain degree he and Marx had overstated the importance of economic factors: "The economic situation is the basis, but the various elements of the superstructure [including law] . . . also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their form."28 Similarly, Bukharin, a Russian Marxist, conceded that "[t]he superstructure, growing out of the economic conditions and the productive forces determining these conditions, in its turn, exerts an influence on the latter, favoring or

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27 See K. MARX & F. ENGELS, supra note 24, at 60.
28 Letter from Frederich Engels to Joseph Block, Sept. 21, 1890, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY 395, 397-98 (L. Feuer ed. 1959). In this letter Engels also stated:

According to the materialist conception of history, the ultimately determining element in history is the production and reproduction of real life. More than this neither Marx nor I has ever asserted. Hence if somebody twists this into saying that the economic element is the only determining one he transforms that proposition into a meaningless, abstract, senseless phrase. Id.

Cf. Marx's statement in text accompanying note 32 infra.

Writing only a month later, in a letter to Conrad Schmidt dated October 27, 1890, Engels seemed to admit an ideological function of law, which may even rise to the heights of a motivating or self-actualizing force:

In a modern state law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression . . . . And in order to achieve this the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class — this in itself would offend the "conception of right." . . . Thus to a great extent the course of the "development of right" consists only, first, in the attempt to do away with the contradictions arising from the direct translation of economic relations into legal principles, and to establish a harmonious system of law, and then in the repeated breaches made in this system by the influence and compulsion of further economic development, which involves it in further contradictions . . . . The reflection of economic relations as legal principles . . . goes on without the person who is acting being conscious of it; the jurist imagines he is operating with a priori propositions, whereas they are really only economic reflexes . . . . And it seems to me obvious that this inversion, which, so long as it remains unrecognized, forms what we call ideological outlook, reacts in its turn upon the economic basis and may, within certain limits, modify it. Letter from Frederich Engels to Conrad Schmidt, Oct. 27, 1890, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY, supra at 404.
retarding their growth." Retarding their growth. Reservations such as this, however, were not meant to detract from the ultimate impact of economic factors upon the development of legal and social systems. One commentator has stated: "Though it is conceded that the prevailing system of economic production is not the exclusive cause in the development of history and law, still it is held [by most Marxists] that the economic system is in the last instance the determining and by far the most important factor of historical and legal evolution."

B. Marxian Class Analysis and the Class Character of Law

Marxian social theory is based on the premise that the primary function of social organization is the satisfaction of the basic human needs for food, clothing, and shelter. The material production system is therefore the essential element around which all other societal institutions are organized:

In the social production which men carry on, they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society — the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness.

Marxian theory asserts that in the course of providing for basic material human needs and through the utilization of the instruments of production, the members of any precommunist society become segregated into classes. "The mode of production in material life," stated Marx, "determines the general character of the social, political, and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness." In another context Marx stated: "As individuals express their life, so they are. What they are, therefore, coincides with their production, both with what they produce and with how they produce. The nature of individuals thus depends on the material conditions determining their production."

29 N. Bukharin, Historical Materialism 228 (1925).
30 E. Bodenheimer, supra note 4, at 80.
31 See, e.g., K. Marx & F. Engels, supra note 24, at 7.
32 Marx, supra note 25, at 43. See also Engels, Socialism: Utopian and Scientific, in Basic Writings on Politics and Philosophy 68, 88-89 (L. Feuer ed. 1959).
33 Marx, supra note 25, at 43.
34 K. Marx & F. Engels, supra note 24, at 7.
A Marxist definition of class can be stated as any aggregate of persons that perform the same function in the production scheme. Marx based his class differentiation on objective factors such as the ownership or nonownership of the instruments of production. He outlined three main classes, differentiated according to their relation to the means of production in the socioeconomic system: (1) The capitalists are the owners of the means of production, and “[b]y ‘bourgeoisie’ is meant the class of modern capitalists [who are the] owners of the means of social production and employers of wage labor.”

(2) The workers or proletarians are all those employed in the industrial system by others. The proletariat, therefore, is that “class of modern wage laborers who, having no means of production of their own, are reduced to selling their labor power in order to live.”

(3) The landowners in Marx’s theory differ from capitalists and are regarded as survivors of feudalism or serfdom. It is clear from The 18th Brumaire of Louis Bonaparte, which is an application of Marxian class analysis to a specific historical event, that Marx recognized differentiation and substrata within each of the basic class categories. For example, he perceived the petty bourgeoisie or small businessmen as a transitional class wherein the interests of two classes are combined. According to Marx, the economic tendencies inherent in the capitalist system will eventually cause the petty bourgeoisie to bifurcate, some descending to the working class and some improving their economic circumstances to become significant capitalists.

Marx’s primary interest was in understanding and facilitating the emergence of class consciousness among the exploited strata of society. Under Marxian theory economic and social position determine all consciousness, but class consciousness results specifically from the inherent conflict of interests and overt struggle between the classes. Since interclass antagonism is the means by which a particular social group reaches an organized self-identification, it is possible to have a social stratum within a society that has a number of objective economic characteristics in common and yet, due to the lack of antagonism, has not attained that level of “consciousness” or social awareness necessary to make the group a social and political

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35 Marx & Engels, Manifesto of the Communist Party, in Basic Writings on Politics and Philosophy 1, 6-7 n.1 (L. Feuer ed. 1959).
36 Id.
38 Marx & Engels, supra note 35, at 34.
Class consciousness may be defined, therefore, as the social awareness of the members of a particular group, who are fulfilling the same economic function within the society, of their common relationship and interests to one another and their antagonism toward the other classes of the socioeconomic system.

Under normal conditions, the ruling class can prevent the emergence of "true" class consciousness by imposing social control through the use of propaganda and police power, often under the guise of legality. Thus, Marx did not view nation-states as incarnations of justice or emanations of metaphysical entities in terms of the spirit of man or world-view; rather, they were institutions of economic life — tools for the economically powerful to maintain and strengthen their power positions.

An example of such a group was the French small-holding peasants described by Marx in *The 18th Brumaire of Louis Bonaparte*. These peasants possessed many attributes which might imply a common class situation:

The small-holding peasants form a vast mass, the members of which live in similar conditions but without entering into manifold relations with one another. Their mode of production isolates them from one another instead of bringing them into mutual intercourse. The isolation is increased by France's bad means of communication and by the poverty of the peasants. Their field of production, the small holding, admits of no division of labour in its cultivation, no application of science and, therefore, no diversity of development, no variety of talent, no wealth of social relationships. Each individual peasant family is almost self-sufficient; it itself directly produces the major part of its consumption and thus acquires its means of life more through exchange with nature than in intercourse with society. . . . In so far as millions of families live under economic conditions of existence that separate their mode of life, their interests and their culture from those of the other classes, and put them in hostile opposition to the latter, they form a class. In so far as there is merely a local interconnection among these small-holding peasants, and the identity of their interests begets no community, no national bond and no political organization among them, they do not form a class. They are consequently incapable of enforcing their class interest in their own name, whether through a parliament or through a convention. *K. Marx,* *supra* note 37, at 123-24.

The class which has the means of material production at its disposal, has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it. The ruling ideas are nothing more than the ideal expression of the dominant material relationships grasped as ideas; hence of the relationships which make the one class the ruling one, therefore, the ideas of its dominance. *K. Marx & F. Engels,* *supra* note 24, at 39.

Marx wrote:

Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organization which the bourgeoisie necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests. *Id.* at 59.

It can be argued that Marx and Engels' description of the modern state as an "executive committee" for managing the common affairs of the entire ruling bourgeois class was a defendable viewpoint since at that time free general elections were not yet com-
The attitudes of the lower class during the predominance of the economically powerful can be characterized by the Marxian term *false consciousness*. Marx explained: "Just as our opinion of an individual is not based on what he thinks of himself, so can we not judge such a period of transformation by its own consciousness; on the contrary, this consciousness must rather be explained from the contradictions of material life, from the existing conflict between social forces of production." Under relatively normal conditions of oppression, Marx found little correlation between the objective class position and the subjective class consciousness. "And as in private life one differentiates between what a man thinks and says of himself and what he really is and does, so in historical struggles one must distinguish still more the phrases and fancies of parties from their real organism and their real interests, their conception of themselves, from their reality." "True" class consciousness emerges only through class struggle and does not achieve totality until the social system reaches a point of breakdown and social revolution occurs.

Marxian class analysis and social theory explain the history of mankind following the rise of class divisions in terms of class struggles:

At a certain stage of their development the material forces of production in society come into conflict with the existing relations of production, or — what is but a legal expression for the same thing — with the property relations within which they have been at work before. From forms of development of the forces of production

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43 K. Marx, *supra* note 37, at 47. Marx and Engels made the following observations concerning the development of consciousness:

We set out from real, active men, and on the basis of their real life-process we demonstrate the development of the ideological reflexes and echoes of this life-process. The phantoms formed in the human brain are also, necessarily, sublimates of their material life-process, which is empirically verifiable and bound to material premises. Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence. They have no history, no development; but men, developing their material production and their material intercourse, alter, along with this their real existence, their thinking and the products of their thinking. Life is not determined by consciousness, but consciousness by life. K. Marx & F. Engels, *supra* note 24, at 14-15.
these relations turn into their fetters. Then comes the period of social revolution.44

The era of bourgeois capitalism in the 19th century was not without its class struggles. Marx stated:

The modern bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.

Our epoch, the epoch of the bourgeoisie, possesses, however, this distinctive feature: It has simplified the class antagonisms. Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other — bourgeoisie and proletariat.45

In the bourgeois capitalistic system, the working class is exploited by the owners of the instruments of production who are the visible common oppressors. This oppression forges a unity of interests with-

44 Marx, supra note 25, at 44.
45 Marx and Engels, supra note 35, at 8. Engels explained the causes for class struggle within the bourgeois capitalistic system as follows:
[Under the capitalist system] the owner of the instruments of labor always appropriated to himself the product, although it was no longer his product, but exclusively the product of the labor of others. Thus the products now produced socially were not appropriated by those who had actually set in motion the means of production and actually produced the commodities, but by the capitalists. The means of production, and production itself, had become in essence socialized. But they were subjected to a form of appropriation which presupposes the private production of individuals . . .

This contradiction, which gives to the new mode of production its capitalistic character, contains the germ of the whole of the social antagonisms of today. The greater the mastery obtained by the new mode of production . . . the more it reduced individual production to an insignificant residuum, the more clearly was brought out the incompatibility of socialized production with capitalistic appropriation . . .

The contradiction between socialized production and capitalistic appropriation manifested itself as the antagonism of proletariat and bourgeoisie. Engels, supra note 32, at 94-95 (emphasis omitted).

Coterminous with the developing class struggle in bourgeois capitalist society was the increasing alienation of man within his sociolegal system. Professor Fuller has noted that Marx had a strong aversion for any principle or arrangement whereby one man would necessarily serve the needs or ends of another:

This fundamental aversion to interdependence comes to most articulate expression in an early passage in which Marx describes life in bourgeois society — that is, in a trading society — as one in which man "treats others as means, reduces himself to the role of a means, and becomes the plaything of alien forces." L. FULLER, supra note 5, at 26, citing R. TUCKER, PHILOSOPHY AND MYTH IN KARL MARX 105 (1961).

in the working class and compels it to organize to meet the structured conflict situation with its capitalist-employers over wages and working conditions.

To the Marxist, the bourgeois capitalistic system is the final stage of class struggles; the social ferment and resulting social revolution which will emerge from this system will rapidly transform the immense social and political superstructure and bring into existence the classless communistic society. According to Marx:

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\text{the bourgeois relations of production are the last antagonistic form of the social process of production — antagonistic not in the sense of individual antagonism, but of one arising from conditions surrounding the life of individuals in society; at the same time the production forces developing in the womb of bourgeois society create the material conditions for the solution of that antagonism. This social formation constitutes, therefore, the closing chapter of the prehistoric stage of human society.}
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The Marxian concept of law is based upon the class analysis which has been briefly outlined above. In Marxian theory, law is viewed as an emanation of the "state" and is therefore fundamentally determined by economic relationships. To quote Engels:

Since the State is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomized, it follows that in the formation of all communal institutions the State acts as intermediary, that these institutions receive a political form. Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis — on free will. . . . It must not be forgotten that law has just as little an independent history as religion.

Since the state is a product of the struggle of classes, dominated by the ruling class, law is viewed as a political means for maintaining the economic interests of the ruling class. Law is an ideological superstructure of society, constructed upon the economic basis, which reflects the materialistic outlook of the ruling class. Law is not

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46 Marx, supra note 25, at 44.
47 K. Marx & F. Engels, supra note 24, at 60-61.
48 Whilst the State may attempt to create the illusion of "standing above class," Law (at least Civil Law) cannot do so; for it has to express, within its framework, the basic social relations themselves. Property relations, for example, are mere legal expressions for existing relations of production, and social classes may be described as owning (or not owning) certain kinds of property. But legal and political forms of social consciousness must be distinguished from the underlying economic basis. While dependent on the latter, they have also an independent life of their own. Thus the relations of production in one period may influence subsequent periods. Law can never be "higher" than the particular economic structure of society and the resultant cultural development. But it certainly can be backward in relation to the actual stage of
oriented to the idea of "justice;" rather it is a means of dominance and a tool of the exploiters or ruling class who use it in their own interests.

A Marxist evolutionary (but precommunist) societal-progression can be constructed as follows: First, individuals group together for a purpose relating to basic subsistence (food gathering, common shelter, mutual protection); second, the manner in which the individuals within this "society" interact and cooperate in the use of the means of production of subsistence commodities becomes established in the form of rules and laws; third, once the laws are generally accepted or generally imposed, the leaders or "rulers" of the group perpetuate the laws in order to maintain the stability of the society and its ongoing function relative to their own dominant position within the society as the "ruling class." In such a society law is an institution, an expression of an economically related ideology which effectuates and maintains the material status quo. Furthermore, the society itself, by habit or avoidance of anarchy, compels its members to obey the law.

This "institutional" aspect of law is evident in the Soviet legal system. With regard to Soviet techniques of adjudication, Professor Berman has noted that Soviet judicial opinions reflect a syllogistic mode of reasoning, and a conceptual rather than a pragmatic logic:

All flavor of "sociological jurisprudence" is missing from [Soviet legal opinions]. Law seems to be conceived in terms of fixed rules; its application is viewed as requiring accuracy, not policy. The opinions are short. Occasionally the facts of the case are developed at length, but rarely is there any elaborate discussion of the law. The opinion has more the form of a decree, and indeed is entitled a "decree" (postanoylonis). Typically the court characterizes the facts in the language of those articles of the codes or provisions of statutes which it considers to be relevant, and then

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49 See K. MARX & F. ENGELS, supra note 24, at 7, 18.

economic development. Unless the old forms can be used for changing social purposes, or re-interpreted to serve new needs, they may prove serious obstacles for the development of society, and actual political struggle may be needed to solve the contradiction. Thus it is certainly wrong to interpret Marxism by stating that the "superstructures," amongst which is Law, reflect economic conditions automatically. Law not only reacts upon economics, but is also influenced by various forms of social consciousness even more remote from economic life than Law itself — for example by religious and philosophical conceptions. In this interaction of the various forms of social life, economics are only dominant because men must eat before they can theorise, and because the evolution of the production forces (i.e. of the relations between Man and Nature which underlie the relations of production) forms that independent variable which makes possible a dynamic interpretation of society. R. SCHLESINGER, supra note 24, at 18-19.
simply "applies" these articles or provisions. There is very little argumentation. On the other hand, where it is conceived that there is a gap in the law, the Soviet courts often do not hesitate to fill it. In fact Soviet codes and statutes are full of lacunae, and as a result much of Soviet law is avowedly judge-made.50

Despite its overemphasis on economic determinants, Marxian class analysis is a valuable analytical and interpreting tool for understanding history, current politics, and even legal processes. The concept that classes are products of the relations of production and commerce and are therefore purely economically conditioned is a valuable insight, although only a partial truth. Undoubtedly, economic interests have had a great influence in history, including the history of law.61 Furthermore, Marx's stress on the economic determination of political, social, and legal behavior indicates the necessity today for a multivariate analysis in order to understand all the integrative aspects of a dynamic sociolegal system.

C. The Withering Away of State and Law in the Communist Society

According to Marxian theory, after the "workers' social revolution," and even after the establishment of a proletarian dictatorship, the class character of law will continue as long as the new ruling proletariat needs the old order's legal institutions, coercive apparatus, and "law" to suppress and eliminate the unenlightened hostile elements and groups within the new regime. Marx and Engels predicted, however, that all law would eventually disappear. As Professor Berman has noted:

Marx and Engels foresaw a classless society in which disputes would be settled by the spontaneous, unofficial social pressure of

61 See C. FRIEDRICH, AN INTRODUCTION TO POLITICAL THEORY 156 (1967). See also C. FRIEDRICH, supra note 24, at 149, 152. One commentator has noted: Dynamic and conflict-oriented analyses of the legal order are indebted to Marxist theories. And a Marxist or Marxist-like emphasis on the broad structuring of economic relations has provided the foundation for various specific studies of legal trends, ranging from the area of property law to that of criminal law and penology. E. SCHUR, supra note 4, at 114-15. The most constructive contributions to understanding the relation between economic conditions and legal institutions from a Marxist point of view have come from Karl Renner and Otto Kirchheimer. See, e.g., K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (O. Kahn-Freund ed. & A. Schwarzchild transl. 1949); G. RUSCHE & O. KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939). See also O. KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1961). For a critique of Renner's analysis of property in a capitalist society, see W. FRIEDMANN, LEGAL THEORY 368-72 (5th ed. 1967); R. SCHLESINGER, supra note 24, at 27-29.
the whole community, by the group sense of right and wrong or at least expediency. They saw a precedent for this in the condition of certain primitive peoples who have no positive law, no state, but instead punish aberrational behavior through informal, spontaneous group sanctions. As among primitive societies at the beginning of history, so in classless society at the end of history, they said in effect, control will exist only in the habits and standards of the whole people, in the \textit{mores} of the good society.\footnote{52}{H. BERMAN, \textit{supra} note 14, at 280. As will be discussed below, informal, spontaneous group sanctions have become an integral part of the Soviet legal system.}

Therefore, a third major doctrine of the Marxian philosophy of law is the prophecy of the disappearance of law in the evolving communist society. But according to classical Marxist theory, law and the state as instruments of oppression and coercion will disappear \textit{only} after the complete victory of communism and the establishment of a classless society.\footnote{53}{One commentator has noted that it is this doctrine of the withering away of the state and law which gives a certain metaphysical aspect to the Marxian interpretation of law: Marx was convinced that the world was traveling from lower to higher forms of social life. He believed that communism, which he considered to be the next stage in the evolution of mankind, would be a social system superior to the capitalistic system that preceded it, and that a socialist or communist order would be able to dispense with instruments of compulsion like law and the state. He as well as Engels was convinced that, after the establishment of communism, the inexorable, deterministic laws of development that had hitherto governed the history of mankind would cease to be controlling, and that mankind would leap from the “realm of necessity into the realm of freedom.” The realization of material abundance, social justice, and full cultural bloom would be the great accomplishments of the new social order. E. BODENHEIMER, \textit{supra} note 4, at 81 (footnote omitted). \textit{See also} Hazard, \textit{The Withering Away of the State: The Function of Law}, \textit{Survey: A Journal of Soviet and East European Studies}, No. 38, Oct. 1961, at 22; Kline, \textit{The Withering Away of the State: Philosophy and Practice}, id., at 63.}

The theoretical implications of the withering away of state and law are important for an understanding of the heuristic and “parental” functions of law within the Soviet legal system. Classical Marxist literature is not explicit on how man and his sociolegal institutions must be changed to make the communist society possible. It is clear, however, that even after the state and law have withered, there will be a continuing administration in the area of economic production. Obviously, without overt enforcement by state compulsion, the maintenance of the stability of the social order required by the continuing administration of material production would necessitate a fundamental change in the acquisitional and aggressive attitudes of the citizens of the precommunist society. Without some external mechanism of enforcement and coercion, the social norms required for stability of the economic administration must be “inter-
nalized" so that compliance with the economic administration and appropriate behavior within the social system itself will be voluntary, predictable, and subject to intragroup correction.

This aspect of classical Marxian theory has been discounted as utopian, but for the present discussion we need not be concerned with whether such a monumental social change is actually possible. Rather our concern is in establishing the philosophical and theoretical groundwork upon which is based much of the Soviet justification for using the legal system as an educational means in the preparation of the citizenry for the true communist state.

Marx foresaw that the first step in the revolution of the working class would be "to raise the proletariat to the position of ruling class, to establish democracy." Marx died before he could complete his class analysis; however, he did make several references concerning society's transition to communism. In his earliest discussion of the transition, in 1847, Marx predicted that in place of the old capitalistic society, there would be substituted "an association which will exclude classes and their antagonism, and there will no longer be any political power ...." In the Communist Manifesto, published in 1848, Marx and Engels foresaw "a vast association of the whole nation" in which "the public power will lose its political character," and a "conversion of the functions of the State into a

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65 K. MARX & F. ENGELS, Manifesto of the Communist Party, in THE COMMUNIST MANIFESTO 31 (S. Beer ed. 1955). Marx further stated in this context:

The proletariat will use its political supremacy to wrest, by degrees, all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state, i.e., of the proletariat organized as the ruling class; and to increase the total of productive forces as rapidly as possible.

Of course, in the beginning, this cannot be effected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production, by means of measures, therefore, which appear economically insufficient and untenable, but which, in the course of the movement, outstrip themselves, necessitate further inroads upon the old social order, and are unavoidable as a means of entirely revolutionizing the mode of production. Id.

66 K. MARX, Excerpt from Poverty of Philosophy, in SELECTED WRITINGS IN SOCIOLOGY AND SOCIAL PHILOSOPHY 239 (T. Bottomore & M. Rubel eds. 1956). Marx and Engels defined "political power" as "the organized power of one class for oppressing another." K. MARX & F. ENGELS, supra note 55, at 32. Marx claimed that this definition applied only to "bourgeois" states. But perhaps it applies in an even greater sense to communist states.

67 K. MARX & F. ENGELS, supra note 55, at 32. The textual statement was taken from the following quotation:
mure superintendence of production."\textsuperscript{88} In one of Marx's last works, *Critique of the Gotha Program*,\textsuperscript{59} published in 1875, he expounded a partial analysis of the transitional stages of the communist society which has played a prominent part in Soviet political as well as jurisprudential writing ever since Lenin made it central to his work, *State and Revolution*.\textsuperscript{60} In his *Critique*, Marx stated that "with the abolition of class distinctions all social and political inequality arising from these would also disappear of itself."\textsuperscript{61}

Engels also spoke of the transition to communism. He wrote that "the political state, and with it political authority, will disappear as a result of the coming social revolution, that is, that public functions will lose their political character and be transformed into the simple administrative functions of watching over the true interests of society."\textsuperscript{62} Engels later referred to "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.'"\textsuperscript{63} According to Engels, the state will "wither away." In the sentences which precede this statement the entire Marxist legal and political philosophy is well expressed:

> While the capitalist mode of production more and more completely transforms the great majority of the population into proletarians, it creates the power which, under penalty of its own destruction, is forced to accomplish this revolution. While it forces on more and more the transformation of the vast means of production, already socialized, into state property, it shows itself the way to accomplishing this revolution. The proletariat seizes political power and turns the means of production into state property.

> But in doing this it abolishes itself as proletariat, abolishes all class distinctions and class antagonisms, abolishes also the state as state. Society thus far, based upon class antagonisms, has had need of the state. That is, of an organization of the particular class which was pro tempere the exploiting class, an organization for the

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\textsuperscript{88} Id. at 43.

\textsuperscript{59} See Marx, *Critique of the Gotha Program*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 112 (L. Feuer ed. 1959).

\textsuperscript{60} See V. Lenin, *STATE AND REVOLUTION* 75-85 (Int'l Publishers ed. 1968), discussed in text accompanying notes 65-72 infra.

\textsuperscript{61} Marx, *supra* note 59, at 125.


\textsuperscript{63} Engels, *supra* note 32, at 86.
purpose of preventing any interference from without with the existing conditions of production, and, therefore, especially for the purpose of forcibly keeping the exploited classes in the condition of oppression corresponding with the given mode of production (slavery, serfdom, wage labor). The state was the official representative of society as a whole; the gathering of it together into a visible embodiment. But it was this only in so far as it was the state of that class which itself represented, for the time being, society as a whole: in ancient times, the state of slave-owning citizens; in the Middle Ages, the feudal lords; in our time, the bourgeoisie. When at last it becomes the real representative of the whole of society it renders itself unnecessary. As soon as there is no longer any social class to be held in subjection, as soon as class rule and the individual struggle for existence based upon our present anarchy in production, with the collisions and excesses arising from these, are removed, nothing more remains to be repressed, and a special repressive force, a state, is no longer necessary. The first act by virtue of which the state really constitutes itself the representative of the whole of society — the taking possession of the means of production in the name of society — this is, at the same time, its last independent act as a state. State 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.64

It was Lenin, however, writing in 1917, who initially formulated a full exposition of a theory of the transitional period of proletarian dictatorship.65 In his work State and Revolution, Lenin wrote: “The state is the product and the manifestation of the irreconcilability of class antagonisms. The state arises when, where, and to the extent that the class antagonisms cannot be objectively reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable.”66 Lenin postulated that the new state, which is “no longer a state in the proper sense of the word,”67 would

64 Id. at 105-06. The last sentence of this quotation is often translated as "It withers away."

65 Professor Berman has stated:
Lenin accepted the classical Marxist conception of state and law as instruments of coercion, but called for the use of a new proletarian state apparatus to crush the bourgeoisie. He thus rejected the appeal of the anarcho-syndicalists for immediate abolition of all state apparatus. At the same time, the theory of the "withering away" of the state, once the classless society had emerged, was made central to Lenin's doctrine of socialism. H. Berman, supra note 14, at 24-25.


66 V. Lenin, supra note 60, at 8.

pass through two stages towards stabilization after the revolution of the proletariat. The first stage would be socialism. In this stage the state would be rebuilt using the old machinery of bourgeois institutions. "Marxism differs from anarchism in . . . that it recognizes the necessity for the state and for state power in a period of revolution in general, and in the period of transition from capitalism to Socialism in particular."68 During this first phase of communistic development, that of socialism, the nation would be one large workshop and office of controlled production, where each man’s pay would be equal to the amount of work he did. The second and higher stage, that of “true” communism, was to occur after some prosperity, when controls could be eased. There would be more abundance; the effect of capitalists would be nil; and, therefore, prices would not have to be high. In this second evolutionary phase a man’s pay would now be equal to his needs, and since theoretically this would alleviate all want, there would be no economic deprivation and therefore no need for a police state with its bourgeois institutions of law and government. As Lenin wrote: “[O]nce the majority of the people itself suppresses its oppressors, a ‘special force’ for suppression is no longer necessary. In this sense the state begins to wither away.”69 State officials would be reduced to carrying out the instructions of the armed workers, much in the manner of “responsible, moderately paid ‘managers,’” and the beginning of the 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 in which the more and more simplified functions of control and accounting will be performed by each in turn, will become habit, and will finally die out as special functions of a special stratum of the population.70

Socialism would ultimately “shorten the working day, raise the masses to a new level, [and] create such conditions for the majority of the population as to enable everybody, without exception, to perform ‘state functions,’ and this [would] lead to a complete withering away of every state in general.”71 Lenin based his analysis on the manifestations of the withering away of state and law in the

68 Id.
69 V. LENIN, supra note 60, at 37.
70 Id. at 43. A comparison can be made here to Professor Fuller’s functional distinction between “managerial direction” and “law” and also his discussion of the “juristic aspects of managerial systems.” See L. FULLER, supra note 5, at 207-10, 212-13.
71 V. LENIN, supra note 60, at 98-99.
Paris Commune of 1871 and in the early stages of the Bolsheviks’ regime in Russia.  

After the Bolshevik Revolution of 1917, the Marxist interpretation of law was accepted by the Soviet Union as an official creed. During the early years of the new regime, several Soviet jurists expounded the doctrine of the eventual withering away of the state and law. In the decades following the Revolution, however, the Marxist concept of law has undergone a number of substantial transformations, and there is no indication that the process of reinterpretation and readaptation of the “classical” Marxist doctrines to the ever-changing political situation within the Soviet Union has come to a halt. No attempt is made herein to comprehensively trace this complex development, although certain aspects of the Soviet applications of “classical” Marxism will be discussed in a later section of this article.

The brief outline of the Marxist evolutionary concept of law presented above provides a sufficient basis for counterdistinguishing a more integrative and sociological concept of law, and also for recognizing the theoretical implications of Marxist ideology and legal theory which are found in the Soviet legal system as discussed below.

D. Max Weber’s Sociological Concept of Law: A Comparison

Max Weber’s sociological concept of law is a striking contrast to Marxian legal theory and provides an interactional perspective for analyzing the heuristic and “parental” functions of law within the Soviet system. The following discussion of Weber’s sociology

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72 Concerning the Paris Commune of 1871, Lenin stated:

The Commune ceased to be a state in so far as it had to repress, not the majority of the population but a minority (the exploiters); it had broken the bourgeois state machinery; in the place of a special repressive force the whole population itself came onto the scene. All this is a departure 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. Id. at 56.

Later in the same year (1917), Lenin reported that the Russian Revolution had already established, “although in a weak and embryonic form, precisely this new type of ‘state,’ which is not a state in the proper sense of the word.” V. LENIN, supra note 67, at 47. In the following year, Lenin said, “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.” V. LENIN, Report on the Activities of the Council of Peoples’ Commissars, Jan. 11, 1918, to the Third All-Russian Congress of Soviets of Workers’, Soldiers’ and Peasants’ Deputies, in 2 SELECTED WORKS 594-95 (Moscow ed. 1960).

73 See text accompanying notes 95-108 infra.
of law will be limited to his general criticism of the theory of the economic determination of law, his sociological concept of law including his typology of rational and irrational forms of lawmaking and lawfinding, and his views on the class nature of law, and the democratic administration of society.

Weber followed Marxian theory only in viewing history as a continuous class struggle. Weber criticized the economic determinism of Marxian theory, and in his interpretation of legal thought he gave as much weight to human ideas and ideals as he did to purely economic interests. In this regard Weber stated:

To be sure, economic influences have played their part, but only to this extent: That certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery, have influenced the systematization of the law or have intensified the institutionalization of political society.74

Weber summarized the relations between law and economic activity as follows:

(1) Law (in the sociological sense) guarantees by no means only economic interests but rather the most diverse interests ranging from the most elementary one of protection of personal security to such purely ideal goods as personal honor or the honor of the divine powers. Above all, it guarantees political, ecclesiastical, familial, and other positions of authority as well as positions of social preeminence of any kind which may indeed be economically conditioned or economically relevant in the most diverse ways, but which are neither economic in themselves nor sought for preponderantly economic ends.

(2) Under certain conditions a "legal order" can remain unchanged while economic relations are undergoing a radical transformation. In theory, a socialist system of production could be brought about without the change of even a single paragraph of our laws, simply by the gradual, free contractual acquisition of all the means of production by the political authority. . . . [T]he legal order would still be bound to apply its coercive machinery in case its aid were invoked for the enforcement of those obligations.

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which are characteristic of a productive system based on private property. Only, this case would never occur in fact.\textsuperscript{75}

(5) The legal status of a matter may be basically different according to the point of view of the legal system from which it is considered. But such differences [of legal classification] need not have any relevant economic consequences provided only that on those points which generally are relevant economically, the \textit{practical} effects are the same for the interested parties. . . .

(4) Obviously, any legal guaranty is directly at the service of economic interests to a very large extent. Even where this does not seem to be, or actually is not, the case, economic interests are among the strongest factors influencing the creation of law. For, any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive social groups, and the formation of social groups depends, to a large extent, upon constellations of material interests.

(5) Only a limited measure of success can be attained through the threat of coercion supporting the legal order. Owing to a number of external circumstances as well as to its own peculiar nature, this applies especially to the economic sphere. It would be quibbling, however, to assert that law cannot "enforce" any particular economic conduct, on the ground that we would have to say, with regard to all its means of coercion, that \textit{coactus tamen voluit} \textsuperscript{76} [although coerced, it was still his will]. For this is true, without exception, of all coercion which does not treat the person to be coerced simply as an inanimate object. Even the most drastic means of coercion and punishment are bound to fail where the subjects remain recalcitrant. In a broad mass such a situation would always mean that its members have not been educated to acquiescence. Such education to acquiescence in the law of the time and place has, as a general rule, increased with growing pacification. Thus it should seem that the chances of enforcing economic conduct would have increased, too. Yet, the power of law over economic conduct has in many respects grown weaker rather than stronger as compared with earlier conditions.\textsuperscript{76}

Weber did not view the influence of economic determinants as simply a function of the general level of acquiescence towards legal coercion. Instead, he believed that this influence is determined by the limitations of the economic capacity of the persons affected and also by the relative proportion of strength of private economic in-

\textsuperscript{75} Subsequent history has proved Weber's conclusion to be only partially correct. Professor Max Rheinstein has stated:

The norms of the legal order, existing before the total socialization took place could also be applied after its occurrence, if legal title to the various means of production were to be ascribed not to one single, central public authority but to formally autonomous public institutions or corporations which are to regulate their relationships to each other by contractual transactions, subject to the directions of, and control by, the central planning authority. Such a situation does indeed exist in the Soviet Union. \textit{M. Weber, supra} note 8, at 36 n.24.

\textsuperscript{76} \textit{Id.} at 35-37 (footnotes omitted).
terests on the one hand and interests promoting conformance to the rules of law on the other.

Weber theorized that some types of economic activity could be carried on without formal state institutions. In contrast to Marx, however, Weber believed that "an economic system, especially of the modern type, could certainly not exist without a legal order with very special features which could not develop except in the frame of a 'statal' legal order." The Soviet experience, with its modification of the "classical" Marxian theory and its retention of a coercive legal system, partially verifies this aspect of Weber's analysis.

Weber retained Hegel's concept of the reciprocity of society and the state in emphasizing the need in modern society for both the ruled and the rulers to believe in the legitimacy of the sociolegal system. Social stability is achieved through the social cohesion brought about by cultural norms and the coalescence of material and ideal interests, combined with the exercise of governmental authority or status group dominion. Legitimate authority depends upon an established administrative organization subject to specific controls and acting pursuant to certain imperative guidelines. Weber recognized the complexity of the modern sociopolitical system, but rather than postulating a cause and effect relationship or searching for a primal cause — such as the Marxist's economic determinism — he developed a cogent behavioral foundation for the institutional concepts of society, government, and the attendant legal system.

Weber defined law as "simply an 'order system' endowed with certain specific guarantees of the probability of its empirical validity." The probability that human conduct will be oriented toward the idea of the existence of the order system determines its validity. The distinctively legal emerges when "there exists a 'coercive apparatus,' i.e., that there are one or more persons whose special task

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77 Id. at 39.
78 Id. at 13. Weber's approach in defining "law" and the "concept of law" is that of a conceptual pragmatist. See notes 15-16 supra & accompanying text. For each term he used, Weber posited a careful groundwork definition which was not meant to be a statement of any "true" or "false" nature or essence of the term or the idea conveyed by the term, but rather an explanation of what Weber meant when he chose to use the term.
79 M. WEBER, supra note 8, at 3. Only then will the content of a social relationship be called a social order if the conduct is, approximately and on the average, oriented toward determinable "maxims." Only then will an order be called "valid" if the orientation toward those maxims occurs, among other reasons, also because it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him. Id.
it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement."  

A legal norm, therefore, exists in the probability that it will be enforced by a specialized staff, and "[a] legal order can indeed be characterized by the agreements which it does or does not enforce."  

Weber emphasized the role of coercion, but he did not limit the notion to legally sanctioned physical force:

The means of coercion may be physical or psychological, they may be direct or indirect in their operation, and they may be directed, as the case may require, against the participants in the consensual community, the consociation, the corporate body or the institution within which the order system is (empirically) valid; or they may be aimed at those outside.  

In order to "legitimately" exercise such coercive force, the fully matured political community has developed a system of casuistic rules. "This system of rules constitutes the 'legal order,' and the political community is regarded as its sole normal creator, since that community has, in modern times, normally usurped the monopoly of the power to compel by physical coercion respect for those rules."  

A central aspect of Weber's analysis of the concept of law is his distinction between rational and irrational lawmaking and lawfinding.

Today we understand by lawmaking the establishment of general norms which in the lawyers' thought assume the character of rational rules of law. Lawfinding, as we understand it, is the "application" of such established norms and the legal propositions deduced therefrom by legal thinking, to concrete "facts" which are "subsumed" under these norms.  

Weber emphasized two categories of lawmaking and lawfinding — rational and irrational. Lawmaking and lawfinding can proceed rationally or irrationally with respect to either formal or substantive criteria. According to the typology which Weber developed for distinguishing the various types of legal thought as they have appeared in the evolving processes of lawmaking and lawfinding,

80 Id. at 13.  
81 Id. at 100.  
82 Id. at 13.  
83 Id. at 341. In this analysis Weber viewed fully developed or matured law as a system of governance by rules; he saw the distinctively legal obligation as a component of an impersonal order that exhibits a strain toward rationality. However, when Weber actually applied his concept of law, especially in his theory of bureaucracy, the significance of legal coercion was greatly modified.  
84 Id. at 59.
jurisprudential development can approximate or consist of combinations of the following types:\textsuperscript{85}

1. \textit{Irrational}, that is, not guided by general rules:
   \begin{itemize}
   \item[a.] \textit{Formally irrational}, that is, guided by means which are beyond the control of reason, such as an oracle, a prophetic revelation, or an ordeal.
   \item[b.] \textit{Substantively irrational}, that is, guided by reactions to or evaluations of each individual case. Although this type has no exact counterpart in reality, it would seem to be representative of the ideal of the free-law (Freirecht) movement in Germany, the jurisprudence of interests as expounded in France at the turn of the century, and the American schools of legal realism and sociological jurisprudence.
   \end{itemize}

2. \textit{Rational}, that is, guided by general principles:
   \begin{itemize}
   \item[a.] \textit{Substantively rational}, that is, guided by clearly conceived and articulated general principles of an ideological system other than that of the law itself, such as ethics, ideology, power politics, and religion. Examples of this type are Mohammedan law and, in certain respects, Soviet-Marxist law and legal theory.
   \item[b.] \textit{Formally rational}, that is, guided by operative facts which are determined not from case to case but in a general manner. There are two kinds of formal rationality:
     \begin{enumerate}
     \item[(i)] \textit{Extrinsically formal rationality}, that is, ascribing significance to tangible facts common to every case; and
     \item[(ii)] \textit{Logical formal rationality}, that is, expressing its rules by the use of abstract concepts created by legal thought itself and conceived of as constituting a complete system. Examples of this type are those methods of legal thought which in modern jurisprudence have become known as “jurisprudence of concepts” or “conceptual jurisprudence.”
   \end{enumerate}
   
Soviet-Marxist law and legal theory, viewed in terms of its ideological basis, can be classified within this typology under the heading of \textit{substantively rational}. As an idealized type of lawmaking and lawfinding, the substantively rational

\textit{...}

\textit{...}

Indeed, it can be argued that it is due to this substantive rationality that the Soviet legal system has placed an overt emphasis on the heuristic and “parental” functions of law, at least in the unidirectional sense. Theoretically, the socialist system of law will “wither away,”

\textsuperscript{85} This schematic outline of Weber's typology has been modified from the discussion presented in \textit{id.} at 61-64, and in Rheinstein, \textit{Introduction} to \textit{id.} at xlii.

\textsuperscript{86} M. WEBER, \textit{supra} note 8, at 64.
but until that self-actualized stage of "true" communism is attained, the coercive legal system is to be used as a means to internalize the tenets of communist social behavior and public self-government.

In contrast to the Marxian theory of legal development, Weber expounded a sociological explanation (and interactional analysis) for legal and systemic societal change. In this regard Weber stated:

Theoretically, the origin of legal norms might, as we have already seen, be thought of most simply in the following way: The psychological "set" which arises with the habituation of an action causes conduct which in the beginning constitutes plain habit later to be experienced as binding; then, with the awareness of the diffusion of such conduct among a plurality of individuals, it comes to be incorporated as "consensus" into people's semi- or wholly conscious "expectations" as to the meaningfully corresponding conduct of others. Finally these "consensual understandings" acquire the guaranty of coercive enforcement by which they are distinguished from mere "conventions." Even on this purely hypothetical construction there arises the question of how anything could ever change in this inert mass of canonized custom which, just because it is considered as binding, seems as though it could never give birth to anything new. . . . Of course, empirically valid rules of conduct, including legal rules, have at all times emerged, and still emerge today, unconsciously, i.e., without being regarded by the participants as newly created. Such unconscious emergence has occurred primarily in the form of unperceived changes in meaning; it also takes place through the belief that a factually new situation actually presents no new elements of any relevance for legal evaluation. Another form of "unconscious" emergence is represented by the application of what actually is new law to old or somewhat different new situations with the conviction that the law so applied has always obtained and has always been applied in that manner. Nonetheless, there also exists a large class of cases in which both the situation as well as the rule applied are felt to be "new," although in different degrees and senses.87

Weber examined the sources of innovation in law from an interactional perspective and noted that where private elements are strong in the legal system, the "auxiliary" jurists, such as lawyers, notaries, conveyancers, and other draftsmen, assume special importance in that system. When the state assures the bindingness of private agreements and "special law,"88 the drafters of these legal documents and the

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87 Id. at 67-68.
88 This modern technique of leaving it to the interested parties thus to create law not only for themselves but also with operative effects as regards third parties gives those interested parties the advantages of a legal institution of special law, provided they comply with the substantive requirements as expressed in those terms which they have to incorporate in their arrangement. Id. at 141.
creators of these new "social relationships" may become legal innovators who play an important role in shaping the legal and social development of the society. To a certain extent, such a legal development has occurred in the Soviet Union as the creative roles of the lawyer and law worker have gained governmental approval and encouragement.89

For Weber, as for Marx, "class" distinctions in modern society result from unequal economic power. Economic determinants, however, are not the sole elements of status-group formation in Weber's sociolegal analysis. Weber attempted to formulate a concept which would encompass the influence of individuals and ideas upon the formation of groups without losing sight of the economic conditions:

In contrast to the purely economically determined "class situation" we wish to designate as "status situation" every typical component of the life fate of men that is determined by a specific, positive or negative, social estimation of honor. . . . In content, status honor is normally expressed by the fact that above all else a specific style of life can be expected from all those who wish to belong to the circle.90

Weber defined democratic administration as administration based upon the assumption that everyone is equally qualified to conduct the public affairs and in which the scope of the power to command is kept at a minimum.91 This definition would seem consonant with the avowed goals of Marxism; however, Weber further noted:

Democracy becomes alienated from its purity where the group grows beyond a certain size or where the administrative function becomes too difficult to be satisfactorily taken care of by anyone whom rotation, the lot, or election may happen to designate. . . . The growing complexity of the administrative tasks and the sheer expansion of their scope increasingly result in the technical superiority of those who have had training and experience and will thus inevitably favor the continuity of at least some of the functionaries. There always thus exists the probability of the rise of a special, perennial structure for administrative purposes, which of necessity, means for the exercise of domination.92

This aspect of Weber's analysis is supported by the Soviet-Marxist attempt to create a "pure" democracy, which has resulted in the

90 FROM MAX WEBER: ESSAYS IN SOCIOLOGY, supra note 74, at 186-87.
91 M. WEBER, supra note 8, at 330.
92 Id. at 333-34.
creation of a "new ruling class" and an autocratic regime in which law is essentially a means whereby the political leadership exercises control over society — contrary to most Western systems where law is essentially a means for society to control the political leadership.\footnote{See Berman, supra note 50, at 948. See generally M. Djilas, The Imperfect Society (1970); M. Djilas, The New Class (1957); N. Popovic, Yugoslavia: The New Class Crisis (1968).}

Weber's sociological and interactional perspective provides a sharp contrast to "classical" Marxian theory and a point of departure for analyzing the heuristic and "parental" functions of law within the Soviet system.

IV. THE HEURISTIC AND "PARENTAL" FUNCTIONS OF LAW WITHIN THE SOVIET SYSTEM

To put a man behind walls and not to try to change him is to deny him his humanity — and ours.\footnote{N.Y. Times, Apr. 26, 1970 § E (Magazine), at 25.}


The heuristic function of law is that aspect of the sociolegal system by which individual or collective opinions concerning sociolegal relationships are created or stimulated in the interaction that takes place within the social system between "the law" and "social behavior." The educational and "parental" functions of law describe the role of law as a guiding teacher and parent. These functions can be viewed as unidirectional, that is, in terms of the "law" directing desired social behavior; or they can be viewed as interactional, that is, in terms of the synergistic interplay between the social participant (individual or collective) and the observed (or empirical) legal system. The "content" of the law within the particular sociolegal system may also depend, to varying degrees, upon related ideological, cultural, and traditional preconceptions, as well as ethnocentricity, national outlook, and geographic position.

The Soviet system is an appropriate subject for an analysis of the effect that an ideology can have on a legal system because the Soviet government accepted from the outset the clearly articulated ideological and political philosophy of "classical" Marxism, including the Marxian concept of law.\footnote{See text accompanying notes 25-73 supra. See also Bell, Ten Theories in Search of Reality: The Prediction of Soviet Behavior, 10 WORLD POLITICS 327 (1958); Chambre, Soviet Ideology, 18 SOVIET STUDIES 14 (1967); Daniels, The Ideological Vector, 18 SOVIET STUDIES 71 (1966); Fieron & Kelly, Personality, Behavior and Con-}
Revolution of 1917, Soviet jurists have reinterpreted the Marxian concept of law to justify the continuance of law and the maintenance of a socially coercive legal system in a society where the state and law are destined to "wither away." These jurists have viewed the Soviet Union as being in a transitional period during which the socio-legal institutions are used to educate and direct the people in behavior patterns appropriate for the future stage of "true" communism.

Marxist-Soviet theorists have generally acknowledged two characteristics of the Soviet society's transition to communism: The state with its law is to wither away, and at the same time increasing technical administration is to occur, without state compulsion, especially in the realm of economic production. The implication of these two propositions, without an alternative mechanism of coercion or enforcement, is that the "new Soviet man" — Homo Sovieticus — must somehow be educated and trained to voluntarily observe the norms required for the continuing administration and for the forthcoming stage of public self-government.

Lenin expanded Marx and Engels' theory of the withering away of the state to include a full exposition of the transitional period of "proletarian dictatorship." Lenin rejected the idea of immediately abolishing the coercive state apparatus after the successful Revolution, but he retained the doctrine that the state and law would wither away once the hostile elements in the socialist society had been purged and the classless society had emerged. Furthermore, he emphasized the role of the "armed masses" of the people in maintaining order and administration without state compulsion.6 Lenin's emphasis on the role to be played by the masses during the transitional period suggests direct, informal, spontaneous, and collective intragroup action without excess state compulsion. Thus, in his address, "To the Population," on November 5, 1917, Lenin stated:

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 in your hands all affairs of the state. . . . Get on

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6 V. LENIN, supra note 60, at 75.
Lenin also emphasized that the soviets were a "new state apparatus" like that of the Paris Commune, "not a state in the proper sense of the term," but a "transition state," a "harbinger of the withering away of the state in every form," "the first step towards socialism," and "the first stage of a socialist society."98

In the early years of the new regime, the leading Soviet jurists maintained a relatively strict interpretation of Marxian legal theory.99 Thus, M. A. Reisner, writing in Moscow in 1925, anticipated that "law, manifestly, will die out forever — side by side with a whole series of other forms of ideological thinking."100 Reisner treated law as a particular type of state action that would necessarily wither away under communism due to the fulfillment ("each according to his needs") of all material individual needs. Another prominent Soviet jurist of the early years, Yevgenii B. Pashukanis, equated the dying out of the "state" with "the dying out of law in general" and "the gradual disappearance of the juridic elements in human relations."101

In the decades following the Bolshevik Revolution, the Marxist concept of law has undergone numerous transformations and reinterpretations.102 But Professor Berman has noted:

98 See, e.g., V. LENIN, Can the Bolsheviks Retain State Power?, in 2 SELECTED WORKS 455 (Moscow ed. 1960); V. LENIN, First All-Russian Congress of Soviets of Workers' and Soldiers' Deputies: Speech on the Attitude Towards the Provisional Government, in 2 SELECTED WORKS 177 (Moscow ed. 1960); V. LENIN, Seventh All-Russian Conference of the R.S.D.L.P., in 2 SELECTED WORKS 106 (Moscow ed. 1960); V. LENIN, The Tasks of the Proletariat in Our Revolution, in 2 SELECTED WORKS 81 (Moscow ed. 1960). Concerning the Paris Commune, see note 72 supra & accompanying text.
100 Reisner, Law, Our Law, General Law, in SOVIET LEGAL PHILOSOPHY 83, 108-09 (H. Babb transl. 1951).
101 Pashukanis, The General Theory of Law and Marxism, in SOVIET LEGAL PHILOSOPHY 111, 124 (H. Babb transl. 1951). In dealing explicitly with the doctrine of the withering away of the state coupled with the pragmatic concept of the continuing administration of society, Pashukanis attempted to distinguish between legal regulations, which would gradually "die out," and technical regulations, which would actually increase in the new Soviet state. Id. at 135-36, 178. According to Pashukanis, a railroad timetable is an example of a purely technical regulation. As a legally imposed rule, the timetable is a means for attaining maximum economic efficiency. A multiplicity of such rules contributes to form a planned economy. In contrast, a law expressing railroad liability is a purely juridic regulation. Similarly, a table of military organization is an administrative-technical regulation, while a bourgeois draft law is a form of juridic regulation. So long as the market economy continues, juridic regulations are necessary.
102 No attempt will be made here to trace this complex development which has been
Whether conceived in terms of an immediate or of an ultimate future, the idea that law will die out under Communism has had important repercussions on the Soviet legal system from its initial stages of development until the present. For connected with this mystical concept is a practical distinction between official law and unofficial law-consciousness, and a practical belief that the main purpose of official law is to shape and develop that unofficial law-consciousness, so that people will actually think and feel what the state, through official law, prescribes. When the state has fully educated all people to internalize the legal system, then that legal system will no longer be needed.103

Persistently repeated throughout Marxist-Soviet writing is the concept that legal institutions are to be used to educate the new Soviet man in preparation for communism. Thus, article 3 of the Law Concerning the Judicial System of the U.S.S.R. and of the Union and Autonomous Republics states:

The court by all 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.104

Presumably, the goal of law is thus to educate the people during the period of socialism so that the transition to communism can be speedily carried out and the Marxian utopia achieved.

103 H. Berman, supra note 14, at 282. Concerning "law-consciousness," the following discussion based on L. I. Petrazhitskii's analysis of the subject should be noted: To understand a legal system it is necessary to distinguish between the official law proclaimed by the state and the unofficial law which exists in the minds of men and in the various groups to which they belong. Each of us has his own conceptions of rights, duties, privileges, powers, immunities — his own law-consciousness. . . . The official law of the state, with its authoritative technical language and its professional practitioners, cannot do violence to the unofficial law-consciousness of the people without creating serious tensions in society. At the same time, official law is more than a reflection of popular law-consciousness; it also shapes it, directly or indirectly. Id. at 279 citing L. I. Petrazhitskii, Thoria Prava i Gosudarstva v svias s teoreii nравственности [The Theory of Law and State in Connection with THE THEORY OF CHARACTER] (St. Petersburg ed. 1909).


Numerous Soviet jurists and political theorists have discussed the educational role of legal institutions. Writing in 1918, Lenin described the way in which the bourgeois court was replaced by the people's court in the Soviet Union: "We transformed the court from an instrument of exploitation into an instrument of education on the firm foundations of socialist society." In 1927 Pashukanis stressed that the criminal law should be applied in the Soviet Union as a pedagogic measure. S. A. Golunskii and M. S. Strogovich wrote in 1940: "It is perfectly manifest that the educative part played by the soviet court, which decides questions of applying the law and compelling observance of legal norms, strengthens the citizens' consciousness of their moral obligations with reference to the state and to each other." In an address on "The Educational Significance of The Soviet Court," delivered and printed in 1947, Ivan T. Goliakov, then Chief Justice of the Supreme Court of the U.S.S.R., stated:

The most important function of the socialistic state is the fundamental remaking of the conscience of the people, 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.

Since the death of Stalin in 1953, increasing numbers of Soviet jurists have expressed the view that legal institutions have an important educational role within Soviet society.


107 Golunskii & Strogovich, supra note 104, at 381.


tant than the theoretical exclamations concerning the educational role of Soviet legal institutions are the actual structure and operational approaches of some of these institutions — which include certain social organizations and the antiparasite or "refusal to work" laws, as well as the Soviet courts.

A. The Role of Social Organizations

Since the death of Stalin certain governmental functions within the Soviet Union have been gradually assumed by social organizations such as the People's Volunteer Militia and the Comrades' Courts. Professor Berman has pointed out: "These organizations have a dual parental function: they bring the will of the 'collective' to bear on miscreants, and at the same time they educate the participants in what Soviet writers call 'popular self-government.'" The formalized social interaction encouraged by these social organizations not only unidirectionally creates appropriate public opinion or law-consciousness in individuals, but also allows and even encourages the "will of the collective" to achieve relatively new consensual content through these social organizations — that is, to a certain extent the content of public self-government is overtly susceptible to progressively changing societal mores and other social norms.

1. The People's Volunteer Militia. — The People's Volunteer Militia (narodyayaya militsia), or "People's Patrols," was established in the post-Stalin period to act alongside the regular Militia (police force) in keeping law and order in public places. The Volunteer


110 H. BERMAN, supra note 14, at 286.


112 The 1960 R.S.F.S.R. Statute on the People's Volunteer Militia lists the following tasks of the members:

(1) To maintain public order on streets, in stadiums, parks and other public places, at meetings, demonstrations, sports events, etc.; (2) Together with police, court and Procuracy agencies, to combat petty crime ("hooliganism"), drunkenness, theft, violations of trade regulations, speculations, moonshining, and other offenses; (3) To enforce traffic regulations; (4) To combat neglect of children; (5) To make suggestions to state and social organizations for taking measures of influence against persons who violate public order; (6) To send materials concerning offenders to Comrades' Courts or administrative agencies,
Militia is similar in its function and physical composition to the *druzhiny* or people's police of prerevolutionary Russia, and for this reason the members of today's Volunteer Militia in the Soviet Union are often referred to as "*druzhinniki."

The *narodyayta militsia* is composed of millions of volunteer members, and its general purpose is to draw a relatively large segment of Soviet society into law enforcement. A member of the Volunteer Militia has the duty of maintaining public order. To carry out this duty, he may freely enter public places, demand that a citizen stop violating the peace, and commandeer transportation for the victim of a crime or accident. He may also draw up a statement of violations and send it to the staff chief or *druzhina* commander and, when necessary, take a violator before the staff of the local People's Volunteer Militia, the regular police force, or the nearest rural or village soviet. Serious cases are handed over to the police for prosecution before the ordinary courts. Minor cases are dealt with by reprimands or by transfer to the Comrades' Courts.

Professor Berman has pointed out that the Volunteer Militia groups exercise specific educational functions in addition to those powers that are normally exercised by regular police forces in most other countries:

*The Peoples Patrols* are concerned with anti-social activities not amounting to crimes — for example, neglect of children. They sometimes ridicule offenders in the press or on public display boards ("Billboards of Shame"). They speak to general meetings of workers and employees in enterprises and institutions. They roam the city in pairs, taking issue with conduct of which they do not approve, such as boisterous parties, drunkenness, wearing of "Western" clothes, or dancing of "Western" dance steps. The aim of the People's Patrols is to establish an educational agency for law-enforcement whose members will be an integral part of

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113 The leading members of these Volunteer Militia groups, however, are usually party members or Komsomol (Young Communist League) members.

114 H. BERMAN, supra note 14, at 286-88.
the society itself, who will, in the words of the 1960 statute, "be an example in work and in everyday life."115

The Secretary of the Leningrad City Party Committee has commented that:

[T]he work of družbinniki constantly exceeds the limits of patrolling the streets, and is turned into daily educational work with people. The družbinniki already do not limit themselves to information about violators at their place of work; they go to the enterprises, establishments and organizations where they speak to general meetings of workers and employees, appearing thereby as initiators of the public censure of violators. The authority of the družbinniki among the toilers is rapidly increasing. They consult with them more and more often on problems of their children's education, family relations; they ask advice and help in such matters which at first glance apparently do not come within the duties of the družbinniki.116

There is no real parallel in American society for the Soviet People's Volunteer Militia. Some residential districts in large metropolitan areas of the United States have organized citizen police forces, but these are generally protective associations rather than coercive or educational bodies. The only legal manifestation of citizen police power in the United States is the "citizen's arrest"; however, it can be argued that the heuristic and "parental" functions of the Soviet People's Volunteer Militia are exercised in the United States by more informal (and perhaps equally effective) social forms of coercion.

2. Comrades' Courts.117—In 1959 Premier Nikita S. Khruschev stated before the 21st Party Congress:

Many functions performed by government agencies will gradually pass to social organizations. ... The time has come when more attention should be paid to the Comrades' Courts, which should seek chiefly to prevent assorted kinds of law violations. They should hear not only cases concerning behavior on the job


116 Boikova, in SOVETSKAIA OBSCHESTVENNOST' NA STRAZHE SOTSIALISTICHESKOI ZAKONNOSTI 119-20, quoted in Morgan, supra note 111, at 64. See also Savitsky, Simply to Be a Volunteer is Not Enough, Izvestia, June 25, 1967, at 3, translated in 18 CURRENT DIGEST OF THE SOVIET PRESS, No. 25, July 13, 1966, at 31.

but also cases of everyday deportment and morality, and cases of improper conduct by members of the group who disregard standards of social behavior.\textsuperscript{118}

The Comrades' Courts (tovarischeshkiye sudy) were first set up in 1919 in a number of factories and apartment buildings to deal with petty crimes and antisocial activity. These social organizations functioned effectively during the 1920's, but they gradually fell into disuse during the 1930's when Stalin's severe criminal law legislation removed much of their jurisdiction. After 1939 little was heard of the Comrades' Courts until they were revitalized in 1959 to deal with comparatively minor and quasi-legal offenses. At present there are enactments governing Comrades' Courts in almost all of the Soviet Republics. In the Russian Republic (R.S.F.S.R.) these social organizations are now governed by the Decree of July 3, 1961, which has subsequently been amended by the Presidium of the Supreme Soviet of the R.S.F.S.R. to increase the jurisdiction of the Comrades' Courts.\textsuperscript{119} This broadening of jurisdiction suggests that the government's current policy is to encourage these nonprofessional and informal tribunals and to relieve the People's Courts of a number of minor offenses which can best be handled by the Comrades' Courts.

The main functions of the Comrades' Courts in the Soviet Union are to prevent violations of the law and offenses which are considered harmful to society, to educate people by persuasion and social influence, to create an atmosphere of intolerance towards antisocial and "parasitic" acts, and to develop and consolidate cooperative relations between citizens.\textsuperscript{120}

\textsuperscript{118}Translated in H. Berman, \textit{supra} note 14, at 285-86; Morgan, \textit{supra} note 111, at 57.


\textsuperscript{120}The 1961 R.S.F.S.R. Statute on Comrades' Courts (as amended through January 16, 1965) describes the function of the Comrades' Courts as follows:

Comrades' courts are elective social agencies called upon actively to foster the education of citizens in the spirit of a communist attitude toward labor [and] socialist ownership and the observance of the rules of socialist community life, and the development among Soviet people of a sense of collectivism and comradely mutual assistance and of respect for the dignity and honor of citizens. The most important aspect of the work of comrades' courts shall be the prevention of violations of law and misconduct that cause harm to society, the education of people through persuasion and social pressure, and the creation of conditions of intolerance toward any antisocial acts. Comrades' courts shall be invested with the trust of the collective, shall express its will, and shall be responsible to it. \textit{Id.} art. 1.

This statute is discussed at length in Berman & Spindler, \textit{supra} note 117, at 857-95.
Comrades' Courts can be set up in factories, apartment buildings, collective farms, and universities — anywhere there are at least 50 (and in certain cases fewer than 50) people living or working. In 1969 it was estimated that more than 40,000 people in Moscow alone were taking part in the work of the Comrades' Courts at their places of work and places of residence. Comrades' Courts are composed of a panel of three or five judges, chosen by majority vote at an open election (not by secret ballot), who serve for a term of 1 year. The 1961 R.S.F.S.R. statute does not specify the qualifications for judges of these courts, but in practice they are usually chosen from among the employees with the longest service.

Despite their comparatively nonprofessional and informal character, the Comrades' Courts are required to have a secretary, to make transcripts of their proceedings, and to keep proper records. They have power by law to summon witnesses, and if the directions of their decisions are not complied with, the respective People's Court can levy execution in the same way that execution is levied on property belonging to convicted persons who have not complied with the civil judgments of such a People's Court. The Comrades' Courts may at any time transfer a case directly to a People's Court if the case appears to be more serious than was originally thought or if more thorough investigation is required.

The respective statutes of the various Soviet Republics allow the Comrades' Courts to become involved in the legal processing of a wide variety of quasi-crimes. The cases with which the Comrades' Courts are concerned can be divided into four general categories: (1) labor discipline, which includes cases heard by the factory courts involving "slackers," absenteeism, constant lateness for work, poor quality work, failure to observe safety regulations and fire precautions, carelessness resulting in damage to machinery or stock, and drunkenness or general carelessness on the job; (2) cases arising out of social relations, which are usually heard by the apartment building courts and which include cluttering corridors in crowded tenant apartment buildings, using foul language, spreading malicious and unfounded rumors about neighbors or colleagues, failing to give proper assistance to a sick or injured citizen, engaging in unworthy conduct towards women, and failing to bring up one's children properly or to care for and support one's aged parents; (3) antisocial acts, which is a broad and general category for such acts

as "hooliganism," drunkenness, minor speculation, parasitism, illicit use of government transport for private purposes, petty thefts, "moonshining" or the illegal production of alcoholic beverages, and certain misdemeanors which are sometimes transferred to the Comrades' Courts from the regular courts; and (4) civil disputes, which include disputes over property where the value does not exceed 50 rubles and where both parties consent to the matter being heard by a Comrades' Court.  

The Comrades' Courts are "social organizations" in the sense that they are staffed by lay volunteers rather than civil servants, they purportedly perform a persuasive rather than a coercive function, and their decisions are supposed to be carried out voluntarily.  

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122 The list of matters which can be heard by a Comrades' Court is set forth in the R.S.F.S.R. Statute of July 3, 1961, on Comrades' Courts, art. 5 (1961), as amended, Jan. 16, 1965, translated in BASIC LAWS ON THE STRUCTURE OF THE SOVIET STATE, supra note 119, at 265. See also Morgan, supra note 111, at 58-59.

123 Berman & Spindler, supra note 117, at 842. The social nature of the Comrades' Courts is reflected in the sanctions which they can apply. These social sanctions are outlined in article 15 of the R.S.F.S.R. Statute on Comrades' Courts as follows: A comrade's court may apply the following measures of pressure to an offender: (1) oblige [him] to apologize publicly to the victim or the collective; (2) announce a comradely warning; (3) announce a social censure; (4) announce a social reprimand, with or without publication in the press; (5) impose a money fine up to 10 rubles if the offense is not connected with a violation of labor discipline, and a fine up to 30 rubles for cases of petty stealing of state or social property, and up to 50 rubles for repeated petty stealing; (6) place before the director of the enterprise, institution, or organization the question of applying one of the following measures in accordance with the labor legislation in force: transferring the offender to lower-paying work or demoting him; (6a) place before the director of the enterprise, institution, or organization the question of dismissing, in the established procedure, a person who performs work connected with the education of minors or youth, or work connected with the disposition or keeping of valuable items, if the comrades' court, taking into account the character of the offenses committed by such person, considers it impossible to entrust such work to him in the future; (6b) place before the director of the enterprise, institution, or organization the question of assigning persons who have committed petty hooliganism, petty speculation, petty stealing of state or social property, theft of inexpensive articles of personal consumption or everyday use, beatings, or light bodily injuries, to unskilled physical labor in the same enterprise, institution, or organization for a period of up to 15 days with pay for the work fulfilled; (7) raise the question of evicting the offender from the apartment he occupies if it is impossible to live with him or if he has a predatory attitude toward housing resources; (8) a comrade's court may, in addition to applying the measures of pressure provided by sections 1-7 of the present article, oblige the offender to make compensation, in an amount not exceeding 50 rubles, for damage caused by his illegal acts. When considering cases of petty speculation, a comrades' court shall adopt a decision to transfer the articles of petty speculation to the income of the state. In cases of stealing of state or social property, the comrades' court in all instances must oblige the offender to make full compensation for material damage that has been caused. R.S.F.S.R. Statute of July 3, 1961, on Comrades' Courts, art. 15 (1961), as amended, Jan. 16,
Proceedings of the Comrades’ Courts are often widely publicized and are occasionally filmed for television or the newsreels. The 1961 procedural manual of the Comrades’ Courts stresses the desirability of public apology by the offender and the encouragement of attendance and participation at the trial by the accused’s fellow workers and neighbors. The offender’s subsequent conduct is followed by the Court.124

Soviet jurists have estimated that the number of higher court cases diminished by 25 percent in the first year after the adoption of the Comrades’ Court statutes in 1961.125 Although there have been acknowledged abuses of the Comrades’ Court system and complaints of misapplication of law and of decisions exceeding jurisdictional competence, “they have failed to justify the worst fears.”126

The Comrades’ Courts are intended to function as courts of morals as well as courts of law. This synthesis of law and morality, which blurs the distinctions so carefully drawn by the 19th century philosophers of jurisprudence both on the continent of Europe and in Anglo-American legal thought, is based on the Marxian theory that law will “wither away” along with the state as the true communist society gives conscious birth to itself. After the gestation period of socialism, public opinion, as expressed and impressed through the consensus of one’s neighbors and fellow workers, will take the place of legal coercion, and to this extent the Comrades’ Courts are a foretaste of the kind of social control which will exist.
in the communist society of the future. Thus, the Supreme Court of the Russian Republic has spoken of the "changes and additions aimed at improving the work of the Comrades' Courts in the communist upbringing of the working people . . . ."  

It is safe to assume, as at least one Soviet writer has, that "in many instances the public could exert a much stronger influence on a wrongdoer than [a more formal] court trial would." One Soviet jurist has called the Comrades' Courts "an effective form of moral influence upon violators of the rules of the socialist community," and he claims that "a person facing a court of his comrades feels as if he were before the court of public conscience." The Comrades' Courts' reliance on public influence, however, deprives that system of many of the safeguards of traditional legal institutions, "including right to counsel, presumption of innocence, precise formulation of issues, precise definitions of offenses, and evidentiary standards of relevance and materiality." Furthermore, the Comrades' Courts use lay adjudicators rather than professionally trained judges. And although their sanctions and means of coercion are often only social — for example, public apology, warnings, and public censure — the Comrades' Courts may also impose, among other sanctions, fines up to 10 rubles, proposed job transfers, demotions, evictions, and may require payment of damages up to 50 rubles.

The possibility of injustice is somewhat minimized, however, because sanctions are generally mild and offenses charged are those of

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131 Berman & Spindler, supra note 117, at 903.
132 See note 123 supra.
which the entire collective or community would have knowledge. It can also be argued that additional legal refinements would detract from the informal and distinctively "social" coercive nature of these institutions.

A partial comparison can be made between the Soviet Comrades' Courts and the numerous voluntary and often formally or informally coercive organizations in the United States, such as "shop" committees in factories, Parent Teacher Associations, Neighborhood Committees, and Tenant Associations. A major difference between these Soviet and American social organizations is that the Comrades' Courts are pervaded by a sociopolitical ideology which justifies and encourages state "parental" involvement.133

B. The Antiparasite and Refusal to Work Laws

In the Soviet Union, and also in most Western nations, there are certain laws which perform heuristic and "parental" functions within the sociolegal system. The Soviet antiparasite and refusal to work laws, which concern "persons avoiding socially useful work and leading an antisocial and parasitic way of life," are one such example.134

The antiparasite laws, formulated as part of a public discipline campaign under Nikita S. Khrushchev, provided for the calling of a public meeting to pronounce judgment on those persons who were living on "unearned" income. Prior to February 1970, "parasites" could be sentenced to exile for 2 to 5 years by such a public meeting. The Edict of the Presidium of the Supreme Soviet of the R.S.F.S.R., "On Strengthening the Struggle Against Persons Who Refuse to Engage in Socially Useful Work and Lead an Antisocial Parasitic Way of Life,"135 enacted on May 4, 1961, and amended on Septem-

133 An American parallel might be drawn to the Federal Rent Supplement Program of 1968, created under section 101 of the Housing and Urban Development Act of 1965, 12 U.S.C. § 1701s (Supp. III, 1968), which authorizes rent supplements to members of a cooperative — a residence managed by a democratically elected tenants' committee with power to assess members and evict defaulters.


ber 20, 1965, includes a comprehensive explanation of the role and ultimate objectives of the antiparasite and refusal to work laws:

Our country, under the leadership of the Communist Party, has entered the period of expanded construction of communism. Soviet people are working with enthusiasm at enterprises, construction projects, collective and state farms and institutions, performing socially useful work in the family, observing the law and respecting the rules of socialist community life.

However, in cities and in the countryside there are still individual persons who, though able to work, stubbornly do not wish to work honestly and lead an antisocial parasitic way of life. On collective farms such kind of persons, while enjoying the benefits established for collective farmers, refuse to engage in honest work, subvert discipline, and thereby inflict damage upon the artel's economy.

The parasitic existence of these persons is as a rule accompanied by drunkenness, moral degradation and violation of the rules of socialist community life, which have an adverse influence on other unstable members of society.

It is necessary to wage a resolute struggle against antisocial, parasitic elements until this disgraceful phenomenon is completely eradicated from our society, creating around such persons an atmosphere of intolerance and general condemnation.

Taking into account the many expressions of desire on the part of the working people that the struggle against antisocial elements be intensified, the Presidium of the Supreme Soviet of the R.S.F.S.R. decrees:

1. It shall be established that adult citizens able to work who do not wish to fulfill a most important constitutional obligation — honestly to work according to their capacities — and who refuse to engage in socially useful work and lead an antisocial parasitic way of life, shall be enlisted, by decision of the executive committee of the district (or city) soviet of working people's deputies, in socially useful work in enterprises (or construction sites) located in the district of their permanent residence or in other places within the boundaries of the same region, territory, or autonomous republic.

   Persons who refuse to engage in socially useful work and lead an antisocial parasitic way of life who live in the city of Moscow, in the Moscow Region, or in the city of Leningrad shall be subjected, by decree of a district (or city) people's court, to resettlement in specially designated localities for a term of two to five years with enlistment to work in the place of settlement.

Mainly as a result of pressure from the Soviet legal profession, the 1965 amendments to the R.S.F.S.R. Edict (quoted in part above) in-
roduced a number of procedural safeguards relating to the trial and judgment of "parasites." According to the amended Edict, charges against persons believed to be leading a parasitic way of life must be confirmed by the police, who are obligated to issue a warning to the individual in question. The execution of a resettlement decree imposed on an individual found guilty of leading a parasitic way of life must be supervised by the local administrative authority. Although the sentence imposed is normally not subject to appeal by the guilty individual, the procurator's office can protest confirmation of a sentence to a higher regional authority. In addition, the antiparasite laws are now generally being enforced by the courts rather than by public meetings.136

But the antiparasite laws were still not without their faults, and many jurists both inside the Soviet Union and abroad criticized them because they lacked solid legal foundation. These jurists argued that persons charged with being "parasites" were not given full due process of law since the antiparasite legislation had not been included in the criminal codes of the various Soviet Republics. As a result of this criticism, the Presidium of the Supreme Soviet of the R.S.F.S.R. on February 25, 1970, quietly replaced its controversial antiparasite law with a new criminal regulation that forces people to engage in "socially useful work" or face up to a year in prison or in a labor camp.137 The major change effected by this newly revised anti-

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136 Speaking of the R.S.F.S.R. antiparasite law prior to its 1965 amendment, Professor Berman noted:

This statute, with all its defects, is a considerable improvement over the earlier anti-parasite laws enacted by the various smaller republics in the years from 1957 to 1960, which were even more vague in their definitions and which provided for no judicial administration whatever, leaving offenders entirely at the mercy of "the public." . . . [T]he limitations introduced into the statute reflect a certain compromise with [the "strict legality" school], and an effort to reconcile the parental features of the law with the more objective standards which have characterized the reform movement since Stalin's death. H. Berman, supra note 14, at 294.

137 The new antiparasite or "refusal to work" law further amends articles 1 to 6 of the 1961 Edict so that these articles now read as follows:

1. To establish that able-bodied legally adult citizens who do not wish to perform a major Constitutional duty — to work honestly according to their capabilities — who avoid socially useful work and who lead an antisocial, parasitic way of life are liable to be brought before internal affairs agencies for an official warning that their parasitic existence is impermissible and that they must accept employment within a period of 15 days.

2. Persons who avoid job placement and who continue to lead an anti-social, parasitic way of life after having been officially warned in accordance with Art. 1 of the present decree are enlisted, by decision of the executive committee of a district (or city) Soviet, in socially useful work at enterprises (or construction projects) situated in the district where they reside permanently or in other places within the given province, territory or autonomous republic.
parasite law is that those persons found to be "parasites" are no longer subject to exile.

Prior to 1970 the Soviet antiparasite laws emphasized their societal disinfectant role. The primary function of these criminal regulations was to rid cities and collective farms of undesirable persons so that their apathetic attitude would not be a contagious influence on their neighbors and fellow workers. The work-stimulus feature of these earlier laws appeared to be of secondary importance. In comparison, the newly revised law is directly aimed at influencing individuals to engage in "socially useful" activity in line with the current drive in the Soviet Union to increase the size of the labor force and to tighten labor discipline. As did the Edict of 1965, discussed above, the new antiparasite law, or, more accurately, "refusal to work" law, provides that a person accused of living a parasitic way of life be given a warning by the police stating that

3. The management and public organizations of enterprises (or construction projects) where persons avoiding socially useful work have been sent to work are obliged to provide jobs for them, conduct educational work with them and adopt measures for their assignment to production collectives.

The management of the enterprises (or construction projects) is obliged to see to it that the Soviet that made the decision on the placement of such persons is informed, within three days, of all cases involving their dismissal.

4. The exposure of persons avoiding socially useful work and leading an antisocial, parasitic way of life and the verification of all the relevant circumstances are carried out by internal affairs agencies on the basis of materials in their possession, at the initiative of state and public organizations and on the basis of citizens' complaints. The verification is to be carried out within a period of 10 days.

If, even after an official warning, such persons do not take the path of an honest life of labor, the internal affairs agencies send the materials about them to the executive committee of the district (or city) Soviet, which examines these materials, within a period of 10 days, in the presence of the persons who have avoided socially useful work.

5. The internal affairs agencies are responsible for supervising the execution of the decisions of the executive committees of districts (or city) Soviets on sending such persons to work.

6. In cases where persons leading an antisocial way of life maliciously avoid the implementation of the decision of the executive committee of the district (or city) Soviet on job placement and termination of parasitic existence, the management of the enterprise (or construction project) is obliged to report this, within five days, to the internal affairs agencies so that the question may be decided of whether to bring criminal charges against such persons in accordance with Art. 209/1 of the Russian Republic Criminal Code. Translated in 22 CURRENT DIGEST OF THE SOVIET PRESS, No. 16, May 19, 1970, at 32.

The revised antiparasite law of the R.S.F.S.R. claims constitutional justification for its existence, and indeed article 12 of the 1936 Constitution of the Soviet Union provides that "[w]ork in the U.S.S.R. is a duty and a matter of honor for every able-bodied citizen, in accordance with the principle: he who does not work, neither shall he eat. The principle applied in the U.S.S.R. is that of socialism: from each according to his ability, to each according to his work." U.S.S.R. FED. CONST. art. 12 (1936).
he should find suitable work. If the individual does not find such work within 15 days, the local government is compelled to assign him a job in the general region where he lives. If he then “maliciously refuses” to work, he is liable to criminal charges under a new section of the R.S.F.S.R. criminal code and could face up to a year’s deprivation of freedom or corrective tasks for the same period.

Although the antiparasite laws in the Soviet Union are currently undergoing a period of change and reevaluation, it is unlikely that they will be abolished entirely. A new refusal to work law similar to that of the R.S.F.S.R. has been promulgated in at least one other Soviet Republic (Central Asian Republic of Tadzhikistan), and it can be assumed that the newly revised R.S.F.S.R. law will eventually be adopted and applied in all the Soviet Republics.

The R.S.F.S.R. Supreme Court has continually emphasized the educational purposes of the laws which attempt to prevent citizens from leading an antisocial parasitic way of life in its decree “On Strengthening the Struggle Against Parasites.” The following statement is an example:

The important significance of the edicts of the presidiums of the supreme soviets of union republics which provide responsibility for an antisocial parasitic way of life lies in their preventive, prophylactic pressure. The basic purpose of legislation on strengthening the struggle against parasitic elements is to bring persons who are leading an antisocial way of life to honest work. . . . Consideration of materials on parasitic elements in open juridical sessions held in city and rural clubs and at circuit sessions in enterprises, collective farms and state farms, attracts the broad attention of the workers and creates a setting of intolerance and general censure with respect to persons who lead an antisocial parasitic way of life. . . . Consideration of materials concerning persons who lead a parasitic existence must secure the proper application of measures of administrative pressure provided by law, and must have the purpose of bringing such persons to socially useful work and of warning other persons against similar antisocial conduct.

The Soviets also recognize that intragroup social pressure and censure can be inherently more effective in some situations than the


more formal means of legal coercion. The R.S.F.S.R. Supreme Court has stated:

In the consideration of materials concerning antisocial parasitic elements the courts do not always secure the link with the broad public that is necessary for the attainment of the goals of preventive and educational pressure. . . . It is necessary for the courts in their activity to direct a broad summoning of society to the consideration of materials about such persons, creating a setting of intolerance towards antisocial parasitic elements and the general censure of idlers. . . . In determining measures of administrative pressure, courts must individualize them on the basis of the concrete circumstances and the personality of the law-violator. . . . For the purpose of strengthening the educational significance of judicial trials of persons who lead a parasitic way of life, such trials should be conducted more frequently in enterprises, in collective farms, and in city and rural clubs, with attraction of the attention of the public.\(^1\)

From the unidirectional perspective, the Soviet State's "parental," educating, and opinion-creating functions, as they relate to the refusal to work and antiparasite laws and to antisocial behavior in general, are necessary for the socialist society's movement toward an ideological system of economic distribution according to individual needs. In order to attain such a goal, it is necessary to create intra-group social pressures and personal self-corrective attitudes which will maintain that sense of moral and legal obligation which under more individualistic systems is supported additionally by strong material incentives. Professor Berman has analyzed these functions within the Soviet system in terms of representing a certain concept of the idealized new Soviet man:

Social courts, and also the administrative procedure for resettling "antisocial elements," reflect a particular conception of the nature of man and of his relationship to law. Man is conceived to be in need of education, guidance and training to make him better-disciplined, more honest and hard-working, more conscious of his social obligations. Law is conceived as having a special role to play in bringing about this result. Soviet "legal man" is not the

independent, self-reliant, "rugged" individual of the past two, and possibly four, centuries of Western legal history. He is the more dependent, more helpless "member of the group" who has become increasingly characteristic of the legal traditions which have been developing in Europe and America as well in the decades since 1914.142

The refusal to work and antiparasite laws can be viewed as a formalized or institutionalized means whereby the consensus of the "productive" citizenry can be brought to bear on their relatively unproductive comrades in an attempt to socially and legally coerce parasitic laggards out of their economic lethargy and dependency and into a mental frame of reference which accepts the physical responsibilities of cooperative and mutually dependent economic advancement. In a planned economy, such as the Soviet Union's, where community and individual economic benefits are directly related to the nation's overall production, the ability of the working citizenry to bring social and legal pressure to bear on those unproductive welfare recipients who are capable of actively participating in the production process is an economic necessity.

Interactionally, the heuristic and "parental" functions served by the Soviet Union's antiparasite laws may be a more intelligent alternative than letting the local citizenry resort to anarchical or primordial forms of self-help in an effort to rid their immediate communal society of individuals who willfully cause an economic and social drain on the system. A major criticism of the institutionalized antiparasite law approach, however, is that it may have the ultimate effect of thwarting individualism and progressive systemic change. In addition, these laws have given rise to instances of apparent injustice in their operation due to the definitional vagueness inherent in the concept of a "parasite."143 But the recent revisions of these laws in the R.S.F.S.R. can be viewed as a partial verification of the interactional effect brought about by the citizenry in the furtherance of sociolegal change within the Soviet Union.

Obviously, the economic context and therefore the system of incentives (negative as well as positive) of a "market" system differ


143 See, e.g., The Trial of Iosif Brodsky, THE NEW LEADER, Aug. 31, 1964, at 6, 10-11. Even the revised R.S.F.S.R. refusal to work and antiparasite regulation of 1970 does not specify what constitutes a "parasitic way of life."
vastly from the Soviet situation. A comparison can be drawn, however, between the Soviet antiparasite laws and certain American vagrancy laws, antiloitering ordinances, laws which make certain forms of social behavior or social deviance a crime, and those laws which make individual “status” (drug addiction) a criminal offense.\textsuperscript{144} Also noteworthy is the tendency in the United States for legal sanctions and penalties to become more severe for the repetitious offender.

C. The Educational Role of the Soviet Court

Article 3, paragraph 1, of the 1958 Fundamental Principles of Legislation on the Judicial Structure of the U.S.S.R., the Union and Autonomous Republics states:

By all its activities the court shall educate the citizens of the U.S.S.R. in the spirit of devotion to the Motherland and the cause of communism in the spirit of strict and undeviating observance of Soviet laws, of care for socialist property, of labor discipline, of honesty toward public and social duty, of respect for the rights, honor and dignity of citizens, for the rules of socialist common-life.\textsuperscript{145}

Many Soviet jurists have noted the educational influence that the court exercises upon the accused. In an address on “The Educational Significance of the Soviet Court,” delivered in 1947, Ivan T. Goliakov, then Chief Justice of the Supreme Court of the U.S.S.R., stated that the Soviet court exercises “the greatest possible influence . . . on those who are called to a reckoning before it.”\textsuperscript{146}


\textsuperscript{145} Fundamental Principles of Legislation on the Judicial Structure of the U.S.S.R., the Union and Autonomous Republics, art. 3, § 1 (1958), \textit{translated in} H. Berman, supra note 14, at 305.

Based upon these principles, the autonomous Republics of the Soviet Union have enacted their various laws on court organization. The R.S.F.S.R. statute, for example, reads in part as follows:


The Soviet criminal courts educate the defendant and the public through the judge, the "teaching" sentence, and the encouragement of public participation in trials. Professor Berman has outlined seven features of Soviet criminal procedure, concerning both the pretrial investigation and the active participation of the court in the trial itself, which, though not necessarily unique to the Soviet system, illustrate the emphasis placed on the educational and "parental" role of the Soviet court — an emphasis that has been carried further in Soviet law than in any other modern legal system:

1. The preliminary investigation is directed toward clarifying the entire situation in the mind of the accused as well as in the records of the investigator.

2. The "entire situation" sought to be clarified includes not merely the circumstances of the case, in the usual sense of that phrase, but also the whole "case history" of the accused, including any past misconduct, his attitude toward the Revolution, his entire motivation and orientation. In addition, the examiner is required to seek the answer to such questions as: Did the commission of the crime take place under coercion, threat, or by reason of economic strain? Was the alleged offender at that moment in a state of hunger or destitution? Was he influenced by extreme personal or family conditions? Was he in a state of strong excitement?

3. Upon indictment, the trial commences with the court's interrogation of the accused directed, again, to his entire biography. Whether or not he is a Party member, whether or not he has been in trouble before, whether or not he has earned rewards for outstanding achievement of any kind, whether or not he took an honorable part in the Great Fatherland War — these and similar questions make it clear that it is not simply the offensive act that is to be punished or exonerated, but the man himself.

4. It is the duty of the court to protect the accused against the consequences of his ignorance, to clarify to him his rights, to call expert witnesses in his behalf when needed whether or not he so requests. [The court will also appoint legal counsel for any defendant without a lawyer.]

5. On appeal the higher court not only reviews the entire case, both on the law and on the facts, but may also receive evidence not offered in the original trial.

6. The death of the convicted person does not prevent an appeal or a reopening of the case if newly discovered circumstances may lead to the rehabilitation of his reputation.

7. In imposing a sentence, the court has a large range of penalties from which to choose, including public censure, confiscation of all or part of the criminal's property, a money fine in the form of the monthly deduction of a certain percentage of the criminal's pay (so-called "corrective" labor tasks), prohibition to carry on a

particular trade or profession, exile from the city, banishment to remote areas, as well as deprivation of liberty in corrective labor colonies and imprisonment.\textsuperscript{147}

The Soviet criminal courts educate and redirect the defendant who has strayed from the path of acceptable behavior.\textsuperscript{148} Presumably the judge's influence during the course of the trial makes the defendant less likely to violate society's social and legal norms in the future.

Soviet criminal procedure deals with the "whole man," but it deals with him in a particular way, as a teacher or parent deals with a child. The court is interested in all aspects of his development, and especially in his mental and psychological orientation, because it is its task to try to "remake" him, or at least to make him behave. The Soviet judge may upbraid or counsel the accused, explaining to him what is right and what is wrong in a socialist society. Even if he is acquitted, the court may deliver an official "admonition," that is, a warning of the dangers involved in conduct which is in itself not criminal but which may lead to criminal activity. If he is convicted, the court imposes punishment as a sign of the state's disapproval or condemnation of both him and his criminal act.\textsuperscript{149}

Closely related to the concept of the judge influencing the accused in trials in the Soviet Union is the role of the trial itself in maintaining the sense of collective unity and in effectuating the collective purposes of the socialist society. Former Chief Justice Goliakov of the U.S.S.R. Supreme Court has stated: "The publicity of our court [procedure] means the attraction of the widest [public] into the courts," and for this purpose, "the court arranges its sessions at such time that is most favorable for the toilers to attend."\textsuperscript{150} The court may also hold "demonstration trials" of important criminal

\textsuperscript{147} H. Berman, supra note 14, at 305-06.

\textsuperscript{148} The educational and "parental" implications of the Soviet concept of law are also found in civil procedure. "As in criminal procedure, the court in civil cases is concerned not merely with deciding the facts and issues before it, but also in clarifying them to the parties." \textit{Id.} at 309. Thus, article 16 of the Fundamentals of Civil Procedure of the U.S.S.R. and the Union Republics states:

> It is the duty of the court, without limiting itself to materials and pleadings submitted, to take all measures provided by law for the detailed, full and objective elucidation of the real circumstances of the case, of the rights and duties of the parties.

> The court must explain to the persons taking part in the case their rights and duties, must warn of the consequences of committing or not committing procedural actions, and must render assistance to the persons taking part in the case in realizing their rights. \textit{Translated in} H. Berman, \textit{supra} note 14, at 309.

\textsuperscript{149} \textit{Id.} at 307.

\textsuperscript{150} I. T. Goliakov, \textit{supra} note 108, at 17.
cases in the enterprises and collective farms where the crimes were committed."

The idea of a trial serving as an instructive example to the rest of the immediate community is not peculiar to the Soviet legal system. In the Soviet Union, however, there is an overt recognition of this educative function of the legal system and also a general tendency to emphasize the use of criminal and civil trials for their educative effect. Quoting a speech by President Kalinin, former Chief Justice Goliakov has stated:

"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. Not only that: by trying a case correctly, by disclosing the causes of crimes, the court mobilizes the attention of the masses and arouses public opinion to a struggle for the extirpation of crime. The Court also teaches the patterns of exemplary behavior to the members of the socialist society through the "teaching" sentence. To aid in fulfillment of this task, the Soviet court has a large range of penalties from which to choose when imposing a sentence upon the convicted defendant. And the punishments prescribed in the criminal codes often leave to the court's discretion a very large leeway between the minimum and maximum penalty. The choice and application of a particular sentence or penalty to fit the particular individual defendant — a feature not uncommon in many other modern legal systems — is conceived of as having a twofold educational function. First, the sentence can be individualized to have the maximum "teaching" effect upon the individual defendant found

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In a similar vein, another Soviet jurist has stated:

[Each 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. Goluksky, The Creative Role of Socialist Law in the Period of the Comprehensive Building of Communism, Sovetskoe gosudarstvo i pravo, No. 10, 1961, translated in 1 SOVIET LAW AND GOVERNMENT, No. 1, Summer 1962, at 13, 22. See also Blinov, Who Knows the Law, Pravda, Jan. 24, 1967, at 2, translated in 19 CURRENT DIGEST OF THE SOVIET PRESS, No. 4, Feb. 15, 1967, at 28; Dicharov, Returning to the Subject: Knowledge of the Law, Pravda, May 18, 1967, at 2, translated in 19 CURRENT DIGEST OF THE SOVIET PRESS, No. 20, June 7, 1967, at 22.
guilty of a crime, taking into account his mental and psychological orientation. Second, Soviet judges are supposed to be continually aware of the effect of their decision upon the attitudes of the other participants in the trial, including spectators, and upon the attitudes of the public in general. Every decision of the court must therefore be "as convincing as it is sound, so that not only [the judge] himself and the people's assessors, but also all the persons attending the session should . . . understand [its] correctness."\(^{153}\)

If properly selected and explained, the particular sentence applied to the convicted defendant will presumably have an educational effect upon the observers of the trial and upon the public in general. Such persons will recognize the inherent justice of the social norms being legally enforced, and they will want to conform to them in the future. Under such circumstances, the trial affects more persons than just the defendant, and everyone will be less likely to become an offender. One Soviet jurist has stated:

> 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 people's 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.\(^{154}\)

Another Soviet writer has discussed the educational effect of the properly selected and applied sentence upon the attitudes of the general public 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 accidently strayed.\(^{155}\)

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153 Address by President M. I. Kalinin, Tenth Anniversary of the Supreme Court of the U.S.S.R., quoted in I. T. Golliakov, supra note 108, at 17.


The courts in the Soviet Union have three kinds of sentences which exert "social influence" upon the defendant in regular criminal proceedings. (1) Article 44 of the Criminal Code of the R.S.F.S.R.\(^{156}\) provides that if a court finds it inexpedient to send a convicted defendant to prison, it may suspend the sentence, and in addition, may turn the offender over to a public organization or to the collective of his fellow workers for reeducation and reform. (2) The criminal codes of the various Soviet Republics provide further that an offender may be turned over to a public organization or collective for reeducation and rehabilitation even without the formality of a trial or actual conviction if the offender admits his guilt and the offense is not a great social danger.\(^{157}\) The offender put on such probation is then expected to justify the faith of the collective and his fellow workers by honest labor and by overt respect for the "norms of socialist community life." This procedure differs from the suspended sentence in that the accused may be placed on probation at any stage of the trial proceedings. Furthermore, an offender may be put on probation not only by the trial judge, but also by the procurator, the investigation judge, or even the police if such action is approved by the procurator. (3) Under the criminal codes of the various Soviet Republics, the trial court is authorized to transfer minor crimes to a Comrades' Court in the case of first offenders.\(^{158}\) This category of offenses includes minor assault, slander and insult, and other violations where the "social influence" of the community or collective may have a greater educational and prophylactic effect than a fine or sentence.

From the interactional perspective the judge's concern with the broad educational impact of each particular decision and sentence can teleologically affect the immediate content of each such decision. In this respect, teleology need not necessarily imply that an end-
out-of-view controls or directs social change; generally, the concept is associated with the doctrine that "goals or ends of activity are dynamic agents in their own realizations." That the inherent "justice" of a sentence must be readily comprehended by the judge's immediate public and must be educational in its ultimate effect creates the necessity for increased interaction (perhaps even subliminal) between the judge and his public, both present and future. Indeed, there have been instances, reported in the Soviet newspapers, where certain judges may have been unduly swayed by the passions of the participating public during certain trials.

The court educates the public by publicizing court proceedings, encouraging public attendance at trials, and sometimes providing opportunities for direct public participation in the judicial process. Prior to promoting judicial action the investigating judge may survey the opinion of the relevant residential or occupational group to learn the facts of the dispute and the character and general conduct of the litigants. This investigation can be undertaken to obtain information and to determine local attitudes prior to the judicial trial of first instance and sometimes prior to appellate review. Such a judicial survey of fact and local opinion may also be conducted at any time during the trial. Sometimes officially recognized representatives of local groups participate in the actual trial, and it is common for the bench to be removed to the physical locus and "social site" of the dispute. Furthermore, although neither the Civil Procedure Code nor the Criminal Code of the U.S.S.R. provides for spectator participation in judicial trials, persons present are regularly given permission to speak in conduct-related cases.

The vast majority of the civil and criminal trials in the Soviet Union begin at first instance before a People's Court, composed of a professional judge and two lay assessors. These lay assessors provide a further integrative link between the court and the public. The higher courts, such as the District Courts and the Supreme Court of the respective Union Republic, are mainly appellate courts, and appeals and reviews in these higher courts always come before a court composed of three professional judges. But when these higher courts acts as courts of first instance, the trial always proceeds before a court

161 See generally O'Connor, supra note 126, at 51.
composed of one professional judge and two lay assessors as in the People's Courts.

Article 109 of the Federal Constitution of the U.S.S.R. states that:

People's judges of district (or city) people's courts shall be elected by the citizens of the district (or city) on the basis of universal, equal, and direct suffrage by secret ballot for a term of five years.

People's assessors of district (or city) people's courts shall be elected at general meetings of workers, employees, and peasants at the place of their work or residence, and of military personnel in military units, for a term of two years.\(^{162}\)

To be elected as either a judge or lay assessor, a person must be at least 25 years old. And as prescribed by article 109, the lay assessors are directly elected for terms of 2 years. Assessors with special qualifications or expertise are often chosen to sit in a particular case on the basis of their expertise — for example, an engineer may be chosen to sit in a case involving industrial injuries.

As with the elected nonprofessional judges in the Comrades' Courts, the lay assessors in the People's Courts provide an element of lay participation in the administration of justice in the Soviet Union. This function is generally served by the jury in common law countries, and it maintains the phenomenon of "legal irrationality" (in Weberian terminology) in the Soviet judicial process. The jury system was introduced into Imperial Russia in 1864. By commonly acquitting the accused in the face of conclusive evidence of guilt, the Russian jury quickly gained the reputation of being notoriously lenient. Therefore the Soviet government abandoned the jury system and adopted the use of lay assessors sitting with a professional judge and having equal rights with him — a concept borrowed from certain German courts.\(^{163}\)

Since the lay assessors are elected every 2 years, they are ultimately accountable to their local constituents. Much politicking can occur between the candidates at election time, and such behavior has been generally encouraged by the Soviet Government, which views it as a means for increasing public awareness of socialist legality. The lay assessors must periodically report back to their electors and give an account of their stewardship. Furthermore, they may be recalled by the electorate before their term of office has expired.

"Assessors need have no legal training, and in fact the majority

\(^{162}\)Translated in Basic Laws on the Structure of the Soviet State, supra note 119, at 21-22.

\(^{163}\)E. Johnson, supra note 127, at 124-25.
have none, but on election they are given a handbook and have to attend at least two lectures a month in a special course for People's Assessors, the lectures being given by judges, practicing lawyers or university law teachers."¹⁶⁴ There is frequent concern, evidenced in the Soviet newspapers, over the need for increased legal education and training for the lay assessors.¹⁶⁵ Even some of the judges of the People's Courts do not have formal legal training when they are elected and in such instances they are compelled to take a correspondence course in law. The risk of gross misinterpretation of the law is not as great as it might be, however, because the procurator must protest any decision of the courts he thinks is erroneous in its legal content.

An additional educative and "parental" feature of the People's Courts is their power to issue supplemental directions which usually extend beyond the direct issues raised by the case. "Where a case has revealed shortcomings, the person or organization responsible may be ordered to take appropriate steps to prevent their recurrence; and the courts are also required to satisfy themselves that their supplementary directions have been complied with."¹⁶⁶

D. Summary

The present section has attempted to outline not only the theoretical bases for the educational role of Soviet legal institutions but also the actual structure and operational approach of some of these institutions, including certain social organizations (the People's Volunteer Militia and the Comrades' Courts), the antiparasite or refusal to work laws, and the Soviet courts in their educational role. In addition, the heuristic function of law in the Soviet system is evinced by the public's participation at all levels of the legal processes and by the emphasis placed on personal and intragroup self-correction.

V. DEVELOPMENT OF A SOVIET SOCIOLOGY OF LAW

In light of the Soviets' emphasis on what have been interpreted herein to be the educational and "parental," heuristic, and self-

¹⁶⁴ Id. at 125.
¹⁶⁶ E. JOHNSON, supra note 127, at 127.
actualizing functions of law, it might be questioned why they have not formulated a distinct and explicit sociology of law. In a book published in Moscow in 1961 entitled The Individuality of the Criminal and the Causes of Crime in the U.S.S.R., Professor A. Sakharov asserts that for some 25 to 30 years after the Revolution the application of sociology and psychology to crime was avoided in the Soviet Union because lawyers and social scientists feared that such studies would necessarily lead them to the anthropological theories of positivistic criminology. Since the death of Stalin, however, Soviet jurists have increasingly argued that the conditions and circumstances of a crime must be carefully studied so that the requirements of socialist law can be met and just sentences passed. For the sociologically-oriented jurist, states Professor Sakharov, criminal responsibility is always specific and personal, and therefore the punishment should fit the criminal rather than the crime. Furthermore, the ultimate goal of any penal sanction should be to rehabilitate and reeducate the criminal so that he will not repeat the same or a similar offense and so that he will become a cooperative participant in the production processes of the socialist state. Idle hands are prone to individualism, while shared work creates a sense of belonging and mutual achievement. Before passing sentence the Soviet court must first make a thorough investigation of the personality of the accused person. This presupposes an examination of his conduct at work, in everyday life, and within his family and the collective, his age and family situation, the presence or absence of previous convictions, his services for the state, and similar factors.

This aspect of the sociology of Soviet law might be referred to as its inherent "humanism." But one social theorist of the U.S.S.R. is quick to assert that "[s]ocialist humanism has nothing in common with Christian 'all-forgiveness'. Genuine humanism excludes a sentimentally pitying, indulgent attitude toward human weakness, shortcomings and vices." Although this statement provides evidence of a failure or an unwillingness to understand the philosophical content of Western humanism, the same Soviet theorist has intimated a concept of "socialist humanism" which might not be too far removed from the accepted theories of criminal punishment in our Western legal system:


But humanism, as a principle upon which to base the application of punishment, has two sides—not only a humane regard for the individual who has committed a crime, but also the safeguarding of Soviet society and its citizens against criminal encroachment, and this latter presupposes, where necessary, the severe punishment of persons who have committed grave crimes.\textsuperscript{169}

In the formulative period of what may eventually become an expressly recognized Soviet theory of the sociology of law, there was a misguided attempt to relate criminal behavior to heredity and a "biological predisposition" towards antisocial and criminal behavior. This misguided approach to criminology may have been fostered by the phenomena of Lysenkoism—the belief in the hereditability of acquired characteristics—which was avidly promoted under Stalin. The theory of "biological predisposition" towards antisocial and criminal behavior is generally refuted in the Soviet Union today, and it is not uncommon to find Soviet social theorists making comments such as the following:

\begin{quote}
After all, each of us is biologically unique. When one's personality is formed under the influence of the social conditions of life, one's natural characteristics also participate in this process. But the point is that in and of themselves these characteristics are neutral. Socially useful or socially harmful traits arise only in the process of moral formation of the personality. . . . In fact, the exclusion of "biological predisposition" guides us toward the ascertaining and elimination of circumstances that are conducive to law-breaking, in living conditions themselves, in the immediate social surroundings, in the social micro-environment.\textsuperscript{170}
\end{quote}

There is some indication that Soviet jurists and social theorists are becoming increasingly aware of the value of empirical sociological research and are beginning to formulate their own concepts of the sociology of Soviet law based upon the tenets of Marxian historical materialism—the economic determination of law, Marxian class analysis and the class character of law, and the withering away of state and law in the communist society. For the Soviet sociologist, as for most Western sociologists, at each stage of historical development society represents a whole, a specific social organization with its particular relations and laws. The study of society as a historically developing whole, the study of the laws of the succession of socio-economic formations, the investigation of the internal relationship of various aspects and

\textsuperscript{169} Id., translated at 9.

phenomena of social life — these constitute the subject of sociology.\textsuperscript{171}

It has also been stated that: “The focus of attention of Marxist sociology is man in his relationship to surrounding reality in all the diversity of his real ties and relations.”\textsuperscript{172}

For the Soviet-Marxist, concrete sociological research is concerned with the posing and solving of important social problems. “Among these, first of all, are changes in the social structure of society in the process of the transition to communism.”\textsuperscript{173} Similarly, it has been stated that

\[\text{[o]}\text{nl[y scientific thinking can determine the direction of society's development and set forth the concrete tasks of the masses’ activity in accordance with the objective laws and requirements of social process. . . . The development of scientific knowledge about society, as well as about nature, is connected with numerous complex processes of differentiation and integration of sciences, their interpretation and the establishment of new mutual links among them.}\textsuperscript{174}\]

The nature and causes of lawbreaking in a socialist society have recently been the subject of numerous studies and discussions within the Soviet Union. The justification for such interest has been that an effective struggle against lawbreaking and social norm infringement is possible only on a “scientific basis,”\textsuperscript{175} and that intensive research and study, coupled “with the use of the method of concrete sociology, of questions of the interrelations, correspondence, and mutual determination of aspects of the activity of a particular system of agencies and their individual components yields better substantiated conclusions and concrete proposals designed to enhance the role of such organs.”\textsuperscript{176}

Studies of the sociopsychological and individual behavioral traits of lawbreakers have been conducted in recent years in Moscow, Leningrad, Lvov, Latvia, and a number of other places. “They

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\textsuperscript{172} \textit{Id.}, \textit{translated} at 7 (emphasis omitted).

\textsuperscript{173} \textit{Id.}, \textit{translated} at 6.

\textsuperscript{174} \textit{Id.}, \textit{translated} at 3.

\textsuperscript{175} Karpets, \textit{supra} note 170, \textit{translated} at 24.

\textsuperscript{176} Zimanov, \textit{An Experiment in Introducing the Method of Concrete Sociological Research into Jurisprudence}, Sovetskoe gosudarstvo i pravo, No. 12, 1964, \textit{translated in} 4 \textit{SOVIET LAW AND GOVERNMENT}, No. 2, Fall 1965, at 42, 43. This article indicates that a sociological report written by U. Dzhekebaev, candidate of jurisprudence, entitled “Questions of Improving the Effectiveness of the Struggle Against Persons Conducting a Parasitic Way of Life,” which was published in 1964, may have been influential in bringing about changes and considerable reforms in the antiparasite laws.
all show that the moral characteristics of lawbreakers are completely
determined by the complex interrelations between them and other
people, by influences, circumstances, and conflicts, by all their inter-
actions and by the external social micro-environment.\textsuperscript{177}

The Soviets admit, however, that there are still a large number
of unsolved problems in the sphere of the correction and reeduca-
tion of lawbreakers,\textsuperscript{178} and that empirical sociological research has
not been sufficiently implemented. "Social research, including con-
crete-sociological research, has not yet become a mandatory compo-
nent part of the scientific guidance of social development in our
country. This gap must be closed, for without such research theories
of communist relations and the shaping of the new man and of com-
munist consciousness cannot be correctly guided."\textsuperscript{179}

Professor Kudryavtsev, in an \textit{Izvestia} article entitled "The Law
and Sociology," has argued that Soviet jurists have a very powerful
and precise instrument in empirical sociological research for analyz-
ing objective reality in the field of crime prevention.\textsuperscript{180} He goes on
to state: "Juridical science and practice still make very little use of
the latest methods of sociological research, statistics, mass observa-
tions and public opinion studies. Jurists by habit confine themselves
to formal and logical categories and appeals to people's sentiments.
Such a 'method' cannot lead to optimum solutions."\textsuperscript{181}

\section*{VI. Conclusion}

Within the nine categories of the sociological typology presented
in this article, the Soviet legal system is characterized by its unique
emphasis on the \textit{educational} and \textit{"parental,"} heuristic, and \textit{self-
actualizing} functions of law.

The Soviets acknowledge that their domestic law and legal insti-
tutions have an educational role to perform in the molding of the
character of the Soviet people. The sociological task of Soviet law
is to educate not only the immediate parties to a particular dispute,

\begin{itemize}
\item \textsuperscript{177}Karpets, \textit{supra} note 170, \textit{translated} at 24.
\item \textsuperscript{178}Id., \textit{translated} at 25. \textit{See also} Gertsenzon, \textit{On the Study and Prevention of
Crime}, Sovetskoe gosudarstvo i pravo, No. 7, 1960, at 78, \textit{translated} in 12 \textit{CURRENT
DIGEST OF THE SOVIET PRESS}, No. 41, Nov. 9, 1960, at 3-6, 44.
\item \textsuperscript{179}Konstantinov \& Kelle, \textit{supra} note 171, at 6.
\item \textsuperscript{180}Kudryavtsev, \textit{The Law and Sociology}, Izvestia, Nov. 23, 1965, at 3, \textit{translated} in
\item \textsuperscript{181}Id. Another Soviet jurist has stated that "[d]isregard for the sociological aspect
of legal phenomena and matters of public law is one of the principal reasons for the
backwardness of jurisprudence and for its significant isolation from the practice of build-
ing communism." Zimanov, \textit{supra} note 176, at 42.
\end{itemize}
but also the spectators, the participating public, and society as a whole to be the kind of "new Soviet man" which the socialist state is seeking to develop. The ideal Soviet citizen should be hard-working, honest, resourceful, cooperative, and above all conscious of his membership in a socialist society and aware of the obligations which result from this membership. That the Soviets have a political philosophy and ideology which stresses collective self-consciousness more than individual initiative enables them to view law more readily in terms of social mobilization and social dedication than in terms of individual and private rights.

One Soviet jurist has effectively described the educational role of socialist law as follows:

When Soviet doctrine speaks of the educational role of socialist law, it has in mind a very specific range of questions, namely: the content of the law in effect (the principles and standards people learn from it); the clarity and accessibility of legislation to the broadest masses of the people; the importance of conscious, voluntary compliance with the law (and not under fear of punishment); the fact that regulation by law must, above all, persuade people of the need and desirability of precisely a certain and not another development of the given group of social relationships; and, finally, that the sanction in the application of a provision of law is not an end in itself, but primarily a means of education and of preventing similar violations.\

Although the legal nature of the citizen's relationship to the state can be described in terms of the "parental" function of law, this concept must be interpreted from the viewpoint of the interactional perspective; that is, in a very real sense the citizenry may be able to predetermine the "content" of the law either by means of their direct and general involvement in the sociolegal processes or by means of internal systemic feedback resulting from the "childish" rebellion or reaction to the authoritarian "parentalism" of the state.

Closely related to the educational and "parental" function of law within the Soviet system is the heuristic function; and this article has attempted to indicate some of the methods by which individual and collective opinions concerning sociolegal relationships are created or stimulated by the interaction that occurs within the Soviet system between "the law" and "social behavior."

The Soviet legal system can also be characterized by the emphasis placed on the self-actualizing function of law — that is, the role of

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law as a means for the positive creation of a statement of rules for orderly sociolegal change and as a means for goal attainment within the context of planned or programmed systemic change. And, indeed, the social theorists of the U.S.S.R. continue to forecast the eventual withering away of the state and its coercive legal institutions as the interim or transitional legal system of socialist law makes provision for the gradual evolution of the socialist state into communist public self-government and for the complete eradication of crime, coupled with the gradual replacement of measures of criminal punishment by measures of an educational and self-correcting character.183 The concept of the self-actualizing function of law, however, has not been the major concern of this article, and many interesting questions pertaining to the perfectability of man and the effect that avowed ideological constructs can have on programmed societal goal attainment require further research and discussion.

Professor Berman has succinctly summarized the lessons to be learned from the heuristic and "parental" functions of law in the Soviet legal system:

From the standpoint of the West, the development of Soviet law requires a revision of some of our conceptions of the Soviet system. The popular view of the Soviet state as a police state run by professional revolutionaries, whose actions are governed solely by the desire to extend their own power, is a dangerous half-truth....

We may learn from the socialist character of Soviet law that socialism is not an end in itself; nor is capitalism; and that the balance between personal initiative and social-economic integration is one which must be struck again and again in any going legal system. ... [W]e may learn from the parental character of Soviet law the great potentialities and the grave dangers inherent in the development of positive law as a guardian and teacher of the law-consciousness of persons and groups.

In their focus on the parental and educational role of law, with its conception of the litigant, the subject of law, as a youth to be guided and trained, the Soviets have made a genuine response to the crisis of values which threatens twentieth-century society — a response which has not merely a Marxist and a Russian but a universal significance. ....

Man is not uniformly the dependent and growing youth of Soviet law, nor is he uniformly the reasonable man of our Western legal tradition. ... A healthy legal system must give reflection in procedural and substantive rights and duties, at appropriate times

and appropriate places, to all the various phases of man's true na-
ture.\textsuperscript{184}

From the sociological point of view, a problem arises in attempt-
ing to determine the extent to which the legally imposed social
norms are a result of the participatory interaction between the citi-
zenry and their legal institutions. The Soviet Government has
stressed its desire for, and the necessity of, broad public participa-
tion in the processes of the legal system. But from the paucity of
empirically observed and documented sociological investigations, it
is difficult to establish the creative and progressive effect that public
participation actually has had on the Soviet legal system and on
the "content" of the social norms which are being legally imposed.

Legal institutions — such as the courts, certain sociolegal or-
ganizations, laws, and implied sanctions — may serve many func-
tions within a complex social system. This article has suggested a
sociological typology which tentatively divides these functions into
nine categories, which can be used to analyze modern legal systems
and to clarify certain interactional aspects of such dynamic ongoing
systems. Although the "parental" and heuristic functions of law
have been discussed in this brief outline as characteristic of the role
of law in the Soviet system, it is submitted that these same functions
exist with varying degrees of emphasis in all other modern legal
systems.

Obviously, this article has only brushed the surface of a vast
area of sociological jurisprudence where much research and compar-
ative analysis is needed. Thurman Arnold once described the judicial
trial in Western society as a "series of object lessons and examples.
... It is the way in which society is trained in right ways of thought
and action, not by compulsion, but by parables which it interprets
and follows voluntarily."\textsuperscript{185} The extent to which this statement is
valid needs to be empirically tested. Future sociolegal research in
this general area should include a comprehensive comparative analy-
sis of the effectiveness of the educational and heuristic use of legal
institutions in other social systems, and an analysis of the extent to
which the emphasis placed on the various functions of law within a
legal system represent a particular concept of man and of the perfect-

\textsuperscript{184} H. Berman, supra note 14, at 383-84. \textit{See also} Berman, \textit{The Comparison of Soviet and American Law}, 34 \textit{Ind. L.J.} 559 (1959).

\textsuperscript{185} T. Arnold, \textit{The Symbols of Government} 129 (1935).
ability of human nature. To paraphrase Rousseau: 188 Whoso would undertake to give legal institutions to a People must work with full consciousness that he has set himself to change, as it were, the very stuff of human nature.