THE LEGAL NIHILISM OF PASHUKANIS

Stephen J. Powell*

A denial of the need for law: "The withering away of the categories . . . of bourgeois law by no means signifies that they are replaced by new categories of proletarian law," but by "the withering away of law in general, that is to say, the gradual disappearance of the juridic element from human relations."¹ Thus did Eugene B. Pashukanis, in the best tradition of Marxism, begin to develop a theory of Soviet law, or nonlaw, which would avoid the apparent contradiction of having a capitalist institution like "law" in a communist state.² That the general "softening" of the pure communist line after the rise of Stalin resulted in a merciless purge of both Pashukanis and his legal theories does not diminish their importance from a jurisprudential standpoint.

Though Pashukanis derived much of his foundation philosophy from German schools of jurisprudence, his true legal nihilism is essentially unprecedented, and understandably so, for the simple reason that the October Revolution left Soviet jurisprudences with a rather unique theoretic system under which to work. Legal nihilism, and the commodity exchange theory of law which Pashukanis developed as its basis, are symptomatic of a continuing and deeper problem. Because the Soviets have not and cannot totally abandon the Marxist-Leninist doctrine of the "withering away" of the state, but can only postpone the immediacy of its implications, there still exists a need for a legal theory consistent with this doctrine.³ It is not a purpose of this article, at least not a conscious one, to explore the reasoning which has replaced that of Pashukanis in the Soviet Union. However, it must be pointed out that legal nihilism has not yet become a wholly moot and academic concept. Thus, while it would appear that the contribution of Pashukanis and others like him is well-established and should be considered relevant to current jurisprudential problems, this has not proved to be the case. . . . Needless to say, the halls of academe do not ring loudly with the voices of legal theorists debating the merits of legal nihilism. Perhaps this disinterest on the part of those who should know is justified, but the author does not agree. Although Pashukanis continues to be commented upon, these studies rarely if ever go beyond his importance to the Soviet theoretical scheme;⁴ that is to say, they do not attempt to show the relevance of the work of Pashukanis to inquiries which are even now being made in jurisprudential circles. With the ever-increasing clamor over such schools of jurisprudence as legal realism

* B.A. 1964, J.D. 1966, Instructor of Law, University of Florida.
4. See, e.g., the articles cited notes 6 and 10 infra.
and analytical positivism, with the resurgence of natural law and the embryonic effort to include the lawyer-practitioner in legal philosophy, comes the always-present question, "What is the function of law?" Each school, of course, attempts to expound upon this inquiry on the basis of its own theory, and precious little effort is expended to relate these attempts, either to each other or to the broader implications which they raise.

The legal nihilism of Pashukanis betrays his view of the function of law, the one which he believes it must serve. By studying his theory, one may not only gain insight into the narrow roads Pashukanis traversed, but also may emerge with a better understanding of the manner in which other legal scholars view the function of law. This article will attempt to provide the groundwork for such insight and understanding.

Eugene Pashukanis rose to power in the early 1920's to become the leading juridical scholar during the N.E.P. period, a time of coexistence between socialism and private enterprise, the Leninist concession to the individual in man and the private trader in society. He became Director of the Institute of Soviet Construction and Law of the Communist Academy and Editor-in-Chief of its official organ, "The Soviet State." Pashukanis proved himself the only more or less original thinker of Soviet jurisprudence with his short and well-reasoned work, The General Theory of Law and Marxism, which was published during the peak of his prestige in 1924, and was the most successful manuscript in the history of Soviet legal literature.

The reason for Pashukanis' ascendency in the Soviet legal structure is easily explicable. Soon after the October Revolution, it became quite obvious that the new experiment in statehood could not long survive without something resembling "bourgeois law." The goal and ideal of Marx, that is, a dictatorship of the proletariat, could not immediately spring full-blown from the jaws of the revolution. For a time at least, even the most optimistic realized that a ruling hierarchy must continue to exist, and it could not reasonably do so without some semblance of a theory of control. This control, however, must not come in the form of bourgeois law, for it would be too embarrassing to be forced to admit that socialism required the capitalistic process of law. Thus the time was ripe for Pashukanis to step in and fill the need for a justification of the continuation of "law" in the socialist state. His contribution toward this end was, to say the least, singularly unique and totally relevant to the task at hand.

The sociological, and more specifically, economic, jurisprudence of Pashukanis was founded on the well-established Marxist principle that the state and its concomitant law are the "superstructure" mirroring the basic economic organization of society. Assuming, therefore, that in the communist

8. Shuman, supra note 2, at 210-11.
society of the future both the state and its law would "wither away," Pashukanis proceeded to develop his own original justification for this process. In the first place, the very lifeblood of the juridic form is "the opposition of private interests," that is, the clash and contrariety of individual claims and demands. With this point as the initial assumption, Pashukanis next links the concept to capitalism. The basic institution of capitalism is exchange, and all goods are viewed as commodities, that is, they are destined for that exchange on the market which necessarily gives rise to extreme individual competition and conflict. The major and minor premises are thus established, and it remains only to recognize the consequential conclusion: Since "law" is in essence the regulation of opposing private interests, and since "only bourgeois-capitalist society creates all the conditions essential" to exchange, therefore law reaches its climax and highest attainment only in capitalist society.

Operating under this conclusion, Pashukanis would necessarily oppose the development of a "proletarian" or socialist system of law for the period of transition to pure communism. After all, where the conflict of private interests is absent from the social order, there can be no such concept as law. "Law, like barter, is a means of intercourse between disunited social elements." With the elimination of private ownership of goods under socialism, the element of conflicting private contracts so necessary to law will also disappear, and thus to attempt the development of a proletarian law would be no more than an exercise in futility. Even after Pashukanis, in the face of severe criticism, found it necessary to refute most of his life's work, he still clung to the belief that "we cannot be occupied with the creation of a system of proletarian law."

The "commodity exchange theory of law," as the principle developed by Pashukanis has come to be known, presupposed that an historical study could conclusively demonstrate the origin of law in the marketplace, in the process of trading or bartering. That this is evident in such areas of law as contracts, negotiable instruments, torts, and property law is not difficult to discern. However, Pashukanis did not content himself with an explication of the obvious, and for this reason spent a good deal of time juggling with what could well have been the nemesis of his commodity exchange theory, namely, the criminal law. The problem was apparent: How could the criminal law be viewed as law in its "true" sense when it does not appear to contain the necessary elements, specifically, a relationship between equals, but on the contrary a relationship between the state and an individual? As Pashukanis himself stated, "the idea of absolute obedience to

11. Pashukanis, supra note 1, at 137.
12. Id. at 162.
13. Id. at 119-20.
14. Id. at 180.
15. Id. at 200-01.
17. See Fuller, supra note 10, at 1160.
some external norm-creating authority has nothing to do with legal form."\textsuperscript{18} As a result, there is nothing "legal" in the relationship between a master and his slave, there is no ground for the application of the category of law to soldiers conforming to orders from a superior, or a community of Jesuits blindly fulfilling the will of their leader.\textsuperscript{19} These are examples of domination by one unit over another, and since law connotes equality and not subjection, they are nonlegal relationships by definition. How, then, can the criminal law be of legal concern? Pashukanis demolishes his strawman by pointing out that even the criminal law finds its roots in barter, for example, in the buying off of the blood feud. The anthropologist Malinowski, writing two years after Pashukanis and in a very different context, evolved a striking parallel to this conception when he decided that law becomes a distinct social phenomenon only when reciprocity becomes formalized.\textsuperscript{20} However, Pashukanis goes further than this rather shaky analogy to justify the existence of the criminal law \textit{qua} law by hypothesizing that it is understandable that a society based on the exchange of commodities would extend the idea of value for value to all kinds of social relations. The analogy to the marketplace is a clear one: Just as every buyer must pay a definite price for the goods he wishes to buy, so also must one who contemplates violation of the social order (the "criminal") be willing to undergo some definite punishment for the crime he wishes to commit. Criminal codes become, seen in this light, nothing more nor less than price lists—if a criminal "wants" to commit Crime X, he knows he can be required to "pay" a set price for this choice, namely, Punishment X.\textsuperscript{21} By analogizing the criminal law to a debtor-creditor relationship, with the state as creditor and the criminal as debtor, Pashukanis is able to fit even the penal codes into his commodity exchange theory. But does it follow that merely because bourgeois criminal law is a simple reflex of the private law of exchange, criminal law will be unnecessary under pure communism? To Pashukanis the answer was resoundingly in the affirmative. In the socialist society to come, criminals would be dealt with by specialists—doctors, teachers, even executioners—but not by lawyers and not by any process of law.\textsuperscript{22} The reason for this result is basic to Pashukanis' opposition to the development of a proletarian law, and therefore should be examined, particularly in its relationship to the work of another legal theorist.

For some of the same reasons that Pashukanis opposed the systematic standardization of proletarian law, so also did Savigny nearly a century earlier voice vehement resistance to the proposed codification of the German legal rules.\textsuperscript{23} Though the divergences in their respective rationales are manifest, the similarities justify the analogy. For Savigny, codification was not only undesirable but also impossible, since the origin of positive law was for

\textsuperscript{18} Pashukanis, \textit{supra} note 1, at 154.

\textsuperscript{19} Id.

\textsuperscript{20} B. Malinowski, \textit{Crime and Custom in Savage Society} 58 (1926).

\textsuperscript{21} Dobrin, \textit{supra} note 7, at 418.

\textsuperscript{22} Id.

him the Volksgeist, or common consciousness and spirit of the people. With such a postulate as a framework and foundation stone of a legal system, codification approached anathema, for mere words must of necessity fail to relay an accurate picture of the gossamer-like feelings of a people, and writing them down in apparently authoritative form could serve no purpose but to mislead future generations. Our Soviet protagonist waged battle against the systemization of socialist law because he, too, felt that such a course was hopeless except under a government fashioned after the principles of capitalism, which was not exactly what Pashukanis understood the October Revolution to be all about. Aside from its impossibility, codification had for him a further disadvantage, namely, that just attempting it would have the unavoidable effect of hindering the eventual withering away of the state as a power-wielding institution. By their very definitions alone, then, both Savigny and Pashukanis must have denounced codification. That their respective efforts proved to be equally unavailing is less a condemnation of their basic juridical skeletons (though that point should not be discounted lightly) than a feather in the cap of pragmatism and ease of the administrative legal process.

Even conceding the tangential affinity of Savigny to the New Economic Policy period's leading jurist, there can be no contention that Pashukanis was willing to limit his criminal law theory to a belief that it was founded in the common consciousness of the people. He believed that the function of criminal law was to "maintain, reinforce, and safeguard fundamental relationships consisting of the relationships between the persons who possess the means of production and the immediate producers." This statement begins to reveal Pashukanis' unconventional, at least from a communistic standpoint, view that equality and law do operate with substantial effectiveness in a bourgeois state, but only to the extent that such a society has as its basis the exchange of commodities. Whereas H. L. A. Hart conceives the criminal process to be the most relevant and notable example of the "orders backed by threats" definition of law, Pashukanis envisions the penal law as simply another manifestation of the commodity origin of law itself, and a successful and continued regulation of the course of commercial exchange. The function of the criminal law, in the eyes of Pashukanis, is not therefore the forbidding of certain actions under penalty, as Hart and most others would maintain, but merely the carrying out of the more basic goal of commodity regulation. The difference between the two views is somewhat similar to the distinction Hart draws between those things one is obliged to do and those which one is under an obligation to do. To use Hart's example, if an

24. Id. In much the same way the psychologist thinks of a "set," or pattern of thinking, as a factor which often severely limits the scope of an individual's reaction to a given stimulus.
26. Id. at 267.
28. Pashukanis, supra note 1, at 160.
armed man ordered you to surrender your cash, it could be accurately stated that you were obliged to comply although you certainly had no obligation, that is, no duty, to do so. In the same fashion, Hart looks at the criminal law in terms of its results, while Pashukanis chooses to concentrate upon its origin and thus would note little difference between penal codes and the law of contracts or wills. These are, to understate the case, vastly dissimilar areas to Hart, not only because of the “origin-results” point, but also, and probably more importantly, because Hart’s purpose in speaking of the criminal law is to set the groundwork for his major hypothesis: The theory that sanction can by no means be the central point of obedience to law, and that “the law” is only coincidentally exemplary of “orders backed by threats.” Secondary rules, or primary rules without sanctions, in other words, are just as much law as penal statutes — The Blackstonian definition of law is far removed from actuality. This noted treatise writer and law-compiler of the Eighteenth Century felt that a law was best considered as “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”

In his disagreement, Hart used the criminal process to best advantage. Since the purpose of Pashukanis’ examination of penal codes in bourgeois societies was to prove its origin and thereby disprove the contention that it could be successfully utilized in a socialist state, he could not but treat the subject in a different fashion. However, he does go far toward a sub silentio refutation of the Blackstonian concept of a law’s function, for it is undeniable that the two supposed origins are theoretically incompatible. In this respect, moreover, Pashukanis’ view of the origin of law plays much the same role as the assumption of the existence of natural law does for more traditional theorists. Both are based upon an illusive sort of idealism which often must simply be accepted on faith, to the exclusion of logical demonstration. The similarity disappears when one looks to the future, for natural law retains continued vitality under whatever political system it is held to operate, while the bourgeois origin of law must be replaced by the technical regulation incident to a socialist, nonlaw state.

However, we should not be unmindful of the points at which the views of Pashukanis and those of Professor Hart fairly touch. For to the Soviet jurist and the British legal theorist alike, the constraint function of law is minimized, the “orders backed by threats” viewpoint is denounced. In the words of Pashukanis, such a condition “contradicts the basic condition precedent to the intercourse of goods-possessors.”

Even when Pashukanis passes from the treatment of the criminal law per se as illustrative of what he considers the severest challenge to his thesis of law’s origin, he still maintains, in his discussion of “the law” in general, a strong aversion to the natural law adherents. This is not particularly surprising, since natural law arises, by definition, the existence of external

31. See the related discussion in H. Arendt, The Origins of Totalitarianism 422-28 (1951).
32. Pashukanis, supra note 1, at 160.
standards as limitations upon and final arbiters of the behavior of man and the validity of the legal "rules" by which he chooses to govern himself.\textsuperscript{33} This is not to say that the "legal nihilism" of Pashukanis, as we have chosen to call his basic premise, does not contain that element of the "ideal" so vital to natural law. In this respect, and by taking a certain amount of freedom with an analogy, the two concepts become rather similar. Just as natural law assumes \textit{a priori} laws of nature, legal nihilism takes as its foundation principle the notion that the essence of capitalism forces it to be the only legal arena. Perhaps one would not be justified in further hypothesizing that legal nihilism, even in the hands of a "capitalist" proponent, would accept the natural law holder's belief in an "ordered universe," since this assumes not only the pre-existence of determinative forces, but also a moral evaluation. Pashukanis accepts law as a capitalistic device not to laud Western tradition, but to prove its irrelevance to the goals of communism and socialism. Although it is not immediately obvious, the commodity exchange theory of law is quite hostile to capitalism.\textsuperscript{34} One reason is that the theory's premise sees conflict as intrinsic to the Western political ideology. In a truistic sense, if there were no clash between consumer and producer, between producer and supplier, between worker and producer, then there would be no need for an elaborate set of legal machinery to resolve these clashes. Of course, not everyone would agree that all conflict is necessarily contraindicated, for the very acceptance of competition as a valuable adrenalin to free society admits belief in some degree of conflict. However, the type of discord which gives rise to a legal rule is not particularly desirable, even if it must be condoned as inevitable under the game plan by which capitalism operates. Thus, most would agree with Pashukanis' unstated, because to him totally obvious, view that conflict is by no means a wanted ingredient of a national code of ethics. Vyshinsky was able to succeed in his campaign to denounce Pashukanis as a "wrecker and traitor" only when he reversed the moral lesson of the commodity exchange theory and made it appear insulting to socialism.\textsuperscript{35} At the same time, Vyshinsky alleged that socialism, not capitalism, contained those qualities which allow the highest development of law, thus completing the semantic twist of the writings of the legal nihilist, a maneuver which cost Pashukanis his life when his recantation was deemed inadequate.

In a broader sense, the commodity exchange theory was an unspoken denunciation of the political form of capitalism in that it attempted to demonstrate the waste and inefficiency found in the system. No pride can be taken in the fact that an amazingly complex, cumbersome, and expensive network of courts, legal practitioners, and law enforcement officials must be maintained in order to insure some semblance of order. Pashukanis would have seen no reason to boast in the face of the inherent beauty of the system, and even its


\textsuperscript{34} Professor Stone deals with this point only briefly, since he assumes, rather typically, that it should be apparent even to the least discerning. J. Stone, \textit{Social Dimensions of Law and Justice} 502 (1966).

\textsuperscript{35} Vyshinsky, quoted in H. J. Berman, \textit{Justice in Russia} 45 (1950).
more usual efficiency, since he considered its existence a basic sign of an inefficient political program. Thus, the strong hostility of the commodity exchange thesis to capitalism is demonstrable, no doubt even to Vyshinsky, who saw good reason to employ his blinders to best effect in this regard.

In the abstract, it is difficult to justify the casting aside of legal nihilism as the skeleton of Soviet jurisprudence. The practical necessity of such a move was unquestionable, either on the ground that the state simply had to assume more power during the “transitional” period to keep order and to effect the eventual goal with the greatest alacrity, or under the generally accepted maxim that power breeds power with which the extant possessors are reluctant to part. Even conceding these pragmatic factors, the discarding of legal nihilism was accomplished at large cost to consistency in Soviet juristic thinking. Perhaps this is an immaterial condemnation, as it clearly would be if the ideological reversal on the subject could be justified solely on the basis that the timetable, and not the desired destination, had need of revision. But Stalin’s depuration of the legal nihilists and especially the doyen of this elite group, through the brutal tactics of Vyshinsky, reflected much more than a change in game strategy. The game itself was to be different; the “withering away” no longer was to be spoken of in imminent terms; the state would retain its position of power and acquire even more control. It cannot be gainsaid that the shift was practically justifiable; however, it portended little for the near-future accomplishment of the October Revolution’s objectives. When Chairman Khrushchev announced in 1961 that the period of “public self-government” would arrive in some twenty years, further fuel was added to the fire kindled by those who had argued that a dramatic “rehabilitation” of the views of Pashukanis as well as an “eradication” of the Vyshinsky cult, was underway in the Soviet Union. It was contended, with some logical force, that once again the goal of “pure communism” was on the Russian horizon and that the belief in legal nihilism was indeed being reincarnated into the forefront of Soviet jurisprudence. However, the predictions seemed overblown at the time, and now appear wholly without foundation in fact. In the very work in which Khrushchev set twenty years as the date of the desired “withering away,” he also proclaimed the continued validity of the state and law in achieving the tasks of “communist construction,” and asserted a greater role for these two institutions, not a reduced position. With the advent of Kosygin and Brezhnev and the increasing part “free enterprise” concepts are beginning to play in everyday Soviet life, the rehabilitation arguments command even less credence. It appears, then, that if Pashukanis is being brought back from the dead, the process is not being carried forth with any noticeable rapidity: The Soviets still have a long way to dig. Tempus fugit.

36. Although it is somewhat beyond the scope of this article, see on these representative methods of purge, H. Kelsen, The Communist Theory of Law 125 (1955).
From a more encompassing viewpoint, legal nihilism takes an undeniably cynical attitude toward "the law" and its function in society, since the theory has as one of its primary premises the principle that legal machinery is simply not necessary to the smooth functioning of all societal systems. To Pashukanis, the reason for this maxim is clear: the only condition which makes legal regulation necessary is the conflict of private interests. However, when there is no conflict, when there is "unity of purpose," then only technical and not legal regulation is involved and needed. Pashukanis contrasts the functions of these two types of regulation with an illustration concerning railroads. The enforcement of the liability of a railroad company for its negligence in injuring a passenger assumes that there are private claims and conflicting interests between the claimant and the company: This is legal regulation. On the other hand, the rules relating to railway traffic and the number of passengers a train will carry are an example of technical regulation because in this regard the passengers and the company have common, nonconflicting, interests. The unity of purpose which will allegedly come about under pure communism means that technical regulation alone will insure the smooth running of the system. That is, all management will be in the nature of a railroad timetable.

At the outset, one may logically ask whether this new process will be merely a distinction without a difference, a change in name and form but not in substance or function. If this scheme of Pashukanis were to be instituted in the Soviet Union at the present stage of that nation's development toward the supposed goal, this would seem to be a telling criticism, since conflicting interests do, in fact, continue to exist. But even assuming that the Soviets, or anyone, can accomplish the prerequisite change in mental attitudes to attain the "from each according to his ability, to each according to his need" plateau, the objection nonetheless cannot be ignored. It needs no elaboration to demonstrate that the line between rules that are technical and those that are legal is a thin and vacillating one. To say that in the society of the future criminals will be dealt with by doctors and executioners, but not by law and lawyers, may be nothing more than a shift in responsibility and function. The process and "rules" to be applied will not necessarily be dissimilar. Instead of a judge and jury, a "technical" administrator, or even a group of them, will now pass on the "guilt" or "innocence" of the accused; and the result of the decision may well be the same, namely, punishment or nonpunishment. Although Pashukanis attacks this criticism in a backhanded manner, he never really attempts to confront it directly, perhaps because he considers both the question and any answer he could give too conjectural for extended discussion. Thus, though any critique of the actualities of legal nihilism should take into account this "form-substance" argument, there is no doubt a rather overpowering contention in favor of adhering to the wait-and-see doctrine.

The cynicism of legal nihilism, in its denial of the functional need for law

41. Pashukanis, supra note 1, at 135.
42. Id.
43. Pashukanis, supra note 1, at 153.
in noncapitalist society, often closely resembles the conceptual notions pro-
pounded by the realistic school of jurisprudence in this country. In an im-
portant sense, the realists are rather more cynical in their approach to Amer-
ican law than was Pashukanis. As already stated, Pashukanis accepted the
validity of capitalist law, within the capitalist context, while severely casti-
gating the context itself. The realists, even to the extent that they accepted
the capitalist context, mercilessly probed the existing framework of law
within that context. However, it would be imprecise to contrast the realists
as disinterested cynics on the one hand, as against Pashukanis the politi-
cally-motivated and shallow (under-critical) interpreter of capitalist law. One
strongly suspects that the realists, too, are not "uninterested" cynics, but are
dissatisfied with the current state of the substantive law,44 albeit not as
fundamentally as were Pashukanis and the makers of the Russian Revolution.

Nevertheless, a difference in emphasis is apparent. When Pashukanis
speaks of law as a necessary regulator of private conflicts, irrelevant and
valueless in common interest situations, he betrays not only his conception
of the function of law but also his adherence to the necessity of the idealistic
component in the legal process. However, when Holmes tells us that if we
would know the law, we must think of it in terms of a conscienceless "bad
man,"45 we cannot but immediately sense the aversion toward confusing law
with morality. This somewhat paradoxical switch in roles of the capitalist
and socialist jurist is striking in more than an historical sense. The legal
nihilist who denies the universal functionality of law cannot do so without
seeing it as a valued-oriented institution. If he did not, he would be hard
put to explain why it will no longer exist once the value system has under-
gone a reversal. And yet even the "softest" of legal realists homilizes against
the "ordinary" infusion of morality into the study of law. The tables have
indeed been turned. Unfortunately, the obliquity cannot be stretched further,
for Pashukanis chose to spend little time in explanation of the posture that
"ought" factors assume for purposes of legal decision-making. One thing
appears credible, however: legal nihilism could not proceed with even a
small degree of conceptual consistency if it were to accept Holmes' circum-
scription of the law as "prophecies of what the court will do in fact,"46 for
this statement implies a predilection for separating law and morality. On the
other hand, nihilism presumes that it is quite proper, both theoretically and
pragmatically, for the resolver of private conflicts to take into account the
idealist element. The normative ambiguity finds graceful resolution in such
a manner, ideologically speaking. No doubt, says the nihilist, a legal rule
such as "contracts require consideration" contains a heavily-weighted set of
norms, but this should not give rise to great concern or confusion so long as
we do not lose sight of the fact that the rule developed because of a particular
private conflict and the norms must thus vacillate when we have occasion to
apply them to another clash of interest. Nihilism attempts neither to sepa-

44. For example, Jerome Frank does not speak endlessly and in *verbum sapienti* style
of "robesim" and myth and ritualism [LAW AND THE Modern MIND 194-95 (1968)] to condemn
the legal system as a whole, but he certainly finds fault with the law in practice.
46. Id.
rate these norms from the rules nor to make efforts to delineate the normative element in a rule, for morality as well as individual mores are integral components of these conflict-resolving devices. In a sense, realism and nihilism run almost together in their rule-skepticism, but as can be seen from the above, the reasons for doing so are diametrically opposite. The Pashukanis-nihilist cautions us to be skeptical of the rule as set down in a particular case to meet the needs of certain factual stimuli because the facts which gave rise to the conflict will not necessarily be the same when the rule has an opportunity to again be applied. But the Holmesian-realist gives the similar warning so we will not be lulled into taking the words used to formulate a rule at face value: we must go behind and beyond them in search of the "hidden agenda." 47 Evidently, the rule of idem sonans has no validity when applied to the ideological battle between these two schools of jurisprudence. 48

Allusion has been made to the paradoxical contrast between the socialist-nihilist and the capitalist-realist in their respective viewpoints that morality must and must not be an intrinsic ingredient of a legal rule. 49 More apparent in its contradictory capacities is the contrast between the nihilist's notation of the importance of the state to the legal process and that of many Western jurists. Although the state to Pashukanis does in fact exercise significant powers in an intimate relation to the legal system in socialist (pre-communist) as well as Western capitalist societies, there is no necessity that it assume this role. Given the existence of private conflict as the basis of law, its effective functioning would be insured by those very interests which conflict even though the state chose not to enter the legal arena. 50 The reason for this last becomes clear when one realizes that it is in the common interest of the conflicting parties that some system to resolve the clashes be in operation to guard against anarchistic breakdown of free enterprise. Obversely, an unbroken line of legal theorists from Hobbes and Blackstone to Holmes and Hart see the power exemplified in the sovereign as an indispensable concomitant to an effective legal system. It goes without saying that these men differ in the degree of emphasis placed upon this belief. Not all would admit approving adherence to Hobbes' statement in his Dialogue on the Common Law, quoted by Felix Cohen, that "in matter of government, when nothing else is turned up, clubs are trump." 51 Cohen himself notes that we obey laws not because they are rational or good or just but because law has "power behind it." 52 This hypothesis, no matter how realistic or "true" it may be, closely resembles, in the slang of the day, the expected result when a football team finds itself at third down on its own two yard line after a pair of fruitless attempts to budge the sturdy defensive line:

47. Id.

48. Moreover, to call legal nihilism a "school" of jurisprudence may perhaps appear to be something akin to poetic license, since its proponents, if any, are not overly articulate. It would not serve our purpose well, however, to call it a "nonschool" of jurisprudence; a school of "nonjurisprudence" possibly?

49. See text accompanying notes 45-47 supra.


52. Id. (emphasis added).
they will "drop back five and punt." The team chooses to surrender possession of the ball not because it has inadequate desire to make a first down, but simply because reality shows the goal to be unlikely for the present. In the same manner those who admit that "clubs are trump" are not motivated by an unconscious drive to promote the cause of "might makes right," but only seek consistency with political and legal reality. Clubs indeed are trump under our present system, so power is said to be a necessary ingredient of law.

The reasoning process in this regard approaches pure rationalization at times, a fact best illustrated in Blackstone's "orders backed by threats" terminology, but not impossible of demonstration in most "definitions" of law. Few would find fault with the contention that power would prevail over justice if they both conflicted and had equal opportunity to operate. Of course, we maintain the vigorous hope that what is powerful will also be just and that what is just will further be powerful; in other words, that the two concepts will coincide. To say the least, this is certainly not always the case, although ways are discovered by which to justify even this state of affairs. More often than not, the resolution of the difficulty is accomplished not by finding a way to insure that the just gains power, but in labeling that which is powerful, and which therefore necessarily prevails, as just.53 It would probably be unfair to call this reasoning ceremony a prostitution of values, but it somehow goes further than a mere placing of the "cart before the horse" in its reversal of values.

One could at this point argue, with a certain foothold in logic, that the legal nihilist is bound to gain the advantage in any theoretical altercation of this sort for the simple reason that a denial of the need for law makes immaterial a detailed explanation of the role of the state and power in the legal process. After all, it is infinitely more difficult to proffer an affirmative defense to the plaintiff's complaint than to refuse to admit that suit has been filed against you; constructive criticism cannot fairly be compared to destructive negation. While not overlooking the "ordinary" validity of this point, it retains less than valuable relevance to the present dispute, for it assumes mala fides on the part of the nihilist, which, despite the title, is simply not there. Pashukanis objected not a whit to the continuation of law as an efficacious, even desirable, institution of nonsocialist society. In fact, he felt that Western political systems could not very well sustain themselves without such a process, and that law found its highest development under capitalistic, free enterprise, situations.54 This is not to say that he approved of law, for he could not very well be expected to energetically promote an institution he was concurrently maintaining as unique to capitalist systems; however, it cannot be disputed that he approached the subject of law, qua law, with near scientific neutrality, and surely not dissentingly. While it may be conceptually difficult to understand at first, to deny law's necessity as the legal nihilists do

53. A profound elaboration of this point may be found in B. Pascal, Pensees No. 298 (M. Turner transl. 1962). Pascal thinks we cannot make the just powerful, because that which is powerful eliminates this possibility by declaring that it is also just. In the end, there can be no argument with might.

is not inerably to take a negative attitude toward the problem. The nihilist of whom we now speak, however, avoids this "pitfall" by his approach to the topic from another direction, namely, by dealing initially with the historical, economic, social, and political bases of "the law," discovering which factors gave rise to law, noting that these factors would not be present in the communist state, then concluding that law will be unnecessary under these circumstances. The negative attitude apparent in philosophical nihilism stands in striking contrast to the legal nihilism of Pashukanis. In this regard, to be sure, the function of law is not conceived as "goal-oriented," but as inescapably intertwined with its origin. Perhaps Dean Pound overlooked this point, or disagreed with it, when he stated that "if there had been law instead of only administrative orders, it might have been possible for [Pashukanis] to lose his job without losing his life."55 It was to support these very "administrative orders," this technical regulation, that Pashukanis devoted the greater part of his juristic life. He was simply too far ahead of his own time for his own good.

More importantly, though, an anthropological or phenomenological approach to the law stands in ready opposition to the nihilist school, for the reason that a "realistic" look at the decision-making process can have value only if one takes for granted the notions that the language of the court is not particularly expressive of its actions, and that such a dissecting procedure will result in a truer sense of the actuality of law. Aside from the already-mentioned proposition that nihilism views morality and the normative element as inherent to a judicial decision, the nihilist would detect scant comfort in this methodology of realism because he perceives the "rule of a case" to be the result neither of the attitude and unspoken prejudices of the tribunal nor of the "semantic" interplay of prior judicial opinions, but of the specific factual conflict then before the court.56 Further, the case-by-case approach of the nihilist, with its irrebuttable presumption of the capitalistic origin of law, improves upon (from a jurisprudential standpoint) Marxian historical determinism by showing that it has only subtle and indirect effect when applied to a real-life legal situation. Even a "radical" realist like Jerome Frank moved closer to the nihilist school in this respect when, after assuming the role of appellate judge, he began to note that it is the facts, and not "the law," which change from case to case. It needs little detailed comparison to demonstrate that Frank's change of position from his earlier works approximates that of Pashukanis when he came to fear, and rightly so, the pragmatic backlash. With the conceded perplexity involved in any attempt to distinguish law from fact in a consistent manner, the point is perhaps not as significant as it may at first seem, but it unquestionably demonstrates variant philosophies on a most important subject.57

Any jurisprudential analysis of legal nihilism would be short of comple-

56. In this respect, the Pashukanis-nihilist is more like the traditionalist than the realist.
57. With his strong emphasis on the directive role of facts to the legal process, it is possible that Professor Louis Brown would have a point or two to make on this subject. See, e.g., Brown, The Case of the Re-lived Facts, 48 CALIF. L. REV. 448 (1960).
tion without a discussion of the similarity in the basic premises of Pashukanis and the man who accurately may be described as the first sociological jurist: Montesquieu as well as to Pashukanis, when man enters a societal environment he essentially registers for a continuing state of war, a battle of conflicting interests. On the other hand, Hobbes, whom Felix Cohen has described as "the grandfather of realistic jurisprudence," saw the warlike conditions as existing not in society but in nature. The reason Montesquieu and Rousseau speak of nature as a "tranquil," nonwarlike, state is because of the common interest and unity of purpose upon which Pashukanis creates his major premise. In primitive society, law is principally penal in nature, since goals are supposedly coincidental in other respects. Only when "civilized" society enters the picture, and conflicting goals thus arise, does the retributive function of law become appropriate. And so, according to Pashukanis, nonpenal law would of course be out of place in a communistic environment, which best approximates the "modern primitive" society. Legal nihilism does not stop there, but goes on to deny the need for even such "fundamental" law as penal proscriptions. The technical regulation which is to replace the criminal law should not be shoved aside as merely another name for the same thing. The major, and determinative, difference lies in the belief that the germinative prerequisites for even a penal law will plainly be absent once the state has withered away, and with its disappearance the "common goal" has made its presence known.

On this same subject, one of the most misplaced criticisms of Pashukanis is to be detected in the writings of Del Vecchio, who not only takes the "normal" attitude that legal nihilism is essentially a negative and destructive philosophy, but proceeds to describe the commodity exchange theory as evincive of the principle that law to Pashukanis is nothing more than a "bourgeois fetish." To the legal nihilist, little could be further from the truth; law is by no means fetishistic, for the simple reason that capitalist society could not exist without it. No contention is proposed, of course, that legal nihilism somehow is the knight in shining legal armor which solves, in one fell swoop, the problems plaguing jurists for centuries. To be sure, this is not the case. For example, one of the largest "gaps" left unexplained and untreated by Pashukanis is the role and nature of international law once "pure communism" is attained. A logical application of Pashukanis, read in the context of Soviet theory, would certainly lead one to the conclusion that his hostility toward codified law would not extend to the international law arena—even to the international law of a communist state. It must be remembered that Pashukanis considered law indispensable to the proper functioning of a competitive society, and rejected law for a communist state only because of the beneficial (he believed) lack of competition in a communist society. However, according to dominant Marxist theory the

international relations of socialist and nonsocialist states will inevitably be marked with conflict and competition. Seemingly, therefore, Pashukanis would admit the necessity of international law in a communist state.

When Professor Fuller describes the premise of the nihilist as a "somewhat startling conclusion," we can be sure he was objecting not so much to the notion that law would be unnecessary in the communist state of the future as to the nihilist viewpoint that duty would likewise disappear. As Fuller explains it, Pashukanis believed that the "morality of duty" would cease to perform any function because the demise of the market economy will mark the elimination of that implicit reciprocity which allows man to treat his fellow man as a means, and not an end. Without this requisite, morality would not exist. This was indeed too bitter a pill for Fuller to swallow, for it is conspicuously the weakest point in the entire school of nihilistic jurisprudence.

However, even conceding the existence of these weaknesses, it is apparent that the legal nihilism of Professor Pashukanis was totally consistent with the Marxian background under which he operated as well as that future of the Soviet state to which he considered it his duty to address himself. His nihilism should not be ignored, or passed over with condescending haste, as has been the case thus far, for it contains several points worthy of more detailed scrutiny. The purpose of such study would not be wholly academic, since Pashukanis speaks to many of the "important" questions upon which the modern schools of jurisprudence can find little agreement. The difficulty of putting legal nihilism to use is apparent, for the very reason that its political background is relatively unique. However, this should not be considered a valid excuse for disregarding the theses of Pashukanis, since, after all, he spent the greater part of his effort in explanation of "bourgeois" law, else he could not have authoritatively argued its inapplicability to non-capitalist society. Even less to be excused is that disdain for his theory caused by the belief that it is negative and destructive criticism: On the contrary, Pashukanis has assumed a rather favorable jurisprudential attitude toward existing law in capitalist countries; it is only his political allegiance which leads to his "legal nihilism." This is not to say that the usual treatment of Pashukanis and his school for nihilists is completely unwarranted, for he does little justice to such concepts as duty. Since Pashukanis views the morality of duty as coexistent with and dependent upon the economy of the marketplace, he assumes the two will disappear arm in arm. To many this position would be thought of as inconsistent with the nihilist concept of the intimate relationship of morality and legal "rules." And yet the nihilist framework does not topple even if we remove this foundation stone. It is at present inconceivable that the Soviet Union will actually "rehabilitate" the theories of Pashukanis. It is at least some tribute to the man as jurist that we can safely hypothesize from this fact alone that pure communism finds no place on the Soviet horizon.

62. Id. at 25-26.
63. That is, it is believed that the most telling argument against Pashukanis-nihilism is precisely that dogmatic unreality of the Marxian theory to which it is inextricably wedded.