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A Practical Approach to Legal-Pluralist Anarchism: Eugen Ehrlich, Evgeny Pashukanis, and Meaningful Freedom through Incremental Jurisprudential Change

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ABSTRACT: John Hasnas (2008) has famously argued that anarchy is obvious and everywhere. It is less well known, however, that Hasnas also argues that anarchy must be achieved gradually. But how can this work? In this paper, I show that directly confronting state power will never produce viable anarchy (or minarchy). Using the example of Soviet jurist Evgeny Pashukanis, I detail an episode in apparent anti-statism which, by relying on the state, ended in disaster for the putative anti-statist. I next show how combining the theories of Austrian legal thinker Eugen Ehrlich and American political philosopher William Sewell, Jr., can lead to a gradual undoing of state power via case law. Finally, I bring in the example of Japanese jurist and early anti-statist Suehiro Izutarō as a warning. Suehiro also attempted to decrease state power by means of case law, but because he lacked a clear anti-statist teleology he ended up becoming an accomplice of state power, even imperialism. The way to Hasnian anarchy/minarchy lies through the skillful application of case law with an eye always towards the attenuation, and eventual elimination, of the power of the state.

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> *"No one believes that we can transition from a world of states to anarchy instantaneously. No reasonable anarchist advocates the total dissolution of government tomorrow."* John Hasnas (2008, 129)

INTRODUCTION

There is nothing more dangerous than the state. (Rummel 1994) The modern nation-state, regardless of the ideology upon which its existence is premised, is an enemy of human freedom and a threat to peace and prosperity at home and abroad. (Rockwell 2014) Proponents of various political arrangements argue endlessly over which kind of state is the best, but these debates merely obscure the central fact of the state: it is always and everywhere a sovereign outlaw predicated on theft, coercion, and violence. (Rothbard 2000)

The state, properly considered, is thus seen as the common foe of humanity. And yet, despite the animosity to it which the state's very nature virtually ensures, the state has shown a remarkable ability to endure. Attempts to confront state power directly almost always fail, while those that succeed tend only to produce even bigger state apparatuses. (Cf. the Bolshevik Revolution, the fall of the Qing Empire, the American Revolution, the French Revolution, and the Meiji Restoration.) Likewise, attempts to declare autonomy from state power through secession or other voluntary forms of disassociation (for example, by refusing to acknowledge the state's jurisdiction over one's privately-held land or property) are also virtually guaranteed to end badly.

For example, in 1861 the Southern States of the United States effected an orderly and thoroughly lawful separation from the North, but this was met with such overweening violence—including widescale attacks on non-combatants—that the newly-formed Confederate States of America were forced to rejoin the larger state on humiliating terms of surrender. (Cisco 2007) Likewise, when law-abiding citizens such as Cliven Bundy and Randy Weaver have attempted to absent themselves from the purview of state power, the state has responded with overwhelming use of force, often lethal. (Grigg 2015)

Anyone who desires freedom is thus presented with a seemingly impossible choice, between submission to the state, which surely ends freedom, and suicidal rebellion, which ends both freedom and life. How does one respond to the dilemma

presented by the state? Is there some way to enhance human freedom within the context of the state while also attenuating state power gradually, with the eventual goal of so diminishing statism that a true Hasnian anarchy becomes possible? I believe there is. In this paper, I argue that the theories of Austrian legal philosopher Eugen Ehrlich point toward the real possibility of greater freedom within a given state and, ultimately, the gentle overthrow of pernicious state power.

However, such a project, although surely worth the attempt, is understandably fraught with peril. States, and statists, are ever mindful of the precariousness of their position, and so are sensitive to even the slightest whisper of rebellion. Not only that, but armed suppression is not the only way that states deal with those who try to carve out non-state spheres for themselves. Many states, and statists, are as expert at co-opting freedom-loving groups and individuals as they are at killing them or throwing them in prison. To give just one example, legal scholar and jurisprudential reformer Suehiro Izutarō, who attempted an Ehrlichian project of his own in interwar Japan, was co-opted by the state due to his failure to maintain the teleology of anti-statism. As a result, Suehiro ended up using Ehrlich's theories, not to chip away at state power, but to further amplify it. (Morgan 2019) I will detail how this happened in the hopes of guiding other would-be Ehrlichian freedom-partisans safely around this hazard. The demise of the state must be the ultimate goal of any truly human society, but this must be accomplished gradually, dialectically, and stealthily. A subdued anarchy, grounded in Ehrlichian legal pluralism, is the surest method for communities to regain their freedom.

I begin with a consideration of Evgeny Pashukanis, a Soviet jurist who attempted to instantiate the Marxian-Engels mythology of the autopoetic 'withering away of the state'. Pashukanis's example proves the folly of directly confronting state power. Before turning to an explication of how the theories of Eugen Ehrlich, put properly and prudently into practice, can advance freedom and sap the state's strength, it is necessary to show what happens when legal theorists try to confront the state head-on.

I. EVGENY PASHUKANIS

Evgeny Bronislavovich Pashukanis (1891–1937) was a Soviet legal thinker who achieved wide renown in the early years of

Stalin's dictatorship. Pashukanis was (seemingly) protected by political connections to people in high office, but he eventually ran afoul of the state by arguing openly that state power should be curtailed. For his naivete he was executed by, of course, the state.

What makes the case of Evgeny Pashukanis especially striking is that, in calling for the end of the state, he was simply repeating what he, and many others, took to be political orthodoxy in that state. Pashukanis never attempted violent revolution. He merely used the same platitudes that the state's ostensible intellectual fathers had advanced—platitudes, indeed, that the theorist had been promoted to chief justice of the state's supreme court for publicly espousing. The absence of all but a faint gloss of legality on the state's swift execution of the theorist when his theories—which were not even his, and which he had long been encouraged by the state to disseminate—fell from favor provide a chilling capstone to this lesson against directly facing off against statism.

Pashukanis's most well-known argument was little more than a recapitulation of Marx's and Engels's teaching that, with the advent of socialism, the state would "wither away." (The 'withering away of the state' was first predicted by Friedrich Engels. (Engels 1878, 302, cited in Kelsen 1988, 25 fn. 62.)) When this happened, Pashukanis said, law would become superfluous. Although much of the legal thinking in Marx and Engels is ambiguous at best, the Soviet Union was founded by Lenin as an experiment in putting the ideas of Marx and Engels into practice, and Lenin himself had expanded upon Marx and Engels' legal ideas by accentuating their prophecy of the state's quiet self-destruction.[2] It therefore seemed entirely safe for Pashukanis to argue in favor of a doctrine from the philosophical forebears of the Bolsheviks and from the Bolsheviks's leader, Lenin. And yet, it was for precisely this that Stalin, Lenin's heir and thus the world's chief enforcer of Marxist-Leninist thought, had Pashukanis killed. Stalin revised the thinking of Marx, Engels, and Lenin to justify a permanent state with himself at the head. Stalin was therefore not interested in the withering away of the state, because that would have meant the withering away of Stalin. Pashukanis confronted state power directly, albeit unintentionally, and was killed as a result.

Pashukanis came from humble beginnings, but for a time his studies in the law led to a rapid rise in his notoriety and access to

[2] See Lenin ([1917] 1932, 149), in Kelsen (1955, 51 and 51, fn 1).

state power. Pashukanis studied at the University of St. Petersburg during World War I, and later became a circuit judge after joining the Bolsheviks in 1918.[3] He was then "a legal adviser in the People's Commissariat of Foreign Affairs" in the early 1920s.[4] Pashukanis remained virtually unknown until the 1924 release of the book that would both win him fame and position, and also lead to his eventual purge and execution: *The General Theory of Law and Marxism: An Experiment in the Criticism of Basic Juridical Concepts*. (*Obshchaia teoriia prava i marksizm*, cited in Stuckha 1988, 41, fn. 1) The book, written as Pashukanis's attempt to work through some initial ideas about jurisprudence in a purely socialist society based on the writings of Engels and Marx, quickly gained a prominence out of all proportion to the author's modest motivations in writing it.[5]

Working under the general aegis of Marx-Engels thought, Pashukanis borrowed from German philosopher Hegel and Soviet historian M.N. Pokrovsky in emphasizing the "distinction between essence and appearance," attacking the "*Roman lex persona* [as] an insufficient basis for the universality of rights attached to individual agents under capitalist modes of production" (Beirne and Sharlet 1990, 41, fn. 7; citing Pashukanis 1931) and insisting that "the development of Russian capitalism must be understood in the context of the historical primacy of mercantile capital" (Beirne and Sharlet, 1990, 41, fn. 8; citing Pokrovsky n.d.). For Pashukanis, it was key that:

> Marx had begun his analysis of the inner dialectic of the capital-labor relationship (the production of surplus value) with a critique of the categories of bourgeois political economy. […] In order to apprehend the historically specific form of the relationship of capitalist exploitation, one had first to pierce the veil of appearances/semblances/forms which the real relationship inherently produced, and on which it routinely depended for its reproduction.

In other words, Pashukanis took seriously the polylogism that was central to Marx's class-materialist analysis of capitalism and applied it to the field of law, premising his own analysis on the

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[3] See Hazard (1980), and Bellingham (2018).

[4] Beirne and Sharlet (1990, 17). See also Hazard (1971, 143) citing also Hazard (1938, 244).

[5] Beirne and Sharlet, (1990, 41, fn. 1). Hazard sees Pashukanis's early work as not systematic. See Hazard (1938, 245).

Marx-Engels dogma that the state would become superfluous under full socialism.

Pashukanis wrote his 1924 treatise during the first flowering of Lenin's New Economic Policy (NEP), a strategic retreat into temporary capitalism in order to strengthen the Soviet experiment in the long term. In the earliest stages of the revolution, the Bolsheviks aggressively dismantled the legal order on the grounds that it had been a function of the bourgeoisie's domination of the proletariat. A skeletal framework of institutions was left in place in order to accomplish the move into full socialism, and the law itself was largely discarded in favor of Bolshevik judges' use of "revolutionary consciousness" in undoing what few legal remnants continued to exist. (Beirne and Sharlet 1990, 24) The Russian Civil War, though, necessitated a more robust court system for rooting out and punishing so-called enemies of the revolution. Pashukanis saw this move in the same way Lenin characterized the NEP, i.e., as an expediency and not as a permanent feature of a truly classless society. (Beirne and Sharlet 1990, 25). This also necessitated a retreat from the anti-intellectualism of the early Bolshevik turmoil (David-Fox 1997).[6] This dramatic shift in policy and the lack of abiding principles it betrayed might have alerted Pashukanis against assuming that safety would lie in adherence to Marxist thought, no matter how orthodox.

In the event, however, Pashukanis's abiding concern in joining Marx and Engels in anticipating the withering away of the state was his belief, which he found also in Marx's *The Critique of the Gotha Program* (1875), that the commodity form was inextricably linked to, and indeed gave rise to, the legal form. Because of this, "proletarian or socialist law was a conceptual, and therefore a practical, absurdity. While the market bond between individual enterprises (either capitalist or socialist) remained in force, so also the legal form had to remain in force." (Beirne and Sharlet 1990, 25) Eventually, the law would come to resemble what Pashukanis saw as the only sustainable feature of the NEP, namely, its "administrative-technical rules which governed the economic plan." (Beirne and Sharlet 1990, 25) Once socialist man had been freed of his bourgeois shackles, he would need only economic tinkering. Crime would be as unthinkable as the

[6] David-Fox cites structuralist Theda Skocpol (1979) in accentuating this point.

spontaneous exchange of goods for a profit. Indeed, Pashukanis was so convinced that Marx had intended such an evaporation of the legal "superstructure" that Pashukanis called the withering away of the law "the yardstick by which we measure the degree of proximity of a jurist to Marxism." (Beirne and Sharlet 1990, 25, citing Pashukanis 1929, 268)

Central to Pashukanis's critique was what he saw as the artificial juridical and economic individualism underpinning bourgeoisie society. Taking Marx's "club-law is law nevertheless"[7] as his touchstone, Pashukanis held that:

> law, like barter, is a means of intercourse between disunited social elements. The degree of such disunion may be greater or less historically, but it never disappears entirely. Thus the enterprises belonging to the Soviet state perform one general task in fact; but—working by the methods of the market—each of them has its own isolated interest; they are opposed to each other as buyer and seller, and they act at their own risk and peril—accordingly they must necessarily be in *juridic intercourse*. The final victory of the planned economy will put them exclusively into an association with each other based on technical expediency and will make an end of their juridic personality (Pashukanis 1924, 181).[8]

Because of this rigid conformity to Marxist ideology, Pashukanis was forced into a concomitant adherence to the archetypical Marxian history of the rise of the state as a tool of merchants and class exploiters:

> As an organization of class dominance and an organization for the conduct of external wars, the state neither requires—nor essentially admits of—legal interpretation. These are domains where the so-called *raison d'etat*—that is to say, the principle of bare expediency—holds sway. Conversely, authority—as the guarantor of exchange in the market—cannot only be expressed in the terminology of law but itself is represented as law and only law: that is to say, it merges completely with an abstract objective norm. Accordingly, every sort of juridic theory of the state which would embrace all the state's functions is necessarily inadequate—it furnishes only an ideological—that is to say a distorted—reflection of reality and cannot reflect faithfully all the facts of state life. (Pashukanis 1924, 183)

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[7] Korsch (1922), cited in Pashukanis (1924), in Babb (1951, 180). For Marx's views of the state see Marx (1938, 8, 17) and Engels (1875), cited in Marx 1938, 31.

[8] See also Kelsen (1955), esp. ch. 1, "The Marx-Engels Theory of State and Law."

For Pashukanis, the law was a fundamentally bourgeois concept and could not be reformed. As the state inevitably disappeared, the law, too, would just as inevitably disappear along with it.[9]

Pashukanis's theories were in plain agreement with Marx-Engels orthodoxy (such as it was) on the subject of law, and as herald and prophet of the state's demise under the conquering Bolsheviks Pashukanis was appointed in swift succession to a variety of top-ranking positions in various departments in the emerging Soviet government. Pashukanis's ideas, reprisals of those of Marx and Engels, themselves became part of the Bolshevik canon. As John Hazard points out:

> Pashukanis' influence was such that courses in civil law in the law schools were abandoned. Courses in the administrative law of planning, called in Pashukanis' parlance 'economic law', as in Germany, replaced them. A few hours only were devoted at the end of the full year's course to those aspects of civil law which Pashukanis interpreted as the vestige of the past. Textbooks on Civil Law likewise were replaced by textbooks entitled *Economic Law*. A similar atrophying of criminal law was anticipated, with the substitution of 'general principles' to guide the judges instead of precise articles defining types of crime and setting specific penalties (Hazard 1980, xxxi).

Pashukanis's place in the Soviet legal pantheon seemed assured.

Had Pashukanis been able to study the works of Ludwig von Mises, he might have understood that "the state" cannot act, and cannot wither away, because "the state" is nothing more than a grouping of individual people. (Mises 1949) Among different people, many will be interested in free trade and peaceful cooperation. Some will be comparatively hostile to fruitful interaction, but will do the bare minimum necessary to get by. Given human nature, a few will lie, cheat, steal, and even kill in order to advance their individual ambition. It is against such people that societies have always arranged some system of self-defense. Pashukanis imagined a socialist society free

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[9] Cf. Lenin: "With the extinction of classes the state itself will inevitably pass out of existence. The society which will organize production on a new basis of free and equal associations will relegate the state where it shall belong: to the museum of antiquities along with the spinningwheel and the bronze axe." Lenin, *Sochineniya*, vol. 21, p. 372, quoted in Chakste (1949, 22). Pashukanis's view of the state was also informed by Engels' conceptualization of the state as a kind of Leviathan cork keeping potential class warfare in check. See Pashukanis (1924, 184), citing Engels 20th German ed., 177–78.

of individual aggression because, by a process of the denaturalization of mankind as a class partisan, free of juridical and economic individuals per se. But what Pashukanis got instead was Josef Stalin. The emerging Soviet state was hijacked by one man bent on converting the state apparatus into the machinery for effecting his personal designs, including revenge on enemies and former allies.

The first stirrings of trouble for Pashukanis came in April of 1929, when Stalin gave a speech on Leninism in which he denounced his erstwhile friend, the Old Bolshevik Nikolai Bukharin, for the latter's insufficient understanding of dialectics. Chief among Bukharin's failings, according to Stalin, was his having presumed to lecture (the deceased) Lenin on "the problem of the state." Stalin accused Bukharin of failing to make the distinction between the bourgeois state and the state of the dictatorship of the proletariat as used for the purpose of furthering revolution internally and defending the homeland from hostile forces abroad. Stalin was asserting, in his speech, his sole heirship to the mantle of Lenin—asserting, that is, the sole right to interpret Lenin's writings and speeches and to pass judgment upon what was orthodox and what was not. Even more ominously, Stalin was announcing his personal identification with the state. Those who called for the "withering away of the state" were being put on notice that such pronouncements were henceforth liable to being interpreted as calls for the withering away of Stalin himself.

In retrospect it is obvious why Stalin could not dispense with the machinery of the law and the state—he needed the courts as a stage for the show trials that would later clear away the last of his rivals among the Old Bolsheviks, principally Bukharin himself. There is also a separate, but related, element of deception in Stalin's appropriation of Leninism. (See Tucker 1979, 347–66) As Adam Przeworski and Michael Wallerstein write in "Structural Dependence of the State on Capital":

> The central and only distinctive claim of Marxist political theory is that under capitalism all governments must respect and protect the essential claims of those who own the productive wealth of society. Capitalists are endowed with public power, power which no formal institutions can overcome. People may have political rights, and governments may pursue popular mandates. But the effective capacity of any government to attain whatever are its goals is circumscribed by the public power of capital. The nature of political forces that come into office does not

> alter these limits, it is claimed, for they are structural—a characteristic of the system, not of the occupants of governmental positions nor of the winners of elections.[10]

Surrounded by ascendant capitalist states (and forced thereby to admit that the worldwide triumph of communism would be at best seriously delayed, thus necessitating a period of accommodation to reality), Stalin actually adopted a Fordist approach to economics and emphasized vast programs of production (his notorious "Five-Year Plans") for the quasi-market of perpetual "War Communism."[11] It was in part to avoid the embarrassment of having this betrayal of Marxism-Leninism made theoretically plain that Stalin purged Pashukanis, who as a faithful mouthpiece for orthodox Marxian thought was a hindrance to Stalin in his plans to co-opt Marxism and Leninism for his own private ends.[12]

By the end of the first Five-Year Plan, the National Socialists had taken power in Germany and the Bolsheviks were preparing for what many in both the Communist and National Socialist camps saw as the inevitable war between the two totalitarian systems. (Reisman 2014) Given the realities of the age, the War Communism of the Russian Revolution was giving way to Stalin's assertion that socialism was possible, at least for the time being, in one country. As such, the state, Stalin argued, was indispensable, both for carrying forward the revolution domestically, and for protecting it from enemies closing in from abroad. Pashukanis's insistence on a rigid interpretation of Marx's and

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[10] Przeworski and Wallerstein (1988, 11), also citing Luxemburg (1970) and Pashukanis (1924) in Babb, (1951). See also Fred Block (1977, 6–27), cited in Przeworski and Wallerstein (1988).

[11] The "transition" period from bourgeoisie rule to pure socialism was undertheorized by Marx and Engels, and the problems associated with the transition were dealt with largely ad hoc. Cf. Hans Kelsen: "Marx says that in the phase of transition from the proletarian revolution to the establishment of perfect communism, that is to say, during the period of the dictatorship of the proletariat, there will be still a law, but that this law, in spite of its progress as compared with the bourgeois law, will still be 'infected with a bourgeois barrier (*mit einer buergerlicher Schranke behaftet*)'." Kelsen (1955, 3), citing a letter from Marx to Bracke, May 5, 1875, published in *Neue Zeit*, IX–1, 1890–91, 561 *et seq*. See also Hazard (1938, 247), citing Taracouzio (1935). On the challenges of internationalism for the Soviet Union and for Soviet law, see Hazard (1957, 387–88). On later Soviet internationalism, see Hirsch (2008, 701–30).

[12] Cf. Marx, *Gesamtausgabe* I–1, 574, cited in Kelsen (1955, 19, fn 47). See also Lenin (1917, 221), cited in Kelsen (1955, 55 and 55, fn. 18).

Engels's teaching about the transience of the state under pure socialism was a liability, and Stalin set about removing both the theories and their main proponent.

After a telling failure to gain election to the Academy of Sciences (the 'immortals', as the Soviets called its members), there followed a scathing denouncement by Stalin of Pashukanis's theories (and charges of treason and espionage) published in the September 1, 1937, issue of *Bolshevik*. (Hazard 1980, xxix) The handwriting on the wall was unmistakably clear. In the wake of Stalin's 1929 speech sharply criticizing Bukharin, and implicitly putting Pashukanis on notice, too, Pashukanis had written a revised version of his *General Theory of Law and Marxism* and had published articles and given speeches in which he "confessed" to his own ideological errors and attempted to restore himself to the Soviet leadership's good graces. All was for naught. On January 4, 1937, Pashukanis was disappeared from his Deputy Commissar office, driven past his house on Gorky Street so he could see his files being thrown in the back of a truck, and, after being investigated by "impartial" officers from the Ukrainian branch of the NKVD and arraigned by his former friend Vasilii Vasilievich Ulrikh—one of the leading jurists at Stalin's show trials—was later condemned to death, also by Ulrikh. The sentence was carried out by firing squad just a half hour after it was read into the record (Vaksberg 1991, 129–33).

There is much irony in Pashukanis's having been executed in this way, especially given his opposition to capital punishment and his refusal to incorporate it into the early Bolshevik legal guidelines on the grounds that it was unworthy of an enlightened socialist state. But there is even further irony in Pashukanis's having been executed by the same state, and under the same law, that he was sure would soon wither away as mankind entered into a new mode of existence following the disappearance of class warfare and the false juridical monadism that Pashukanis saw as the grounds of the legal form. But it should also be remembered that Pashukanis had also benefitted greatly from statism. Although he had championed a 'withering away of the state', he could hardly have failed to notice that all of his political opponents had been dispensed with by the same state that Pashukanis was prophesying would meet its own demise.

As historian Robert Sharlet writes in "Stalinism and Soviet Legal Culture":

> The jurisprudence of terror [i.e., of Stalin's rolling purges] flourished rapidly along the interface of the strengthened prerogative and the weakened normative state. The fruit of this development was an especially grotesque species of political justice. Legal forms were co-opted for extra-legal purposes, judicial process was subordinated to political ends, and law itself was used to legitimize and rationalize terror. The jurisprudence of terror institutionalized and routinized political terror within the context of formal legalism. In effect, terror was 'legalized' and the criminal process 'politicized'. (Tucker 1977, cited in Bellingham 2018, endnote 22)

Pashukanis must have known this. In fact, John Hazard, who studied under Pashukanis in the 1930s as an American foreign exchange student in the Soviet Union, remembered that "those who strayed from Pashukanis's line were castigated … or denied faculty appointments, promotions and salary raises. […] Teachers [were] compelled to conform not only to ideas of Marx but also to those of Pashukanis." (Hazard 1980, xiii–xiv, cited in Bellingham 2018, endnote 43) Pashukanis seems to have been confident that the statist forces which had elevated him to the primacy of his profession and cleared the field of his rivals would never turn against him.

Pashukanis's example is a stark reminder that confronting the state directly is suicidal. It is essential that the state be overcome so that those who would cartelize under the statist banner be denied a platform for their plans, but it is also equally essential that the state be done away with by slow degrees, and not all at once (and certainly not by marrying a putatively anti-state ideology to state power). I therefore propose that communities engage with the state dialectically, weakening and transforming the state incrementally over time. The best way to do this is through case law. A legal-pluralist caselaw system, coupled with jury trials, is the surest path toward the downfall of the state. A clue as to how this might be undertaken comes first from a little-known Austrian legal thinker, while one of that thinker's disciples provides a cautionary tale against implementing anti-state ideas without a clear anti-state teleology in mind.

II. EUGEN EHRLICH

Evgeny Pashukanis had the misfortune of living under one of the most brutal regimes in human history, but his case is not generically unique. Stalin and the Bolsheviks acted with acute ruthlessness against Pashukanis. However, virtually any other state would also have taken steps to eliminate someone who

actively challenged state authority, even abstractly. Virtually any contemporary state would do likewise, as the examples of Edward Snowden and Julian Assange amply attest. In light of these realities, let us turn to another legal thinker whose work offers some hope that the state may, perhaps, be challenged, and eventually defeated, incrementally, stealthily, and with low risk for the challengers. Austrian legal philosopher Eugen Ehrlich (1862–1922) offers a model for how such a project might unfold.

Born into a deracinated Jewish family in Czernowitz in the Austria-Hungarian province of Bukovina, Eugen Ehrlich did his Habilitation on Roman law in Vienna in 1894. He was never able to rise above the post of rector at Franz-Josef University in Czernowitz, a second-rate appointment attributable largely to Ehrlich's Jewish background.[13] Taking advantage of his de facto exile in the hinterland, Ehrlich was among the seminal group of law-and-society thinkers at the turn of the century that launched the sociological turn in both jurisprudence and in legal philosophy. Ehrlich, along with Hermann Kantorowicz (1877–1940), founded the *Freirechtsbewegung* (Free Law Movement) in the first decade of the twentieth century and, together with Kantorowicz, Max Weber (1864–1920), Émile Durkheim (1858–1917), Hugo Sinzheimer (1875–1945), and Roscoe Pound (1870–1964), formed the nucleus of what would later become known as the law and society movement.

Disillusioned with state power for a variety of reasons both personal and intellectual, Ehrlich sought the legitimacy of the law in something other than the reigning corporatist-positivist state. Specifically, Ehrlich conducted extensive research in community custom, which he saw as a way to reform Austrian law by means of insisting on the validity of legal pluralism within the existing Civil Code jurisprudential system. For many thinkers in the German tradition, the state and its laws were seen as forming an unassailable edifice not open to reform. While some German thinkers had posited a distinction between *Gemeinschaft*, or community, and *Gesellschaft*, or civil society, the legal system itself conceptually "saw" only *Gesellschaft*. Most theorists admitted of a working identity between law and the state. Ehrlich, on the other hand, argued that the state and the law are not the same. In many

[13] Rottleuthner (1987, 19). Ehrlich converted to Roman Catholicism ca. 1894. Johnston (1983, 89).

ways, they are at odds with one another, if not opposites. German experience itself tends to prove this. Ehrlich's groundbreaking *Grundlegung der Soziologie des Rechts* (1913), for example, offers clues to the ability of the law to endure even amidst political crisis, such as in the wake of the Second Reich's defeat in World War I.

Ehrlich, along with Kantorowicz, observed that societies organically and spontaneously generate their own legal orders apart from the oversight of a state, and often in contradiction to the state's Pandekten-style law (a centralized system of law based on the Pandects, a codification of Roman law) claiming a totality of legal sovereignty.[14] The plurality of law in Ehrlich's Bukovina region of Austria-Hungary was probably the source of his initial puzzlement over the gap between what the law in the books said, and what the people in the villages and towns actually did. While interpersonal disputes were meant to be adjudicated according to the Weberian scheme of the state's monopoly of violence, in reality those disputes were often resolved according to customs and practices that often seemed to have very little to do with the codified positive law. For Ehrlich, the application of the law involved, not the robotic matching of real-life happenings to an ethereal and abstracted Civil Code, but, rather, a great deal of human agency floating clear of the legal realm and drawing on norms better understood by the new discipline of sociology. (Rottleuthner 1987, 5) *Gemeinschaft*, in other words, was not an ideal imposed from above by the *Gesellschaftlich* corporatist state, but a process of messy discovery taking place in actual lived society far removed from state control.

Unlike his predecessors, Ehrlich was almost indifferent toward the existence of the state within the framework of actually-existing legal practice. Ehrlich's turn away from German legal idealism found expression in his theory of Free-Law:

> As a Free-Law advocate […], Ehrlich criticized the ideal of the seamless web of a codified legal order, and made clear that the decision in an individual case could not be understood as a logical derivation from general norms (or even concepts), performed 'with the aid of a hair-splitting machine and a hydraulic press'. Like Fuchs, he too emphasized the creative role, the personal moment, in the application of law. However, by this he did not intend that the

[14] Cf, e.g., "Pandektenrecht und deutsches Privatrecht," Hatoyama et al. (1916).

> private intuition of the judge be set free. Rather this is the point where his specific understanding of legal sociology came into play: when the law permits no orientation, the application of law should orient itself on social norms, on the norms of the law which was actually alive in society. In his legal sociology, Ehrlich stressed precisely the central role of society—as the totality of human associations—for the emergence and development of law. Legislation, jurisprudence, and judicial decision-making, by contrast, were considered secondary phenomena. The true legal science—understood as legal sociology—had to capture the law that was 'alive' in society. Traditional jurisprudence was blind to this sphere and only took into account laws and the norms of judicial decisions.[15]

For Ehrlich, the central question of law was this tension between the people and the state. The Pandekten idealists and strong-state advocates had things precisely backwards. Increasing the power of the state—to legislate, regulate, and control ever-greater swaths of private life and to co-opt ever more non-state institutions through promises of political inclusion—led only to greater corruption and a wider gulf between law and society. Left to their own devices, people actually fared much better without interference from the state. A political solution to social ills was therefore not even misguided; it was oxymoronic.

With the theories of Eugen Ehrlich we have a blueprint for foregrounding communities and communal custom and practice as the "groundwork" for an entirely new kind of law. But how can this new law be animated and deployed to challenge the power of the state? The answer lies in the works of American sociologist and historian William Sewell, Jr. In chapter four of *Logics of History*, for example, Sewell posits a relationship between structure and agency that is open to interventions and contingencies. (Sewell 2005, 124–51) Sewell's kinetic view of the interaction between people and institutions expands on Anthony Giddens's "duality of structure" and Pierre Bourdieu's *habitus* to envision complex of social, political, cultural, and economic influences that more closely approximates the reality of human life amid structural patterning. ((("By this [i.e., 'duality of structure'] he [i.e., Giddens] means that [structures] are 'both the medium and the outcome of the practices which constitute

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[15] Rottleuthner (1987, 5), citing Ehrlich, lecture at *Juristische Gesellschaft*, Vienna, April 3, 1903, reprinted in Ehrlich (1967, 196), and Ehrlich (1913, 196).

social systems' (Giddens 1976, 1979, 1981, 1984). Structures shape people's practices, but it is also people's practices that constitute (and reproduce) structures. In this view of things, human agency and structure, far from being *opposed*, in fact *presuppose* each other." (Sewell 2005, 127)) This approach "(1) recognize[s] the agency of social actors, (2) build[s] the possibility of change into the concept of structure, and (3) overcome[s] the divide between semiotic and materialist visions of structure." (Sewell 2005, 126–27) Sewell's rethinking of structural malleability is the key to setting legal-pluralist anarchy against the existing state, chipping away at the state one small interaction at a time. The dialectic is the key to the ongoing existence and substantive autonomy of the *Gemeinschaft* vis-à-vis the *Gesselschaft*, and especially the *Gesselschaft* writ large, the state.

The absence of a state short-circuits this dialectic, destabilizing the legal-pluralist *Gemeinschaft* and inviting reprisal, such as Stalin's against his enemies (including Pashukanis). Giving up the notion that structures themselves are negotiable, pliable, and subject, at least partially, to human agency—or, as Sewell put it, that structures (such as law) are "continually evolving outcome[s] and matri[ces] of process[es] of social interaction"—leaves a *Gemeinschaft* with no partner in the dialectic diminishment of the state. (Sewell 2005, 151) *Gemeinschaftlich* autonomy via legal-pluralist anarchy is much better accomplished by means of case-law interactions with state authorities. Case-law trials, even in the state's courts, are small-scale legal skirmishes, as it were, that afford small *Gemeinschaften* a fighting chance of winning small victories against state power and incrementally undermining the state's power.

This tension among law, society, and the state was summed up by Ehrlich himself, although in the context of legislation and not case law. The important point, however, is that, for Ehrlich, law was a means of *attenuating* state power, not augmenting it:

> Legislation is commonly considered the oldest, the original, the peculiar task of the state. In reality, however, the state becomes a law-giver only late in its existence. The original state is a purely military center of might and is concerned neither with law nor with courts. The original state, so far as it is not yet Europeanized, knows no legislation. We speak, it is true, of the legislation of Moses, of Zarathustra, of Manu, of Hammurabi, but these are only collections of judicial and juristic laws together with numerous religious, moral, ceremonial and hygienic provisions such as we can see in popular or popular-scientific writings.

> An oriental despot can, if he pleases, level a city to the earth or condemn a few thousand human beings, but he cannot introduce civil marriage into his kingdom.[16]

The more central planners work to bind up law and society through executive power, the farther law and society drift apart from one another. Local communities can achieve a measure of autonomy from state interference by acknowledging and reflecting the spontaneity and unpredictability of social order under the banner of legal pluralism, with jury trials as a key feature of this arrangement.

Also, when communities or their members have no choice but to interact with the state's courts, this helps to ensure that the state's judges will be forced to divorce their decisions from statist-ideological presuppositions. Legal-pluralist decentralization and the promotion of anti-statist jurisprudence are both effective at carving out spheres of autonomy for local *Gemeinschaften*. The gradual "withering away," one case at a time, of the state's monopoly on the justice process, along with the championing of legal pluralism and spheres of law separate from the state's legislative prerogative, are the two abiding promises of Ehrlichian jurisprudence.

III. SUEHIRO IZUTARŌ

In the ideas of Eugen Ehrlich and their animation when coupled with the theories of William Sewell we thus have a blueprint for reducing statism and recovering human freedom in our time. Through discrete dissociation from the jurisprudential machinery of the state via an Ehrlichian exercise of community-based common law, those who are willing may be able to attenuate the state's monopoly on "justice" (in the case of the state, this almost always means, simply, "arbitrary immunity from arbitrary violence") and effect real justice organically and in accordance with the natural law. What's more, Ehrlich's program does not even require that its practitioners repair to a commune and convene trials apart from the state's court systems. In fact, it is even more effective if the Ehrlichian practitioner turn the tables on the state by using the state's courts as an entrepôt for importing *Gemeinschaftlich* justice into statist jurisprudence. By means of case law, an Ehrlichian may

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[16] Eugen Ehrlich, "The Sociology of Law," under the heading "An Appreciation of Eugen Ehrlich," Pound (1922, 137), cited in Rokumoto (1994, 101).

be able to establish precedent and cultivate judges of conscience, such that pockets and veins of humanity may begin to appear within the statist apparatus. Eventually, if all goes well, the state will be defeated from the bottom up and the inside out. Without firing a shot, the justice-minded jurist will be able to bring the state to heel.

However, the example of someone who tried just such a project should give us pause. Suehiro Izutarō, a Japanese jurist, student of Eugen Ehrlich, and one of the founders of the law-and-society movement in Japan, returned from a period of research with Eugen Ehrlich determined to use case law to upend the Japanese legal system and bring about a quiet Ehrlichian revolution in Japanese society. Under Suehiro's plan, courts, instead of being adjuncts of the state, were to become levers of the disenfranchised people. The force of the masses, case by case, would be brought to bear on the courts, thus bringing the promises of that sweeping zeitgeist of liberalization and social change known as "Taishō Democracy" to the men and women in the street who remained without the right to vote.

But it was not so simple. Eventually, Suehiro was himself converted from Ehrlichian champion of the underclasses to legal technician in the service of the imperial state. Without grounding in principles and focusing only on Ehrlichian method, Suehiro fell into the state's powerful gravity field and turned against the original aims of his youthful Ehrlichian ambitions. His case, somewhat akin to Pashukanis's but with key differences, is thus also a warning of what can happen whenever someone tries to undo the evils of the state, even indirectly and even using Ehrlichian means. Without the teleology of anti-statism, incremental anti-statist activities run the risk of, conversely, amplifying state power and leading to the cooptation of would-be anti-statists.

Suehiro Izutarō began his legal career as a high statist. Like virtually every other law student of his time in Japan, Suehiro had been trained largely in the conceptual jurisprudence then fashionable in Europe and taught to view the changeless legal code as both the means and the end of courtroom reasoning. Legislatures, however constituted, were thought to produce timeless tables of law, into which the various cases that came before a judge's bench were to be fitted in order to conform to the Platonic ideals expressed in the Civil Code. (Aomi [1967] 2007, 154) In response to the ongoing disenfranchisement of the vast majority of the Japanese population, Suehiro began to formulate a plan to use case law as

a way to apply pressure on judges to turn aside from the state-centric mode of forcing individual cases to fit into the Japanese Civil Code, which had been modeled on the French and German codes. In doing this, Suehiro reasoned, judges would be obliged to pay attention to the details of the cases brought before their benches, thereby rendering individual plaintiffs and defendants at least visible to the judge, and therefore, in theory, more likely to receive the justice that was their due.

Under the statism of the Meiji Constitution of 1889, (Kawagishi 2007, 308–31, esp. 315–16) the court system, which might have exerted a measure of supervision over the political and administrative processes *qua* extensions of the imperial person, was almost exclusively a site for the one-sided application of state power (Takayanagi and Blakemore, in Mehren 1963, 9–10, and Haley 1991, 78). Cases—even those in which the judicial system was called upon to interpret actions of the legislature—were understood to be adjudicated in the emperor's name. (Kawagishi 2007, 314ff) Checkmated by the ascendancy of Prussian-style conceptions of the relationship between the individual and the state, liberals, natural lawyers, and other non-statists in Japan began to search for ways to involve those of the lower classes more fully in the political process. Suehiro realized that a systematic approach was needed in order to pressure judges to act as individuals, thus forcing a space to open up even within the state's Code-based legal order for the Ehrlichian "living law" practices of communities whose traditional practices had previously been invisible to the state. And the way to do that was to continually adapt statutory law to social realities by means of case law.

In particular, Suehiro attempted to develop, within the existing court system, an entirely new strategy for adjudicating cases, along with an entirely new body of case law as a result. By introducing the case method, Suehiro hoped to make visible to the courts the classes excluded from the judicial process, and also to make judges—and, ultimately, the political network as a whole—more responsive to those classes. Using Ehrlich's work on the law-and-society movement as a guide, Suehiro established the Civil Code Caselaw Research Group (*Minpō hanrei kenkyūkai*) at the University of Tokyo in 1921. In volume after volume of case-law reports, Suehiro and his university acolytes pounded away at the status quo in the Japanese courts, revealing again and again—by dint

of a simple investigation of the facts of a given case—that most supreme court (*Daishin'in*) judges could not possibly have sought to administer justice to those who appeared before their bench. Almost universally ignorant of the particularities of a given suit or case, the judge, as Suehiro and his research group showed, was most likely to have glanced at a brief summary of the case, applied some abstract tenet of the Civil Code, and then declared the case to be closed and the matter resolved. By publishing their case-law reports, Suehiro and his team exposed the travesties of Code-based justice, thereby applying intense social pressure on judges to act more equitably in making their decisions.

Suehiro saw "the security of the law" (*Rechtssicherheit*, *hōteki anzen*) as an important guarantee of autonomy for local *Gemeinschaften*:

> It is a certainty that those who hold law to form a perennially perfect *Geschlossenheit* [cohesive unity] will, of course, deny that legal decisions have the power to create law. […] The first and most important point we stress in the study of caselaw is not about how a court understands a phrase in a law text in an abstract, scholarly way. Nor is it the formal logic apparent in a decision, nor is it simply the conclusion itself. Judges are people who, when faced with the concrete details of a case, engage, unconsciously, in a complex set of behaviors that goes beyond formal logic and rigid reasoning. The essential point of the study of caselaw is to attempt to arrive at a thoroughgoing, concrete legal security, *Rechtssicherheit*, by discerning fixed principles from within that set of behaviors.[17]

This security of the law, bought by pushing back against the state in an ongoing, low-level dialectic via the medium of the caselaw, was to be a key transitional strategy in Suehiro's legal-pluralist anarchical scheme.

In Suehiro's case, however, the absence of underlying legal principles and of a clear anti-statist teleology eventually left him scrambling for the security, not of the law, but of the state, when the political order around him began to break down. As Japan entered a phase of autarky during its high-imperial expansion into Asia and the Pacific, the state gradually expanded to conquer even internal epistemes, such as legal studies, and co-opt formerly non-state and anti-state actors into the imperial project. The state became the nation, and the nation became the state. In this milieu, Suehiro proved helpless to resist state power. Proclaiming the

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[17] Minpō Hanrei Kenkyūkai (1922, 1877). Cf., e.g., Ernest Gellner's *geschlossener Handelstaat*, or "autarchic modern state," in Gellner (1983, 107).

rendering of jurisprudence as a scientific pursuit, with statistical data to be used in both legislation and interpretation of laws, Suehiro proposed strengthening the command economy by carrying out surveys of places that had recently come under the control of the Japanese Empire.[18]

For example, in the October, 1938 issue of *Hōritsu Jihō*, Suehiro laid out the justifications for surveys of North China, noting that:

> Henceforth, the most important thing that we can do for the sake of Japan's political contact with the Chinese masses is first to learn what legal customs are current among those masses. […] The most important preparation that we can make is to respect those [legal customs] and to continue using them, thus regulating our relations with them [i.e., the Chinese]. […] Even if, for instance, we refuse to do this on the grounds that this kind of survey would have no political value, it would still have a tremendous scholarly significance to do this kind of large-scale survey of the legal customs current among the Chinese masses, as such a survey should have been carried out before but so far has not sufficiently been undertaken. (Suehiro 1938, 2–3)

The order of the justifications is significant. As legal history scholar Ishida Makoto argues:

> It is noteworthy here that [Suehiro's] emphasis on the political significance of the surveys comes before [his emphasis on] their scholarly significance. From the very beginning, Suehiro called for this survey with a clearly political intention to contribute to the control of occupied territory in the aftermath of the start of the Second Sino-Japanese War.[19]

The earlier, Ehrlichian Suehiro would have couched seeking out the "social facts of law" (*Rechtstatsachen*) as they prevailed among a non-state setting.[20] However, the Suehiro of 1938 foregrounded the fact that one of his express goals in proposing, organizing, and completing the survey was to aid in the Japanese government's administration of recently-conquered Chinese territory.

In the introduction to a work on his 1930s and 40s China surveys, Suehiro wrote:

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[18] Ishida Makoto, in Rokumoto (2004, 170), citing Suehiro (1941, 61–62).

[19] Ishida, in Rokumoto (2004, 170–71), citing Suehiro (1938, 2–3). See also Suehiro, "Hōritsu to kanshū: Nihon hōri tankyū no hōhō ni kansuru hito kōsatsu," in Chūgoku nōson kankō chōsa kankōkai (1955, 25–32); quotes taken from 27.

[20] See Coutu (2009, 593).

> Of course, neither economic nor social laws are absolutes. In whatever way, the dictates of political disingenuousness stand to change [these laws] quite extensively. This goes without saying. Nevertheless, we must very severely admonish [those who would] fall into the way of thinking which ignores completely the authority of [economic and social] laws, and hold that political power should be given free rein to shape everything. While I think that, in order to prevent the damage that would result [from such an approach], we must make preliminary efforts to separate and set in opposition the state, which is the symbol of political power, and society, which is the symbol of social laws, I also think that the scientific method is the most suitable for studying the state, politics, and law. (Chūgoku nōson kankō chōsa 1955, 25–32; quotes taken from 31)

The scientific method notwithstanding, Suehiro wrote these words as an introduction to a report on surveys carried out for the more efficient administration of areas of China conquered by the Japanese Imperial Army.

IV. CONCLUSION

The failure of Suehiro to build up communities apart from the state and to continue to attack the state incrementally using case law led to his identification with the state and the end of his original, Ehrlichian anti-statist program. Likewise, Pashukanis was executed by the state for naively claiming that the state would eventually wither away with the ascendancy of Marxist ideology. In light of these historical realities, I propose a blending of the insights afforded by Suehiro, Pashukanis, Ehrlich, and Sewell in order to outline a general program for establishing communities as independent as possible from state authority, while also voluntarily interacting with the state in order incrementally to attenuate that authority, acting as a constant corrosive against the self-aggrandizement of the state's leaders and agents.

First, as William Sewell's insights into structures and events make clear, the state is a given and is not going to disappear by force. If anything, force used against the state only makes the state stronger. As Evgeny Pashukanis learned, even those who do nothing more than write books about the state's disappearance are often deemed a threat to the state's monopoly of violence.

But, second, the state *can* be ignored, at least to some extent. Amish communities and American Indian tribes, along with monasteries and other non-statist *Gemeinschaften*, are witness to the

fact that isolation from the state often affords more autonomy than does openly challenging the state or theorizing its dissolution.

Third, an Ehrlichian legal order unique to a given community and evolving from within it, such as the English Common Law or Germanic tribal law did, is a virtually ready-made way to ensure stability in an anarchical community. Jury trials are the best way to ensure that law does not become tyranny over society. Furthermore, state courts should, and can, be avoided at all costs in order to maintain *Gemeinschaflich* autonomy as far as possible.

Fourth, when it becomes necessary to interact with state courts, a case-law method is best. Case law forces judges to think using synderesis and not statist ideology, prying them away from their Code-based justifications and entangling them in the limiting skeins of the natural law. As a bonus to case law, each case becomes precedent that, ideally, incrementally undermines Code law, thus attenuating the power of the state while also injecting more of the "living law" into the jurisprudential corpus of a given state.

The state is a threat to the freedom of people everywhere. John Hasnas has rightly argued that anarchy is "obvious" and that our human communities and daily lives do not require the state. Indeed, the state, in any form, is not only deleterious to human freedom but positively hostile to human life and incompatible with human flourishing. Rome will not be un-built in a day. It will take patience, planning, and no small degree of wiliness. But it can be done. Taken as a set, the examples I offer here show us how the state can be taken on and, eventually, made to wither away.

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