Reclassifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field

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This Article will demonstrate how, throughout the 20th century, American scholarship on Russian law has not progressed as a steady accumulation of facts, but instead has been driven by changing American political anxieties and hopes regarding Russia's political place in the world. Although such politicization might have been excusable when Russia lay closed to the West, it is unacceptable today, as there are now unprecedented opportunities to engage in empirical research on Russian law.

To facilitate a more empirical and accurate understanding of Russian law, this Article will propose the creation of an ideal type model for Russia law that will operate much the way the civil law and common law ideal types do in classifying and comparing Western European and North American legal systems. Scholars should begin the construction of this ideal type by exploring whether Russian law is sufficiently different from the civil law family to merit another ideal type. This ideal type approach will normalize our understanding of Russian law, encouraging us to ask the same questions of Russia's legal system as we do of other European legal systems. Such normalization will also help us better understand contentious debates surrounding Russian law, including whether it is a Western style legal system, the effectiveness of rule of law promotion, and suitability of western legal transplants in the region.
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I. INTRODUCTION

Law is a system (or order) of social relationships, which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class.\(^1\)

Statements from Russian legal scholars like the one above have long been rightly characterized by American scholars as the naked reflection of communist propaganda. In making these dismissals, however, American legal scholars have ignored the fact that much

\(^1\) Peter Stuchka, Selected Writings on Soviet Law and Marxism 143-44 (1988).
of their own scholarship on the Soviet and post Soviet Russian legal system has also been distorted by American political values and beliefs.

Although not subject to the same central government control as its Russian analogue, American interpretive scholarship on Russian law has been shaped by shifting American anxieties and hopes regarding Russia’s political position in the world. For instance, in describing Russian law, scholars have allowed changing perceptions of Russia to spawn contradictory views: they have envisioned Russian law as, alternatively, a system based on the chaotic application of mass terror, a totalitarian system where law is the means of oppression for one all-powerful leader, and a system of doctrine that hardly matters in day-to-day life. The same shifting political atmosphere has affected the comparison of the entire Russian legal system with other legal systems: scholars have argued that Russia’s legal system is most analogous to the legal systems of Eastern Europe, China, or South America.

These inconsistent accounts of Russian law cannot all be accurate. It is true that, at a formalistic level, written law can change rapidly: the lawmaker need only issue a new set of laws. However, at a more meaningful level of understanding, these new written laws will naturally interact with stable social practices, norms, behavior, and expectations. Understood in this fuller sense, law simply does not change overnight; it does not have some sort of "inde-

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5. During the Cold War period, Soviet Russian law was compared to both the legal systems of Eastern Europe and the Chinese legal systems. See John N. Hazard, Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States (1969). After the fall of the Soviet Union, particularly within the rule of law area of the transition literature, Russian law has been compared to the law in South American countries. For a good summary of how the legal systems of post-communist countries like Russia were analyzed alongside South America, see Thomas Carothers, The Rule of Law Revival, 77 Foreign Affairs 95 (1998).
6. For a classic statement of the importance of societal norms, expectations, and attitudes to the interpretation of the law, see Lawrence Friedman, The Legal System: A Social Science Perspective (1975). For the other side of the debate, but one that still acknowledges the relationship between society and law, see Alan Watson, Society and Legal Change (1977).
This Article will seek, therefore, to both describe how political values have fueled these misperceptions of rapid legal change and suggest a more accurate and culturally situated understanding of Russian law.

In today’s globalizing world, these shifting interpretations have more than theoretical and descriptive consequences; they carry a significant practical value. First, Russia’s vast size, strategic geopolitical position, colossal nuclear arsenal, and massive oil and gas reserves place it at the very forefront of international politics and relations. Therefore, reasoned policymaking and effective commercial transactions demand a deeper and less politically contingent understanding of Russia’s legal system. In fact, attempts at promoting the rule of law and democratic constitutionalism in the wake of the fall of communism have seriously suffered in the last fifteen years due to our failure to understand Russian law.

Second, from a historical vantage point, Russia’s legal system has influenced the development of law in Eastern Europe and Asia; therefore, an understanding of the Russian legal system is critical in comprehending the evolution of law in Eurasia. Finally, from an academic standpoint, Russia’s continuing legal transformation in the wake of communism offers important theoretical lessons to scholars interested in the dynamic relationship between law, culture, norms, and political change. Indeed, the transplantation of Western legal institutions into Russia and their effects sheds sub-

8. A recent excerpt in the New Yorker discussed Russia’s growing influence as an energy superpower: “With thirty percent of the world’s gas exports, Russia can impose its will for one simple reason. ‘The entire world is obsessed with energy security and resources,’ Fyodor Lukyanov, the editor of the quarterly journal Russia in Global Affairs, told me. ‘You need it. We have it. It is up to us to decide how to deal with that. India and China are seeking new sources of energy to secure their very rapid growth. The U.S. is lost in its war in Iraq, the European Union has no idea what it is anymore. And then there is Russia: stable, wealthy, controlled very solidly. No opposition. There is really a feeling of superiority, a sense that Russia is now an indispensable nation, as Mrs. Albright said just a few years ago about the United States.” Michael Specter, Kremlin Inc., NEW YORKER, Jan. 29, 2007. Available at http://www.newyorker.com/reporting/2007/01/29/070129fa_fact_specter?currentPage=7.
9. There has been considerable soul searching in America regarding Russia’s failure to consolidate democracy. See Russia’s Wrong Direction: What the United States Can and Should Do, REPORT OF AN INDEPENDENT TASK FORCE NO. 57, COUNCIL ON FOREIGN RELATIONS (2006). Also, the Journal of Democracy sponsored a number of responses to the question of “What Went Wrong in Russia?” 10 JOURNAL OF DEMOCRACY 3 (1999).
stantial light on the normative and institutional underpinnings of Western legal systems as well as suggesting the possibilities for effective legal transplantation in the future.\footnote{11}{Alan Watson, \textit{Legal Transplants: An Approach to Comparative Law} (1993); Inga Markovits, \textit{Exporting Law Reform – But Will It Travel?} 37 \textit{Cornell Int’l L. J.} 95 (2004); Daniel Berkowitz, Katharina Pistor, Jean-François Richard, \textit{The Transplant Effect} 51 \textit{Am. J. Comp. L.} 163 (2003).}

For all these reasons, this Article will explore the particularly acute problem of politicization in American scholarship on Russian law. The strong influence of mainstream American political values on this scholarship is not surprising: scholarship on Russia has generally been of considerable policy interest and the line between policy papers and academic work has often been blurred. What is surprising, however, is that to date no scholars have explored the exact mechanisms of this politicization, its tangible outcomes, or proposed any solutions to the problem. This Article will address these questions for the first time, seeking to better understand both how internal American anxieties about Russia have been incorporated into comparative legal scholarship and also what possible solutions might be found to this dilemma.

To do this, this Article will be divided into two parts. Part II will explicitly examine the mechanisms and outcomes of academic politicization in American comparative law scholarship. A clearer understanding of this process will provide new insights into the ways that academic scholarship incorporates dominant contemporary political images and values. Part III will then suggest a new way of understanding Russian law that will help counter these mechanisms of politicization. Such a new understanding will depoliticize understandings of Russian law, providing scholars with an opportunity to advance one of the fundamental goals of comparative law: the ability to accurately and constructively compare and contrast legal systems across the globe.

\textbf{A. Overview of Part II: The Process of Academic Politicization and Its Outcomes}

To understand the process of academic politicization, it is important to understand the methodological underpinnings of comparative legal scholarship. To grasp the diversity of legal systems across the world, comparative legal scholars have grouped geographical regions into legal families. Each legal family is a model
formed by abstracting the basic commonalities of the region’s legal system from a given set of information. The two best-known legal families or models are the common law and civil law.

This Article will argue that legal families in comparative law are best understood as ideal types. Developed by Max Weber, an ideal type has two main characteristics. First, it is a form of historical typology: it is a model that seeks to abstract the basic generalities of a given phenomenon from historical information. As Weber wrote “it is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, more or less present and occasionally absent concrete individual phenomenon, which are arranged according to the one-sidedly emphasized viewpoints into a unified analytical construct.”

Second, the ideal type is not meant to represent the concrete reality of a particular phenomenon at any one time or be verifiable like a scientific hypothesis; on the contrary, it is a “mental construct” of selected elements of historical reality. Therefore, the ideal type becomes an organizing principle or yardstick around which scholars can build and compare their work rather than a universal model that other scholars should follow or mimic. Weber saw this relational function of the ideal type as a way of avoiding the problem of subjectivity in social science modeling - a problem that stemmed from the inevitable tendency for social scientists to attribute meaning to models of human behavior and institutions.

The two best known legal families—the civil law and common law—embody these principles. First, they are both grounded in historically generated commonalities. For instance, the common law family is defined by its origins in medieval England and its later spread to the English colonies. It is due to this shared history that the legal systems in the former English empire share common-
alities, including an adversarial procedure and judge-made law. Similarly, the civil law family originated in Western Europe and was exported to Western European colonies; these regions’ legal systems are characterized, among other things, by an inquisitorial procedure and a tradition of judges following detailed legal codes in making judicial decisions.

Second, comparative law scholars constantly challenge and revise these ideal conceptions of the common law and civil law. For instance, Alec Stone Sweet’s scholarship focuses on the distinction between judicial review in common law and civil law countries; however, he argues that the differences are not as pronounced as might be suggested by a formalist understanding of the civil law and common law models. Scholars also challenge the ideal characteristics of each system. For instance, Amalia Kessler’s recent work has pointed out the historical use of inquisitorial procedure in the American common law system: she describes how the inquisitorial tradition was widely used within the common law equity courts.

The classification of the Russian legal system, however, has not been based on an ideal type. Instead, comparative legal scholars have classified Russian law based on a politically contingent model. By political model, I denote an interpretive academic framework that contains contemporary political assumptions, values, and beliefs. Such political models have placed far too much emphasis on the consequences of political changes in understanding the Russian legal system. Furthermore, they have acted in much the same way that Thomas Kuhn argued that paradigms have influenced scientific research: they have purported to represent re-

16. Mary Ann Glendon and others write that “comprehension of the rule of law in England today, and its litmus role in other common law systems, calls for an understanding of the cardinal incidents in English history which were generative of the slow but persistent development of institutions which comprise the common law tradition.” MARY ANN GLENDON, PAOLO G. CAROZZA, & COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON WESTERN LAW 306 (2007).

17. As Mary Ann Glendon and others write, “[w]hen we refer to some of the world’s legal systems with a common name, such as ‘Romanist’, ‘Romano-Germanic’, or ‘civil law’ systems, we are calling attention to the fact that, despite their similarities to other legal systems and despite national differences among themselves, these systems share a distinctive heritage.” Id. at 52.


ality and predisposed scholars to assign certain meanings to Russian law, ask particular questions of its development, and look for specific conclusions in their final analysis.  

In fact, because of Russia's highly sensitive political relationship with the West and the political anxieties that this has created in the United States, the dominant political model has tended to confine the field of legal enquiry to a set of limited contemporary political and economic questions. Indeed, it is from this connection to contemporary political agendas that the model draws its power: such a model is then valid until political values and attitudes change sufficiently, necessitating the evolution of a new dominant model (see Figure 1). Each time a new political model is adopted, interpretive scholarship pursues a different path, often ignoring the bulk of previous scholarship. Such shifts weaken understanding and provide a false impression of Russian legal evolution.

In sum, the problems with American comparative legal understanding of Russian law throughout the 20th century are a result of the fact that scholarship has not been grounded on a ideal type but instead has been driven by a political model. Thus, knowledge of Russian law has not progressed on the basis of a critical comparison of historical work to an ideal, but rather has been contingent on changing political circumstances. In fact, in the last ninety years, it is possible to trace four distinct politicized approaches to Russian law.

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20. Kuhn defines a paradigm as a set of received beliefs that then exerts a deep hold on the mind of the scientist and acts as a conceptual box for the classification of all future information. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 5-15 (1962).

21. Thomas Kuhn defines a paradigm shift as a shift in response to an anomaly that "subverts the existing tradition of scientific practice." Id. at 6 The frequent changing of political models in response to a new political atmosphere is a similar process. Id. at 79-85.
First, during the inter-war period (1917-1945), the rise of communism in Russia and communism's spread to much of the former Tsarist Russian empire presented a political and ideological challenge to the West. However, due to a lack of academic sophistication in the study of Russia, no dominant comparative model had yet been created within which to situate these contemporary values in an academic discourse. As a result, scholarship was often the simple reflection of the writer's own political reaction to the rise of communism.

Second, during the early Cold War period (1945-1960), the bipolar rivalry between the United States and the Soviet Union led to aggressive funding of Russian studies. This funding spawned an increasingly sophisticated academic community which incorporated McCarthy-era fears of communism and an atmosphere of pitched ideological struggle into a new political model: the totalitarian model. This political model envisioned the Soviet Union as a system bent on the subjugation of the entire population to the will of the dictator. Most comparative scholars— with a traditional private law focus—saw Russian law through this totalitarian model.22 As a result, they interpreted Soviet Russian law as morally repugnant and unworthy of study: for them, it was the use of a civil law system for totalitarian goals.

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Third, during the late Cold War period (1965-1991), decreased brinkmanship and a period of detente between the Soviet Union and the United States created a less highly charged political atmosphere for research into the political and ideological nature of the Soviet Union. This politico-ideological emphasis fit well with the comparative work of a set of legal scholars influenced by legal realism, an interpretive legal philosophy that highlighted the importance of political belief and ideological values in understanding the law.\(^{23}\)

Using legal realist discourse, these scholars created their own political model tailored to the Russian legal system. They argued that Soviet law was the progenitor of a unique family of ideologically oriented law: the socialist model.\(^{24}\) This model – one which argued that the Soviet Russian legal system sought to end class divisions and build a socialist world - would be accepted as the third major legal model in the world next to the common law and civil law models. Although the socialist model was useful in noting similarities in legal ideology between socialist countries, it was methodologically problematic and overemphasized the ideological and formalistic elements of the Soviet Russian legal system at the expense of more historical and empirically grounded understandings of Russian law.

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\(^{23}\) Although legal realism was a movement of the 1920s, 30s, and 40s, its influence lived on amongst those who had been trained in it during the inter-war period. See John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).

\(^{24}\) See Hazard, *supra* note 2.
Finally, in the post-Soviet period (1991-present), the political and ideological climate changed markedly, necessitating a new model. Amidst rhetoric that heralded the inevitable triumph of Western liberal democracy, the American government and private universities enthusiastically funded projects seeking to uncover the keys to successful democracy and market building. The transition model was born: Russia and the rest of the former communist world were seen as in transition to free market democracy. Inspired by the transition model, scholars began to understand Russian law in the morally loaded terms of the law and development scholarship, which focused on the value of American legal rules and institutions in the promotion of democracy and free markets abroad. In particular, they analyzed the barriers that current Russian law erected to transition and proposed Russian legal reform in order to accelerate Russia’s ongoing transition to modern, free market democracy. This new transitional model of Russian law—which survives to this day—broke new ground in exploring the transitional and economic aspects of law but still only captures one dimension of Russian law.


26. For a scathing critique of American law and development scholars’ attempts to both theorize and export American legal institutions abroad in order to promote development (free markets and democracy) during the 1950, 1960s, and 1970s, see JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).
B. Overview of Part III: Towards a New Model

If the existence of political values in models of Russian law has created so many problems in our understanding of Russian law, why not abandon models altogether and embark upon a model-less approach to Russian law? At least one scholar has advocated this approach. Yet, if we were to adopt such a position, comparative scholars would have to limit themselves to the role of translators of new Russian legislation and codes. In fact, a model is essential in organizing interpretive scholarship and facilitating important contributions to scholarly understanding. Thomas Kuhn writes that no body of facts "can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological belief that permits selection, evaluation, and criticism." In the absence of an explicit model, any interpretive scholarship would inevitably be controlled by an external conceptual framework or unspoken model, which would incorporate the same contemporary political and economic imperatives as pre-understanding: providing a set of unchallenged assumptions, principles, and values that scholars would use to filter their sources and carry out their legal analysis. Thus, to ensure that comparative legal scholars are always aware of their pre-understandings when engaging in interpretive work, Part III will address issues of comparative law classification and suggest a more accurate model for understanding Russian law.

Part III will argue that a more appropriate model for the study of Russian law is an ideal type. Such an approach will bring our

28. In the comparative law world, Mark Van Hoecke and Mark Warrington have argued that appropriate models are critical in ensuring that comparative lawyers do more than compare laws, but compare legal evolution, culture, and mentalité. Legal Culture, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, 47 INT'L & COMP. L.Q. 495 (1998).
29. KUHN, supra note 18, at 16-17.
comparative approach to Russian law in line with the current ideal type approach of the common law and civil law families. In so doing, we will be able to normalize our understanding of Russian law, asking the same questions of it that we do of the legal systems in Western Europe and North America.

At the same time, an ideal type approach to Russian law will also solve two of the most pressing problems that have undermined previous research. First, it will solve the problem of politically contingent models. In fact, as an explicit practice in historical typology, an ideal type will encourage a deep empirical investigation of the broad historical roots of Russian law. Such broad, empirical historical work is now possible: since the fall of the Soviet Union, the archives have opened and scholars are increasingly basing their historical work on primary source documents. This deeper survey of Russian law in the longue durée will thus help to prevent politicization by providing us with more information on the deep-seated, long-term characteristics of Russian law.33

Second, an ideal type has the advantage of explicitly rejecting the concept that the model represents the reality of Russian law (as the political models have in the past); instead, the ideal type is a point of comparison for future scholarship. Therefore, with the ideal type, as new empirical research is produced on Russian law or current information is refuted or falsified, scholars will then debate whether the ideal type then needs to be changed in light of the new information. In this way, this continual reconsideration will provide the mechanism that will stop the ideal type model from propagating previous subjective determinations of meaning the way that political models have in the past. This will solve another of the key problems with political models: their tendency to tie shifting political meaning to Russian law.

What ideal type should be used to understand Russian law? The full construction of an ideal approach to Russian law lies outside the scope of this paper. Part III, however, will argue that scholars should begin this search for an ideal type by exploring whether Russian law is sufficiently different from the civil law ideal to warrant its own ideal type. It will conclude by describing some of the

33. The term ‘longue durée’ comes from the French Annales school which rejected history as a series of events but instead emphasized the search for the long-term continuities within history. Such a search for deeply rooted continuities is an integral part of building an ideal type. See Robert Putnam, Making Democracy Work: Civic Traditions in Modern Italy (1993).
promising directions in historical scholarship that will aid this exploration of the differences between Russian law and the civil law family.

II. POLITICAL MODELS AND AMERICAN PERCEPTIONS OF RUSSIAN LAW

This Part will survey the political models that have driven scholarship on Russian law for the last ninety years. Two main problems with political models will become apparent. First, political models focus the attention of the researcher on short term, politically charged factors at the expense of the long-term continuities that have bounded Russian law over the centuries. Second, these political models tend to be highly transient: they are only valid until political values and attitudes change sufficiently, necessitating the evolution of a new dominant model. Each time a new political model is adopted, interpretive scholars often pursue a different path, ignoring or discrediting the bulk of previous scholarship.

A. The Inter-War Period: No Model, 1917-1945

Between 1917 and 1945, no consensus political model emerged to interpret Russia. This absence was the result of two factors. First, there was no agreement within Russia about the future direction of the revolution. Within Soviet law, for instance, a contentious debate questioned whether a socialist state should have a legal system at all. For instance, one of the key Soviet legal thinkers, Evgenii Pashukanis, argued that law was essentially a bourgeois mechanism based on the exchange of commodities and would therefore have no place in a fully developed socialist system. 34

Second, in the American academic world, scholars had little access to reliable sources that might hint at the changes that Russia was undergoing. 35 Further, even if they had access to these sources, there were no adequate resources to train sophisticated Russian specialists:

There were no Russian Institutes or Russian Research Centers. Even the language was taught only to those who


wished to become professional Slavists...[the student] was expected to plod the weary road through Church Slavonic and old Bulgarian as he worked his way forward in time...the study of European history was centered on western and central Europe, and those who did research in the field thought it quite sufficient to know only French and German.36

To make things worse, comparative legal scholarship in America was in its infancy.37

Without a dominant model, the scant American comparative scholarship on Soviet law largely coincided with the author’s personal political view of Soviet Russia and the Bolshevik Revolution. Amidst the Red Scares and clashes between labor and management in the early 1920s, the Soviet Union was seen as a threat to American national security.38 As a result, many authors interpreting Russian law incorporated their own fears of Russia into their scholarship and portrayed Soviet law as the dictates of a terror-based state. Allan Carter’s 1922 article “The Bolshevist Substitute for a Judicial System” exemplified this kind of scholarship.39 Carter was an American governmental aide who based his article on his research regarding whether the American government should recognize the new Soviet government. Relying solely on English translations of Lenin’s speeches and British intelligence reports, Carter’s descriptions mirrored contemporary American fears of the Soviet Union. For instance, he wrote, “[t]he principal institutions set up by the Bolsheviks...bear no resemblance to a judiciary...[and] have been steadily developed and centralized into one vast machine which has been able for the first time in modern history to keep an entire nation in a state of virtual slavery.”40

36. Id. at 189.
37. Comparative law was not taken seriously in American law schools until after the Second World War. A survey carried out in 1952 suggested that comparative law was beginning to be introduced into American law schools but was still not seen as an important course and was largely reserved for graduate law students. Edward D. Re, Comparative Law Courses in the Law School Curriculum, 1 AM. J. COMP. L. 233 (1952).
40. Id. at 346.
Russian émigrés who had fled the revolution and were now teaching at American universities revealed their personal frustrations with the Russian revolution in their scholarship. As a result, much of their work focused heavily on the role of terror in the Bolshevik Revolution and did not attempt to mask their level of disdain for the system. For instance, one such émigré, Pitirim Sorokin, who had once been Chairman of the Department of Sociology at the University of Petrograd before the revolution, could hardly conceal his disgust for the new legal system when he wrote, "[t]he Soviet justice (sic) and courts are really poor and typical of any mad, tyrannical regime." 41

As America sank into the Great Depression, scholarship emerged which reflected the personal agendas of leftist intellectuals who desperately wanted to see Soviet Russia as a country that offered an alternative approach to depression-era America. Much of this work regurgitated pre-packaged Soviet political propaganda, portraying the Russian Revolution as a grand experiment in the creation of utopia. Mary Calcott’s *Russian Justice* exemplified this type of scholarship, providing a glowing appraisal of Soviet criminal law as a system that was making a genuine attempt at "humane" and "effective crime prevention." 42 She based these conclusions on her "own judgment in regard to prisons and courts" as well as her choreographed visits to the Soviet Union, in which she specifically acknowledged her special debt “to the Assistant Attorney General of the USSR, Professor A. J. Vishinsky, who gave valuable time for appointments.” 43 As if sensing that her sources might not be reliable, she also naively claimed that her research and findings were “thoroughly checked for accuracy of statement by a member of the Commissariat of Justice in Moscow.” 44 On the whole, such unsophisticated work did little to advance understanding of Russian Soviet law.

### B. Early Cold War Period: The Totalitarian Model, 1945-1960

The Second World War and the beginning of the Cold War transformed American comparative legal scholarship. America was forcefully pulled out of its isolationism. American academia’s rela-

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43. *Id.* at ix.
44. *Id.* at 10.
tionship with Russia was transformed. Gone were the days of learning Church Slavonic in order to learn Russian. On the contrary, the growing rivalry between the United States and the Soviet Union induced the American government to actively encourage research into every aspect of its rival's operations in order to become more effective in combating the Soviet Union's growing influence. Stephen Cohen has described this interest in the Soviet Union as a "booming growth enterprise in American academic life from the late 1940's to the middle 1960's."45

Many of the newly trained political scientists, Sovietologists, and historians who emerged situated contemporary fears and anxieties about Russian power (typified by McCarthy's interrogations of Americans for communist sympathizing) within a sophisticated academic model: the totalitarian model.46 This totalitarian model envisioned Soviet Russia as a state which suffered under a system characterized by "a form of personalized rule by a leader and an elite who seeks to dominate both society and the regular legal structure which is called the 'state.'"47 This model would emerge as the dominant mechanism for understanding the Soviet Union in the early Cold War period.

The totalitarian model had a powerful influence on a small, but burgeoning, group of mainstream American comparative law scholars. These scholars - most notably Alan Watson, Rudolph Schlesinger, and Wolfgang Friedmann - saw the primary goal of comparative law to be the comparison of the private law systems of the civil law and common law systems.48 Looking through the lens of the totalitarian model, they saw nothing more in Soviet law than a civil law system that was being utilized by an autocratic regime to subject the entire nation to the will of the dictator.49 Wolf-

46. See Karl Popper, The Open Society and Its Enemies (1945) and Hanna Arendt, Totalitarianism (1951).
47. Leonard Schapiro, Totalitarianism 102 (1972).
48. Their skepticism for the socialist model was echoed in England as well. F. H. Lawson, Professor of Comparative Law at Brasenose College, Oxford, also saw nothing special in Soviet law, writing: "apart from their Marxist power slant, [Soviet law] is not very different from what is done in most peoples of advanced civilization; and they have not been to any extent pioneers." F. H. Lawson, Book Review, 21 U. CHI. L. REV 780, 783 (1954).
49. Western European immigrants dominated American comparative law. Two of the most important - German-born immigrants Friedmann and Schlesinger - incorporated their own distaste for Nazism into their suspension of Soviet law. See Mathias Reimann,
gang Friedmann typified this approach, arguing that there was nothing unique about the Soviet legal system. For him, Soviet law was simply the product of "a totalitarian government" and therefore of little interest to serious comparativists. This negative approach typified mainstream comparative law's view that Soviet Russian law was simply not worthy of serious comparative study.

i. Hazard and Berman as Dissidents: Soviet Law through a Legal Realist Lens

Two American scholars, however, did find Russian law worthy of study. John Hazard and Harold Berman rejected the totalitarian denial of the importance of Soviet Russian law during the early Cold War period. Both had extensive first hand experience with the highly politicized nature of the Soviet legal system and had strong backgrounds in legal realism. As a result, they saw the Soviet Russian legal system as one that deserved study because it suggested the deeply political nature of law. Indeed, for both men, legal realism's emphasis on the relative unimportance of the law on the books fit with their conception that Soviet Russian law was not a civil law system that served the interests of an all powerful leader, but one that was unique because it was driven by powerful political and ideological undercurrents. Although they were aware that the Soviet code resembled the French and German civil law legal codes, both argued that Soviet law was fundamentally different. Viewing Soviet law through a legal realist prism, they argued that Soviet law was different because it was one of the chief mechanisms in the communist political and ideological reformation of Soviet Russia.

John Hazard had first hand experience with the political nature of Soviet law. While a student at Harvard Law School, he had forged a close relationship with the legal realist Roscoe Pound, who had first argued that the law must more closely incorporate sociology and politics. On Pound's recommendation, Hazard had been the first American student to study law at the Moscow Juridical Institute in 1933. While in Moscow, Hazard sat through classes stressing the critical importance of Marxist-Leninist political ideology in


51. Although Pound became more of a formalist conservative in his later years, Hazard was influenced by him while he was still in his early, legal realist stage.
the Soviet legal curriculum. During the Second World War, Hazard became highly involved in coordinating allied aid to the Soviet army.

Consequently, Hazard found the underlying basis of Soviet law to be the fulfillment of the goals of Marxism-Leninism. His scholarship, therefore, sought to highlight these links between political ideology and Soviet law. He described the development of legal theory in the Soviet Union as a political project: "Soviet law reflects closely the economic and political condition within the USSR." His first major book, Law and Social Change in the USSR, brought together many of his articles and took a similar political approach. He later recollected, "this small volume has emerged from the author's long standing desire to place in brief compass a consideration of the manner in which the formulae of the law and the institutions of the lawyer have been utilized to achieve political ends." Furthermore, Hazard was not averse to pointing out what he felt were positive elements of Soviet law. In "Socialism, Abuse of Power, and Soviet Law", Hazard described how Soviet law provided safeguards against the growing power of the state, directly contravening the totalitarian model.

Hazard used his political vision of Soviet law to justify the teaching of Soviet law in American law schools. Although it was clear that very few of his students would ever travel to Soviet Russia or have any practical use for Soviet legal doctrine, he saw the study of Soviet Russian law as important in the ideological struggle between the Soviet Union and the United States. Studying the two systems side by side, he felt, would show the important animating values behind each of the system's legal rules and would suggest the moral superiority of the American system over the Soviet one.

In an article from 1951, he outlined his vision of Soviet legal studies as a form of political and ideological training:

52. Indeed, Hazard had been in the Soviet Union when Pashukanis' ideas that socialist law was inevitably bound to wither away were repudiated by the Soviet ideologues. See John Hazard, Recollections of a Pioneering Sovietologist (1984).
56. Id. at ix.
It is possible to utilize comparative law in the American laws and for convincing American law students of the desirability of their system of law. The field may be broadened to convince citizens of non-Soviet states of the preference of the systems of law, which are in effect in those states over the system of law in the Soviet sphere of influence. In this way the study of comparative law could become an instrument in the current ideological struggle by which those who protect the system of law, namely the future practitioners, prosecutors, and judges, may develop at any early stage in their education an appreciation of the values which their system protects and a determination to see that these values are maintained.\(^5\)

He further emphasized this politicized view of comparative law by discussing the importance of training foreign lawyers studying in the United States. "[T]he political advantages of comparative law seminars at the graduate level have been appreciated . . . . [I]f we in the United States hope to foster values which we cherish as essential to the preservation of freedom throughout the world, we must win friends."\(^5\) For Hazard, law was a key battle ground in the Cold War and law schools had to face their responsibilities in countering Soviet legal propaganda.

Harold Berman took a different politically based approach to Soviet law. A fluent Russian speaker who had been heavily involved with the Soviet Union during World War II in the European theater of operations, Berman had considerable Russian expertise. He categorically rejected the totalitarian model's approach, stating, "[I]t is a mistake to view Soviet law as merely an instrument of dictatorship."\(^6\) Instead, drawing from Karl Llewellyn's more romantic, pseudo-spiritual strand of legal realism,\(^6\) he emphasized the fact that Soviet Russian law was unique because of its "parental" nature. A concept developed by Llewellyn prior to World War II, the parental function of law suggested that law was increasingly playing a role in guiding the individual in the modern world as in-


\(^5\) Id. at 275-76.


Individual self-sufficiency was waning. Berman's conception of parental law was closely tied to Soviet ideology, particularly the conception that the Party would be the guiding force in the citizen's everyday life. Perhaps due to his close association with the religious philosopher Eugen Rosenstock-Huessy at Cornell, Berman envisioned the parental nature of Soviet law as a kind of pseudo-spiritual mechanism by which Soviet leaders sought to inspire their subjects. For Berman, this parental aspect of Soviet law was a useful model for American legal thinkers: "in their focus on the parental and educational role of the law, with its conception of the litigant, the subject of law, as a youth to be guided and trained, the Soviets have made a genuine response to the crisis of values which threatens twentieth-century society." In fact, he saw Soviet law as a new type of law that challenged the West and offered it an opportunity for advancement. In a series of articles, he argued that Soviet law presented a unique challenge to the United States: "Soviet law explicitly challenges American law, claiming to expose its weaknesses and to offer a new synthesis, a new method of development, a new set of values and principles." Indeed, Berman finished one section on this pseudo-spiritual emphasis with a quote from his legal realist mentor, Llewellyn: "our own law moves steadily in a parental direction." Thus, for Berman, Soviet law was a call to arms, representing the important role of the state in directing individual development in a progressive future.

Berman also sought to enshrine these ideas in American comparative legal education. Originally based at Harvard, Berman taught a class entitled "Comparison of Soviet and American Law." In a 1959 article, Berman saw the teaching of Soviet law as an exercise in revealing the importance of the parental aspect of Soviet law. Soviet law was "a genuine response to crisis of the 20th century, which has witnessed the breakdown of individualism – in law

62. For a description of Berman's argument in the Soviet context, which also includes a good description of the meaning of parentalism, see James L. Hildebrand, The Sociology of Soviet Law (1972).
63. This quote can be found in all three editions of Harold Berman, Justice in Russia (1950, 1963, 1982). In the 1950 edition, it is on p. 291; in the 1963 edition, it is on p. 384; in the 1982 edition it is on pp. 383-4.
65. Quoted from Berman, Justice in Russia 206 (1950).
66. This view has recently been taken up by Inga Markovits in The Death of Socialist Law?, 3 Annual Review of Law and Social Science 233 (2007).
as well as in other areas of spiritual life...our own law may be seen in the light of Soviet experience, as seeking a level which combines the virtues of individuality and collectivity, while avoiding the mythology of either 'ism.'

ii. Criticizing the Dissidents

Many of those who accepted the dominant political model of Russian law—the totalitarian model—would not tolerate such dissent. As a result, Hazard and Berman's work faced considerable criticism from mainstream comparative law scholars. Much of this criticism hinted that both Hazard and Berman were accepting Soviet propaganda about the ideological nature of its law. Some of this criticism was inevitable: there were areas of overlap between legal realism and Marxist-Leninism legal theory. In particular, both Hazard and Berman were part of intellectual movements that saw law as a force for social change.

In a review of Berman's *Justice in Russia*, Rudolph Schlesinger suggested that Berman was exaggerating the ideological content of Soviet law. In this review, Schlesinger plainly stated that Soviet Russian law was an entirely unremarkable legal system "in which lawyers have to solve most of the problems familiar to their Western colleagues." Any attempt to argue that there was something particularly unique about the system was a reflection of the "pitfalls threatening anyone who deals with the evolution of some social system in terms of its theoretical output... instead of dealing with it in terms of concepts as can be derived from its everyday workings."

Others attacked Berman and Hazard for similar reasons, but in less nuanced ways. One scholar criticized Berman's *Justice in Russia*, saying: "This is the crucial point. In his search for deep sources and broad horizons of the Soviet law, which challenge us to think over our own institutions and trends, the author overlooked its manifest essence: that it is the law of a totalitarian state,

69. *Id.* at 978.
rather abhorring than challenging."\textsuperscript{70} Nikolai Timasheff, a Russian émigré, attacked Hazard for not being critical enough in his description of Soviet law. He argued that the concept of Soviet law as part of a totalitarian scheme was self evident: "Soviet law is the law of a society in decay."\textsuperscript{71}

Hazard and Berman faced more than just academic attacks for their engagement with Soviet law. For instance, Hazard was called in front of The House Committee on Un-American Activities for his extensive connections with the Soviet Union during this period: "Hazard was grilled in closed session during which he was interrogated....as to why he had gone to the USSR to study law."\textsuperscript{72}


In the 1960s, the political situation in the US shifted: McCarthy was discredited and a more permissive atmosphere emerged. Meanwhile, Soviet influence in the world continued to grow as communist ideology spread to many countries in Africa and Asia. Socialism was becoming a worldwide phenomenon. The political atmosphere was ripe for a new political model.

\textit{i. Continental Origins of the Socialist Legal Model}

The socialist legal model had been developed in France during the 1950s and it had distinctly political roots. In France, the Left was far more influential and Marxism-Leninism was less of a taboo subject. Consequently, the totalitarian model was far less influential. At the same time, rather than confrontation, the general political mood on the continent favored coexistence with growing Soviet power: "the newly-found socialist states quickly replaced their laws between 1948 and 1950, particularly constitutional, administrative, and civil law, modeling it in many respects after Soviet law. There could no longer be any doubt that a new system had arisen on the face of the world legal map."\textsuperscript{73} As a result, intel-


\textsuperscript{72} John Hazard, Recollections of a Pioneering Sovietologist 78 (1984).

lectuals sought accommodation and understanding of the Soviet Union; legal scholars engaged with Soviet political ideology.

Rene David, one of the leading French comparativists, saw comparative legal modeling as a solution to this political threat. An understanding of Soviet law, David argued, held the keys to "the international unification of law" and, consequently, peaceful coexistence.\(^4\) Citing Roscoe Pound and other legal realists, he argued that it was the "social relationships" and "psychology of those to whom the law applies and those who are charged with its application" that really mattered.\(^5\) Only if legal scholars recognized this fact would lawyers be "awakened to the conscience of the new world and . . . be instilled with the international spirit which has lain dormant during a century of retreat into national law."\(^6\)

In response to this political atmosphere and his grand vision for solving it, David portrayed Soviet law as the progenitor of a new family of legal systems: the socialist legal family. By calling socialist law a new family of law, he was arguing that it deserved a place alongside the common law and civil law families.

David outlined the socialist model in his highly influential book, *Les Grandes Systemes de Droit Contemporains*.\(^7\) The political foundations and justifications for the model were far sturdier than its theoretical or academic consistency.\(^8\) The first problem was methodological. When defining his criteria for a separate legal family in the introduction, David argued that legal families shared "constant elements": legal concepts, similarity of structure, and the methods whereby social processes are encountered and met by legal authorities.\(^9\) However, since socialist legal systems shared both the procedures and legal concepts of the civil law system, David drew on legal realism and focused exclusively on the stated political and ideological intent of socialist legal systems, stating: "the originality of Socialist laws is particularly evident from the revolutionary nature attributed to them; in opposition to the somewhat static character of Romano-Germanic laws, the proclaimed


\(^{75}\) *Id.* at 14.

\(^{76}\) *Id.* at 27.


\(^{78}\) When I cite his work, I will cite to the later English translation. RENE DAVID, *MAJOR LEGAL SYSTEMS OF THE WORLD: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW*, 11 (David Brierley, trans.) (1968).

\(^{79}\) *Id.* at 15.
ambition of socialist jurists is not so much to establish order as to upset society and create the conditions of a new social order in which the very concepts of state and law will disappear."

On his own methodological terms, however, his model lacked two of the three criteria that define a new family.

David also ignored the history of Russian law: he assumed that Tsarist Russia had no serious legal tradition. Indeed, to make the socialist legal model stand alongside the deep historical traditions of the common law and civil law families, David argued that Soviet law was *sui generis*, a young legal system that had essentially begun its history in 1917. To support this argument, David argued that Tsarist Russia had no real legal tradition, claiming that "another point worth emphasizing is the weakness of the legal tradition and the idea of law in Russia." Indeed, he found little more in pre-1917 Russian legal culture than the Western stereotype that Russia's spiritual nature was particularly well suited to a Marxist view of law: "Leo Tolstoy wished for the disappearance of law and the advent of a society founded on Christian charity and love. The Marxist ideal of a communist and fraternal society does find deep roots in the moral and religious sentiments of the Russian people."

Finally, David had to solve the serious problems of grouping countries with such divergent legal traditions, histories, and practices as China, Russia, and Vietnam into the same legal family. David solved this problem by dividing the socialist legal family into separate branches:

The family of Socialist laws originated in the Union of Soviet Socialist Republics where these ideas have prevailed and a new law has developed since the 1917 Revolution. However, the laws of the people's republics of Europe and Asia must be classed as groups distinct from Soviet law. These laws belong to the Socialist family, but in the first group a greater persistence of characteristics properly Romano-Germanic is detected, while in the second it is useful to enquire how these new concepts are reconciled in practice with the principles of Far Eastern civilization, which governed those societies before the Socialist era.

80. *Id.* at 17-18.
81. *Id.* at 137.
82. *Id.* at 138.
83. *Id.* at 18.
The linguistic, cultural, and historical differences between these two branches of socialist law were vast. Although he emphasized the common political ideology, David did not describe how these political similarities manifested themselves in common legal processes or approaches.

**ii. Hazard Justifies Importing the David Socialist Model to American Comparative Law**

The socialist model would not be welcome in the halls of American academia until the late 1960s. Indeed, as anti-communist hysteria receded, academic departments in the U.S. began to revise the moral condemnation of the Soviet Union contained in the totalitarian model and were searching for a new model. Academics now sought to engage with ideology to counter its influence. The diversity of communist countries became an accepted academic topic. Work on socialist political ideology was viewed with interest rather than feared or repressed. One sign of this change was the English translation of David’s *Les Grandes Systemes de Droit Contemporains* in 1968.

Hazard seized on this new academic atmosphere in America to import the socialist legal model. Despite its many methodological, historical, and grouping problems, Hazard—in pioneering the development of the socialist model in American comparative law—drew heavily on David’s work in building the American version of the socialist legal model. In justifying this creation, Hazard mixed his own personal convictions of the political nature of Soviet law with justifications based on the political importance of understanding America’s Cold War opponent. For Hazard, the methodological problems were not particularly important. He acknowledged the chief problem of the model was “[i]ts method is the method of the Romanist...” However, he believed so deeply in the supremacy of politics in the Russian legal system that he felt that the model would promote scholarship that would reveal that law in Soviet Russia was a “reflection of social values and an instrument of social change.” Indeed, Hazard saw this influence as being so

84. KUHN, note 18.
86. DAVID, supra note 77, at 7.
87. HAZARD, supra note 3, at 521.
88. Id. at 521.
strong that, "the civil-law relations in their traditional Romanist form have been pushed to the fringes of social relationships."  

Hazard also saw the model as a critical political tool in understanding and countering the Soviet threat. In a 1964 article entitled "The Soviet Legal Pattern Spreads Abroad", he described the important role of legal education in spreading Soviet control in the developing world: "Moscow’s ‘Friendship University’ is teaching Soviet law to the Africans and Asians in its classrooms... Law, as one of the principal instruments of social change, must be disseminated together with the Marxist doctrine that is its motivation." Grasping the nature of the spreading socialist model, therefore, held the keys to understanding the political challenge posed by communism. Relatedly, Hazard also saw the advantage of the model in its comprehensive understanding of the entire communist bloc:

I must investigate what had happened to law in other societies claiming to have been influenced by Marxist thought. I must seek a common core... the Marxist inspired systems [were] distinctive because of total abolition of an economic base for pluralism, and because power rested upon political and social organization reaching into every aspect of life.

Hazard also saw the socialist model as an important way to overcome the traditional contempt for Soviet law in the American comparative law world and encourage a new generation of young scholars to study Soviet Russian law. Indeed, there is a sense of urgency in his writing, suggesting that he envisioned the socialist model as important in transforming what he saw as the stiflingly parochial nature of American legal education. For instance, Hazard often acknowledged the methodological difficulties of the model, but always stressed that broadening the study of Soviet law was important: "courses which focused on the USSR have been broadened...this has introduced problems...nevertheless, with all of the inconveniences, the rewards of cross comparison within the Marxian socialist family itself are so great as to encourage the in-

89. Id. at 523.
91. HAZARD, supra note 3, at 165.
structor to introduce them."\textsuperscript{92} Hazard also saw the model as drawing students' attention to a particularly challenging area of study:

If the similarities are so great, why introduce Eastern European materials when Western European ones are in more accessible languages, are richer in quantity, and come from cultures which require no extensive background education to overcome cultural shock? . . . Yet, if he were to make such a choice, those who are partisans of a course in comparison of Eastern European Legal systems with those of North America would feel that he was missing an opportunity.\textsuperscript{93}

Relatedly, Hazard also saw the promotion of this model as a way of developing comparative legal scholarship that blended politics and sociology with legal analysis. He saw this as part of a legal realist re-fashioning of the modern American law school: "English and American practice establishes a separate law 'school', usually physically separated, and often emotionally apart from the rest of the university in which it functions."\textsuperscript{94} Instead, he entreated the readers to "accept comparison which goes beyond legal techniques to codes of morals, and to political, economic, and social structures."\textsuperscript{95} By breaking legal scholarship out of its isolation from the rest of academia, legal scholars could finally understand the importance of politics and ideology to law in the rapidly changing Cold War world.

Finally, it is also possible that Hazard advanced the model to increase his prestige in the American comparative law world. He was certainly aware of the effect that the model had exerted on David's reputation: "Professor Rene David of France has used this method to great advantage in the University of Paris, and his lectures in an expanded form have proved so valuable to other teachers that they have been published in several editions and several languages, including English."\textsuperscript{96}

\textsuperscript{92} Hazard, Area Studies and Comparison of Law: The Experience with Eastern Europe, 19 AM. J. COMP. L. 645, 649 (1971)
\textsuperscript{93} Id. at 647.
\textsuperscript{94} HAZARD, supra note 3, at 522.
\textsuperscript{95} Id.
\textsuperscript{96} Hazard, 19 AM. J. COMP. L. at 650.
iii. Communists and Their Law: Hazard’s View of Socialist Law

Spurred on by these political, academic, and personal agendas, Hazard made the classic American statement of the socialist legal model in his highly influential 1969 book *Communists and Their Law: A Search for the Common Core of the Marxian Socialist States*.97 Pointing to the importance of an “international fraternity of legal scholars concerned with the comparison of laws”98 in determining the main features of communist law, he argued that “[t]he principles of public order established by Lenin after the Bolshevik revolution of 1917 had given birth to a distinct legal family comparable to the Anglo-American common law, the Romanist systems, and the law of Islam.”99 Echoing David, Hazard’s argument made it clear that much of the inspiration for this view was drawn from the spread of Soviet influence in the world. He made frequent reference to the work of scholars from the new Soviet sphere of influence—Hungary, Yugoslavia, China, and other countries—who stressed the fact that they were not importing the Soviet system, but a socialist one instead. Hazard also explicitly allied himself with the Soviet conception that the communists had developed a socialist type of law: he cited the Communist Party ranking of countries based on their success in “building socialism” as further evidence of a socialist legal model.100

Hazard argued that four main areas distinguished Soviet Russian law (and other communist legal systems) from the civil law system and rendered them deserving of the status as a family of socialist law. All were fundamentally politically driven differences. First, he pointed to the economic differences of socialist states in shaping the way that law functioned. In a state-owned and planned economy, he argued, private law is absorbed by public law, removing socialist legal families from the civil law orbit.101 Second, he saw

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97. See HAZARD, supra note 3.
98. Id. at viii.
99. Id. at viii.
100. Id. at 519.
101. In arguing that public law had absorbed private law, Hazard was echoing David’s words: “[A]ll means of production have been collectivized. As a result, the field of possible private law relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its preeminence—all has now become public law.” DAVID, supra note 60, at 25.
the political distinctiveness of socialist states—what he called the "strong, even unchallengeable, leadership, fortified by law in maintaining its distinct position"—as a unique element of socialist countries' legal system.¹⁰² Third, he pointed to the importance of the law in engendering social change, arguing that Marxist ideology made law a mechanism for "mobilization for total social involvement."¹⁰³ Finally, he focused on ideology and the importance of the commitment in the socialist legal family toward the withering away of the legal system.

iv. Berman's Own Version of the Socialist Model

Berman was far less of a model builder (indeed, his interest in Soviet law was waning at this point).¹⁰⁴ As a result, he leveled many criticisms against Hazard’s purely politically-based vision of a socialist model in an article in the journal Problems of Post-Communism.¹⁰⁵ Berman noted that the concept of socialist law was a Stalinist invention: “it was only in the mid-1930s that Josef Stalin—chiefly through his legal spokesman Andrei Vyshinskii—began to talk about ‘socialist law’ as a ‘new type of law.’ After World War II, as other countries became Communist, they, too, claimed to have a ‘new’ socialist type of law.”¹⁰⁶ He then criticized Hazard’s attempt to understand this type of law: “it is becoming harder and harder to find any single characteristic that is common to the legal system of the fourteen countries generally called communist.”¹⁰⁷ He also suggested that this model of socialist law seemed to reflect a Marxist way of thinking about the law which was largely ahistorical:

A typology of legal systems cannot be derived solely from an analysis of how political, economic, and social values are reflected in legal doctrines and procedures in various countries; at least equally important is an analysis of the

¹⁰². Hazard, supra note 3, at 523.
¹⁰³. Id. at 524.
¹⁰⁴. Berman was increasingly writing general scholarship on the western legal tradition (much of which drew from his earlier work on the pseudo-spiritual nature of law). Indeed, two of his major works traced the history of western law back to the twelfth century and emphasized the religious influence on western law. See Berman, Law and Revolution: The Formation of Western Legal Tradition (1983).
¹⁰⁶. Id. at 25.
¹⁰⁷. Id. at 26.
historical development of legal institutions, over long peri-
ods of time, in the context of the historical development of
the societies of which they are part.\textsuperscript{108}

Although he disliked Hazard's model, Berman once again
pointed out what he saw as distinctive about Soviet law: its paren-
tal role. Thus, if a separate socialist legal model was to be con-
structed, Berman believed that it should be grounded in his concept
of socialist law as parental law. He wrote,

It is not enough to say that Soviet law is an instrument of politics
or that under Soviet law the state has extended the range of its in-
terests and its powers. The more important fact is that in the So-
viet Union law is viewed, above all, as a means of educating, guid-
ing, training, disciplining, and mobilizing people to fulfill their po-
itical, economic, and social responsibilities.\textsuperscript{109}

\textit{v. The Concept of Socialist Law Spreads to the Comparative
Law Casebooks}

Although methodologically weak, the political forces underpin-
ning the socialist model were powerful. Within twenty years of the
publication of Hazard's \textit{Communists and Their Law}, the socialist
legal model was widely regarded as a separate legal family along-
side the common law and civil law systems. The model spread to
every major comparative law casebook, all of which had developed
in reaction to the steadily increasing interest in comparative law
instruction in American law schools.\textsuperscript{110}

Despite this increasing acceptance, the theoretical or methodo-
logical basis did not grow more sophisticated. Indeed, most of
these casebooks did not deeply explore why socialist law should be
thought of as a different legal family, instead choosing to mention
its existence only in passing. This lack of increasing sophistication
further reflected the political underpinnings of the model: it was
hard to justify the model methodologically on anything other than
political grounds.

John Merryman's casebook from 1978 is a good example.\textsuperscript{111}
Merryman's introductory article "The Three Principal Legal Tradi-

\begin{footnotesize}
\begin{enumerate}
\item[108.] \textit{Id.} at 28.
\item[109.] \textit{Id.} at 30
\item[110.] One of the best examples was John Merryman, \textit{Comparative Law: Western Euro-

\begin{footnotesize}pean and Latin American Legal Systems, Cases and Materials} (1978).
\item[111.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
tions” adopted the socialist model, asserting that “[t]here are three major legal traditions in the contemporary world: civil law, common law, and socialist law.” The brief description of socialist law mimicked the historical myopia of the David-Hazard approach:

The socialist law tradition is generally said to have originated at the time of the October Revolution....One intention of the Soviet revolutionaries was to abolish the bourgeois civil law system and substitute a new socialist legal order. The actual effect of their reform was to impose certain principles of socialist ideology on existing civil law systems and on the civil law tradition....the result is a young, vigorous legal tradition that still displays its essentially hybrid nature.

In his introductory article, Merryman also echoed the idea that Soviet Russian law was much the way that its ideologues described it:

Socialists see our legal system as incorporating and perpetuating a set of goals and ideals that they regard as socially and economically unjust....Finally, to a socialist lawyer, both the civil law and common law traditions are subject to criticism because they embody but do not clearly state their ideologies. Such a lawyer sees our legal systems as devices by which bourgeois ideals are concealed in ostensibly neutral legal forms, which are then used to exploit the proletariat.

After this brief description of socialist law as a distinct legal family in the opening article, the casebook failed to develop these ideas more fully in a separate section, limiting their analysis to discussion of the common law and civil law systems in Europe and Latin America.

An Introduction to Comparative Law, by Konrad Zweigert and Hein Kotz, was translated into English and became one of the staple comparative law casebooks in the country. It also mimicked the David-Hazard approach by discussing the existence of the so-

112. Id. at 2.
113. Id. at 4-5.
114. Id. at 5.
115. Id.
Reclassifying Russian Law

cialist legal family, arguing that "the legal systems which form the socialist legal family have a special character owing to their common foundation on the world view of Marxism-Leninism. This fact sharply differentiates the socialist legal systems from those of the West and justifies their attribution to a separate legal family." 117

This casebook also imported the David-Hazard politicized view of Russian law: "law is determined exclusively by its political function." 118 The casebook then contained a lengthy exposition of the importance of Marxism-Leninism to the development of Soviet law. In addition, Zweigert and Kotz also adopted the traditionally biased view of Russian history. They referred to Russia's history of "Tsarist despotism" 119 and asserted that Russia lacked "a native juristic tradition." 120 Further, they adopted a traditional stereotype of Russians' attitude to the law, describing "[the] religious temperament of the Russian people, for whom the wickedness of the world could be overcome not by formal legal devices such as the guarantee of political or civil rights but only by turning the world into a band of brothers enthused by Christian love for one's neighbor." 121 However, similar to Merryman's casebook, Zweigert and Kotz failed to explore any further the precise dimensions of a socialist legal system.

Mary Ann Glendon's *Comparative Legal Traditions* represented the first major American casebook that devoted equal attention and analysis to the socialist legal family, along with the civil law and common law systems. 122 Much of the analysis on socialist law was provided by one of the co-authors, Christopher Osakwe. Born in Nigeria and taught Russian as part of the Soviet Union's attempt to spread communist influence in Africa, he later attended Moscow State University. In his analysis, Osakwe did not solve any of the methodological problems of the model and essentially combined the theories of Berman and Hazard in defining the socialist legal system. Mimicking Berman, he stated that "[s]ocialist law is not only a blueprint for the social, economic, and political transforma-

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117. Id. at 297.
118. Id. at 302.
119. Id. at 305.
120. Id. at 310.
121. Id. at 311.
tion of society but also a form of secular theology.” He also adopted the David approach, dividing the socialist legal family into two groups: “one can identify two subgroups within the socialist legal family, the Soviet and East European on the one hand, and the Chinese and Southeast Asian subgroup on the other.” Largely due to the fact that it was the most extensive discussion of the socialist model in a casebook, Osakwe’s synthesis would become the generally accepted statement of socialist law in American comparative law.

**vi. Interpreting Soviet Law through a Socialist Lens**

As it migrated into the casebooks, the socialist model drove the majority of interpretive work on Russian law during the 1970s and 1980s. Its increasing influence even led to the creation of a new legal journal that focused specifically on the development of socialist law: the *Review of Socialist Law.* Created in 1975, this journal would further encourage work on Soviet law to follow the socialist model. The socialist model also helped form Christopher Osakwe’s early career: he would emerge as Hazard’s heir in promoting the socialist model, publishing thirty articles on Soviet law between 1971 and 1989.

In 1986, Osakwe sought to add his own theoretical contribution to the conception of Soviet law as a socialist law. In a highly theoretical article suggestive of his Marxist legal training as a law student at Moscow State University, he found four bases for Soviet Russian law as a socialist legal system: Romano-Germanic, Greco-Hobbesian, quasi-religious, and Russian. Much as with his casebook scholarship, these four foundations combined the prevailing Hazard, Berman, and David interpretations of Soviet law with

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123. *Id.* at 673.
124. *Id.* at 713.
125. As the Editor wrote, “[t]he Soviet legal model has spread far beyond the borders of Eastern Europe, but at the same time diversification has set in and the specifically Soviet flavor of many legal institutions has been lost or attenuated. What has usually remained is three elements of political life which have a decisive impact on the structure of the legal systems of the countries concerned: the paramount position of a single leading party, large scale Marxist-inspired nationalization or socialization of the means of production, and rigid economic planning.” Editors Foreword, 1 Rev. Socialist L. 5 (1975).
126. *Id.*
Osakwe's own Marxist-inspired interpretation of Soviet law. For instance, the concept that Soviet law was Romano-Germanic was simply the uncontroversial statement that Soviet law had the form and process of continental European legal systems. Further, the Greco-Hobbesian basis (a term that he used as short hand for the importance of political ideology in Soviet law) was a paraphrase of Hazard's argument that Marxist political ideology permeates Soviet law. Finally, the quasi-religious section drew largely from Berman's conception that the chief contribution of Soviet law was its parental nature.

Osakwe’s final conception—that Soviet law was also essentially Russian—held some potential promise for creating a firmer methodological basis for the socialist model. However, he found the uniquely Russian characteristics of Soviet law—somewhat inexplicably—in "three dualisms: the symbiosis between party law and state law; the concentric existence of two moralities . . . ; and the parallel existence of two conceptions of justice." Osakwe never explained why these dualisms were uniquely Russian. He might have found these in Russian history, but the socialist model dictated as one of its pre-understandings that Tsarist law was irrelevant. He never delved into this issue. Finally, much of the remainder of his analysis reads as if it was taken directly from a Soviet-era textbook: "The Soviet state today is engaged in an ongoing revolution, the ultimate goal of which is to attain a communist society. . . . The CPSU [Communist Party of the Soviet Union] is the brain, the conscience, the mind of Soviet society."

The mid 1980s witnessed a new push to develop the theoretical basis of the socialist model. For its 1984-1985 edition, the Columbia Journal of Transnational Law solicited articles in honor of John Hazard. In twelve articles written by a collection of American and foreign academics, the authors deliberately described the socialist aspects of Soviet law. For instance, Gordon Smith de-

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128. Id. at 26.
129. Id. at 15.
scribed the impact of socialism on procedure, writing that the uniquely socialist nature of Soviet law was the effect of political ideology on people's legal consciousness.\textsuperscript{132}

Two years later, Osakwe hosted a conference at Tulane University entitled "Unity and Diversity Within the Socialist Legal Family."\textsuperscript{133} In his introductory lecture to the conference entitled "Introduction: The Greening of Socialist Law as an Academic Discipline", Osakwe pointed to the achievements of the socialist model in replacing the totalitarian model:

comparativists are becoming more sensitive to the basic philosophical issues of socialist law by casting off nihilistic, commercial, and negativistic restrictions on objective scholarship in the area of comparative law. It is this new posture that has encouraged what I perceive as the greening of socialist law as an academic discipline.\textsuperscript{134}

Although nearing the end of his career, John Hazard also gave a talk at the conference discussing the difficulties of seeing socialist law as a completely separate discipline. He backed away from justifying the distinction on anything other than political grounds, admitting that for law students from Western Europe, there was little difference between their system and the communist one that lay to the east: "[t]here is no difficulty to be faced when taking a student group from France to the Eastern countries because they find a legal system quite like their own in structures, methodology, and procedure."\textsuperscript{135} For Hazard, the most important aspect of the


\textsuperscript{134} Id.

socialist model was its tool as a form of political teaching: "I do not mean that we teachers should in most cases want to indoctrinate our students in one direction or another, but at least we hope to make them aware of the relation of economic structures to politics . . . . to prepare students for statesmanship in a world that is now concerned with etatisation." Hazard saw this as a unique aspect of American legal education: "We Americans think, or like to think, that we are training for statesmanship, and our students need to know not only the bread and butter subjects, but also the public law subjects that have to do with human rights and freedom."

In the years just prior to the fall of the communism, however, the continuing theoretical and methodological shortcomings of the model came under scrutiny. For instance, just before the fall of the Soviet Union in 1991, John Quigley (a former student of Berman) wrote a scathing article attacking the concept of a socialist model and the "separationists" who supported it. Pointing out that socialist revolutions only took place in countries with civil law traditions, he argued that socialist law was simply a new type of civil law. Critiquing each of the generally accepted defining characteristics of socialist law, he concluded that each was not sufficiently different to be classified as a different legal family. For instance, he argued that the fact that public law was replacing private law in socialist legal systems did not make socialist law distinctive; on the contrary, civil law and common law countries were undergoing much the same process. He also argued that the role of a dominant political party did not distinguish socialist legal systems: "civil law systems developed in Europe under monarchies, with no role for political parties." Just as the model seemed to be undergoing a healthy analysis, however, the Soviet Union collapsed.

136. Id. at 1282-83.
137. Id. at 1282.
139. Quigley pointed to five different areas of purported uniqueness that were not sustainable: 1. Socialist law is programmed to die out with the disappearance of private property and social classes and the transition to a communistic social order; 2. A single political party dominates in socialist countries; 3. Law is subordinated to creation of a new economic order, a process in which private law is absorbed by public law; 4. Law has a religious character; 5. Law is prerogative instead of normative. Id. at 781-808.
140. Id. at 788.
141. Id. at 785.
D. Post-Communist Period: The Transition Model, 1991-Present

The communist system of law delivered several blows to comparative law. The first blow struck when the system was first created in Soviet Russia during the years 1917 to 1922. The second even greater blow was the spread of the communist system of law to Eastern European countries, East Asia, and to Cuba after the Second World War. The last blow came when the system became extinct in the 1990s.142

i. Methodological Reactions to the Fall of Communism

The fall of the Soviet Union and communism in Eastern Europe triggered an immediate paradigm shift in Russian legal studies. In a very short time, an entire family of law vanished; the methodological, historical, and conceptual problems of the model were left bare.143 There was no consensus answer to what would happen next. One comparative scholar—Ugo Mattei—suggested that the formerly socialist legal countries now should be classified as a legal family in transition: “there is a clear willingness in these systems to change and reform in the direction of a pluralistic market economy...this may be enough to consider former Socialist countries as a family of law in transition.”144

The Glendon casebook—largely due to its commitment to socialist law as a separate legal family—provided the most extensive discussion of the fate of the socialist legal family. The discussion of socialist law went from being a whole third of the book to a short chapter in the section on civil law. This change shortened the 1994 edition by more than 300 pages.145

In the chapter on socialist law—entitled “The Rise and Fall of the Socialist Legal Tradition”—Osakwe struggled to explain whether the socialist legal family still existed. He refused to admit that so-

143. It forced journals to rename themselves. In 1992, the Review of Socialist Law became the Review of Central and East European Law.
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cialist law had disappeared, writing melodramatically "[w]ithin fifty years of its checkered history the meteoric rise of socialist law was surpassed only by its apocalyptic fall. As a result of recent defections from its ranks, the socialist legal family today is a caricature of its old self. But it is far from dead." Although socialist law "no longer qualifies to be placed on the same pedestal with the civil law and the common law", he maintained that "socialist law lives on in other parts of the world and any report of the death of this legal culture at this time is grossly exaggerated."

Though continuing to argue that socialist law was a separate legal family, Osakwe admitted that the model had significant methodological problems: "when viewed from the vantage point of its infrastructure and methodology, no qualitative differences can be identified between socialist law and the civil law." He also seemed to edge toward the concept that some of the European post-communist countries were in transition to the civil law system. Though not explicitly mentioning the word transition, Osakwe now argued that the European countries of the socialist legal family were now returning to the civil law system:

Of the three legal subgroups that coalesced to form the socialist legal tradition, one – the Central and Eastern European – has abandoned socialist law and returned to its civil law roots. The other two – the Chinese and Southeast Asian as well as the emerging third world cultures – remain faithful to the core tenets of socialist law.

The implicit suggestion that the European post-Communist countries were in transition was more apparent later in his analysis: "each one of the former European members of the socialist legal family has subjected all facets of its legal system to cataclysmic reforms in preparation for their re-entry into the civil law orbit. The common core of these reforms are democracy, legality, and privatization."

147. Id. at 396.
148. Id. at 401.
149. Id. at 396. Other parts of this argument also seem problematic. For instance, to argue that China had a socialist legal system in the mid 1990s seems to be a difficult position to sustain.
150. Id. at 406.
Osakwe’s view of Russian history remained problematic. Socialist law, in his view, was the sole creation of Joseph Stalin:

[t]he true father of modern Soviet law is Iosif Vissarionovich Dzhugashvili (a.k.a. Joseph Stalin)....The mish-mash of faulty parts, sloppy workmanship and bad engineering that went into the creation of socialist law nonetheless inspired unwavering confidence in its chief architect, Joseph Stalin, a dictatorial leader who acquired his knowledge of law and legal systems not from any tutored study but from the revolutionary laboratory of Bolshevik Russia.\(^{151}\)

This historical simplification led to a Marxist comparison between the French and Russian revolutions in spawning new legal systems:

Like the civil law in France, socialist law in Russia was the product of a bloody revolution that claimed the lives of millions of people. Within the span of a little more than one-half century it became the law by which sixty percent of the earth’s population of the earth’s population governed their lives.\(^{152}\)

In sum, Osakwe was largely unable to solve the massive conceptual problems that the fall of the Soviet Union had exposed within the socialist model. His solution—that the socialist legal family had diminished in size but was still existent in a few isolated countries—was unconvincing. It was also largely ignored. In fact, Glendon did not invite him to contribute to her next casebook. Instead, Glendon’s new 1999 *Comparative Legal Traditions in a Nutshell* simply excised the section on socialist law and replaced it with a newly drafted section on European integration.\(^{153}\)

Most casebooks, however, had little desire to even attempt to confront the difficulties and problems in reclassifying Russian law. Merryman’s 1994 edition of the *The Civil Law Tradition*, swept the disappearance of socialist law under the rug, as if embarrassed to acknowledge its existence.\(^{154}\) In the preface, the book commented quickly that socialist countries were now transitioning back

\(^{151}\) Id. at 398.

\(^{152}\) Id. at 395.

\(^{153}\) Mary Anne Glendon, Michael Wallace Gordon, & Paolo G. Carozza, Comparative Legal Traditions in a Nutshell (1999).

Reclassifying Russian Law to the civil law system: "in most of the socialist nations, socialist law was little more than a superstructure of socialist concepts imposed on a civil law foundation. With the end of the Soviet empire the superstructure is being rapidly dismantled, and nations once considered ‘lost’ to the European civil law are returning to it."\(^{155}\) Later, in the introduction, Merryman’s opening article which had previously described the three global legal traditions now simply omitted the socialist legal system through the strategic use of deletions and bracketed additions: “There are [two] highly influential legal traditions in the contemporary world: [the] civil law [and] the common law.”\(^{156}\)

Newer books on American comparative law were not beholden to previous editions and simply chose to ignore Russia and the socialist legal family. Some of them eschewed the whole modeling approach altogether.\(^{157}\) Other scholars that continued to use models responded to the changed geopolitical landscape and shifted the focus of their casebooks to European integration (German reunification and the spread of the EU), the economic challenges of the Far East (Japan and China) and, after the terrorist attacks on September 11, 2001, to Islamic law.\(^{158}\) Articles like “Educating Lawyers for Transnational Challenges: The Challenge of Islamic Law”\(^{159}\) began to appear in law journals. Russia, a country that had once served as the flagship of an entire family of law, had disappeared from comparative law casebooks.

In sum, American comparative legal scholars largely abandoned explicit discussions of models of Russian law. Work on Russian law became increasingly instrumental and economic; theoretical conceptualizations of Russian law largely disappeared. One of the most experienced and prolific scholars in the field, William Butler, exemplified this refusal to engage with the theoretical side, arguing that the true calling of good comparative legal work was transla-

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155. Id. at vii.
156. Id. at 3.
tion: "legal translation of quality is perhaps the penultimate achievement of the accomplished comparativist (the ultimate achievement must be drafting legislation for a foreign legal system in its own language and style)." Even the Review of Central and East European Law (formerly the Review of Socialist Law) seemed to have tired of interpretive model building and was now focused on the practical work of transcribing legal changes in the post-socialist world:

Since 1992 the Review has focused mainly on legal developments in Central and Eastern Europe and in particular on the increasing integration of this part of the world into a pan-European framework. Emphasis is given to practical aspects of law. Reports and translations of recent legislation are included and the Review thus provides rapid access to documents not available elsewhere.

**ii. The Transition Model Emerges**

The abandonment of explicit considerations of a new model amongst comparative legal scholars meant that once again the prevailing "pre-understanding" or model of Russian law would come from outside the law. The emerging post-communist consensus was that Russia was a country in economic and political "transition". This transition model envisioned Russia as reorienting its entire political, economic, and legal system toward capitalism and democracy.

The transition model developed in response to what Samuel Huntington would call the "third wave" of democratization in the world. Indeed, with the fall of communism, Western businessmen, government policy advisors, bankers, lawyers, and commercial consultants poured into Russia and other post-communist nations, hoping to facilitate Russia's transition from socialism to capitalism. The number of U.S. government agencies with newly

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161. This is the description of the journal found on Journal Seek. Available at http://journalseek.net/cgi-bin/journalseek/journalsearch.cgi?field=issn&query=0925-9880.

162. According to this theory, the third wave of democratization began with Portugal in 1974 and peaked with the fall of communism and the rise of democracy in these countries. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).
funded democracy programs "grew from two to thirty between 1989 to 1991."

In the academic and policy world, an entire industry developed in order to facilitate this transformation. The line between the academic and the policy maker was dissolved as this movement began to create the early outlines of the transition model. The National Endowment for Democracy established the Journal of Democracy, a journal whose chief focus was on both theorizing and promoting democracy in the 'transitional' countries like Russia. New institutes were set up in powerful American universities that sought to analyze democratic and economic transition throughout the world. For instance, the Center for Democracy, Development, and the Rule of Law was established at Stanford with the purpose of promoting "innovative and practical research to assist developing countries and transitioning societies in the design and implementation of policies to foster democracy, balanced and sustainable development, and the rule of law." This new cottage industry of transition research was aggressively funded, sponsoring visits to post-communist countries, supporting international conferences, and organizing briefings with foreign leaders and officials. Many of the new transitologists, as scholars of transition were calling themselves, came from top American universities and saw themselves as in the process of developing a universal set of principles that would govern the creation of democracy. Often without a knowledge of the language or history of the post-communist country, these researchers sought to unearth the key factors that would help guide the formerly socialist countries towards Western-style democracy and free markets. Most transitologists saw local expertise as largely unimportant; as Tho-

mas Carothers pointed out, a key assumption of the transition model was that "the underlying conditions in transitional countries—their economic level, political history, institutional legacies, ethnic make-up, sociocultural traditions, or other structural features—will not be major factors in either the onset or the outcome of the transition process."\(^{168}\)

This transition movement had a profound impact on all areas of academic scholarship. Legal scholarship was no exception. Scholars describing Russian law turned their attention to the new laws that were drafted and debated their effects on democratization and capitalism; they continued to ignore the historical continuities within Russian law. Theoretically, the basis of American scholarship shifted from a literature driven by politics and legal realism to one driven by the law and development movement.\(^{169}\)

Law and development scholarship has a checkered history. Initially developed by American scholars after the Second World War, law and development sought to both promote American legal institutions abroad while (to a lesser extent) seeking to understand the relationship between legal institutions and economic and political development. However, it had been largely discredited and abandoned in the mid 1970s.\(^{170}\) Buoyed by the end of the Cold War, however, enthusiasm for political and economic transition in the post-communist nations spawned a powerful new focus on law and development.\(^{171}\)

As a result, legal transitologists focused on Russian law as a critical force in Russia’s economic and political development. As Peter Solomon and Todd Foglesong write: “Most students of de-


\(^{171}\) All of this literature ignored the lessons from the previous round of law and development literature. For a good summary of the initial round of law and development literature, see Brian Z. Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT’L L. 470 (1995).
mocratization and the transition to a market economy in Eastern Europe and the former Soviet Union envisage the development of a strong legal order, if not actually a ‘rule of law,’ as a vital and necessary ingredient of liberal political and economic change.”

Many of these scholars saw themselves as correcting the initial failures of market liberalization, which they saw as based on a failure to recognize the importance of institutions like law in economic transition: “in the early 1990s, among the leading reformers, in academia, and in the multilateral institutions, in both theorizing and practical economic policy, there was a signal lack of emphasis on the necessity of immediate, constructive institutional reforms.” Consequently, their scholarship was pre-occupied with questions like “[w]hat role do law and legal institutions play in the economies that are in the midst of revolutionary change away from centrally planned socialism?”

Comparative researchers compared the Russian legal system with other transition countries, such as Eastern Europe and South America. For these scholars, the “rule of law” was an institutional buttress for both free markets and democracy: their job was to suggest legal reform that would help move these post-socialist countries move ‘away’ from socialist patterns of behavior towards capitalist systems of law.

Joseph Stiglitz and Karla Hoff’s “After the Big Bang: Obstacles to the Emergence of Rule of Law in Post-Communist Countries” is a good example. Neither author was a regional expert: Joseph Stiglitz is a highly renowned economist who now teaches at the Columbia Business School and Karla Hoff was with the World Bank when this was written. Their article drew heavily on economic developmental language, taking a quantitative approach to Russian law. With this approach, Stiglitz and Hoff sought answers to the question of why privatization had not created a constituency in Russia that would support the rule of law.

174. Id. at 1.
175. See LINZ & STEPHAN, supra note 142.
When they addressed social or historical factors they were inevitably placed in a law and economics framework:

Consider first the role of history. . . . During the long period of Soviet rule a parallel, informal structure grew up alongside the official Party structure, in which people engaged in illegal trade. . . . This structure survived the collapse of Soviet rule. . . . Pessimism about the emergence of the rule of law [a shift down in the \( n(x) \)] shifts the switch line down and, in a vicious cycle, makes less likely the emergence of a rule of law.\(^{177}\)

In the end, after many more conversions of social factors into quantifiable figures, Stiglitz and Hoff concluded that there was not enough of a political constituency for the rule of law and, as a result, that privatization in Russia – as compared with other Eastern European countries like Poland – was far less successful in facilitating transition.

Even the work of the comparative legal scholars with Russian language skills fell under the spell of the transition model. For instance, Christopher Osakwe no longer took much interest in the socialist nature of Russian law. Stepping down from his professorship at Tulane in 1988, he joined the Eurolaw group – which according to their website is “an association of independent law firms of European and international business lawyers specialized in business law.”\(^{178}\) With the exception of his theoretical analysis in the 1994 Glendon casebook described above, Osakwe began to write primarily on the commercial aspects of Russian law, guiding foreign investors into the regulatory framework of the Russian economy.\(^{179}\)

Another legal scholar with Russian expertise was Kathryn Hendley, a researcher who had carried out significant empirical research in the late Soviet period. After her foray into empirical research, Hendley published her results largely within the current

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177. *Id.* at 760.
transition model. This direction is unsurprising as she served as a consultant to the World Bank between 1994 and 2002, worked for U.S. Agency for International Development during the 1990s and also was a consultant with the Free Trade Institute for a year.\(^\text{180}\) Indeed, much as Hazard and Berman’s war time experience drove their scholarship, Hendley’s experience amidst the powerful political and academic drive to transform the socialist world to liberal democracy drove her scholarship. Consequently, much of her subsequent work focused on Russian economic courts and the role that they have played in Russia’s economic transition to capitalism.\(^\text{181}\) Much of this work fulfilled the burgeoning interest in Russia as a potential business outlet and free market.

Hendley also situated her work within the rule of law aspect of the transition model. She argued that the lack of an effective rule of law and set of legal institutions was hindering Russia’s transition to free market democracy: “[l]aw has a checkered history in Russia.”\(^\text{182}\) Although referring to the history of Russian law, Hendley confined herself to a short exposition of law in the Soviet period, failing to delve into the functioning of law in the Tsarist period. This fixation on the Soviet period provided a one-sided view of Russian law: “[u]nder Leninism, law was considered a one-way projection of state authority.”\(^\text{183}\) With this continued exclusive focus on the post-1917 Russian historical legacy (ignoring the Tsarist Russian history), Hendley suggested the extent to which the transition model inherited the socialist legal model’s view of Russian law as a system invented in 1917 and one that only responded to the political dictates of the Party.

Legal scholarship also focused on the role of law in the creation of a liberal, democratic state. The majority of this work focused on Russian constitutionalism. Robert Sharlet’s work is an example of the focus on the political components of transition.\(^\text{184}\) Sharlet discussed the constitutional elements of Russia’s political transformation to a liberal, rights-based state:

\(^{180}\) http://www.polisci.wisc.edu/users/hendley/CV.pdf.


\(^{182}\) Kathryn Hendley, Assessing the Rule of Law in Russia, 14 CARDOZO J. INT’L & COMP. L. 351, 351.

\(^{183}\) HENDLEY, supra note 2, at 45.

[t]his article discusses current Russian constitutionalism as a facet of Russia's larger and longer-term transition from authoritarianism, hence a phenomenon subject to change. Assumptions of this article include: 1) Russia remains and will continue to be essentially an authoritarian state for some time; and 2) the direction of political and legal development in Russia is towards institutionalizing a democratic process.\(^\text{185}\)

Robert Ahdieh also analyzed the political aspects of transition in his work on Russian constitutionalism. Justifying his studies, Ahdieh highlighted the two driving themes of scholarship on Russian law: “constitutionalism is among the first principles of both democracy and the free market; it lies at the heart of Russia's future development.”\(^\text{186}\) He took the innovative and potentially ground-breaking approach of focusing on the Russian legal consciousness rather than the words of the constitution. In particular, he criticized Russian reformers for focusing too heavily on structural change and ignoring the normative creation of a constitutional consciousness.

Although highly innovative, his exploration of the historical grounding of this legal consciousness is limited by the transition model's ahistorical approach. As a result, Ahdieh assumed in the introduction that the normative failure came from an “ill-prepared” society whose experience is based on “years of totalitarianism.”\(^\text{187}\) Russia's experience with constitutionalism in the Tsarist period, however, is left unexamined.\(^\text{188}\) Thus, we are left with a vivid picture of Russian attitudes toward constitutionalism but the reader is left still wondering if the historical legacy can be overcome or even if Western-style constitutional consciousness is a desirable goal for Russia.

Much of this work was and remains valuable. However, its primary focus on the normative effects of particular legal mechanisms in promoting democracy and free markets limited its explanatory power. Indeed, a deeper understanding of the continuities of Russia law that remained despite the political and economic transfor-

\(^{185}\) Id. at 495.


\(^{187}\) Id. at 8.

\(^{188}\) For more on the Tsarist roots of Russian constitutionalism, see A. N. Medushevskii, Russian Constitutionalism: Historical and Contemporary Development (2006).
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mations of the 20th centuries were left unexplored. This neglect was particularly egregious because the newly opened Russian archives were revealing these secrets to the world; American historians were writing about the real continuities that existed behind the rhetoric of the Bolshevik Revolution. A deeper knowledge of the real differences between Russian law and the Western legal systems was in reach but not yet in reach.

III. DE-IDEOLOGIZING THROUGH HISTORICIZING: PLACING RUSSIAN LAW IN AN IDEAL TYPE

Current classifications in legal families, in addition to being largely Euro-American centric, need to be revised because the geo-legal map of the world is substantially different. 189

Today, comparative legal work continues to focus on the effects of Russian law in encouraging economic and political transition. However, as the influence of liberal democratic ideas have faded in Russia, this model of transition and the adherence to a law and development approach looks more and more strained. 190 It is possible that a paradigm shift to another political model is already underway: in political and economic scholarship, Russia is increasingly being given new labels such as “hybrid democracy.” 191 Rather than letting contemporary political reactions to a more autocratic Russian government shape an entirely new political model, this section will suggest that legal scholars take an ideal type approach to Russian law that draws on the general continuities of Russian law over time.

A. Advantages and Disadvantages of the Ideal Type Model

As we have seen, the ideal type approach to Russian law will help alleviate many of the problems with political models. First, the ideal type will correct the myopic, ahistorical approach that has characterized political models for the last ninety years. While political and developmental understandings of Russian law will re-

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191. For the use of the term hybrid democracy, see Kelly M. McMann, Economic Autonomy and Democracy: Hybrid Regimes in Russia and Kyrgyzstan (2006).
main important, a historical view will provide comparative scholars with an understanding of the deep cultural anchors of Russian law. Second, this historicized ideal type will normalize our pre-understanding of Russian law. Indeed, if Russian law is also classified as an ideal type, scholars will more easily be able to compare and contrast the Russian legal system with the ideal types of common law and civil law in North America and Western Europe. Finally, an ideal type approach will solve the problem of conceptual shifts that have hindered scholars from understanding the deep continuities that exist within Russian law. Viewed in comparison with an abstract ideal, scholars will then organize their own findings and critically orient their work to the prior work. As a result, the ideal type will be more flexible, less prone to propagating subjective and transient definitions of meaning, and, as a result, less likely to incorporate political views and fundamentally change its perspective every twenty or thirty years.

The ideal type approach does, however, have some limitations. Indeed, by its terms, it is an over-simplification, a broad generalization from a diverse and highly complex set of social phenomenon. As a result, the ideal type will tend to ignore diversity and focus on commonalities; in so doing, it might ignore important characteristics of the phenomenon that it is modeling. In this sense, the ideal type cannot and should not hope to attain a full understanding of Russian law on its own.

Yet, an ideal type is necessary in order to organize serious scholarship on Russian law: it will provide a starting point for future scholars, allowing them to quickly grasp the work has been done in the field. Furthermore, the ideal type’s search for generalities of Russian law can suggest the boundaries on potential Russian legal reform and, consequently, be used to predict future outcomes. Used in this way, the ideal type will help facilitate future U.S. policy towards Russia, deepen commercial relationships, and strengthen our intellectual understanding of Russian law and its former empire. A clearer comparative understanding is also critical in assessing the effects of Western legal ideas in Russia.

192. For more, see Susan J. Hekman, Weber, the Ideal type, and Contemporary Social Theory (1983).
193. Id.
B. Directions in Building the Ideal Type

What is the best way to embark on this ideal type approach to Russian law? The first question for scholars to ask is whether the Russian legal system is sufficiently different from the civil law family to merit another ideal type. On the one hand, the Russian legal system seems to share a great deal in common with the civil law countries: a code based legal system and a system of judicial review that closely mirrors the Western European civil law countries. On the other hand, however, the Russian legal system has a number of distinctive features (including a powerful office of the state prosecutor) and was isolated from the European legal systems for much of the early period of civil law development. Research, therefore, should be organized around comparing the Russian legal system with the civil law system.

Much of this work should draw on the unprecedented opportunities for empirically based research in Russia, which can uncover the deep continuities in Russian law. Indeed, since the fall of the Soviet Union, the Russian archives have been opened to scholars and the study of both Tsarist and Soviet history has been revolutionized. Basing their work on their own and others’ empirical research, comparative legal model builders can began to draw the outlines of a new interpretive model.

Two directions in historical research potentially serve as important beginnings in testing the relationship between the Russian legal system and the ideal type of the civil law. One of the most promising directions is to trace the deep roots in Russian history of state recognition for non Civil Code-based legal orders within Russia.

For instance, during the Tsarist period, the Tsar created peasant-run volost courts, which applied locally generated customary law rather than the Civil Code. These volost courts - the only courts that most Russian peasants would ever see - were widely popular

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194. The current Russian legal code is a translation of the Dutch code.
197. One of the best contributions is the compilation of Peter Solomon cited above. See id.
forums for attaining what one scholar has characterized as "efficient, regulated, effective, and recorded justice." Their decisions were also influential: Gareth Popkins has recently suggested that the Tsarist courts often applied customary law, ignoring the Civil Code. This tradition of informal justice continued throughout the Soviet period as voluntaristic justice in the form of 'comrade' courts and people's courts. It has also continued into the current Russian legal system. In 1998, Russian authorities reinstituted the Tsarist Russian practice of using Justices of the Peace (JPs) to resolve minor civil and criminal disputes. These JPs are outside the traditional federal Russian court system and are appointed by regional assemblies; as a result, their loyalty is more likely to be to ethnic or religious-based local legal customs.

In fact, localized law has flourished throughout Russian history. For instance, in majority Muslim areas of Russia, there has been consistent state tolerance for Islamic customary law over the previous two centuries. For instance, a form of customary Islamic law called *adat* law was recognized by the Tsar in the largely Muslim areas of Russia for centuries. This type of law persisted throughout the Soviet period and has actually grown in importance since the collapse of the Soviet Union, particularly in Tatarstan, Dagestan, and Chechnya. As one report suggested, "[t]he resurgence of customary practices since the 1990s is testimony to the dogged persistence of *adat* law into the present..."

The co-existence and official recognition of these overlapping legal traditions alongside the Russian Civil Code suggests that the Code is not as important in everyday Russian life as it is in other civil law countries where the code is enforced under a unified and uniform state system. In fact, the persistence of these differing legal traditions over time in Russia seems to reflect a unique state-sponsored form of legal pluralism, marked by multiple, uncoordi-

202. Id. at 34.
nated, coexisting or overlapping bodies of law.\textsuperscript{203} Much of this work on legal pluralism focuses on state recognition of different legal systems as a method of colonialism; this connection would fit with Russia's long history as a large, multiethnic state.\textsuperscript{204} Jane Burbank's observation on the Tsarist legal system seems to be as relevant today as in the Tsarist era:

My point is not that a multiplicity of social norms operated outside Russian law—this is always the case even in the most conventionally law-based states—but that Russian law legalized local courts whose decisions in some cases could be made on customary or religious principles.\textsuperscript{205}

Further work is needed to expand this research. How closely has the legal recognition of local customary law been tied to state cohesion and empire building? More importantly, to what extent did the application of these competing systems of customary law mean that the civil code was changed or rendered ineffective? If the Russian Code turns out to be one part of a pluralistic Russian legal system, this fact will challenge Russia's categorization as a civil law country and help build a new ideal type of Russian law.

Second, future research should grapple with the unique institutional framework of Russian law. Indeed, Russia has legal institutions that are unprecedented in the civil law world. The procuracy is a good example of such an institution. Throughout its long history, the office of the procuracy has simultaneously prosecuted those who violate the law as well as bearing responsibility for "ensuring legality" during the pre-trial phase and trial. The procuracy is also a legal watchdog. As Michael Geistlinger writes, "the Russian procuracy by its very nature constitutes a fourth power, the power of supervising the execution of laws by all other organs of the Russian state."\textsuperscript{206} This power to both prosecute and supervise has been criticized as impinging on the independence of trial judges and has no ready analogue in civil law countries.

\begin{footnotesize}
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\item The majority of work describing legal pluralism focuses on its international context. For a good survey, see Paul Schiff Berman, \textit{Global Legal Pluralism}, 80 S. CAL. L. REV. 1155 (2007).
\item Jane Burbank, \textit{An Imperial Rights Regime: Law and Citizenship in the Russian Empire}, 7 KRITIKA: EXPLORATIONS IN RUSSIAN AND EURASIAN HISTORY 397, 403 (2006). Available at http://muse.jhu.edu/journals/kritika/v007/7.3burbank.html.
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It has long been justified as an instrument of centralization for Tsars, commissars, and presidents over the past five centuries. First established in 1722 by Peter the Great, it became a powerful institution in ensuring the power of the state during the Tsarist period. Even despite the odious, oppressive nature of the procuracy in the eyes of the communist revolutionaries, Lenin reintroduced it in the early Soviet period as "a means of establishing a centralized system." Furthermore, despite once again facing significant opposition in post-Soviet Russia as an instrument of communist oppression, the procuracy, with all of its power, has been retained in post-Soviet Russia. In fact, much of the present day discussion of the procuracy revolves around the necessity of retaining this institution as a way of dealing with Russia's vast size and restive regions and ethnic minorities.

More work needs to be done to further pursue these questions. How much control does the procuracy exert over judges in Russia today? How does the procuracy affect Russia's inquisitorial legal procedure? What relationship exists between the continued existence of the procuracy and Russia's continued status as a multinational empire? What other unique institutions have persisted in the Russian legal world for centuries?

Answers to these questions and others will help us understand Russia's current default classification as a transition law country. To find these answers, legal scholars will need to engage with scholarship from other disciplines, including Tsarist-era Russian legal history that looks across political divides for continuities and generalities that typify Russian law. Co-authoring between legal scholars and Russian historians will be productive; it will be critical for scholars to cooperate by both testing each other's assumptions and building on each other's work. Such work will help to create a more coherent vision of the development of Russian law over the centuries.

This brief survey suggests a few beginnings in the pursuit of an ideal type approach to Russian law; it is in no way exhaustive. Such work is important not just in order to better understand Russian law. It will also open new avenues of research for future comparative scholars and allow comparative law scholarship to

expand from its traditional focus on Europe and America. This expansion of perspective will then advance the chief goal of comparative law: to deepen our understanding of the way that law functions in different political systems, cultures, and societies.