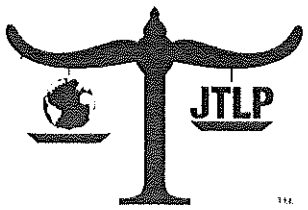

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Against the Triumvirate of Common, Civil & Soviet/Socialist Law

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AGAINST THE TRIUMVIRATE OF COMMON, CIVIL & SOVIET/SOCIALIST LAW

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I. INTRODUCTION. WHY THE TRIUMVIRATE: COMMON, CIVIL & SOVIET/SOCIALIST LAW?

This essay questions the one-hundred-year comparatist classification of the three European legal systems of the 20th century. These were civil, common, and socialist law. It builds on Michel Foucault's[1] episteme that classifications tame conceptual

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chaos, organizing it so that scholars may familiarize themselves with new pieces of information, and transform them into subsequent knowledge. Foucault alerts us that successful taxonomy designates the limits of our thinking process. It denotes simultaneously what we can imagine and accept as truth, and that which we cannot.[2] In this spirit, the present inquiry into the widely accepted triumvirate of civil law, common law, and socialist law becomes an investigation into what is acceptable to the historian and comparatist legal scholar and what is unorthodox. In other words, why is it unconventional to designate soviet or soviet-socialist law a subcategory of civil law, and why did Western scholars prefer to go along with the Stalinist creation of a new category, of "socialist" law, as a third legal system, and in the process liquidate the "soviet" qualifier, practically overnight?[3]

This essay argues that differentiating the soviet-socialist or socialist legal system from the civil system is a distinction without difference, if the distinction is from the perspective of the common law comparatist: to the extent that common law is a system based on case law, or something more complex.[4] The same distinction between common law and civil law applies to the one between common law and the soviet legal system metamorphosized into socialist with the Stalinist 1936 Soviet Constitution.[5] The dichotomy, and the tripartite classification it produced, is the result,

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thank the JTLP editors and staff, and especially its editor-in-chief, Nicholas Lower. Like always, this is for Izzie and ZouZou.

1. MICHEL FOUCAULT, THE ORDER OF THINGS (Pantheon Books, 1970). The author also used MICHEL FOUCAULT, THE MOTS ET LES CHOSES (Gallimard, 1966).

2. The essential problem of Classical thought lay in the relations between *name* and *order*: how to discover a *nomenclature* that would be a *taxonomy*, or again, how to establish a system of signs that would be transparent to the continuity of being [...] The history of knowledge can be written only on the basis of what was contemporaneous with it [...]. It is in this sense that archeology can give an account of the *existence* of a general grammar [...]. (italics in the original)

MICHEL FOUCAULT, THE ORDER OF THINGS, *supra* note 1, at 208.

3. For a history of the process, *see* ANDREI Y. VYSHINSKY. LAW OF THE SOVIET STATE (Macmillan, 1948).

4.

> What is the common law? Some people say that the common law is a method— a technique for deriving the law from precedent. There is no doubt that some courts engage in deriving rules by reading precedent and seeking the thread that ties them together, but this purely methodological view of the common law is a modern invention. It ignores the complexity of history and, in particular, the way in which the great text writers fashioned.

GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW *in* A GLOBAL CONTEXT: THE BASICS, 14 (Oxford University Press 2005).

5. Eighth Congress of Soviets of the Union of Soviet Socialists Republics, The Soviet Socialist Constitution (Dec. 5, 1936), https://www.marxists.org/history/ussr/government/constitution/1936/1936-constitution.pdf; *See generally* ANDREI Y. VYSHINSKY, THE LAW OF THE SOVIET STATE (Macmillan, 1948).

to paraphrase Foucault, of vagaries of chance, of distinctions between similar things based not on tradition, and neither on their evolution and history, but, at best, on a mixture of bold conjecture and distortion, and at worst, on inertia and intellectual laziness. Or, even more interestingly, on the code of knowledge which enables and distorts all orders and classifications. As Foucault suggests, "errors (and truths), the practice of old beliefs, including not only genuine discoveries, but also the most naïve notions, obeyed, at a given moment [having lasted over 100 years], the laws of a certain code of knowledge."[6]

To decipher the Foucauldian idea of a taxonomic code of knowledge as it applies to this classification of civil, common and soviet/socialist law, Part I briefly summarizes Foucault's work and situates the research problem within that specific epistemic constellation. Part II engages in a brief historical survey of the previous taxonomies of the legal systems of Western Europe and the iron cladded Europe and shows how the widely accepted taxonomy is an incongruous result of inconsistent application of two criteria – the sources of individual rights and the politics of legal administration. It briefly reviews Western and Soviet legal literature for their dissonant result of inconsistent use of taxonomic standards. Part III further incorporates Foucault's work, especially what he calls the archeology of knowledge. It employs some recent empirical data to show that all legal systems are instrumental in preserving a particular type of society, and that the difference between the Soviet system and the American legal system cannot solely stem from statism alone, understood as state intervention in the marketplace[7]. Both the planned and the free market are the result of state-enforced legal norms: At a minimum, both require contracts to be legally binding and enforceable for planned and free-market transactions.

Thus, this essay calls for a reexamination of the historical triumvirate of the 20th century legal systems into common, civil, and socialist law as it stands on a hybrid of legal and para-legal standards, different from the standards which differentiate between the civil and common legal system. Of course, the triumvirate could be based on the defining source of rights and duties for each system. Then, the classification would find some organizing principle applying to all categories equally. For instance, even though reductionist, one could say that court-decisions are the main source

6. FOUCAULT, THE ORDER OF THINGS, *supra* note 1, at ix.

7. According to Frederick Hayek, the difference is in the type of statism. The soviet one commands people the road to take, while Western capitalist states provide signposts. Again, a distinction without difference if the signpost is "dead end," for instance, that signpost better be read as a command. *See* F. HAYEK, ROAD TO SERFDOM, 54 (1944).

of rights and duties in common law countries, parliament-voted codifications in civil law countries, and for the iron-cladded countries, as noted in passing by Justice Douglas, whatever the politburo decrees. [8] Then, indeed, in a reductionist manner, the differentiator would equally apply to each category. So, why did comparatist and legal historians here and abroad refuse to use Justice Douglas's observations? Perhaps because the soviet-socialist system would have appeared in its nakedness as a mere bourgeois civil law system [9] whose capitalist values lost all humanity: A capitalist dictatorship. Or worse, because it could not have been possible to have a cold war between a liberal capitalist western world and a dictatorial capitalist soviet world? The western world would have had to fight not to preserve capitalism – which existed everywhere – but liberalism, as a political position opposed to illiberalism.[10]

II. UNPACKING FOUCAULT'S EPISTEMIC FOUNDATION: THE CAT, THE DOG, AND THE POTBELLIED PIG

Unpacking one hundred years of erroneous ordering of legal concepts might seem like a daunting process for a brief essay. That is why the main question here is only deciphering the epistemic comparatist incongruity of classifying soviet-socialist law in the same category with civil and common law.

In THE ORDER OF THINGS, Michel Foucault defines knowledge production as limited culturally and historically. [11] He thus identifies the cultural foundation of concepts (words/mots), demonstrating that their meaning is dynamic. He also explores meaning-making as the interplay between fundamental cultural

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8. WILLIAM O. DOUGLAS, *Foreword* to ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW, at vii (Colum. Univ. Press 1963).

9. *See, e.g.*, EVGENY B. PASHUKANIS, THE GENERAL THEORY OF LAW AND MARXISM 63 (Chris Arthur ed., Barbara Einhorn trans. 2002) (1924) ("Thus, Marx conceives of the transition to developed communism not as a transition to new forms of law, but as a withering away of the legal from as such, as a liberation from that heritage of the bourgeois epoch which is fated to outlive the bourgeoisie itself.")

10. *See, e.g.*, IRA KATZNELSON, LIBERALISM'S CROOKED CIRCLE. LETTERS TO ADAM MICHNIK (1996). *See e.g.*, IRA KATZNELSON, LIBERALISM'S CROOKED CIRCLE: LETTERS TO ADAM MICHNIK 9-10 (1996) ("Liberalism, however, is not a self-evident term, especially for Americans. It has become the name we give to the political position favoring active government in pursuit of reduction in inequity. But this usage as the opposite of conservatism narrows and reduces the term to a situational and partisan definition. By liberalism, Mills certainly meant [...] a guide to the construction of constitutional political regimes respective of human autonomy based on reason and choice. Liberalism has appreciated the state as a remarkable instrument for taming violence and reducing the costs of human interaction, but it also has understood that because states concentrate coercion, they constitute a potential tool for disaster. In this broader usage, liberalism is the opposite of illiberalism.").

11. *See generally* FOUCAULT, THE ORDER OF THINGS, *supra* note 1.

codes, scientific theories, and the pure experience of order, highlighting the fluid and constructed nature of how we perceive concepts and establish their meaning. He calls it the epistemic order in the world, which somewhere else I view as the result of meaning-making.[12]

Foucault writes that a historical period is characterized by epistemes — ways of thinking about truth and about discourse — which are common to each field of knowledge. This epistemic frame determines what ideas are possible to conceptualize and subsequently, within those ideas those acceptable to affirm as true. Foucault explains how acceptable ideas change and develop in the course of time. For instance, "Classical Age" or "Modernity" (from Kant onwards) — which is the period considered by Foucault in the book, do not share the same "acceptable" ideas or the same "truths." THE ORDER OF THINGS is filled with examples to support his thesis that every historical period has underlying epistemic assumptions, ways of thinking that determined what is truth and what is rationally acceptable. One such basic legal episteme is that the main differentiator between civil and common law is the source of individual rights and duties: law emanating from legislative bodies or law emanating from the judiciary.

Foucault's work enables thus the scholar to clearly understand that meaning is a relation between classified concepts within a particular cultural milieu. [13] Within that milieu, concepts are classified and positioned within a network of connections which highlight resemblances between new and old concepts, for instance. Foucault's work clarifies how epistemic errors work to produce accepted truths despite what he calls evidence, the archeology of knowledge, with its amassed empirical data suggesting the contrary. When a third member was elevated to the level of "foundational" member of the European legal family, then that member became legitimized and accepted as an alternative to "civil" and "common" law family. The reasons behind that elevation became obscured by the mere epistemic ordering of things. It thus became accepted knowledge.

> When we establish a considered classification, when we say that a cat and a dog resemble each other less than two greyhounds do, even if both are tame or embalmed, even if both have

12. *See, e.g.*, DANA NEACSU, THE BOURGEOIS CHARM OF KARL MARX AND THE IDEOLOGICAL IRONY OF AMERICAN JURISPRUDENCE 1, 3 (David Fasenfest et al. eds., 2019).

13. In my work I focus on the relational aspect of the textual instigator (author) and textual interpellated (reader), Foucault's relational epistemology is among the concepts I explore. *See id.*

> just broken the water pitcher, what is the ground on which we are able to establish the validity of this classification with complete certainty?[14]

The very existence of the ordering conceals whether the concepts have a degree of sameness. In the instance of the paragraph above, the sameness of both the cat and the dog is their quality of pets. If the classification is done in error, it matters less, because it metamorphosizes into a fulcrum of meaning-making. It enhances communication and knowledge production related to the comparison between two of the most beloved pets.

Similarly, when next to the common and civil law classification a third member is added, the assumption of sameness tempers individual meaning-making. If we were to use Foucault's example, and civil law is the cat, and the dog describes common law, any added third member would be infused with the qualities of the other members of the classification: legitimacy. So, if we call the socialist system, let's say, a Vietnamese potbellied pig, the immediate assumption is that of a pet, not only of an animal, but that of a tamed animal, a pet. And a potbellied pig can be a pet. Similarly, the socialist system can be defined like the common law and the civil law, by the source of their rights and duties. Only for the socialist system, that source is "what the politburo [...] decrees."[15] But that would take away the legitimacy conferred by the classification, and that is why, as shown here, the tri-partite classification of the 20th century European legal systems is never discussed by those widely accepting the classification. Because they would have had to explain how a form of absolutism hostile to any separation of powers[16] is internationally legitimized by the Western academe.

Noting this problem, probably, the comparatist and legal historian tried to cure it not by addressing its inapposite nature to everything a liberally democratic order required from its legal system, but by fabricating a legitimizing tripartite taxonomy, and in the process creating a tectonic epistemic error. Using the example of the three pets mentioned here, the Vietnamese pig, the potbellied pig was deemed a pet similar to a cat or a dog, only exotic. And the classification stayed.

> On what 'table', according to what grid of identities, similitudes, analogies, have we become accustomed to sort out so many different and similar

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14. FOUCAULT, THE ORDER OF THINGS, *supra* note 1.
15. DOUGLAS, *supra* note 7, at vii.
16. WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY, 7 (Univ. Cal. Press 1959).

> things? What is this coherence -which, as is immediately apparent, is neither determined by an a priori and necessary concatenation, nor imposed on us by immediately perceptible contents?[17]

The grid of the three-way legal classification assumed similitude and analogies, although, where they never existed. Consequently, the third member, sanitized from soviet to socialist, became legitimized and perceived not as an imposition, but as epistemic development.

From 1917 until 1936, the first two decades of transition from a tsarist rule of law to a Stalinist rule of law, legal scholars did not feel the need to add any other element to the traditional comparatist classification of Western legal systems: common and civil law. Russia was regarded as a state-capitalist society.[18] The formality of the sources of rights and duties, acknowledging its reductionism, made it clear that legitimately there could only be two in a democracy: the will of the people or the will of judges. But then, in the mid of the 1930s, quite a few illiberal epistemic earthquakes were happening in Europe. Hitler, Mussolini, and Franco were shaking European liberal democracies but not necessarily their capitalist private property foundation. Meanwhile, Stalin was shaking both the liberal democracy structure and its private property ownership, annihilating democracy with a dictatorship and private property with corporate statism.

To legitimize his power, Stalin redefined the Soviet state and its law. The Soviet state was as violent as the capitalist state, but its institutions – identical to those of the repressive capitalist state – were nevertheless different because while there were no classes there still was class struggle. To even imagine abolishing the state, Stalin's mouthpiece, Vyshinsky said, was "anarchist."[19] Stalin used the very concept of the Rule of Law, when he decreed the stability of statutes, and had a new Constitution drafted.[20] Each republic of the Soviet empire became socialist.[21] Overnight. And the soviet legal

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17. DOUGLAS, *supra* note 7, at vii.

18. *See, e.g.*, JOHN HAZARD, SOVIET LEGAL PHILOSOPHY (1951) (summarizes the evolution of the triumvirate classification). See also RAYA DUNAYEVESKAYA, RUSSIA AS STATE-CAPITALIST SOCIETY (1973). Similarly, *see, e.g.*, IVO LAPENNA, STATE AND LAW: SOVIET AND YUGOSLAV THEORY (1964) (soviet or socialist state was representative of the transition from capitalism to a new society and during that transition the law remained capitalist as its inherited institutions).

19. A.Y. VYSHINSKY, FUNDAMENTAL TASKS OF SOVIET LAW *in* SOVIET LEGAL PHILOSOPHY, 303, 310 (1951).

20. *See id.*;ANDREI VYSHINSKY, THE LAW OF THE SOVIET STATE (Macmillan, 1948).

21. *See* ANDREI VYSHINSKY, THE LAW OF THE SOVIET STATE, *supra* note 21.

system became socialist too, as shown from a brief analysis of Andrei Vyshinsky's Stalinist jurisprudence.

Somehow, the Western academe went along, and promoted the widely accepted triumvirate of a) common law, b) civil law, and c) socialist law, while making sure that only two of them were the "great legal systems of the world, the civilian and the common law."[22] Unwittingly, perhaps, in the process those very eminent legal scholars legitimized Stalinism and raised it to the level of an alternate society, competing for the soul of humanity with liberal capitalism. Socialist law replaced the Soviet system with the 1936 Constitution.[23] The legal system it defined was the same as before the 1936 Constitution, therefore its formal sources of rights and duties were what the politburo decreed. However, that was not the reason for promoting a new European legal system. The reason promoted was "extra-legal," as some scholars stated. Socialist law was promoted as a political concept, again an ironic move for the legal minds which did not adhere to the Marxian concept that law is politics. Thus, whether through complacency, intellectual collusion, or collaboration with Stalin's view of the authoritative system he was building behind the Iron Wall, his legal system became sanitized and widely used in comparative jurisprudence under the new label of "socialist law."

> For it is not a question of linking consequences, but of grouping and isolating, of analyzing, of matching and pigeon-holing concrete contents; there is nothing more tentative, nothing more empirical (superficially, at least) than the process of establishing an order among things; nothing that demands a sharper eye or a surer, better-articulated language; nothing that more insistently requires that one allow oneself to be carried along by the proliferation of qualities and forms.[24]

And this is how this disingenuous classification has corrupted the comparatist and historical legal knowledge production. Foucault erroneously presents classifications as mere tentative grouping.

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22. EDITORIAL COMMITTEE, GENERAL INTRODUCTION TO THE SERIES *in* SOVIET LEGAL PHILOSOPHY, ix (1951). (The members of the Editorial Committee were Jerome Hall, Edmund N. Cahn, Felix, S. Cohen, Lon, L. Fuller, George W. Goble, Edward A. Hogan, Josef L. Kinz, Edwin W. Patterson, Harold G. Reuschlein, and Max Rheinstein). For a more general critique of the disastrous impact of the Old Left on knowledge production, *see, e.g.*, TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE (1987).

23. KONSTITUTSIIA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION], https://www.marxists.org/history/ussr/government/constitution/1936/1936-constitution.pdf.

24. WILLIAM O. DOUGLAS, *supra* note 7, at vii.

But, as shown here, that very "grouping" is an epistemic shortcut. Labels convey meaning. They are not merely descriptive.[25] By the very fact of promoting the interchangeable socialist and soviet legal system identifiers at the same foundation level with civil and common law, a controversial concept (socialist) becomes foundational, and receives the assumption of truth and becomes a building block of legal knowledge. Classifications are not innately tentative. It is the most basic form of legitimation of something, which left outside, would have been much discussed and analyzed. Because, as Bentham would remind us, theory is about consequences.[26]

Everything scholars propose has consequences. And continuing to reference a potbellied pig as similar to a cat or dog has consequences which go beyond scholastic games. It affects the trust in knowledge production of present and future generations. It makes us, those interpellated by theories, believe that we really know what socialism is when we do not. We only know two political systems and their legal scaffolding: liberal democracies hosted by Western-style capitalism and autocratic, statist-style capitalism. And law everywhere means order. Not justice. Order. Domestic. International. And order benefits from clear semantic distinctions, and sometimes mythical classifications.

The triumvirate classification of legal systems into civil, common, and socialist law (interchangeably supplanting soviet law), denotes what Foucault calls a bold conjecture of crushing the standards of historical, Roman-Law-infused tradition and 19th century economics. If civil and common law sit on the perceived role of the sources of individual rights and duties–parliamentary statutes or judge-made law—the socialist legal system cannot belong to the same grid.

Unlike soviet law, socialist law requires a political theory built on the aspiration of no private ownership of the means of productions, or on the aspiration that the forces of production have melted into thin air into owners of the means of production. Unfortunately, such a system never existed. The state, a corporate institution, as opposed to an individual, owned most of the means of production in all soviet systems of the Eastern Block. The mere corporate ownership of those means of production (industrial tools), correctly identified by Article 5 of the 1936 U.S.S.R. Constitution,

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25. DANA NEACSU, THE BOURGEOIS CHARM OF KARL MARX AND THE IDEOLOGICAL IRONY OF AMERICAN JURISPRUDENCE (Brill 2019).

26. For more on Bentham, *see, e.g.*, Dana Neacsu, *Applying Bentham's Theory of Fallacies to Chief Justice Roberts' Reasoning in West Virginia v. EPA*, 61 DUQ. L. REV. 95 (2023).

as "state property,"[27] does not become "socialist" just because the same politburo-produced constitutional text makes demonstrably false statements about their physical "possession."[28] How can a weaving loom from a textile factory in Ivanovo,[29] for instance, be in the possession of "the whole people"[30] presumably living within the geographical confines of the U.S.S.R. at any given time? And what does it mean "possession?" Using the loom while toiling for a wage which no one could negotiate or worse, refuse?[31] Nor does the state intervention in the market, either boldly through Constitution-mentioned economic plans,[32] or less obvious, when history requires the U.S. government "to regulate industries 'affected with a public interest.[33]'" Those industries affected with public interest have covered the gamut in recent years from financial institutions (corporate banks[34] and not individuals, such as Bernie Madoff[35]) to dating sites like Grindr,[36] and media sites like TikTok.[37] If socialist

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27. KONSTITUTSIIA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION], chapter 1, at art. 5: "[P]roperty in the U.S.S.R. bears either the form of *state property (the possession of the whole people)* or the form of co-operative and collective farm property[...]." (emphasis added). https://www.marxists.org/history/ussr/government/constitution/1936/1936-constitution.pdf.

28. *Id.*

29. *Ivanovo*, BRITANNICA, https://www.britannica.com/place/Ivanovo-Russia (last visited Sept. 22, 2024).

30. KONSTITUTSIIA SSSR, *supra* note 26, atart. 5: https://www.marxists.org/history/ussr/government/constitution/1936/1936-constitution.pdf.

31. *Id.* at art. 12. Work was a surviving condition: "...'to each according to the work performed." *Id.*

32. *Id.* at art. 11. The economic life of the U.S.S.R. is determined and directed by *the state plan of national economy* for the purpose of increasing the public wealth, of steadily raising the material and cultural level of the toilers, and of strengthening the independence of the U.S.S.R. and its power of defence. (emphasis added). *Id.*

33. WILLIAM O. DOUGLAS, STARE DECISIS, *in* ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 32 (1963) (referencing Munn v. Illinois, 94 U.S. 113 (1876)).

34. For the nationalization of the debt of financial institutions popularized as "bank bailouts," *see, e.g.*, the use of Troubled Asset Relief Program (TARP), a $700 billion government bailout of such financial institutions as Bank of America, Citigroup, JPMorgan Chase and Wells Fargo. Other businesses like General Motors and Chrysler also received funds through TARP. Marc Davis, *A History of U.S. Government Financial Bailouts*, INVESTOPEDIA (Sept. 23, 2024), https://www.investopedia.com/articles/economics/08/government-financial-bailout.asp.

35. Referenced as "American financial criminal and financier" on his Wikipedia page, https://en.wikipedia.org/wiki/Bernie_Madoff. For how his fortune was distributed among his victims, see, e.g., *Justice Department Announces Distribution of Over $158.9M to Nearly 25,000 Victims of Madoff Ponzi Scheme*, OFF. PUB. AFFS. (Dec. 11, 2023), https://www.justice.gov/opa/pr/justice-department-announces-distribution-over-1589m-nearly-25000-victims-madoff-ponzi.

36. Yuan Yang & James Fontanella-Khan, *Grindr is being sold by Chinese owner after U.S. raises national security concerns*, L.A. TIMES (Mar. 6, 2020, 11:43 AM), https://www.latimes.com/business/technology/story/2020-03-06/grindr-sold-by-chinese-owner-after-us-national-security-concerns.

37. Haleluya Hadero, *Senate passes bill forcing TikTok's parent company to sell or face ban, sends to Biden for signature*, AP NEWS (Apr. 23, 2024), https://apnews.com/article/tiktok-ban-congress-bill-1c48466df82f3684bd6eb21e61ebcb8d.

legal systems are something else than a cat, a dog, or a potbellied pig, perhaps it is time to reflect on the error of that classification.

III. THE INVENTION OF SOCIALIST LAW. BRIEF LITERATURE REVIEW

Following Jeremy Bentham's PRINCIPLES,[38] Joseph Raz wrote in his Oxford thesis[39] that a theory of legal systems ought to be analytical in character. Raz proposes a theory which answers the following four problems: (1) the criteria for their existence; (2) the criteria of the membership of a legal norm to a particular system; (3) the criteria of the structure of the system; and (4) the criteria of the identity of content.[40] Raz applied his theory to systems which existed at the time of his scholarship (the French legal system), had existed (the Roman legal system), or belonged to the imaginary (Plato's republican system).[41] Thus, extrapolating Raz's theory, to purport that a legal system exists within a particular classification, that system ought to be identifiable by the uniform criteria identically applied to all legal systems belonging to that classification, otherwise the endeavor is not analytical, but poetic.[42]

From this perspective, it becomes of little import whether the Socialist legal system supplanted the category of Soviet law when both Stalin and the West needed a clear, oppositional cognitive political category. Or that while Hitler was in the making, the West was weighing his usefulness to eradicate the Bolshevik experiment.[43] But clarifying this historic, muddled epistemic blunder rests on more than this author's sense of the order of things. It is useful from a multitude of reasons as well: comparative legal studies, legal philosophy, and also legal cognitive taxonomy[44]. The

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38. *See generally* JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 1 (John Bowring ed., Edinburgh: William Tait 1843).

39. JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF A LEGAL SYSTEM 1 (Oxford Univ. Press, 2d ed. 1980).

40. *See generally* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1980).

41. *Id.* at 1.

42. I use "poetic" as opposed to analytical, building on BERTRAND RUSSEL, WISDOM OF THE WEST (1959), where he described the divorce between art and science because the first relished a sense of freedom and adventure outside the constraints of a set of standards and procedures required by any scientific, ergo, academic endeavor. *Id.* at 373-74.

43. Thus, this article does not start a quarrel with the British National Archive which found value in Chamberlain's foreign policy of appeasement of Hitler. *See, e.g., Chamberlain and Hitler 1938 What was Chamberlain trying to do?*, https://www.nationalarchives.gov.uk/education/resources/chamberlain-and-hitler/.

44. On the value of a legal nomenclature, or taxonomy which would be "transparent to the continuity of being," and thus encourage knowledge production which encourages understanding of being rather than a biased representation of "being" *see, e.g., supra* fn. 1 & 2.

Library of Congress does not use "Socialist Law" in its classification system,[45] though it does index "Civil Law"[46] and "Common Law" for the United States and Canada.[47] This article might thus offer a path forward towards clarification and transparency, with "Soviet Law" and "Socialist Law" as historical subclassifications of Civil Law for countries with a soviet past.[48]

A. Soviet/Socialist Law Is Denied a Seat at the Civil Law Family Table

French Law Professor, Andre Tunc, presciently quoted Dean Roscoe Pound, as saying: "Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurists must have a basis in comparison."[49] Of course, Dean Pound assumed such comparisons as unspoiled by bias and prejudice as possible.

In his seminal book used to teach generations of Harvard Law students, *THE CIVIL LAW SYSTEM*,[50] Professor Arthur Von Mehren limited his introduction to the comparative study of law of the two legal systems whose historical roots he located in the 400-year of what he called romanization of parts of England and Western Europe (west of the Iron Curtain), which preceded the end of the Western Roman Empire.[51] Von Mehren admired Roman law because it embedded "excellent [legal] solutions for particular problems."[52] The admiration for the solutions rested on the ability of Roman law to both reflect the "politic, economic, and social life" and meet the requirements of its development.[53] Von Mehren views law through its functionality, its role ensuring human progress,

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45. *See Class K Law Library of Congress Classification Outline*, https://www.loc.gov/aba/cataloging/classification/lcco/lcco_k.pdf.

46. *See id.*, at Subject Headings K623-968.

47. *See id.*, at Subject Headings KF1-9827.

48. For a thought-provoking brief explanation about how history treats allies like enemies and vice versa, and thus a list of countries with a soviet/socialist past, *see, e.g.*, John F. Kennedy Presidential Library and Museum, *The Cold War*. https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/the-cold-war (last visited Nov. 8, 2024).

49. ANDRE TUNC, *Foreword* to ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM. AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW, at vii (A. James Casner et al. eds., 2d ed. 1977) (quoting Dean Roscoe Pound).

50. ARTHUR TAYLOR VON MEHREN, THE CIVIL LAW SYSTEM. AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (Erwin N. Griswold et al. eds., 1957).

51. MEHREN & GORDLEY, *supra* note 47, at 4 ("In 476 Odovaker deposed Romulus Augustulus, the son of a leader among the Roman mercenaries and last of the line of imperial rulers in the West").

52. *Id.*

53. *Id.*

which historically has been connected to stable politics and flourishing commerce. [54] The way Roman law ensured the administration of law is very much similar to the common law administration of law – where actions could be purchased for each type of complaint, reminiscing of praetorian, judge-made law. On the other hand, treaties, a type of contract (another Roman invention), ensured alliances among kingdoms through the Middle Ages. And finally, the unique identifier of the civil law families would be the manner in which centralized political power was achieved through the codification of local laws, a late Roman legal invention, which in return would be enforced through a centralized system of courts.[55]

The work of Von Mehren limits itself geographically to the legal system west of the Iron Curtain. But, using his book's descriptor: the Roman influence of the codification on the civil law countries; then all the legal systems of the countries located at east of the Iron Curtain thrived on codifications, that would make them members of the civil law family. Not only did Von Mehren refrain himself from doing so; he makes no mention of Soviet or socialist law in his book. And in Roman law, what was not specifically denied was allowed.

B. Socialist Law Becomes an Alternative Third Legal Classification for Political Rather than Legal Reasons

However, as discussed here, few Western members of the Academe ignored the Soviet experiment, like Von Mehren did. Most mirrored the work of Stalin and his soviet legal scholars. Soviet Russia became socialist in 1936, and its law had the legitimacy of being the law of the nation's toilers. Which in itself is absurd because toilers rarely have time to make laws. In 1954, George C. Guins wrote:

> Socialist law .... is a system of norms established by the regime of toilers in the form of legislation for the purpose of protecting, strengthening and developing socialist relations and of building a communist society. The system of norms expresses

54. *Id.* at 8-9. (discussing the development of law after the fall of the Roman empire, Van Mehren cogently argues the role of the rediscovered Roman law in ensuring both political stability and legal solutions for trade and other commercial problems).

55. *Id.*

> the will of the entire Soviet people, which is led by the working class, headed by the Communist Party.[56]

In 1969,[57] John Henry Merryman claimed that: "[t]here are three major legal traditions in the contemporary world: civil law, common law, and socialist law."[58] Continuing this approach, Alan Uzelac stated that the defining feature of socialist law is its instrumentalism.[59] Law is meant to promote a new socialist society, whose success was dependent on the existence of a socialist body of law. The circularity of the definition never came into play. Neither has the instrumentality of the legal system itself, though all laws, to the extent they are legal norms regulate behavior and though their stability protect status-quo. Thus, the very reason for a legal system appears functional and instrumental.

John Quigley seems to be unique in his view of soviet law as socialist law[60] which nevertheless belonged to the civil law family.[61] From Rene David[62] to Leontin-Jean Constantinesco,[63] Western jurists caged law into the mold of socialist law, something utterly different than any continental legal systems. While distancing himself from the "separationist" movement,[64] by stating the roots of the soviet/socialist legal system as civil law, Quigley also noted something worth mentioning. From its inception, the Bolshevik uprising produced both an irrational attitude in the West, which

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66. GEORGE C. GUINS, SOVIET LAW AND SOVIET SOCIETY 42 (Martinus Nijhoff 1954) (quoting Vyskinskii).

57. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1969).

58. *Id.* at 1.

59. Alan Uzelac, *Survival of the Third Legal Tradition?* 49 SUP. CT. REV. 377 (2010).

60. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 801, 801 n.5 (1989) ("By socialist law is meant the law of countries whose governments officially view the country as being either socialist or moving from capitalism to socialism, and which hold a communistic society as an ultimate goal."); JOHN QUIGLEY, SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD (2007).

61. *See, e.g.*, William Partlett & Eric C. Ip, *Is Socialist Law Really Dead*, 48 N.Y.U. J. Int'l L. & Pol. 463, 473 (2016) (discussing the impact of Quigley's work).

62. JOSEPH DAINOW, TRAITE ÉLEMENTAIRE DE DROIT CIVIL COMPARE, BY RENE DAVID 319 (1950).

63. Leontin-Jean Constantinesco, TRAITE DE DROIT COMPARE': TOME III: LA SCIENCE DES DROITS COMPARES 158 (1983) (Soviet law "does not belong to the Continental European system despite the many similarities in technique, concepts, and institutions.").

64.

> [T]hose points of difference have not removed socialist law from the civil law tradition. To draw that conclusion is to overlook the historical connection of socialist law to civil law and the continuing relevance in socialist law of civil law rules, methods, institutions, and procedures.

John Quigley, *Socialist Law and the Civil Law Tradition*, *infra* pp. 808; see also William Partlett & Eric C. Ip, *Is Socialist Law Really Dead* 48 N.Y.U. J. Int'l L.& Pol. 463 (2016) (discussing the influence of Soviet law on Chinese law and describing both as socialist because of their Leninist ideology and statist nature).

Harold Laski identified as an ideatic *cordon sanitaire*,[65] but also progressive reforms, including limiting the workday, first for children, and women, to everyone.[66]

In 1999, in their LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION, published under the auspices of Columbia Law School's Parker School of Foreign and Comparative Law, Professors Gennady M. Danilenko and William Burnham come up with a hybrid classification scheme. For instance, they start with the formal criteria of sources of law: while common law relies on judge-made law, civil law relies on parliamentary-made law. However, they soon realize that either they rectify Stalin's misnomer of soviet law as socialist and would make their case that soviet law fit squarely with the civil law family, or they propose their own hybrid classification, and maintain the Stalinist classification with soviet law becoming socialist law, different but equal to civil and common law.[67] Choosing the path taken by almost everyone else, these two authors adjust their thesis to include, "extra-legal criteria, such as the type of civilization or political ideology."[68] And they continue:

> The contrast between civil law and common law draws primarily on formal criteria, such as the sources of law, organization of the law and ways of handling legal materials. However, the socialist legal system was singled out by using extra-judicial factors, namely ideology and political structure.[69]

Danilenko and Burnham's soviet legal system is a civil law system which they deem different because, they state, it promotes values different than those of a capitalist system. Their views of capitalism rest on the role of the state with regard to the market, and personal life.

> The Soviet legal system operated in a state that had socialized all means of production, established an all-embracing state control over all aspects of social life, was dominated by a "vanguard communist party"

65. JOHN QUIGLEY, SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD, 4 (2007).

66. *Id.* at 12, 14.

67. GENNADY M. DANILENKO & WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 1 (Columbia L. Sch. Parker Sch. of Foreign & Compar. L. ed., 1999).

68. *Id.*

69. *Id.* at 2.

> and proclaimed Marxism as official state ideology, this was bound to affect the legal system.[70]

This teleological view of socialist law is shared by Cleveland State Law Professor Emeritus, David F. Forte, though his position is far from a mere regurgitation of Soviet propaganda.[71] Forte recognizes the incompatibility of a so-called socialist legal system, with any legal system other than the pre-existing civil law system–to the extent it existed–given the tsarist disregard for the very principle of legality and appearance of legality.[72] While a society in so-called transition from the previous form of government–tsarist dictatorship–and previous economic organization–latifundial property concentrated in the hands of the Tsar, and members of the aristocracy–the legal system could not be but one in transition.

The problem with the Soviet legal transition was the fiction of its Marxist defined goal: the disappearance of the state and, to the extent law was mere superstructure produced by the state, then the disappearance of law, too.

> Between capitalist and communist society lies the period of the revolutionary transformation of the one into the other. Corresponding to this is also a political transition period in which the state can be nothing but the revolutionary dictatorship of the proletariat. But this state of the proletariat will eventually wither away as the class distinctions disappear.[73]

As long as the state was viewed as a tool of the ruling classes to conserve, fortify and evolve the economic and social order according to their the interests, and the law was the means to implement that goal,[74] then what was the legitimacy of their very existence when there was only one ruling class, the proletariat, with no opposing classes: the peasants were their allies.[75] Lenin and Stalin, aware

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70. *Id.*

71. *See generally* David F. Forte, *Western Law and Communist Dictatorship*, 32 EMORY L.J. 135 (1983).

72. *Id.*

73. KARL MARX, CRITIQUE OF THE GOTHA PROGRAMME 28 (The Electric Book Co. Ltd 1875),

74. IVO LAPENNA, STATE AND LAW: SOVIET AND YUGOSLAV THEORY 11 (1964).

75.

> The dictatorship of the proletariat is the rule won and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any laws. It is quite clear, in what sense Marx speaks of 'the dictatorship of the proletariat' (in the sense of the proletariat alone, and not the 'proletariat and the peasantry,' for the peasants are a different

any dictatorship requires a violent state, had to distance themselves from Marx and his view about the withering away of the state. The fiction of the transition needed to end and the reality of the dictatorship of the selected few members represented by the new aristocratic elite – the apparatchiks – had to be installed. And as Professor Forte aptly explained, "the Pashukanis school [which] held that both the law and the state would progressively diminish as socialism developed,"[76] had to be delegitimized using legal tools.

> Stalin may not have cared much for the law, but above all, the totality of the power of the state had to be maintained. If legal forms meant the continuation of the strong central state, then he would have legal forms.[77]

Thus, despite any fiction to the contrary, the Soviet market too continued, only its property became mostly corporate - state monopoly - and in a small proportion belonged to kolkhozniks,[78] and some to private individuals. Soviet jurists actively recognized the "organizing role of contracts" in the Soviet economy.[79] Even the decrees nationalizing property in Soviet Russia stated that the objects of property belonged to the state, which administered them in the name of the proletariat. After 1936, the governing power was concentrated in the figure of the president-for-life.[80]

As other prominent legal scholars explained, Soviet law was a direct and at times brutal instrument of policy implementation: "Do not forget," Professor Hazard recollected, "that we have in the Soviet

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class). But he knows that the proletariat is not strong enough to achieve victory without an alliance with the peasantry.

V.I. Lenin, THE PROLETARIAN REVOLUTION AND THE RENEGADE KAUTSKY 10, 77 (1918).

76. David F. Forte, *Western Law and Communist Dictatorship*, 32 EMORY L.J. 135, 179 (1983).

77. *Id.*

78. S. Bratus, E. Fleishits & R. Khalfina eds., SOVIET CIVIL LEGISLATION AND PROCEDURE 56 (1962) ("Communist construction is based on the principle of material incentives for citizens, enterprises, kolkhozes, and other economic organisations.").

79. Inga S. Markovits, *Civil Law in East Germany-Its Development and Relation to Soviet Legal History and Ideology*, 78 YALE L. J. 1, 34 (1968).

80.

> But the new constitution and the maintenance of the Romanist codes gave Stalin much that the proposed codes did not have. First, there was the personal motive. Stalin had set himself the task of removing any potential competitors to his rule. [...] Stalin may not have cared much for the law, but above all, the totality of the power of the state had to be maintained. If legal forms meant the continuation of the strong central state, then he would have legal forms.

FORTE, *supra* note 73.

Union the dictatorship of the proletariat, and that law must serve the state authority."[81] So, Soviet law could stand at the table of foundational legal classifications because its source of rights and duties was different than those of the common and civil law system. But no legal scholar wanted to make that point clear, except as an anecdote.

C. Pashukanis' Soviet Law as Capitalist Civil Law, and Vyshinsky's Socialist Invention

In 1924, when Evgeny B. Pashukanis wrote his famous book THE GENERAL THEORY OF LAW AND MARXISM, Soviet law was viewed as bourgeois or capitalist. Pashukanis argued that the rule of bourgeois law was preserved during the transition to socialism even when capitalist exploitation no longer existed. His position used the same argument as his detractors, a decade later; waiting for the state to wither away, Pashukanis worked with the existing capitalist law; his detractors, given the increased violence of the state under Stalin, could not be expected to keep working with the transitional phase, and invented a new stage, socialist. However, for Pashukanis the existing legal system was bourgeois:

> The transition period -as Marx showed in his 'Critique of the Gotha Programme'-is characterised by the fact that social relations will for a time, necessarily continue to be constrained by the 'narrow horizon of bourgeois right.[82]

Labor was still the basis of a worker's wage, even if the market changed its perceived arbitrariness.[83] The marketplace is never arbitrary. It is heavily regulated, but the rules are rarely broken, so the state punishing arm is not seen, the absence of which has always been misguidedly described as proof of the "free" (as unregulated) aspect of the capitalist market. And where Marx stopped short of defining the enabling state of the capitalist legal order "bourgeois," Pashukanis relies on Lenin's work, which states that "of course, bourgeois right [...] presupposes the existence of a bourgeois state."[84] Because there cannot be any other state, concludes Pashukanis, further referencing Marx. Until labor remains "a

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81. Harold J. Berman, *Soviet Law Reform-Dateline Moscow 1957*, 66 YALE L.J. 1191, 1214 (1957).

82. EVGENY B. PASHUKANIS, LAW AND MARXISM: A GENERAL THEORY OF LAW AND MARXISM. 61 (Routledge 2002 [1924])

83. *Id.* at 62.

84. *Id.* at 63 (quoting Lenin's State and Revolution).

means of life,"[85] then state violence is necessary to implement the legal norms necessary to protect such use of labor, and that state is only capitalist.

However, Pashukanis' view of Soviet law and the Soviet state as just another flavor of bourgeois law and state, was repudiated by Stalin and since forgotten. From the logic of the reality legal norms govern, the Soviet legal scholarship focused on a more formal and positivist approach to law. If the state used to ensure legal order is not bourgeois, because it is not defending the interests of the bourgeoisie, the class which did not really exist to start with in Tsarist Russia, then the new state defined by the new interests it defends would define the legal system as well. For Vyshinsky, that was the socialist state. For Western scholars like F. Hayek, the state became the defining element of the legal system as well, however not because of the interests it protected, but because it interfered with the social relations between market participants, apparently the most foundational relations to the capitalist society as well, according to Hayek, who must be ignoring that they represented what Marx called the basis of all society, the forces of production.

Thus, how different is a soviet planned economy from a free-market "planned" economy? Vyshinsky engages in two answers. The first answer covers the first 20 years of the dictatorship which followed the anti-Tsarist military coup d'état, defined as Marx's transitional period. In his CRITIQUE OF THE GOTHA PROGRAM, Marx speaks of the law governing it as "bourgeois law," and Vyshinsky references it as such.[86] Two decades later, voices who continued the use the Marxian and Leninist view of Soviet law as capitalist, bourgeois, law because 1) it relied on a the state machinery of punishment, and because 2) it promoted and protected market exchange relations, despite their "planned" nature, such as Evgeny Pashukanis, had been "unmasked as a spy and wrecker" [87] and silenced. In their place, Vyshinsky brought in the meta-principle of the Soviet legal system: the use of the state domination and violence to promote the domination of the toilers over the rest of the society. The rules required discipline and discipline required rules.

In 1936, the new federal Constitution, whose main drafter was Vyshinsky, was adopted. It changed the structure of the Soviet government and added the qualifier socialist. From a transitional bourgeois system, Stalin introduced himself as the head of the legal system – whose statutes translated into law the will of the toilers as understood by the communist party and its head, Stalin. Using the

85. *Id.* at 63 (quoting Marx's Marginal Notes).
86. ANREI Y. VYSHINSKY, THE LAW OF THE SOVIET STATE 52 (1948).
87. *Id.* at 53.

state to instill socialist discipline made the legal system socialist. Why was the state's punishing arm necessary? Because socialism did not equate equality. Both Vyshinsky and Stalin had to accept that Russia had not reached the historical stage where competition was superfluous, and everyone would be able to receive what is needed in an equal manner.[88] "Law and legislation – and crime also – are generated by the condition of production forces, and not arbitrarily." [89] Those forces of production have a material component, capital, as well as a relationship component between the people and the corporations engaged in the process of production. If the planned economy to better the public needs made a market socialist, then, it is worth noting that in the United States there have been periods when the state interfered with the market for the benefit of the public.

For instance, in the 1880s the United States Congress established the Interstate Commerce Commission to regulate railroad ticket prices for the benefit of the consumers, and U.S. Senator John Sherman introduced legislation to protect market-place competition and stop monopolistic activities.[90] By the 1930s, the Western world had been shaken by a multi-nation war which changed the partition of the African continent and the Middle Eastern Arab countries, and was surviving economic and social upheaval to such a degree that U.S. Supreme Court Justices were ready to recognize a decade later, after the end of another multi-nation war which brought to the forefront the limits of liberalism as a state-backed ideology:

> Today there is greater realization that survival lies in the development of a cooperative society where the security of capital rest on the broad base of the prosperity of the multitude. Today the accepted view is that property need not be made tyrant in order to give men freedom and incentive to acquire it, own it, and manger it and to unleash the great productive power of free enterprise.[91]

Moreover, as shown below, the so-called liberal state continues to plan the "freedom" of the U.S. market by "nationalizing" the

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88. *Id.* at 14.
89. *Id.*
90. *See* JOHN QUIGLEY, SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD 7 (2007).
91. WILLIAM O. DOUGLAS, ESSAYS IN JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 33 (1963).

financial debt of certain institutions.[92] More recently, the state interference goes also towards nationalizing the assets of institutions it deems dangerous to the U.S. market.

IV. ARCHEOLOGICAL EPISTEMIC SUPPORT FOR SOCIALIST LAW AS ILLIBERAL CAPITALIST LAW. THE SIMILARITY OF LEGAL INSTITUTIONS AND EXAMPLES OF THE US STATE INTERVENTIONS IN THE MARKET

If Foucault's "cat" and "dog" helped with the epistemic assumptions available at a particular historical moment, in this section let's focus on empirical data which would further decry the classification of socialist law as anything as foundational as civil and common law.

A cat and a dog promote understanding of pets, as the concepts stand for similarly situated animals: domesticated pets. From this similarity, in this essay, they were used as metaphors for common and civil law, because both systems are compared based on the sources of legal norms. If their designation were to change to identify other similarly situated concepts, such as liberal capitalism and state capitalism, where would socialist law fit in? Because the main flaw with the current classification of civil, common, and socialist law is that they are not constructed with identical standards (the source of rights and duties). Because if the differentiator is the type of society promoted, then civil and common law are useless identifiers with no distinction. But then socialist law and liberal capitalist law can become Foucault's cat and dog. In addition to their functional and political designation, there are other similarities between socialist (or illiberal capitalist) law and liberal capitalist law.

For instance, the eminent scholar of free-market liberalism, Frederick Hayek, defined the requirements of the Rule of Law as: public norms, of general, equal, and certain applicability.[93] But legality and stability were principles of Stalinist Russia as well. In fact, there seems to be a consensus in finding the Soviet law's element of legality, as Harold Berman pointed out:

> That the Soviet leadership is not so bound and that the Soviet legal system is not a sham but a very real and vital factor in Soviet life are matters of

92. Picking winners and losers in energy/fossil fuels for over a century is another historical example, *see., e.g.*, Tracey M. Roberts, *Picking Winners and Losers: A Structural Examination of Tax Subsidies to the Energy Industry*, 4 COLUM. J. ENV. L. 64, 135 (2016). https://journals.library.columbia.edu/index.php/cjel/article/view/3568

93. FREDRIK A. VON HAYEK, THE MARKET AND OTHER ORDERS 163 (2014).

> observable fact. The notion that a system of law and justice cannot co-exist alongside a system of force and injustice is contradicted many times by history and by experience—in Caesar's Rome, in Tudor England, in contemporary South Africa and in many other times and places.[94]

However, if legality (sakonnost) never changed its meaning from the times of Stalin and his Prosecutor of Death, Vyshinsky, as mere "stability of laws,"[95] which is one of the tenets of our liberal Rule of Law, similarly connected to a Western-style legal system are the organization of legal thought in Soviet Russia. Soviet lawyers also were taught and practiced private, commercial (or business), and public law, at least as these classifications transpired from Professor John Hazard's work,[96] as reviewed by Professor Berman's:

> Since the importance of Comparative Law lies in comparison, it is disappointing to find only a few references to parallel or contrasting aspects of American law... [I]n dealing with Article 1 of the Soviet Civil Code, which declares private rights to be enforceable only when they are exercised in accordance with their social-economic purpose, it would contribute greatly to our understanding of the significance of such a provision if we were led to compare it with the effect of "public policy" considerations on the outcome of American cases. [...]
>
> Closely related is a second crucial question—namely, what, among comparable, should be compared? Here again it seems to me that Professor Hazard, by confining himself for the most part to the "private-law" aspects of Soviet law, has missed a golden opportunity. Only in one case are Soviet state business enterprises involved; in that case alone is there illustration of the direct effect of national economic planning upon traditional legal categories. This is because Professor Hazard has confined himself to the regular courts. He has not dealt with cases decided in the system of commercial courts

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94. Harold J. Berman, *Soviet Law Reform-Dateline Moscow 1957*, 66 YALE L.J. 1191, 1211–12 (1957).

95. *Id.* at 1213 ("Under Stalin, too, the Soviet leadership placed a high value on legality. "Stability of laws" was Stalin's slogan, carried by Vyshinsky").

96. John N. Hazard, *Materials on Soviet Law*, 58 YALE L.J. 661-65 (1947).

> (Gosarbitrazh) which handle disputes between government corporations. One might go on from problems of commercial law to those of administrative law, by comparing, for example, the new Soviet fifteen-year plan for afforestation with our own soil conservation program—not from the economist's standpoint of whether the proposed or accomplished measures will actually prevent soil erosion, but from the lawyer's standpoint of who makes what decisions on what levels and by what processes. The question of contractual freedom and contractual responsibility of state business enterprises in a planned economy is one of the most important problems that the Soviet legal system has faced, and it raises the question of socialism and of planning in a way which lawyers can understand and through which lawyers can make a contribution.[97]

If nothing else, what becomes apparent is that the Soviet legal system enabled business entities owned by the state to use the same legal instruments as any corporate business entity would in any civil or common law system – with contracts enforceable, when breached, in legal courts.

In addition to these examples of archeological knowledge about soviet (socialist) law, below are discussed a few instances of American statism, as government intervention in the free market. It never achieved the level of planification, but who is to tell what triggers such intervention?

In 2008, two publicly held financial institutions, Fannie Mae and Freddie Mac, created by Acts of Congress to fulfil the public mission of promoting access to mortgage credit, particularly among low and-moderate income Americans, were faced with the consequences of making money out of households losing money. By the time the government stepped in to stop the bleeding and thus the foreclosure and subsequent eviction of all those Americans who could not pay their mortgage, the two institutions shared $5.2 trillion of home mortgage debt.[98] The government could have nationalized the institutions, and the mortgages would have been administered by a federal or state agency. Instead, it bankrolled the two institutions and kept their structure and the societal status quo: houses

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97. *Id.* at 664-65.

98. W. Scott Frame, Andreas Fuster et al., *The Rescue of Fannie Mae and Freddie Mac,* FEDERAL RESERVE BANK OF NEW YORK STAFF REPORTS (Mar. 2015) https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr719.pdf.

remained mortgaged, and mortgages would be paid after the period of grace to the same two institutions.

In 2016, the Chinese gaming company Beijing Kunlun Tech acquired a majority stake in Grindr, the popular LGBTQ+ dating app, for $93 million. Two years later, the Chinese company acquired full ownership for an additional $150 million. However, in 2019, the Committee on Foreign Investment in the United States (CFIUS), an interagency committee that reviews foreign investments for national security risks, informed Kunlun that its ownership of Grindr posed a national security risk.[99] This appeared to be the first case in which the United States asserted that foreign control of a social media app could have national security implications: [100] blackmailing concerns.

After a lengthy review process, in March 2020, Kunlun agreed to sell Grindr to San Vicente Acquisition, a U.S.-based company, for about $608.5 million.[101] The deal was approved by CFIUS. The new owners of Grindr are a group of American investors, including Jeff Bonforte and Rick Marini, who became the CEO and COO, respectively, after the acquisition.[102] The sale highlighted the U.S. government's growing scrutiny over the potential national security risks posed by Chinese ownership of companies that handle sensitive personal data of U.S. citizens.

Continuing this path of protecting national interests, the federal government is currently forcing another sale. Enacting the *Protecting Americans from Foreign Adversary Controlled Application Act*,[103]

> Congress has taken the unprecedented step of expressly singling out and banning TikTok: a vibrant online forum for protected speech and expression used by 170 million Americans to create, share, and view videos over the Internet. For the first time in history, Congress has enacted a law that subjects a single, named speech platform to a permanent,

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99. James K. Jackson, *The Committee on Foreign Investment in the United States (CIFUS)* (Feb. 26, 2020) https://crsreports.congress.gov/product/pdf/RL/RL33388.

100. David E. Sanger, *Grindr Is Owned by a Chinese Firm, and the U.S. Is Trying to Force It to Sell*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/us/politics/grindr-china-national-security.html.

101. Zheping Huang & Brett Miller, *Grindr's China Owner Sells Gay App for $600 Million*, BLOOMBERG LAW NEWS (Mar. 7, 2020), https://news.bloomberglaw.com/mergers-and-acquisitions/grindrs-china-owner-sells-gay-app-for-600-million-correct.

102. *See* Sam Dean, *Grindr's New Owners Are Straight. They Say That's Ok*, L.A. TIMES. (July 2, 2020), https://www.latimes.com/business/story/2020-07-02/grindr-new-ownership-american-investors-interview.

103. HR 815-61, Pub.L. 118-50 (2024), https://www.congress.gov/118/bills/hr815/BILLS-118hr815enr.pdf.

> nationwide ban, and bars every American from participating in a unique online community with more than 1 billion people worldwide.[104]

These are unprecedented governmental-backed examples of state interference with the marketplace. However, they do not make the United States legal system any more socialist than the soviet system was either under Stalin or afterwards.

V. INSTEAD OF CONCLUSION: SOVIET-SOCIALIST LAW A CIVIL LAW SUBCLASS

Why do classifications matter? To the extent classifications mirror our collective understanding, they matter. If civil law stems from the work of legislative bodies and common law from judge-made law, then soviet-socialist law is either whatever the politburo says it is, or a civil law subclass.

However, if comparatists insist on replacing soviet law with socialist law and oppose it to the capitalist legal system because of the role of the state, then comparatists need to be prepared to erase the difference between common and civil law systems. Otherwise, is the legal community ready to accept that with each new governmental intervention in our free market, our own government is creating a soviet-socialist system? Just using concepts without understanding their ordering, and how they connect with each other, as Foucault brilliantly explained, we risk confusing ourselves and limiting the value of our own knowledge production.

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104. TikTok Inc., and Bytedance Ltd., v. Garland, No. 24-1113 (Petition for Review of Constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act) (D.C. Cir. 2024) https://fingfx.thomsonreuters.com/gfx/legaldocs/xmpjrzberpr/frankel-tiktokban--complaint.pdf.