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The Fictions of Latin American Law(Part I)

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The Fictions of Latin American Law (Part I)*

Jorge L. Esquirol**

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I. INTRODUCTION

Law reform is again at the center of development proposals for Latin America. From neoliberals to new social movements, political reformers target legal institutions and struggle to redefine the field of play. The right demands more systemic responsiveness to private sector growth. The left champions law's leadership in matters of economic redistribution and cultural pluralism. This state of transition leads inevitably to questions about the background politics of Latin American law. Indeed, the perception of an unpragmatic and intractable legalism fuels current reforms. The rallying image is premodern formalism, one-dimensional and far removed from social realities. This notion of law in need of an infusion of instrumental pragmatism and greater connection with the local citizenry underestimates, however, the actual appeal and complexity of Latin America's tradition of legalism.

Far from an unreactive relic, legalism is maintained quite dynamically through a range of jurisprudential and political projects. It encompasses approaches not so distinct, in fact, from contemporary reform proposals. Viewed in its multiple aspects, legalism is not a mere historical event but, more clearly, an overarching program still marshaling significant support. Its goal is liberal democracy rising above Latin American social differences. Its hold, however, lies largely in maintaining its own political valence off the table. Law's programmatic dimension is denied for the sake of preserving claims to independence, neutrality, and legitimacy. Moreover, legalism's methodological plurality has effectively secured its persistence and resistance to significant challenge.

This Article focuses on the sociological strand of Latin American legalism. It forefronts its support of national governance projects through cultural assimilation to Europe. Specifically, it examines the perspective of legalism's least conservative supporters. While most research on Latin American law demonstrates the influence of doctrinalists, this account highlights the antiformalist and sociological influence. Notwithstanding its claims to relativism and

contextualism, sociological jurisprudence actually reinforces the project of cultural assimilation. In the name of liberal democracy, Latin American particularity is substituted, even by its defenders, for the aspiration to European society.

II. LATIN AMERICAN LEGALISM

The bulk of this Article presents an analytical reading of René David, the foremost comparativist of this century.¹ David's reading of Latin America presents the sociological argument in support of legalism. David identifies Latin American law, rather conventionally, as European law.² More worth noting, however, he premises his classification on socio-historical analysis.³ His argument is significant because it models the common application of sociological juris-

1. See William Jeffrey, Jr., *René David: An Introduction*, 52 U. CIN. L. REV. 124 (1983) ("René David is the foremost French scholar in comparative law today. Professor David began his teaching career in 1929 at Grenoble. In 1943, he moved to the Faculty of Law at the University of Paris, from which he retired to the University of Aix-Marseilles in the late 1970s."); Andre Tunc, *La Mort de René David Un grand juriste*, LE MONDE, June 13, 1990 (the French newspaper, reporting his death in 1990, notes that David may be the most widely known French jurist abroad.)

2. See René David, *L'Originalité des Droits de l'Amérique Latine [The Originality of Latin American Law]*, in CENTRE DE DOCUMENTATION UNIVERSITAIRE, UNIVERSITÉ DE PARIS V (Institut des Hautes Études de l'Amérique Latine ed., 1956) [hereinafter David, *L'Originalité*] (placing Latin American law within the Romano-Germanic legal family, in turn within the Western legal family); see also RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (1964) [hereinafter DAVID, *GRANDS SYSTÈMES*], translated in RENÉ DAVID, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (John E.C. Briery trans., 2d ed. 1978) [hereinafter DAVID, *MAJOR LEGAL SYSTEMS*]; RENÉ DAVID, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ: INTRODUCTION À L'ÉTUDE DES DROITS ÉTRANGERS ET À LA MÉTHODE COMPARATIVE* 258 (1950) [hereinafter DAVID, *TRAITÉ*] ("The legal systems of the twenty nations of Latin America belong, without dispute, to the system of Western law and are traditionally attached to the French group within this system. The conception of the world which they aim to achieve is typically the same as that of Western Europe.")

3. See DAVID, *TRAITÉ*, *supra* note 2, at 17 ("In all countries, law is in strict relation with all other givens of social life: law would not be understandable without knowledge about the society it governs.")

The fundamental elements of this common ideology have already been noted. Common conceptions reign in English-speaking countries and Latin and Germanic countries with respect to morals, politics and economics. From the point of view of morals, the law of all countries considered here derive from the postulates of the Christian religion. From the political point of view, they take as a model the democratic state of liberal type. And from the economic point of view, they derive from the fact of having a society with a capitalist structure. All this is true speaking of France, as well as England, South Africa, the United States, Greece or Chile. In all these countries the legal order is founded on the same moral, political and economic postulates.

prudence to Latin American law.⁴

At first blush, this approach permits at least two obvious possibilities: either a critique of the gap between law and society⁵ or a defense of the congruity between one and the other.⁶ That is, society-based analysis can be the basis for critique as well as legitimation of law: it has no determinate political orientation. Nonetheless, sociological jurisprudence suggests, if not a certain political orientation, at least a political valence leaning toward critique of Latin American legalism. Sociological analysis opens to question law's contextual relation to society. It is this opening to critique that defenders of traditional legalism would neutralize. Society-based jurisprudence, while not the dominant legal theory,⁷ fills this role

4. The tradition of sociological jurisprudence referred to in this Article is discussed in James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

5. See *infra* note 16.

6. For a sampling of the sociological argument reproduced in Latin America, see CLOVIS BEVILAQUA, *LEGISLAÇÃO COMPARADA* (1897) (precursor of sociological jurisprudence, he places Latin America as a fourth subgroup of European law based on democratic character of its nations); ALBERTO M. JUSTO, *PERSPECTIVAS DE UN PROGRAMA DE DERECHO COMPARADO* (1940) (advancing sociological conception of law, citing Lambert, and practice of comparative law, among like societies, as interpretive method of arriving at "common legislative end"); ENRIQUE MARTINEZ PAZ, CLOVIS BEVILAQUA (1944) (describing Bevilaqua's sociological and cultural approach to law); ENRIQUE MARTINEZ PAZ, *INTRODUCCIÓN AL ESTUDIO DEL DERECHO CIVIL COMPARADO* 133-34 (1934) (making the case for Latin American law as European from a sociological position, he affirms comparative law's fruitfulness only when "exercised between peoples of similar culture and that recognize a common end, offspring of the same social and historical influence. The Western peoples of Europe and the Americas, especially fulfill this condition."); Lucas Caballero, *Estudio Social de la Evolución del Derecho en Colombia*, in *PENSAMIENTO JURÍDICO COLOMBIANO: LIBRO DEL CENTENARIO* 327 (1996) (embracing model of social evolution in law and warning that "as in all social activities, progress must be given momentum and directed by the elite of the nation"); TULIO ENRIQUE TASCÓN, *DERECHO CONSTITUCIONAL COLOMBIANO: COMENTARIOS A LA CONSTITUCIÓN NACIONAL* (1934) (analyzing Colombian Constitution through optics of natural law theories and sociological theories); and LUIS EDUARDO NIETO ARTETA, *LA INTERPRETACIÓN DE LAS NORMAS JURÍDICAS* (1976) (criticizing Gény, and praising Hans Kelsen, as to incorporating both human life and social interaction within theory of interpretation and circumscribing field of judicial law-making.)

Note that the thesis of this Article is that sociological jurisprudence is subsumed as one of the strands supporting Latin American legalism through the notion of Europeaness. Accordingly, sociological jurisprudence is often presented by way of European authors and may appear side-by-side with natural law and positivist arguments by Latin American jurists.

7. See Josef L. Kunz, *Introduction* to 3 *LATIN-AMERICAN LEGAL PHILOSOPHY* at xix, xix-xxi (1948) (dating heyday of sociological jurisprudence at the turn of the

within Latin America's legal politics: defending law's connection to society and deflecting charges of ill-adapted formalism.

As such, sociological assertions of Latin America's Europeanness reinvigorate the traditional program. The identification with Europe mobilizes the field of culture, particularly the legal culture, to align with liberal and democratic law.⁸ Legal methods are, in turn, geared to reproduce the culture—if only an aspirational one—identified with and mapped on to Europe.⁹ In this way, legalism is sustained by repeated pronouncements of the law's European character.¹⁰ This intervention in cultural politics is supported by

century and the dominance of Hans Kelsen at mid-century).

8. This Article draws on the work of HOMI K. BHABHA, *THE LOCATION OF CULTURE* (1994). A particularly significant passage to my analysis is:

Culture only emerges as a problem, or a problematic, at the point at which there is a loss of meaning in the contestation and articulation of everyday life, between classes, genders, races, nations. Yet the reality of the limit or limit-text of culture is rarely theorized outside of well-intentioned moralist polemics against prejudice and stereotype, or the blanket assertion of individual or institutional racism—that describe the effect rather than the structure of the problem. . . . The enunciation of cultural difference problematizes the binary division of past and present, tradition and modernity, at the level of cultural representation and its authoritative address. It is the problem of how, in signifying the present, something comes to be repeated, relocated and translated in the name of tradition, in the guise of a pastness that is not necessarily a faithful sign of historical memory but a strategy of representing authority in terms of the artifice of the archaic. That iteration negates our sense of the origins of the struggle. It undermines our sense of the homogenizing effects of cultural symbols and icons, by questioning our sense of the authority of cultural synthesis in general.

Id. at 34–35.

9. *See id.* at 36.

The reason a cultural text or system of meaning cannot be sufficient unto itself is that the act of cultural enunciation—the place of the utterance—is crossed by the difference of writing. This has less to do with what anthropologists might describe as varying attitudes to symbolic systems within different cultures than with the structure of symbolic representation itself—not the content of the symbol or its social function, but the structure of symbolism. It is this difference in the process of language that is crucial to the production of meaning and ensures, at the same time, that meaning is never simply mimetic and transparent.

Id.

10. On the point of the bearer or “subject” of this European identity—the politics of which I locate within Latin American law, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

The foundationalist reasoning of identity politics tends to assume that an identity must first be in place in order for political interests to be elaborated and, subsequently, political action to be taken. My argument is that there need not be a ‘doer behind the deed,’ but that the ‘doer’ is variably constructed in and through the deed.

Id. at 142.

the cross-disciplinary discourse of Latin American unity or identity with Europe.¹¹

The focus on David, in this Article, demonstrates that the trope as well as the program of Europeanness are reinforced not only by proponents of legal formalism—the standard account—but also by its critics. David—himself a critic—presents the sociological argument for Latin American legalism. In so doing, rather than interrogating law's connection to social particularity, he justifies law's legitimacy as to society on the basis of a political project: a rather circular application of his method. Moreover, David reinscribes the jurisprudence of social particularity with rhetoric supporting, quite paradoxically, assimilation to Europe. It is sociology¹² tailored to national governance. Its aim is promoting liberal democratic government¹³ in spite of, rather than on the basis of, Latin American societies.

Pre-figuring the very same challenges and critiques of contemporary reformers, David's brand of historicism in fact fastens more securely the hold of traditional legalism in Latin America. Indeed, by embracing critiques directed against it, Latin American legalism gives the appearance of responding and adapting to, while only

11. For a discussion of Latin American cultural discourse, see Fernando Ainsa, *The Antinomies of Latin American Discourses of Identity and Their Fictional Representation*, in 10 *LATIN AMERICAN IDENTITY AND CONSTRUCTIONS OF DIFFERENCE 1* (Amaryll Chandy ed., 1994) (describing antinomy of Latin American identity and contrasting discourses of authenticity and foreignness).

12. Like other legal scholars of the mid-century, David works against the background critiques of sociological jurisprudence as well as positivism. Both methodologies were tarred with analytic insufficiency and its associations with totalitarian government. David returns to socio-historical jurisprudence: extending its scope of legal sources to the metaphysical—in addition to the material—characteristics of society. David's revamped socio-historical approach to law is discussed further below. See also Kunz, *supra* note 7.

13. The notion suggests a parallel relationship, to be pursued in future work, between left-of-center reformism and sociological jurisprudence. See generally JORGE G. CASTANEDA, *UTOPIA UNARMED: THE LATIN AMERICAN LEFT AFTER THE COLD WAR* (1993).

The reformist aspiration has often been identified with social democracy, European-style. . . . Because of Latin American's demography, social structure, international position, and cultural and political traditions, social democracy looks like a perfect fit: the type of political and economic development strategy that takes into account aspirations and constraints, the past and the future, reform and revolution. But these excessive expectations thrust on social democracy may have rested on an implicit misunderstanding. Transition theorists have emphasized this point: while social democracy may dovetail neatly with Latin America's needs, it doesn't square with its structures, nor with today's international environment.

Id. at 133–34.

more effectively resisting, repeated calls for law's connection to social particularity, functional pragmatism, economic development, social justice, and the like. Claiming already to stand for Latin American particularity and social differences, socio-historicism—the jurisprudential strand examined in this Article—transforms critiques of formalism and insularity into their opposite: that is, into further jurisprudential support for the traditionalist project. This response to claims for Latin American particularity offers an instructive vantage point for recent reform efforts with similar objectives.

The socio-historical argument supporting Latin America's traditional legalism, possibly more significantly than formalist or conceptualist theories of law, reinforces and legitimates the legal project of assimilation to Europe. Again, while most scholarship emphasizes formalism as the explanation for European imitation, this account highlights the antiformalist and sociological dimension of the tradition. It too reinforces European imitativeness while outwardly championing cultural difference.

More sharply focused, Latin America's traditional program in law—assimilating local societies to an idealized Europe—is strikingly unsatisfactory and counterproductive. Legalized assimilation aspires to a single and exclusive cultural form while reinforcing the legal system's calculated unresponsiveness to divergent identity formations. Difference is programmatically denied. Moreover, assimilation has not wholly succeeded on its own terms, in recreating Latin America as European. To the contrary, it has perpetuated the cultural divisiveness of colonial experience. Over time, it has contributed to insulating the legal system from transparent and robust engagement with the cultural commitments of Latin American peoples.

A. Comparative Scholarship

Before proceeding with the analysis of David, a few words about comparative legal scholarship on Latin America are in order. The academic literature reveals two distinguishable traditions. First, the classical tradition focuses on Latin American law's antecedents, its history, influences, and the like.¹⁴ Within this scholarship,

14. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969) (presenting socio-institutional history of Western Europe and Latin America's common legal tradition); RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES—TEXTS—MATERIALS* (1960) (presenting Latin American law as eclectic sampling of European positive law and noting the danger of insufficient local adaptation); PHANOR J. EDER, *A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW* (1950) (grouping, mostly on

comparativists champion the aims of legal learning and the improvement of national laws. Also within this tradition, the overwhelming notion propounded about Latin American law is its European character. The scholarship maintains this image from a variety of perspectives—grounded in law as well as other disciplinary discourses.¹⁵ This Article focuses on the connection between classical comparative scholarship and Latin America's traditional legalism.

Additionally, there is a second body of comparative literature on Latin America. This other scholarship highlights Latin American law's inefficacy and maladaptedness to society as well as the differences of Latin American societies. Deriving mostly from law-and-development lawyers in the 1960s and 1970s, this is a second set of forceful images about Latin America.¹⁶ This scholarship, from the

positive law grounds, but also on historical and psychological factors, European and Latin American law together as modern Roman law); HESSEL E. YNTEMA, *LOS ESTUDIOS COMPARATIVOS DE DERECHO A LA LUZ DE LA UNIFICACIÓN LEGISLATIVA* (1943) (basing program of inter-american legal unification on shared romanist culture of Latin American law); PIERRE ARMINJON ET AL., *TRAITÉ DE DROIT COMPARÉ* (1950) (basing classification of legal families on intrinsic originality, source of derivation, and shared resemblances, and cataloguing legal systems of Latin America within French legal family); GEORGES MICHAÉLIDÈS-NOUAROS, *LES SYSTÈMES JURIDIQUES DES PEUPLES EUROPÉENS* (1958) (grouping Latin America within French or Latin legal family based on perceived identity of morality, culture, economic, and social structure, as well as positive law); FELIPE DE SOLA CAÑIZARES, *INICIACIÓN AL DERECHO COMPARADO* (1954) (following David's criteria of classification in terms of expansive definition of ideology and somewhat less emphasis on legal technique and grouping Latin America, ostensibly to highlight its social, economic, and political specificity, as closer to the Iberian than French part of Western legal family).

15. See Alejandro Garro, *Shaping the Content of a Basic Course on Latin American Legal Systems*, 19 INT'L AM. L. REV. 595 (1988). Garro identifies the two general tropes about Latin American law in his discussion on teaching Latin American law. The first is its European character and thus diminished interest for study. The implication is that it would be more useful and easier simply to study European law. The second trope regards Latin American law's disconnection from social reality. This second idea also marginalizes the study of Latin American law in favor of sociology or anthropology.

16. See KENNETH KARST & KEITH ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* (1975).

The nations of Latin America are often classed with those of Asia and Africa as "underdeveloped" or "developing" countries. But Latin American law is not usually so characterized; the dizzying profusion of laws and lawyers suggests that a more appropriate word for law in Latin America might be "overdeveloped."

Id. at 6.

[T]he formal aspects of Latin American legal institutions requires complementation with a sketch of the underlying legal culture. By legal culture is meant the generalized set of lay and professional values and attitudes towards law and the role of the legal process in society. . . . Where

context of economic backwardness and failed institutions, approaches Latin American law from the perspective of diagnosis: breakdown is identified with the legal culture and the gap between law and society. As with the classical scholarship, Latin American law is once again placed in relation to society, this time to highlight its maladaptedness. The image of European law, here, falls away except to the extent it contributes to law's breakdown. That is, the legal culture's excessive formalism and legalism, contributing to law's inefficacy, is linked to a European ancestry. I leave the analysis of law-and-development scholarship to a companion piece. For now, it will suffice to foreground the dependence of both on concepts of culture and society as descriptions of Latin American law.

B. *René David's Latin America*

One of the leading lights of comparative law in this century, René David is known for his classification of world law into groups of legal families.¹⁷ No stranger to controversy, his grouping of civil and common-law traditions under the same Western legal family

there is some gap between the law on the books and the law in practice in all countries, that gap is notoriously large in Latin America. . . . Much of the explanation for this wide disparity between the law on the books and actual practice lies in a complex of historical and cultural factors that have conditioned Latin American attitudes towards law. Five of the most important of these factors are idealism, paternalism, legalism, formalism and lack of penetration.

Id. at 58.

Latin America, as distinguished from other regions, has features that make the comparative study of legal institutions particularly rewarding: (a) a view of the role of law in the community that differs markedly from attitudes in the United States and Western Europe; (b) a degree of disparity between the written law and the law in action characteristic of the world's developing societies; (c) a varying social structure, ranging from the modern and highly "Westernized" to the semi-feudal; and (d) a rate of social change whose rapidity places serious strain on society's institutional framework.

KENNETH KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* at preface (1966); see also John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457 (1977) (listing works of law and development).

17. See Jeffrey, *supra* note 1, at 124.

Professor David's major concern has been to create a system for classifying a great variety of particular legal orders providing comparatists with a useful and accurate taxonomy of legal systems. . . . Professor David perceives three great "families" of legal systems: the Romano-Germanic, the Socialist and the common law. For the remaining contemporary legal systems, Professor David establishes "families" of religion-based systems.

Id.

sparked considerable controversy.¹⁸ David's bibliography boasts two full-length treatises on comparative law,¹⁹ published originally in 1950 and 1964, and reprinted in numerous languages and editions. More importantly for us, he has written specifically on Latin America in his treatises and in a lesser-known article, *L'Originalité des Droits de L'Amérique Latine*.²⁰

David is a primary figure of classical, as opposed to development, comparativism. He stresses erudition, prudence, and scientific method as the basis of his approach.²¹ Comparative law is presented as strictly apolitical and practical. Its subject is filling in the gaps of national law and legal learning, among like societies with correspondingly like laws. For David, the architect of this comparative science, his subject is cataloguing the world's legal identity or, using his metaphor, drawing the family tree of like societies and, thus, like laws. It is the map intended for useful law-building works of comparison.

The account of Latin American law in David's work²² reveals a

18. See René David, *On the Concept of "Western" Law*, 52 U. CIN. L. REV. 126 (1983) (original French version published in TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW 56 (1961)) (acknowledging controversy engendered by his 1950s treatise and defending category of Western law).

19. DAVID, TRAITÉ, *supra* note 2; DAVID, GRANDS SYSTÈMES, *supra* note 2. David's treatises on comparative law are a cornerstone of modern comparative law.

20. David, *L'Originalité*, *supra* note 2.

21. See DAVID, TRAITÉ, *supra* note 2, at 7-17, 25, 214.

22. David's firsthand knowledge of Latin America derives from four separate speaking tours in 1948, 1950, 1953, and 1976, recounted in his autobiography, RENE DAVID, LES AVATARS D'UN COMPARATISTE (1982). His impressions of Latin American society reveal some surprise at both its non-European diversity and its European desuetude. The following passages are by way of example:

We did not find in Brazil at any moment the ostentatious, conceited capitalists which the French see South Americans as being; we found people, often very rich, but who are all, without pompousness, simple, benevolent, racially unprejudiced. The French only know white Brazilians; one is struck in Brazil by the number of blacks in Rio, by the number of people of indigenous origin in the Northeast, and by the absence of racial conflict everywhere.

Id. at 199-200.

Even more than in Brazil or Argentina, (in Chile) they lived (in 1948) in "la belle époque" and my mother-in-law was delighted to find the lifestyle, society and manners of her youth. . . . I wondered whether, like us, they saw that their society with all its charm was from a bygone era.

Id. at 203. On Mexico:

Two impressions deserve to be noted. The first is the total absence of racial conflict or prejudice. . . . The second impression of Mexico is a country whose level of life is uncontestedly inferior to the United States or Europe, but where one sees, despite the poverty, happier lives than in our societies of abundance.

Id. at 207.

conflict between liberal jurisprudence and liberal politics.²³ David's legal method and political sympathies lead to divergent pictures of Latin America. He attempts to reconcile both but, in effect, values politics over jurisprudence. This divergence has the effect of pitting liberal legalism against democratic law in Latin America.

This section examines, in broad strokes, this puzzle in David's work. On the question of jurisprudence, David advances a renewed liberal legalism in the continental European tradition.²⁴ His theory includes a number of elements and responses to its critics. His conception of law is grounded in the specificity of actual societies. Heir to French and German sociological jurists, David advances the free-law version of nineteenth-century legal historicism or, as I will be referring to it, socio-historicism.²⁵ Generally speaking, socio-historicists view law as the sum of social, economic, and cultural conditions given by the history of its respective society.²⁶ There are several difficulties with this jurisprudential approach, however. Specifically, socio-historicism in this century is linked, at least in the eyes of its critics, to the emergence of both Nazi nationalism and Marxist communism. David does not deny this connection. He minimizes both, however, as deformations of the true version, resulting from an overemphasis on law's materiality. He then turns to reinforcing the socio-historical conception against renewed deformation of this type.²⁷ To this end, he reaffirms the historicists' established credo on law's relation to society, underscoring the point that shared principles and ideals form part of law.²⁸ The emphasis on ideals attempts to counterbalance the notion of materiality, according to him, exaggerated by nationalist and communist doctrines. At the same time, David reaffirms law's dependence on material societies.

When it comes to Latin America, however, even a tempered recognition of law's materiality threatens the project of liberal democracy. There, promoting democracy takes the form of bolstering liberal jurists and averting the tendencies of Latin American societies. Accordingly, David shifts his view of law. In Latin America, he

23. David's alignment with a center-left, European legal politics coincides with his goal for comparative law as the means in which to apply individualist-inspired laws in a social and relational manner. See DAVID, TRAITÉ, *supra* note 2, at 139.

24. See *id.* at 206-14 (proposing through comparative law to bolster legal principles, admittedly different in different societies, as the basis of objective and justifiable decision making).

25. See generally Herget & Wallace, *supra* note 4.

26. See generally *id.*

27. See DAVID, TRAITÉ, *supra* note 2, at 158-59.

28. See *id.*

explains, law resides with jurists instead of societies.²⁹ It is an account paying tribute to and reinforcing the hand of Latin American liberal jurists. It commends them for their unwavering idealism, European legal ideology, and resistance against the primitivism and materialism of Latin American societies. While law is premised on the gamut of societal variables in Europe, in Latin America it is defended as dependent on a class of jurists. The multiplicity of society is in this way reduced to one: the univocal ideology of liberal jurists. This description of law runs counter to David's own legal methodology.³⁰ The image of Europeanness, more precisely speaking, corresponds to the politics of liberal jurists.

C. *Jurisprudence or Politics*

David's particular application of European identity to Latin America reveals two underlying meanings.³¹ First, he reinvigorates liberal law and politics and fortifies its advocates in the region. Law is depicted as the product of jurists clutching to European liberal ideals against the impulses of Latin American societies.³² David's

29. See David, *L'Originalité*, *supra* note 2.

30. See DAVID, *TRAITÉ*, *supra* note 2, at 66-67. David's description of an evenly and unproblematically assimilated Latin America presents a sharp contrast to his critique of French colonialism in Algeria and English colonialism in India, based on the disregard paid to local particularity.

31. This Article also draws on the perspectives suggested in Dan Danielsen & Karen Engle, *Introduction* to *AFTER IDENTITY* at xiii (Dan Danielsen & Karen Engle eds., 1995). For example:

Law is just one of many social discourses, and legal culture is a less distinctive or autonomous part of our culture than is often imagined. . . .

. . . .

At the same time, traditional notions of identity [are inadequate] to explain or describe our complex experiences of law or culture. . . . Critical struggle [surrounds] the meaning and representation of identities in law, culture and politics. All are skeptical about the significance of perceived differences between law, culture and politics, while all are convinced that, notwithstanding its frustrations, contradictions and indeterminacy, law matters.

Id. at xvi-xix.

32. For a wonderful account of literary production at the service of Latin American nationalism, to which my own analysis is indebted, see DORIS SOMMER, *FOUNDATIONAL FICTIONS, THE NATIONAL ROMANCES OF LATIN AMERICA* (1991). Discussing the literary figure of productive heterosexual romance in national politics, Sommer states:

It is possible that the pretty lies of national romance are . . . strategies to contain the racial, regional, economic, and gender conflicts that threatened the development of new Latin American nations. After all, these novels were part of a general bourgeois project to hegemonize a culture in formation. It would ideally be a cozy, almost airless culture that bridged public and pri-

typology further entrenches this view of endangered liberalism. The operative notion of Europeanness—far from passive description—renews law's commitment to liberal democracy through cultural assimilation.³³

Second, David's emphasis on kinship with Europe denotes a separate and more idiosyncratic objective. He places comparative law at the center of a reconstructive proposal on law, not unlike legal process or policy science in the Anglo-American tradition. Comparative law work, among "Europeans," is meant to rectify gaps, insufficiencies, and ambiguities troubling the scientific nature of law. Latin America, here projected as European, is added to Europe's working group. Thus, by reason of both supporting liberal politics and furthering legal science, David stands for a European law of Latin America.

More than just a misplaced and harmless metaphor, David's mark of Europeanness recalls Latin American law and jurists to a project of neocolonialism. It engages Latin Americans in the task of elaborating a European legal science and imitating European societies. At the same time, it removes local societies from the sphere of legal analysis and accentuates law's patrimony along class and partisan lines. The image of Europeanness advances politics in the guise of comparative science. It fortifies Latin American jurists while claiming to promote local societies and a democratic conception of law. Law is designated a product of European or high culture dependent on the interests of a small elite. Framed in this way, the rule of law in Latin America translates into a fragile product of jurists to be cautiously defended against their societies.

Ironically enough, the result of basing law and democracy on Latin American jurists—as opposed to the broader society—is a more rigid line separating Europe and Latin America and separating social groups in Latin America itself. Outwardly, the notion of

vate spheres in a way that made a place for everyone, as long as everyone knew his or her place.

Id. at 29. In like fashion, my analysis in this Article tracks the "pretty lies" of Latin American liberalism's Europeanness.

33. *See id.* at 31.

From our historical distance, both romantic love and patriotism ["Europeanness and liberalism" in our context] can be mistaken for natural givens, although we know them to be produced, perhaps, by the very novels that seem merely to represent them. To acknowledge this possibility is also to ask whether what may have passed for effects of the greater culture in the novel (for instance, the representation of romantic love or of conciliatory nationalism) may indeed be partial causes of that culture.

Id.

Europeanness aspires to quite opposite results. It is intended to draw Latin American law closer by describing its European character and studiously avoiding the discrepancy of its sources. Nonetheless, law is inscribed as inorganic to society, in danger of its environment, and under the fragile protection of legal elites. In short, preserving the rule of law turns into justification for resisting the demands of Latin American societies. And no less ironically, Latin American societies become the explanation for the failings of law and democracy.

In the next few pages, I sketch out and examine what I believe is David's central project: reconstructing European legal science through comparative law. Although his writings on Latin America are peripheral to this main project, they quite aptly capture the socio-historical argument contributing to Latin American legalism. While confessedly drawn to uncovering David's jurisprudential designs, my aim is principally to disentangle the claims made about Latin American law. The following sections outline the methodology and politics, just below the surface of David's work, marking this instance in the construction of Latin America's Europeanness.

III. EUROPEAN RECONSTRUCTION

David's comparative law treatises, *Traité Élémentaire de Droit Civil Comparé*³⁴ and *Les Grands Systèmes de Droit Contemporains*,³⁵ reveal the larger jurisprudential design. It is the project of reconstructing European legal science which permeates discussions outwardly about comparative law. While not intended as theory on its own terms, David's work sketches a whole theory of law. His proposal argues for law's completeness and neutrality.³⁶

Furthermore, David's theoretical project animates the description of Latin American law.³⁷ The underlying theory renders the description both more intelligible and less sustainable. It is more intelligible to the extent that his descriptions can be more easily understood. It is less sustainable as all-purpose descriptions in that they are subordinate to a politico-theoretical project.

34. DAVID, TRAITÉ, *supra* note 2.

35. DAVID, GRANDS SYSTÈMES, *supra* note 2.

36. See DAVID, TRAITÉ, *supra* note 2, at 79–82.

37. See David, *L'Originalité*, *supra* note 2, at 2. David's article on Latin America was written not long after the first treatise.

A. *A Project of Jurisprudence*

David's European legal science attempts to justify law's sufficiency and impartiality. Sensitive to the flaws of positive law and the excesses of nationalism, David crafts a distinct conception of law. He draws on several theories to support his project. First, he marshals a conception of law's nature based on social reality.³⁸ Second, he distinguishes his position from past antidemocratic consequences associated with this theory of law.³⁹ He embraces the critiques of positivism: that codified law contains gaps and ambiguities and that case law and doctrinal scholarship, in addition to legislation, constitute sources of law.⁴⁰ Third, he highlights common ideals as part of social reality.⁴¹ Finally, he invokes an international interpretive community of jurists—the legal family—to transcend the limitations, gaps, and ambiguities of national laws.⁴²

In this most important of elements, he assigns a large role to comparative law. It remains to comparative law to ensure law's sufficiency and neutrality. I will discuss the function of comparative law in the following section. Next, I will examine in greater detail David's vision of legal science, the positions he seeks to reconcile, and the picture of Latin America they entail.

1. *After Natural Law and Positivism*

In setting out the background against which he writes, David presents comparative scholarship as divided between two camps, each with a distinct conception of law. He distinguishes between natural law theories and the historical school. My analysis of these ideas traces the meanings attached to them by David.

As he sees it, natural law theories stress that Latin American law is merely imitative of European law. Any discrepancy between the two is taken to be merely accidental since all law tends to the universal law of nature.⁴³ This is the standard picture that David

38. See DAVID, *TRAITÉ*, *supra* note 2, at 17–28.

39. See *id.* at 147–48, 156–59.

40. See *id.* at 84–85.

41. See *id.* at 154, 161.

42. See *id.* at 78–84.

43. See *id.* at 144–45.

For example, if one starts from the postulate that natural law exists, . . . one would be tempted to reject all profound and fundamental differences existing among legal systems. One would consider that these differences are always accidental, even if one is obliged to discuss the nature of the accident which has given life to them and whose consequences it may not be possible to eliminate immediately.

ascribes to his predecessors and most of his contemporaries.⁴⁴ As he sees it, natural law ideas almost exclusively dominate both theory and description of Latin American law and are responsible for impoverishing its image and interest.⁴⁵

The category of natural law in David's work captures a broad swath of ideas about law. In its grossest form, it stands for the universality of law—the notion that there is a uniform law mandated by reason applicable to all human beings.⁴⁶ This version asserts the sufficiency and completeness of natural law to resolve all legal disputes. Legality is simply a matter of unfolding rules from preordained principles. David decries this position for its abstracted idealism, independence from the social environment, and claims to universality.

A second set of ideas that David idiosyncratically labels natural law is more typically contrasted as positivism.⁴⁷ David paints positivism with the same brush as natural law. From his perspective, both make claims to an unachievable self-sufficiency. Positivism's central claim is that all law is contained in codes and legislation. The judge need not create any new law, but instead needs merely apply the given rules. The premise is that the resolution of all legal disputes is envisioned within the provisions of the positive law. Significantly, positivism asserts the completeness and univocality of codification. Silences or apparent contradictions are to be resolved through logical and analogical reasoning. The link with natural law is positivism's pretensions to universal law. Thus, David foregrounds the claims of completeness and self-sufficiency advanced by both positivism and natural law.⁴⁸

Next, he rejects both variants of so-called natural law theories. He assigns them to a discredited nineteenth-century idealism and bygone European hegemony.⁴⁹ Still, he reserves his strongest cri-

Id.

44. See David, *L'Originalité*, *supra* note 2, at 2.

45. See *id.*

46. See DAVID, *TRAITÉ*, *supra* note 2, at 145–46 (“For example, if one starts from the postulate that natural law exists, which is nothing other than universal reason inasmuch as it governs all men at all times . . .”).

47. For the traditional view of positivism, see H. Coing, *Trois Formes Historiques d'Interpretation du Droit: Glossateurs, pandectistes, école de l'exégèse*, 48 *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 531–43 (1970).

48. See DAVID, *TRAITÉ*, *supra* note 2, at 81; see also David, *L'Originalité*, *supra* note 2.

49. See David, *L'Originalité*, *supra* note 2, at 3 (“Furthermore, the matter that we examine here well demonstrates the incontestable preeminence, in the nineteenth century, of the school of natural law solidly anchored in its victory in the battle over codification.”).

tique for legal positivism. Codification, he insists, is not a universal panacea but simply a useful tool.⁵⁰ He challenges the sufficiency of codification as the sole source of law.⁵¹ He contests the notion that codified law embodies natural law and justice.⁵²

Would it not be preferable to recognize, frankly, that texts of law, like clauses of a contract, are necessarily linked to their own circumstances and, in the event that an entirely new set of circumstances unforeseen at the time the law was enacted supervenes, that judges can, if the ends of justice require it, depart from the formal texts? . . . The excessive respect paid to enacted law which dominated nineteenth century doctrinal thinking has stimulated a number of artificial stratagems designed to maintain that way of thinking rather than eliminate it.⁵³

David directs additional critiques against positivism which he attributes to the historical school. I discuss these below.

2. *Historical Critique*

The historical school, from David's perspective, promotes a radically different vision of Latin America.⁵⁴ Under legal historicism, Latin American law is expected to brim with the particularities of divergent social, political, and economic conditions. Regardless of the European origins of its positive law, different social forces are expected to lead to thoroughgoing adaptations. More strongly still, the historical school contends that despite an aspiration to the same legal ideals, local conditions generate different law and different legal outcomes.⁵⁵ This is the account of Latin American law heralded by David. It is the rejection of natural law theories projected on Latin America.

50. *See id.* ("Codification, by contrast, if we even continue to favor it and it makes new and constant progress, no longer has the prestige it had in the nineteenth century. We see in it at present a useful technique, indispensable even in our century; we no longer consider it a universal panacea.")

51. *See id.* ("We know it is insufficient for rendering law transparent, accessible to all, popular . . .").

52. *See id.* ("We no longer see in it the materialization of natural law and justice.")

53. DAVID, MAJOR LEGAL SYSTEMS, *supra* note 2, at 114 (footnote omitted).

54. David traces the origins of the historical school to Montesquieu. *See id.* at 4. Montesquieu's founding insight, in a period marked by natural law orthodoxy, was that "laws, in fact, differ in the various countries" and that they should differ according to the physical and temporal characteristics of each country. DAVID, TRAITÉ, *supra* note 2, at 147. Another operative idea, attributed to the historical school, is that law differs because it reflects the characteristics of the community or society in question. *See id.* at 155.

55. For a succinct description of the historical school, see Coing, *supra* note 47.

Furthermore, David embraces the historical school's two critiques of positivism: both an internal and an external challenge to the sufficiency of positive law. The internal critique of "gaps" or "lacunas" in the positive law is traced to François Géný,⁵⁶ one of the most widely notable French legal scholars.⁵⁷ Géný is remembered for his sociological empirical method on law.⁵⁸ Here, not uncharacteristically, Géný stands for the impossibility of finding all law within codes or positive enactments.⁵⁹ The charge is that codification cannot anticipate all foreseeable legal disputes. Thus, the law contains gaps. Gaps, however, controvert positivism's claim of the completeness and sufficiency of law. Contrary to the then reigning orthodoxy, this element of critique threatens to undermine legal determinacy. In other words, the historical critique threatens a central tenet of the legal regime. Where the code contains gaps, legal decisions must proceed from some alternative source. That source may, if not otherwise addressed, amount to judicial arbitrariness, a rupture in the theory of legitimate decision making.

David traces a second main critique to one of the leading figures of modern comparative law, Édouard Lambert. A central participant in the founding Congress of Paris of 1900, Lambert is best remembered for pressing comparative law to the service of legal unification "of such communities as have attained the same standard of civilization."⁶⁰ For David, though, Lambert substantiates the critique of positive law's self-sufficiency.⁶¹ Lambert is responsible for articulating an external critique of self-sufficiency, asserting an historical basis for lawmaking in case law. Lambert's legal history undergirds the contention that ancient French custom was based

56. See FRANÇOIS GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1919).

57. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 480 (1986) ("French law after Géný, could never be quite the same again.").

58. *Id.* at 399-400.

59. See DAVID, *TRAITÉ*, *supra* note 2, at 84, 126.

60. H.C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 5-6, 18-19 (1971).

61. See DAVID, *TRAITÉ*, *supra* note 2, at 84.

That which prevented us from doing it [more comparative law] until the turn of the last century, was the predominance, in France, of the teachings of positivism and juridical legalism. One believed in the all-powerfulness of law, and one saw in it, within the [Exegetical] school at least, the only real source important to law. We had to wait until the works of Géný and of Edouard Lambert, for that dogma to be attacked and shaken, but today still, scholarship is far from faithful analysis of the real situation and continues, by routine or caution, to reproduce formulas which see in legislation, flanked by constraining custom, the exclusive force of French law.

Id.

on decisional law rather than the traditional explanation given of habitual practices.⁶² While the distinction may sound arcane to us, it is a watershed for David. It supports the position that, in addition to codes, case law is a well-established source of law in France. David states it clearly:

The formulas that we continue to employ, and that deny to case law and to scholarly writing, in particular, the quality of sources of French law, do not fool anyone anymore in France. We know that legislation has not foreseen everything and can not foresee everything. We know that the legal order, different from the juridical order, contains gaps, in France, as in other countries with written laws. We know the importance of the role that belongs to case law and scholarly writing to clarify the gaps in our laws, even if in our juridical technique a text, more or less foreign to the debate, is always invoked to justify the proposed solution.⁶³

Additionally, David notes the artificiality of the distinction proposed by legal scholars between discovering and creating law in judicial decisions and doctrinal scholarship.⁶⁴ Thus, the critique holds that positivism's claim to self-sufficiency is demonstrably illusory. I will return to the historical school's expanded conception of legal sources in the discussion on comparative law.

The critique of gaps and the critique of insufficiency are the main indictments against positivism that David advances.⁶⁵ The critical theses offer a self-standing critique of positivist adjudication. By denying gaps within the law and the judge as lawmaker, positivism derails the possibility of enlightened legal reform. Debunking positivism, however, entails recognizing the law-making powers of judges and the insufficiency of codes. Judicial accountability is addressed later in David's comparative law proposals.

62. Indeed, David notes Lambert's work for demonstrating that the notion that customary law evolved from habitual practices—a foundational theory of the exegetical school—was invented by Romanists and canonists opposed to customary law. *See id.* at 90. In reality, Lambert reveals customary law as the product of judicial decisions. David associates this error with the stubborn refusal of the exegetical school to recognize case law as a source of law. *See id.*

63. *Id.* at 84–85.

64. *See id.* at 125.

It is extremely difficult, in French law as in foreign law, to distinguish situations in which case law and scholarly writing specify the existing law, and those which create new law; one cannot in effect, on this subject, stop at the formulas that are employed and which tend in general to veil the creative role filled by factors other than legislation.

Id.

65. *See id.* at 81–85, 163–64.

3. *Socio-Historicism*

The historical school also provides David the basis for an alternative conception of law responsive to the failings of what he calls natural law theories. The historical conception of law—a reconstructive attempt in itself—stands for the sufficiency and determinacy of law grounded in society. Its basis is thus an alternative conception of law—both more ample and determinate than the one critiqued. David grounds his project of legal theory in this historical school conception.⁶⁶

Specifically, for the historical school, positive law (“*loi*”) is to be distinguished from general law (“*droit*”). On the narrow end, positive law is defined as the product of juristic construction and is necessarily imperfect. Not surprisingly, it contains gaps, lacunas, and inconsistencies. As much is to be expected. Positive law, however, is only a subset of a society’s law. General law, by contrast, is all-extensive and diffused throughout society. It is socially contingent and varies as to particular peoples. Nonetheless, it is determinate and objectively identifiable. General law provides the means to fill in gaps, resolve inconsistencies, and recognize alternative sources of law. In other words, it has an answer to both the internal and external critiques of positivism.

Socio-historicism, thus, leads to a different conception of law: the view that law is causally related to society. It is not the autonomous science free of social forces. Instead, law is dependent on social forces and takes shape through the interplay of human interaction. This ampler law, to be found in common human interaction, must be abstracted into its legal forms.⁶⁷ As a preliminary step, the judiciary must rely on the community of jurists to cull and decipher its form.⁶⁸ Once fashioned as law, the general law forms the basis for judicially articulated case law.

In this extremely general formulation, socio-historicism ventures an alternative conception which addresses the holes in positiv-

66. *See id.* at 61.

67. *See id.* (“But legal feeling and legal rules remain two different things, and to translate into legal rules the feelings and ideals of a people should be submitted to the domain of technique.”).

68. *See id.* at 164.

Legislators and jurists share the feelings, passions, and prejudices common to men in their time: all the influences of their environment weigh on their thinking and on their will and they do not but fashion a legal substance supplied by mores, usages, and popular beliefs, the multiple tones of the environment.

Id.

ism. While David advances the agenda of reconstruction, he recognizes two opposite and damning problems: a return to idealism, at one end, and uncompromising nationalism, at the other. David views both as distortions of a more genuine historical theory. David's reconstructive project—a reinvigoration of the historical school—attempts to avoid these extremes and develop an alternative proposal.

B. *A Project of Legal Politics*

David's reconstructive project of European legal science is at base an attempt to deal with the twin problems that plague the historical school. At one end, David criticizes the school's turn to idealism. This direction of ideas he associates with Karl Friedrich von Savigny, the German jurist most associated with legal historicism generally.⁶⁹ Second, he critiques the road leading toward an all-encompassing materialism—the route associated with free law interpretation. David relates the error of strictly material explanations of law to two separate traditions. On the one hand, nationalism pulls on the ideas of the historical school to exaggerate the force of all encompassing material conditions to create law. Connected to this idea is the deviation of German Nazi explanations of law in terms of the sole factor of race. On the other hand, Marxism stresses economic determinism at the expense of other social factors contributing to legal development.⁷⁰

1. *Against Idealism*

David finds faults with Savigny and the historical school for their idealism and ultimate conceptualism.⁷¹ The critique of idealism is directed against a full-scale return to preordained principles as the basis of law. That is, rather than deriving legal forms and doctrines from material society, pure ideal supplants socio-historical analysis of social reality. In other words, historicism's entreaty to the general law of the people may be subverted by preconceived legal ideals clothed in the trappings of general law. What is presented as the law in society may be no more than *a priori* principle. Any discrepancies noted with actual society are then rationalized, if need be, by resort to the temporal idea of a lag between the realization of the principle and its practice in society.

69. See Herget & Wallace, *supra* note 4.

70. See DAVID, *TRAITÉ*, *supra* note 2, at 156–58.

71. See David, *L'Originalité*, *supra* note 2, at 2–3.

For David, this route is a return to natural law theories. Admitting to preordained ideals leads to the same shortcomings of legal positivism. What promises to plumb society as the ultimate and generative source of law ends by rejecting society's ultimate relevance. That is, once we pre-identify legal ideals as prior and ultimately working themselves pure through society, isolated social forces then exert no truly determinative hold over legal development. To the extent that society is not seriously implicated in the creation of law, the idea of a general law loses its explanatory power. As such, general law no longer offers the possibility of supplementing the insufficiencies of positive law.

2. *Against Nationalism*

At the other extreme, the historical dogma can go awry by an overemphasis on the social specificity of general law.⁷² That is, an exaggeration of law's specificity with regard to individual societies leads to a misguided nationalism. The miscalibration on this side is the complete abandonment of common legal ideals across societies. Instead, social conditions and idiosyncrasies are sharpened and accentuated to claims of unique expressions of a people. Societal uniqueness is taken to account for even the most technical legal difference. For David, this perversion of historicism is represented by Nazi jurists:

Law, corresponding to a community, should be essentially different from that of other communities, because it expresses, by its nature, a manner of thinking, of feeling, of reasoning that pertains to the members of that community, unified by race. The idea is that of the historical school One well sees, however, how the theory thus presented can easily lead to the exaltation of race, as it happened when national-socialism took power in Germany.⁷³

This phenomenon describes historicism's tendency toward essentialization of societal difference. Where the historical school

72. See DAVID, TRAITÉ, *supra* note 2, at 145.

On the contrary if, following the historical school or the doctrine of national-socialism, one rejected the idea of natural law and one saw in law the spontaneous product of a social environment founded essentially on a certain community of feelings and instincts, holding above all race, one would be lead to deny all possibility of unification, affirming the deep character of differences noted among the various legal systems and *the unsurmountable character of obstacles raised by vital differences of communities separated by their race.*

Id. (emphasis added).

73. *Id.*

conceives of law in relation to its social surroundings, Nazism as its extreme form takes the further step of explaining all law in terms of social and racial determinism.⁷⁴

Furthermore, Nazi law prizes one material factor over all others. Race alone is taken to explain and generate the sum of law and to provide German law's distinctiveness. This is a distortion of the historical school's claim of law's dependence on society. In David's eyes, the Nazi focus on race as the single generative force of law is misguided.⁷⁵ Further still, he denies any generative force to race.⁷⁶ Instead, he assigns it to the level of an artificial and nonmeaningful demarcation of law. Race is irrelevant to law's evolution. Its relationship to law is intelligible only in the context of the politics of nationalism.

In terms of historicism, the nationalist deviation—whether inspired in an array of nationally denominated characteristics or in the more virulent idea of Nazi race—results in a definition of a general law that is nationally limited. While positivism sets the limits of law at the printed text, the nationalist strand sets the limits at the nation's borders. Parenthetically, David, as we shall see, sets the limit with the international legal family. Nationalism, however, undermines the broader efficacy of law. It narrows the domain of a renewed legal science to the four corners of the nation-state, and it threatens the basis for international law by rejecting a cross-national commonality of legal ideals. Considering David's era, it is not surprising that he argues for a broader foundation for law. In no uncertain terms, positivism fed by nationalism is a remedy far worse than the illness of legal uncertainty.

In the United States as well, Nazi law inspired discussions of legal theory.⁷⁷ Here, too, it was considered aberrational. Discussions of legal theory focused, however, on the relationship between law and principles. Moral principles in law, it was argued, offered a basis from which to deny the legitimacy of Nazi law.⁷⁸ Nonetheless,

74. See *id.* at 155–56 (“National-socialist jurists did not miss doing so (the exaltation of race), and strove to explain all the law of their country by what we call by the rather vague term of the genius of race.”).

75. See *id.*

76. See *id.* at 155.

77. See, e.g., EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159–78 (1973); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

78. See PURCELL, *supra* note 77, at 164. Purcell describes the natural law reaction to positivism and legal realism which was associated with the rise of Nazi law.

American legal scholars tended toward explaining law as distinct from morality and offering a separate basis for condemning Nazism.⁷⁹ Briefly put, the general attitude toward Nazi law was to find solid ground for condemning it.

David's perspective is more conciliatory.⁸⁰ Nazi law is characterized as an explicable deviation from the historical school. Its genesis is a misinterpretation of the same legal theory David claims as his own. The objective for David is not to find a basis for condemnation and reproach. Rather, it is to improve on the theory.

3. *Against Marxism*

David's reaction to nationalism may be enough to convince us of his aversion to racial or any other determinism. It comes as no surprise then that he is likewise opposed to economic determinism. He rejects an exclusivity or even predominance of economic conditions as the basis for law. Yet, David accepts that economic conditions and conceptions, unlike race, influence the law. For him, the Marxist deviation consists of a disproportionate emphasis on the role of economic conditions. David objects to its place as the sole legal determinant.

Still, David traces the Marxist thesis to origins within the historical school.⁸¹ As such, he considers economic determinism as another potential deformation of the historical school. Again, similar to nationalism, the error tips toward an overemphasis of material conditions: economic conditions are considered the sole and exclusive determinant of law in society. Unlike nationalism, however, economic conditions are still considered relevant to legal development. In other words, David adopts materialism and rejects determinism.

Yet, he does not express outward antipathy toward Marxism: he claims it within the historical tradition. However, David does so to demonstrate the ill-sightedness of its development. He attempts to disprove Marxism on its own terms and then to remedy its short-

He also describes the more secular mainstream responses to Nazi law in this way: [Lon L.] Fuller, like [Roscoe] Pound, refused to accept any complete or formal system of natural law, nor did he adopt any kind of *a priori* absolutism. His whole discussion of natural law was, in fact, vague and imprecise. He was much more certain of the weaknesses of realism than he was of the foundations of a system of natural law.

Id.

79. *See id.*

80. *See* DAVID, TRAITÉ, *supra* note 2, at 135-36.

81. *See id.* at 156-58.

comings. He stresses Marxism's own recognition of a temporal lag between economic conditions and the legal superstructure: in any determinate period, law is not a "real-time" reflection of economic conditions. Exploiting this concession, David interjects his position as a more complete explanation: law is responsive to a range of social conditions. In this way, he reconciles Marxism to his own theory. Indeed, David minimizes Marxism's own claims to economic determinism.⁸² Once rid of determinism, he is free to make peace with its theory.⁸³

Although less central to David's jurisprudence, his relationship to cold war politics is a telling vantage point. His legal families take bolder significance in this light. While David acknowledges a common baseline with Marxism, he does so to emphasize its difference. There is no mistaking David's loyalties. Europe, he admonishes, is on the brink of a decision in which direction to forge its economic system. Opposed economic systems cannot be reconciled. He presents it starkly: "The thing should be noted and deserves to be considered, at the moment when the world is divided into two opposed economic systems, and when Europe appears undecided as to which path it should take, in this respect."⁸⁴

In a later article, David softens the lines dividing Europe. He notes a drift toward socialism in Western Europe and allows some room for flexibility. In his words, "[A]ll the nations of the West have in varying degrees entered upon the path of socialism, and I think they can proceed a considerable distance along that road without repudiating their 'membership' in the system of 'Western' law."⁸⁵

4. Summary

To summarize to this point, David adopts the socio-historical conception of law—the theory that law is related to the historical trajectory of actual societies. Rejecting "natural law" theories, he envisions law as dependent on society. This conception he presents is vulnerable to misinterpretation: it risks returning to natural law thinking or being appropriated by politics. His examples of past misinterpretations are the traditions of idealism, nationalism, and

82. *See id.* at 158.

83. Interestingly, David emphasizes the idea of temporal lag both to find common ground with Marxism and to critique Savigny's idealism. Whereas Savigny employed the idea of a temporal lag to explain the priority of legal ideals to material conditions, Marxism explains the lag in terms of the priority of material conditions to legal ideals. *See id.*

84. *Id.*

85. David, *supra* note 18, at 130.

Marxism. Alternatively, David proposes a new theory of law and society that avoids these past errors.

In this last connection, David endorses the distinction between a positive law constructed by jurists and a general law emanating from society. He holds out general law as the basis of a reconstructed legal science. And, he addresses the negative deviations of both idealism and materialism by creating a third term. This third category acknowledges the material diversity of societies while not omitting the commonality of ideals, across societies, also contributing to law's development.

C. *Material Ideology*

David's reconstructive proposal, thus, attempts to balance both societal differences and broader ideals. David performs this operation by highlighting a third element—ideology—and describing it as a condition of society.⁸⁶ That is, as between juristic construction and social conditions, ideology figures as a social condition—i.e., a given:

It is sufficiently artificial to want to study on the one hand the influence on law of geography of a country, and on the other hand the influence on law of its economic geography and its civilization. In these two cases, it concerns, honestly speaking, a given that we should consider as such⁸⁷

Again citing the historical school, David affirms social conditions as the basis of general law. Reinforcing the element of a society's ideals, he spotlights ideology as ultimately determinative of general law.

In this peculiar sense, ideology captures all social, economic, and political factors—material conditions—while still maintaining its more accepted meaning of social consciousness.⁸⁸ For David, ideology is the sum of all societal influences affecting law. It is also the basis for distinguishing among legal families.

Ideology then has a double character of both social conditions and social consciousness. As we would expect, David identifies ideology with a society's beliefs, ideals, religion, and traditions. Where he innovates, in fact, is in expanding the meaning of ideology to include the sum of material conditions. In doing so, he subsumes both

86. See DAVID, TRAITÉ, *supra* note 2, at 152. While Gény distinguishes between the types of given, David groups them all under the same category. See *supra* note 38 and accompanying text.

87. DAVID, TRAITÉ, *supra* note 2, at 152.

88. See *id.* at 161.

material and ideal elements under the same heading.

This is not to say that David draws no distinctions between material and ideal conditions of society. On the contrary, he makes a point of distinguishing between them and faults Montesquieu—the father of the historical school—for failing to do so. David's category of ideology is not based on the indistinguishability of social conditions and transcendent ideals. Rather, it is based on the merging of both into an integral form.⁸⁹ Failing to discriminate between them would lead to an overemphasis of one over the other. Specifically, overemphasizing societal differences leads to nationalism or Marxism. Likewise, overemphasizing transcendent ideals leads to idealism. A balance requires the recognition of social conditions and transcendent ideals as separate from each other, although each implicates the other.

1. *Montesquieu Improved*

Illuminating David's meaning of ideology is the manner in which he relates his position to Montesquieu's. In his first comparative law treatise, David lists the factors identified by Montesquieu as the "spirit of the laws":

"The laws should be so proper to the people for which they have been made that it would be highly unlikely that laws from one country would fit another . . . They should relate to the physical conditions of the country; to the climate whether cold, hot or temperate; to the type of life of the people, laborers, hunter or farmers; they should relate to the degree of liberty that the constitution may provide, to the religion of the inhabitants, to their inclinations, to their wealth, to their number, to their commerce, to their mores, to their ways . . . It is in all these ways that it should be considered . . . These aspects form the ensemble of what is called the spirit of the laws."⁹⁰

I briefly turn to David's discussion of Montesquieu⁹¹ for the light it

89. David distinguishes his concept of ideology as a third term in contradistinction to Montesquieu's undifferentiated merging of ideal and material factors. The distinction is parallel to the relationship he describes between ideology, on the one hand, and juristic construction and societal condition, on the other. David exaggerates the materiality and idealism of each of the terms rejected. Material factors are described as physical nature—namely, geography and land conditions. Ideal factors are described as the political regime, religion, and mores. His third term, ideology, highlights economic, social, and political conditions as well as philosophy and religion. In this way, ideology appears less concrete than materialism and less abstract than idealism. Still, it encompasses both.

90. DAVID, *TRAITÉ*, *supra* note 2, at 146 (ellipses in original) (quoting MONTESQUIEU, *ESPIRIT DES LOIS*, livre I, chap. III).

91. See GUTTERIDGE, *supra* note 60, at 12 (criticizing Montesquieu's effort at

sheds on his concept of ideology and, unexpectedly, his views on Latin American law. David registers his disagreement with Montesquieu in a three-part argument.

First, David distinguishes two categories of factors from among Montesquieu's list. David separates out physical⁹² from human factors, to use his terms. He argues against physical factors as the preponderant influence on law. David diminishes the impact of physical factors in two separate ways. He subdivides the set of physical factors further. Only a subset of these he deems relevant to law, specifically, those affecting "man and human relations."⁹³ As such, David rejects the pertinence of all physical variables:⁹⁴ some have no bearing on law at all.⁹⁵ Additionally, David maintains that even the new subset of physical factors is neither sufficient nor the most important basis for law.⁹⁶ Human factors are presented as much if not more influential. Indeed, David minimizes the predominance of physical factors:⁹⁷ they are not the primary influence on law.⁹⁸ Nonetheless, his argument does not, by any means, negate their impact. Despite his efforts at minimizing their importance, David resoundingly affirms their relation to law.

Second, David lessens the abstract quality related with his human factors and, at the same time, emphasizes their impact on law. Here, the argument advances in two steps as well. David first mitigates the abstractness of human factors by linking them to

comparative law while recognizing his founding role in—"realiz[ing] that a rule of law should not be treated as an abstraction, but must be regarded against a background of its history and of the environment in which it is called upon to function").

92. Physical factors are described by David as "physical characteristics of the country, climate, terrain, type of life of its inhabitants, to the extent it is imposed by the geographic conditions of the environment in which they live." DAVID, TRAITÉ, *supra* note 2, at 147.

93. *Id.* at 151 ("Indeed, geographic factors condition, to a certain extent, the development of civilization in all countries, and physical geography does not interest us jurists other than in so far as it affects men and human relations.").

94. *See id.* at 149 ("Law varies in necessary fashion as a function of a certain number of factors of the physical geography of specific countries.").

95. *See supra* text accompanying notes 20-24.

96. *See* DAVID, TRAITÉ, *supra* note 2, at 148.

Without doubt, one should not go too far along this way; experience proves that it would be in vain to attempt to establish the law of a tropical country in a temperate country, or law of mountainous countries in maritime countries: man is never a pure product of the physical environment and relations among men undergo the influence of other more important factors.

Id.

97. *See id.* at 151.

98. *See id.* at 148.

physical conditions. Physical conditions are described as closely related to, or preconditions of, human factors.⁹⁹ That is, they condition human factors much in the same way that they condition law.¹⁰⁰ In this way, David traces human factors to physical conditions.¹⁰¹ Thus, religion and ideals—David's human factors—are described as the products of their physical surroundings.¹⁰² Additionally, he attributes a second source to the formation of human factors. This additional source is cursorily referred to as "other factors" in this part of the argument. The separate basis, however, is necessary. Without it, David's category of human factors would be merely a reflection of physical conditions.

Third and last, David claims that his modified physical and human factors, together, are constitutive of law.¹⁰³ He maintains they are both equally social conditions—givens. As may be apparent, it is this dichotomous category of physical and human factors which David denotes as ideology.

2. *Shared Ideology*

The role of ideology in this reconstructive proposal, unlike a strictly material basis for law, is that ideology can be shared across societies. In this measure, like societies—characterized by like ideologies—may embrace and unite under a commonality of law. Furthermore, ideology is not static.¹⁰⁴ It is capable of change. And al-

99. *See id.* at 151.

The geography of a country exerts an influence over its law, but this influence can hardly be disassociated from the influence of civilization and the ideology to which, along with other factors, geography contributes in forming. The geographic factors condition in effect, in a certain fashion, the development of civilization in all countries, and physical geography does not interest us jurists other than to the extent it affects men and human relations.

The insularity of a country, its desert, mountainous or maritime character, the kind of life concentrated or dispersed that results in the exploitation of its natural, agricultural or mineral resources, all that, and other considerations as well that are *in strict rapport* with its physical geography, strongly influence a people's outlook.

Id. (emphasis added).

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* at 152.

104. *See id.*

The living conditions of different peoples, their outlooks, and their civilization are susceptible, without doubt, of evolving more rapidly and completely than the givens of the physical environment in which they live. . . . it matters little that these givens have a quality more or less of

though adaptive, it is no less determinative of legal development. For David to say that ideology is a social condition is not tantamount to saying it is permanent or fixed or unique to a particular society. The straddling of both material and ideal elements is accomplished by setting up ideology as an autonomous element. For David, ideology is an elective idealism,¹⁰⁵ independent of other social conditions. Societies are neither locked into an ideology nor are they completely constrained by social conditions. A society's ideology is within its choosing.¹⁰⁶ It is not strictly a reflection of material conditions. Thus, David attempts to carve out a definition of ideology that is both consciousness and materiality.

As may be apparent, the term has a very particular meaning for David. Ideology, in this case, does not conceal the real workings of society: it exemplifies the character of society in all of its terms—both material conditions and social consciousness. It is not elusive illusion awaiting to be unmasked: it is the very meaning of the concept of society.

3. *Counter-Critique of Idealism and Materialism*

With ideology as both a material condition and shared ideals, David attempts to out-manuever the pitfalls of both idealism and materialism. He averts materialism by stressing the element of ideals, religion, and philosophy that ideology encapsulates. Averting idealism, he grounds his notion of ideology in the material conditions of society. Far from universal forms from on-high, ideology is

permanence, or that one may or may not envisage their transformation over time.

Id.

105. *See id.* at 153. David's assimilationist vision is made clear in the following passage:

It is without question that certain rules, in each legal system, are beholden to the religion or philosophy professed by the unanimity or majority of inhabitants. . . . It would be in vain to attack head-on the rules in question, no matter how irrational they may seem to us, with the intention of achieving the unification of all law where one finds such rules and legislation. Such a work of unification could not be undertaken until after long preparatory work. It is necessary that the inhabitants of the country targeted detach themselves from their traditional religion and be prepared to welcome the institutions and rules condemned by the former; or it is necessary to convince the inhabitants of the country that the collections they consider sacred do not have in reality this character; or alternatively that the sacred texts do not require in any way the legal rules that over time have been made to proceed from their authority.

Id.

106. *See id.* at 158.

described as socially contingent. Indeed, David's definition of ideology shows the strains of joining matter and ideals. At times, ideology is tilted toward material conditions; at other times, it is tilted toward ideals and consciousness.¹⁰⁷

Embracing the concept of ideology is, counterintuitively, an attempt to rescue the historical school's conception of law from its deviation toward nationalism. Again, that conception of law—defined in terms of social particulars—tends against transnational commonality. Ideology, asserted to be a social given, by contrast provides a basis for commonality among material societies. As such, it is generative of law that is capable of transcending national societies but not predetermined or unchangeable.

David thus responds to nationalism by asserting a basis for cross-national law. Despite the particularities and idiosyncracies of particular societies, a common ideology allows for a community of law. It overcomes the confines of national and ethnic boundaries, appealing to a transcendent marker of a larger identity. That larger identity is the legal family: David's basis for his legal typology. Within the legal family, differences thought unique under nationalism's spell are no more than inconsequential differences of legal technique.

David is cautious, however, not to reintroduce wholesale idealism. Instead, ideology is described in materialist terms, as proximate to the material conditions of society. Rooted in society, ideology contributes to the composition of the legal system. Thus, ideals are not the sole element of legal development. Other social conditions—some more static than others—also impact on law's formation.¹⁰⁸ Nonetheless, ideals, religion, and philosophy, for David, form part of the social given, as distinct from formal juristic constructions.

D. The Function of Comparative Law

The question of ideology takes on the added importance of positioning Latin America among the families of law. In this respect, the ideology of jurists assumes a separate distinction. It is the basis for Latin America's membership within the continental European legal family.

107. *See id.* at 152 ("Among these ideological "givens" of civilization to which it is proper to reconnect, in different countries, the structure and spirit of legal institutions, several categories can be distinguished, and to each, according to its tendencies, can be attributed a preponderant or exclusive role.")

108. *See id.* at 158.

Integral to David's project of legal reconstruction is the function assigned to comparative law. Aiming at legal science, comparative law provides the means to complete the picture. It is the basis for tying together the various members of the legal family into an interpretive community. That is, David's basis for reconstruction is the assembling of an interpretive clan to fill in the deficiencies of national law.¹⁰⁹

Ideology is the main criterion of legal families in David's canonical system and, thus, the basis for assembling a coherent interpretive community. Legal technique is only secondarily described as a criterion of classification. Technique does not amount to deep difference or family differentiation. It notes the rather insignificant and stylistic difference between Anglo-American law and legal family. Both, however, share the same ideology.¹¹⁰

Sharing a common ideology, for David, is an essential aspect of the project of reconstructing legal science. Ideology unites the community of jurists called upon to elaborate the general law. The reconstructive proposal then rests on the possibility of constituting a whole, seamless, and determinate law through an international interpretive community of jurists. Its object is the general law of the historical school, freed of national boundaries and common to all within the legal family. It transcends national positive law but is not universal law. Instead, it is the law shared by like societies.

David's project has the effect of reintroducing abstract principles as a source of law. He reintroduces the force, literally the guiding force, of idealism. Within his definition of social conditions, ideology is a mark of both real differences between peoples and deep similarity among them. Distinct societies may adhere to like ideologies. Their ideological affinity generates a commonality of their laws. In this way, ideology is positioned as the paramount source of legal development.

1. *The Legal Family*

David's legal families are delimited by ideology and constitute transnational interpretive communities. Within an ideological family, thus, jurists are to work in concert toward a scientific law. David

109. For support for this proposition on David's program for comparative law, see John W. Cairns, *Comparative Law, Unification and Scholarly Creation of a New Ius Commune*, 32 N. IRELAND LEGAL Q. 272, 274 (1981) ("David is arguing that the task of comparative law is in fact that set out by the World Congress of 1900.").

110. The Western legal family is described as encompassing three components: Christian morality, liberal democracy, and capitalism. See DAVID, TRAITÉ, *supra* note 2.

emphasizes the family of scholars and courts in the project of making the law whole.

Yet, the endeavor is not worldwide legal unification or haphazard attempts at harmonization. The project of European legal science delimits the interpretive community along the criterion of ideology—a scientific and identifiable manifestation of living societies according to David. Furthermore, differences of legal technique, as opposed to ideology, mark only an internal difference within the family. As noted before, legal technique is said to explain the differences of Anglo-American law from the rest of the European interpretive clan. While exclusively focusing on ideology would suggest complete interchangeability between common and civil law systems, legal technique distinguishes levels of law's transferability within the interpretive community.

In addition, David's interpretive community relies on an expanded notion of the authoritative sources of law. Contrary to the orthodoxy of civil law systems, David wholeheartedly accepts the position that case law and scholarly writing are sources of law. He affirms this as the reality of civil law systems, citing his predecessors: Gény and Lambert.

Notably, David chides fellow teachers and comparativists for perpetuating the belief that case law and scholarly writing are not sources of law in the civilian tradition, leading astray both the credulous student and unwary foreigner.¹¹¹ The observation is hardly overstated. Until recently, comparative accounts of French law have largely underestimated the role of judicial decision making.¹¹²

Even more important, however, David's reconstructive project is premised on the recruitment of jurists and judges to the task of making the law whole and uniform. Reconstruction is premised on both widening and deepening of the sources of law.

Demarcating the interpretive community is, thus, David's attempt to reclaim the completeness and sufficiency of law. His comparative law scheme responds to critiques of socio-historicism. Under this proposal, law is to be found in societies within the same ideological family.¹¹³ While gaps and inconsistencies may plague national law, the expanded interpretive community is expected to yield a completeness and legitimacy capable of recovering European legal science.

Latin American law and jurists, under this plan, are to contrib-

111. See *id.* at 30–31.

112. See Mitchel de S.-O.-Y.E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 *YALE L.J.* 1325 (1995).

113. See DAVID, *TRAITÉ*, *supra* note 2, at 130–31.

ute to the joint effort. The common task is to work the law of the legal family whole. Latin Americans are welcomed within the European ranks:

Latin American jurists can no longer be considered disciples, whose work we leaf through with a complacent eye to find our own doctrines. They are at present our equals, and there is no doubt that tomorrow we will have as much to learn from them as they can learn from us.¹¹⁴

In return for their effort, Latin Americans are promised the benefits of a defensible science of law.

2. *Scientific Method*

Comparative law is also sketched as the scientific method toward reconstruction. Its objective is to incorporate the work of foreign jurists to improve national law: that is, to fill in gaps or resolve ambiguities. To this end, comparative law aspires to rid itself of political considerations or politically tainted scholarship. David separates out the political element by distinguishing between two separate questions: technical feasibility versus political desirability. The comparativist should be concerned only with the technical question. The political question is to be left to legislators and others.

Interestingly, the distinction between practicality and desirability is related to the historical school's conception of law. Specifically, it is related to law's dependence on its social environment. Accordingly, successful legal borrowing or unification is held to depend on the compatibility of the respective social spheres. Thus, it is not merely the political will of the legislator that can effect legal harmonization. It depends on the compatibility of its sources which is, in turn, a function of the societies whose laws are to be harmonized. Thus, the comparativist's task is not mere implementation on the basis of some political goal. Instead, it is the determination of differences and similarities—whether or not societies and their laws are harmonizable.¹¹⁵

Furthermore, David emphasizes the difficulty of comparative law's technical enterprise. This difficulty is accentuated by the propensity of national legal scholars to ignore and, more importantly, to disassemble the actual workings of their legal systems. David notes

114. David, *L'Originalité*, *supra* note 2, at 18.

115. See DAVID, *TRAITÉ*, *supra* note 2, at 144 ("The task of the comparativist, who wishes to prepare the way for legal unification, is to determine if the differences he has noted are profound or not and what is the nature of the obstacles facing unification.")

the obstacles this fact presents in understanding law's interrelationship with the society at hand. More insightfully, he notes the site of political activity that legal scholarship actually is. Some legal scholarship, he goes as far as saying, is a combination of politics and science.¹¹⁶

The politics of legal scholarship risk leading the comparativist astray. The danger is taking as actual law what may be "an ideal law that exists only on the paper and in the hearts of certain jurists."¹¹⁷ By way of example, David points to the convention of French legal scholars to deny the law-making power of the judiciary and case law as a source of law.¹¹⁸ David says no more about their politics than that they respond to "different motives" and the tradition of legal positivism.¹¹⁹

Another pointed example of politicized scholarship is Latin American jurists, themselves. David recognizes that politics, patriotism, and tradition distort the fidelity of self-depiction.¹²⁰ Yet, it is this very distortion which he highlights as the preeminent source and glory of Latin American law. Its ideology is, thus, identified with the liberal politics of a set of Latin American jurists and, for David, represents the hallmark of Latin American legal originality. A juristic politics is thus equated with European society. And, for David, European society is the goal—apparently notwithstanding its compromised scientific nature.

Accordingly, David wavers on his stand against politics and political scholarship. Indeed, the use of the term ideology itself is

116. *See id.* at 29 ("They (the jurists) follow, more or less consciously an ancient if not venerable tradition: that of the collections of false capillaries and false deretals whose authors themselves also combined politics and science.").

117. *Id.* at 28. David himself alludes to the instrumental and political use of the trope of Europeanness or Westernness examined in this Article. His passage reads:

In a great number of countries, concerned with Westernizing or showing that their civilization is Western, scholarly works abstain, possibly due to an ill-conceived patriotism, from describing the law such as it is and undertake to describe an ideal law that does not exist except on paper or in the heart of certain jurists.

Id.

118. *See id.* at 30 ("The essential role that case law plays, for example, is generally ill-known in England, because of the deceptive formula still employed by certain French authors, according to whom case law is not a source of law.").

119. *See id.* ("It is useful to be aware that French legal scholarship itself, for different reasons, does not always give a faithful image of French law. The school of Exegesis, often lost in theoretical discussions, believed for hundreds of years it could ignore case law . . .").

120. *See id.* at 29 ("Considerations of policy, national pride and respect for tradition, intervene in works of law and lead their authors to distort the law of their country in the description they offer.").

constantly reminiscent of an underlying politics. While David attempts to make ideology scientific—the crucible of society both material and ideal—he does not insist on science when he agrees with the underlying politics. In the example of Latin American law, he takes for scientific comparison what he, in other circumstances, might recognize as politics. Doing so, he raises to the level of a scientific account what is a political preference for Latin American juristic liberalism.

At the same time that David lauds the political project of Latin American jurists, he propels his own intervention. The description of Latin American law aligns with and reinforces the project of European legal science. It ensures Latin America's participation within the legal interpretive community of continental Europe and it reinforces the proponents of liberal democracy in Latin America.

IV. LATIN AMERICAN LAW'S EUROPEANNESS

The main import of David's writing on Latin America is to reinforce the connection with European law. David describes it in terms of Latin America's membership within the Romano-Germanic legal family which together with Anglo-American legal systems comprise the family of Western law.¹²¹ There is nothing unique in David's work on the first point: his classification of Latin American law as European is quite common in comparative work.¹²² The question would rather appear to lie in the objectives and possible interest this type of scholarship could have.

A. *Sociological Legalism*

It would be easy to understand David's sense for Latin American Europeanness were he a more conventional comparativist of the prewar idealist school or a historicist focusing on the origins of Latin American law. The codes, professional cultures, and so on, indeed have their origin in Europe. They are broadly understood by those who work with them to be European, if perhaps inflected by contact with the North American common-law tradition. David, however, wants to break with this previous tradition of comparativism and affirm the importance of social conditions and historical circumstances that apply to law. The paradox is David's motivation in maintaining this position while, at the same time, advocating for the Europeanness of Latin American law.

121. See sources cited *supra* note 2.

122. See sources cited *supra* notes 6, 14.

The answer turns out to foreground the role of Latin American jurists in maintaining and defending an alien faith. It is their imitative fealty, ironically enough, which gives Latin American law its "originality" as European. Rather than embracing local conditions as he claims, David merely reasserts Latin American law's European identity. He simultaneously insists on the originality of Latin American law and on its European character. It works by conflating the concept of social particularity with the mere differences of positive law. The result, in the case of Latin America, is a description of law's Europeanness.

David need not reargue Latin American law's Europeanness, however: it is common to the tradition of comparative jurisprudence. Quite the opposite, David's socio-historicism of law should lead to a greater showing of social context. His use of the term "originality" is a gesture to his basic method.

Originality is evidence of the validity of the historical school's proposition of a general law of society. As such, Latin American law is expected to show originality. That is, a finding of Latin American particularity corroborates the historical school thesis. In David's words, "[I]f one were to admit the postulates of the historical school, one should, it seems, be able to demonstrate them by way of the legal systems of Latin America."¹²³

Thus, David's project of refuting idealism and demonstrating the correctness of historicism is premised on a showing of robust originality—evidencing the substantial differences of society he asserts between European and Latin American. Yet, while it appears that David would be enormously eager to demonstrate far-reaching originality in Latin America, he refrains. Instead, David equates originality with juristic ideology and selective imitation at the level of positive law—thereby downplaying societal differences with Europe. Clearly, David is reluctant to travel down the path of societal particularity. Instead he turns to praise Latin American jurists for maintaining the faith of European legal ideals.

1. *Multiple v. Mere Imitation*

David avoids two separate descriptive possibilities with regard to Latin American law. These correlate to the deviations noted by idealism and nationalism in his legal theory.

Pushing against idealism, David avoids the contention that Latin American law is a mere imitation of European law.¹²⁴ He

123. David, *L'Originalité*, *supra* note 2, at 2.

124. *See id.* at 16 ("It is far from, however, considering the law of Latin America,

rejects this latter notion as natural law-style idealism.¹²⁵ Latin American law described as mere imitation would support the latter conception of law. According to David, Latin American legal scholars themselves adhere to this natural law position:¹²⁶ "The jurists of Latin America have been generally idealists; for this reason their effort has constantly tended to highlight, because of a common ideal, that which links them to the tradition and outlook of Europe, much more than to underline the autonomy and originality of their legal systems."¹²⁷ For this reason, he states, they ignore the originality of their own law and are of little help in considering the question of Latin American law.¹²⁸

The originality of Latin American law, according to David, is the variety of its European sources.¹²⁹ While pointing to differences of Latin American societies as compared to Europe,¹³⁰ he highlights Latin American law's selective imitation of European positive law.¹³¹ Doing so, David echoes the familiar litany of foreign models to which Latin American law is purported copy: French, Spanish, Portuguese, Italian, and German law,¹³² as well as U.S. public law.¹³³ David states:

as often imagined, as a simple replica of French law or some other European law.").

125. *See id.* at 2 ("The absence of originality in Latin American law could be reconciled with the thesis of the natural law school. . . . The absence of originality could even be invoked as proof of the well-foundedness of the dogmas of such school.").

126. *See id.* at 5; *see also* DAVID, TRAITÉ, *supra* note 2, at 29 ("The jurists of Latin America do not give account of the particularities, often justified within their legal systems, and model their treatises, too exclusively, on French or Italian scholarship.").

127. DAVID, TRAITÉ, *supra* note 2, at 29.

128. *See* David, *L'Originalité*, *supra* note 2, at 5.

These preliminary remarks were necessary, before broaching our subject and asking what is in effect, original about the law of Latin America. These remarks have helped us see, in effect, how this question has been avoided in the nineteenth century and why, in our day even, we should not expect much help to resolve it from Latin American authors.

Id.

129. The terms "originality" and "particularity" are used interchangeably by David.

130. *See* David, *L'Originalité*, *supra* note 2, at 16 ("The originality is justified by the different conditions of development and existence of the countries of Europe and America.").

131. *See generally id.* While David recognizes some local adaptation, it makes little difference. He reaches the same result of the nineteenth-century natural law theorists. While David emphasizes selective imitation rather than straight copy, the conclusion is still the Europeanness of law; it is not patchwork; it feeds into reforming legal science idea.

132. *See id.* at 13.

133. The latter does not present a problem of classification as he considers An-

Latin American law is original in a first sense, and it is interesting to study, because it has adopted in whole neither French law, nor Spanish law, nor Portuguese law, nor Italian law, nor German law. It has made the effort to take the best from each of those laws, the more satisfying from a theoretical point of view as well as a practical one; the manner in which they have amalgamated and reconciled the principles of the diverse laws constitutes an experiment worthy of interest and confers on that law the certainty of originality.¹³⁴

This bare distinction—selective and multiple as opposed to unmitigated imitation—is presented as counting toward proof of the historical thesis. Although the distinction rejects the necessitarianism associated with a straight copy, David in fact returns to the tradition of reiterating the Europeanness of Latin America's positive law and legal ideals. The differences with Europe are ones of legal technique—much as continental European law differs between each country. David affirms as much: "The legal systems of Latin America [compared to Europe] have a certain originality, comparable at least to that observed when comparing European legal systems among themselves."¹³⁵

2. *Suppressed Particularity*

Another descriptive possibility which David rejects is an emphasis on difference or originality. David recognizes Latin American legal particularity only to the extent that it does not threaten its predominantly European character: "I will take care not to state, in excess, the originality of Latin America law, which do not consider, by any means, a sign of progress."¹³⁶

At first blush, this assertion is somewhat surprising. David opens the very subject by hailing Latin American originality. He relishes the idea of proving that law takes its form from society—and Latin American society he finds very different from European society. He is also anxious to demonstrate law's different manifestations in different societies, putting the discipline of compara-

glo-American law part of the same, broader Western legal family. In his first treatise, David groups Anglo-American and Romano-Germanic subgroups together under the heading of Western legal family. See DAVID, *TRAITÉ*, *supra* note 2, at 269. This category inspired much debate and criticism among scholars. In his second treatise, David separates out the two groups into separate families but retains the idea of a general Western legal family. See DAVID, *MAJOR LEGAL SYSTEMS*, *supra* note 2, at 24.

134. David, *L'Originalité*, *supra* note 2, at 13.

135. *Id.* at 16.

136. *Id.*

tive law to work. Indeed, he laments the slow development of comparative scholarship, which would have disproved natural law ideas earlier. Latin America, for him, is convincing proof of the impact of society on law, disproof of natural law theories, and evidence in support of the historical school.

Nonetheless, David avoids much attention to the particularities of Latin American social conditions. While acknowledging wide differences with Europe, the range of society's influences on legal development is not significantly addressed.¹³⁷ Societal particularity—in its extreme form pushing toward nationalism—is sidestepped by a focus on legal technique and the ideology of jurists.

Differences of legal technique reinforce, rather than distinguish, Latin America's identification with Europe. In turn, juristic ideology is both the prime element of Latin American legal originality and the basis for its identification with European law. Both side discourses repeat the indistinguishability with Europe.

More than a side discourse, however, juristic ideology is for David the height of Latin American originality. It consists of European ideology, which is a community of law rooted in the traditions and ideals of Europe—namely, capitalism, Christianity, and liberal democracy.¹³⁸ David does not hesitate to acknowledge that law's distinguishing feature in Latin America has been its ill-adaptedness to society.

3. *Juristic Ideology*

In addition to the hybrid meaning already assigned to ideology by David, Latin America ideology takes on yet a different significance. Turning to Latin America, David identifies ideology—conceived by him as the total of social givens—to consist of the ideals and commitments of jurists. The independent variable becomes the dependent. Ideology in Latin America—the bedrock of law—is redefined as juristic or legal ideology.¹³⁹ It is the set of ide-

137. See generally *id.* Only in passing are the traditions of indigenous peoples noted as contributing to Latin American originality. Some mention is also made of collective land ownership. They, however, are marginal to David's rather rhetorical turn of originality.

138. See *supra* note 3.

139. David's treatment of Latin American law is in many ways similar to his view of Soviet law. Both Soviet law and Latin American law have a strong basis in juristic ideology. Indeed, legal ideology is a factor distinguishing Soviet law from Western law generally. However, unlike Latin American law, David traces Soviet law to its history in society. Juristic ideology and political economy are depicted as harmonious with Soviet society. Cf. Deloyd J. Guth, Book Review, 66 CANADIAN BAR REV. 199, 201 (1987) (reviewing DAVID, MAJOR LEGAL SYSTEMS, *supra* note 2) ("In

als and political objectives espoused by legal professionals. David equates these to the ideology of European law: the sum of material and ideal conditions of European society.

Indeed, Latin American jurists, confronted with adverse societies, are revered for the constancy of their idealism and commitment to Europe.¹⁴⁰ Interestingly, David both praises the jurists for championing the ideals of a common civilization and upbraids them for espousing blind idealism. Their idealism fails to acknowledge their own particularity. Yet, it is this very idealism which David presents as the particularity and the distinctiveness of Latin America. At the end, this brand of sociological approach is empty of any determinate meaning.

The utility of David's idiosyncratic use of the concept of ideology is its incorporation of both material and ideal elements of society. In fashioning its double character, David attempts to dodge both critiques and deviations associated with an exclusive focus on either element. When discussing Latin American law, however, the source of ideology is no longer the sum of societal conditions. On the contrary, it is a legal ideology recognized to be at odds with the conditions of Latin American society. In Latin America, David demonstrates an ultimate dependence on ideals, championed by liberal elites, as truly transformative of law and society.

A closer look at this description of legal ideology reveals the deficiencies in David's larger project. It demonstrates the wooden and instrumental use of the concept of society as a useful source of law. In this instance, the term, society, is merely a placeholder. It proceeds mechanically from David's historical theory and, in fact, signifies nothing more than legal ideology.

Only in this way can legal ideology stand separate from society. Indeed, as the example of Latin America demonstrates, ideology can withstand a contrary society and persevere. Thus, the historical

short, David explains Socialist Laws (always excluding China!) in terms of their implantation on shallow legal soil, whereas all the other systems (Western, Asian, African) are explained in terms of deep historical roots."

David's concern with the Soviet Union, however, is very different than his concern with Latin America. His objective with regard to Soviet law is to distinguish it from Western law and to place it outside the Western legal family. Soviet law falls outside the Western or European interpretive community of legal scientists, notwithstanding its acknowledged interest and contribution to general learning. See DAVID, MAJOR LEGAL SYSTEMS, *supra* note 2, at 147-53; DAVID, TRAITÉ, *supra* note 2, at 313-37.

140. See David, *L'Originalité*, *supra* note 2, at 16. David attaches the following descriptive phrases to Latin American jurists: "feelings of family with European jurists," "spirit of universalism," "a common civilization with our countries," "quichottisme," "crazy hope," and "stubborn defensive combat." *Id.*

conception of law, in its reconstituted form, is turned against law's interrelatedness with society.¹⁴¹ David, paradoxically, maintains both law's interrelatedness and its autonomy. Thus he announces the triumph of the spirit over matter, of ideal over reality.¹⁴² The result is anachronistically an argument for law unaffected by social reality while still capable of effective social control.

B. Solidarity with Liberal Jurists

David's reluctance to stress Latin American originality—although prominent in his background legal theory—stems from his solidarity with Latin American jurists. That is, his democratizing project of law and society takes an unexpected turn in Latin America. There, the rule of law and European legal ideals are not easily rooted in society but instead, in his estimation, threatened by society. It is only through the unfailing ideological commitment of Latin American jurists that the rule of law has been preserved.

The refusal to bend to the circumstances, and to return to a primitive law in an era where economic and social conditions could make such a law seem better adapted to the country should not be seen as a manifestation of impotence in building an original law. Rather, it is a remarkable triumph of the spirit over matter¹⁴³

He goes on to attribute the persistence of European legal regimes to Latin American jurists:

This originality is justified by the different conditions of development and existence in European and Latin American countries. The stupefying thing is that this diversity and geographic distance should not have further accentuated this originality. The credit goes to Latin American jurists to their spirit of universalism. It is good to underline it; we should appreciate in its just value the constant effort that has been made in Latin America to maintain, together with a Latin law, a common civilization with our countries.¹⁴⁴

At this point, what may be considered a shortcoming is, on the contrary, celebrated by David. Latin American jurists are praised for their faithful adherence to a legal ideology in common with Europe.

141. See DAVID, *TRAITÉ*, *supra* note 2, at 147.

142. See *id.* ("There is there a rather remarkable triumph of the spirit over matter, of ideals over reality that deserves to be spotlighted and appreciated.")

143. *Id.*

144. *Id.*

It is magnificent to see this crazy hope today rewarded by success. The societies of Latin America have become, or on the way to quickly becoming, societies in all respects comparable to those of the old world; it has ceased to be ridiculous to proclaim there the same moral values and the same law as in Europe.¹⁴⁵

David is more committed to reinforcing liberal democracy than insisting on a democratizing conception of law. In other words, he prefers the larger political project over his jurisprudential goals. In the process, he raises Latin American jurists as the source of law itself—despite the inconsistency with his legal theory. The victory of legal ideology over social conditions, David concludes, is the highest order of Latin American originality.¹⁴⁶ Latin American law's distinctiveness is its juristic ideology—an ideology maintained by steadfast and European-oriented Latin American jurists. David states: "The originality of Latin American law has been above all else, during a century, that it was intended to apply to societies that, from the point of view of the doctrines of historical materialism, would have required regulation by completely different rules."¹⁴⁷ The ideology of Latin American jurists coincides with the ideology of the European or Western legal family, and more specifically, of European society.

Put more bluntly, David is faced with a conflict of politics and jurisprudence in Latin America. In Europe, both projects align in terms of a democratizing conception of law and a reconstructive basis for legal science. In Latin America, however, the character of society is deemed to threaten the maintenance of a legal regime held separate from politics. Democratic law threatens legal science and liberal governance. It is Latin American jurists who have resisted a democratic law by insisting on legal science based on the Europeaness of their law. To the extent legal science can be reconstructed—free of the perils of nationalism and communism—Latin America is dependent on its jurists. David's writings are, indeed, a tribute to the constancy of Latin American jurists. The cost, however, is an undemocratic and socially-disconnected law.

In terms of legal theory, the larger the stress on society, and thus specific social conditions, the less obvious the ties to European law and liberal democracy become. The concept of society, David's basis for law, leads to an increasingly differentiated and societal specific law. Each additional factor or societal particularity taken

145. *Id.*

146. *Id.* at 16–17.

147. *Id.*

into account would have the effect of widening the distance between Latin America and Europe. Thus, instead of pointing toward Europe, Latin American societies point to different laws and legal systems. David acknowledges as much. He pictures Latin America as narrowly escaping both primitivism and historical materialism. These are precisely the failures of socio-historicism that David's project proposes to avoid.

Conversely, the more law is insulated from outside factors—thus reduced to form and ideal—the stronger are Latin America's ties with Europe. The extreme version of this position is a full-scale return to what David labels natural law theories. That is, all law is essentially similar or in the process of becoming similar. Similarity without regard to social realities, however, harks back to a disembodied idealism and a position that David, a mid-twentieth-century pragmatist, cannot defend. Indeed, David argues against such theories positing abstract principles as the origins of law. These, he argues, lead to an erroneous belief in the universality or universal development of the world's laws. David's entire work is a rejection of the single and universal legal family.

Thus, reliance on the concept of society entails the conundrum of increasing differentiation and distance. It has no built-in brake on the proliferation of cognizable differences. Ominously in Latin America, it bodes an uncontainable eruption of difference. Drawing from actual Latin American events during David's period, the dangers appear all too real. Militarism and populism, as parallels to nationalism and materialism, threaten a repeat of the course of events in Europe.

Starting from an historical conception of law, a restraint on ever increasing differentiation must then be imposed either by a countervailing concept signifying similarity, or by arbitrarily restricting the number of societal factors considered, or by emptying the concept of society of material meaning. David employs all three discursive strategies but principally the last.

By way of reconstruction, David holds to the concept of society as the source of law—indeed his whole theory rests on it—in a quite idiosyncratic manner. His definition of society attempts to avoid the problems associated with idealism and materialism by interposing a third term, ideology, straddling both elements. Revealingly, though, David then comes to eject consideration of actual social or material conditions from his analysis of ideology. In this manner, he need not stray from Latin America's close identification with Europe. He need merely assert the proximity of ideals. These he finds flourishing within the group of Latin American jurists. Ironically, he finds them flourishing due to the belief of Latin American jurists in ideal-

ist or natural law theories. While he rejects the latter, he reinforces and lauds Latin American jurists for their commitment to European ideals. Accordingly, David holds to the concept of society as both material and ideal conditions and then empties the concept of its meaning relating to material conditions.

C. Undemocratic and Neocolonial Law

My claim here is not that David's characterization of Latin American law is per se untenable. Nor do I here propose an alternative of the same rank. The association of Latin American with European law may quite aptly capture the lived experience: that is, Latin Americans would undoubtedly agree that their laws are European. Furthermore, Latin Americans may have even grown into this characterization—similar to the process of internalizing social conditioning. Indeed, the notion of Europeanness has fueled an entire tradition of debate on Latin American law. It is not surprising that it would effectively populate Latin American legal consciousness.

Regardless, the notion of Latin American law as European serves a specific intervention of politics and jurisprudence. Passing as science in the service of democracy, the notion of Latin America's Europeanness removes law from the reach of society. Its premise is a democratizing conception of law, stipulating law's immanence in society at large. Yet, in fact, the notion of Europeanness openly links law to the labors of a juristic class—a product deemed laudable in itself and constantly in danger from the larger society. The identification with Europe reinforces a neocolonial stance against popular expression. It insulates law from wide segments of society. David hardly exaggerates when he confesses: "Latin American jurists, after having maintained a stubborn, defensive combat over the course of a century and having known to safeguard the conquests of the West, can today move forward with the Europeans to achieve more justice and a better world."¹⁴⁸ Europeanness places law beyond Latin American societies while at the same time outwardly affirming society's agency.

V. CONCLUSION

This Article examined one of the common fictions of Latin American law. This well-worn figure identifies the whole of law as essentially European. My analysis traced the notion of Europeanness through the work of René David and demonstrated

148. *Id.* at 17.

the work performed by this figure in supporting Latin American legalism. The fiction of Europeaness, maintained by formalists and antiformalists alike, supports the traditional program of liberal democracy in Latin America.

The force of this fiction, moreover, rests on the shadow of illiberality cast upon actual Latin American societies. Indeed, the notion of Europeaness is championed and defended precisely because of its perceived irreality in society. Latin American societies are not European, only their jurists pretend to be. The notion of Europeaness is rather a political aspiration. Its goal is assimilating illiberal Latin America to the culture of European democracy.

Relatedly, a second fiction of Latin American law (the subject of a forthcoming article) places front and center the illiberality of Latin American society. Its subject is the counterpart to the belabored image of Europeaness. The illiberality of society and failings of culture are related to economic underdevelopment and social injustice. The background story, in this case, is the legal culture's deep Europeaness. The alienness of jurists and the legal culture as compared to Latin American realities highlights the discordance—or gap—between law and society.

Thus, both fictions of Latin American law complement each other. They are merely perspectival shifts on the same view of illiberal societies at odds with liberal elites. The impact of these conceptions within Latin American legal consciousness remains to be studied. Whether these or other notions significantly inform Latin American legal decision making is a fertile area for further research.