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CONTEMPORARY LEGAL TRANSPLANTS-
LEGAL FAMILIES AND THE DIFFUSION
OF (CORPORATE) LAW

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CONTEMPORARY LEGAL TRANSPLANTS – LEGAL FAMILIES AND THE DIFFUSION OF (CORPORATE) LAW

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Abstract: This paper empirically documents the continued importance of the legal families for the diffusion of formal legal materials from the core to the periphery in post-colonial times. This raises the possibility that substantive differences between countries of different families around the world, such as those documented in the legal origins literature, continue to be the result of separate diffusion processes rather than of intrinsic differences between common and civil law.

Using the example of corporate and securities law, the paper documents the frequent and often exclusive use of legal materials and models from the respective legal family's core countries in treatises and law reform projects in 32 peripheral and semi-peripheral countries. The paper also shows that most authors of these treatises and projects were trained in the respective core countries. Data on the activities of national legal development and cooperation organizations, trade and investment flows, and student migration confirm the close legal family ties and provide some evidence of possible channels through which materials may continue to diffuse within their legal families after decolonization.

The diffusion of formal legal materials need not imply that the substantive development of law is affected by foreign influences, at least not in ways that induce substantive differences between periphery countries of different legal families. Various theories from comparative law, sociology, political science, and economics provide reasons, however, why the content of law in the periphery might continue to be influenced by core country models of the same legal family, as the evidence of formal diffusion suggests they are.

JEL: K40, N40, O19, P50

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Introduction

Contemporary knowledge on comparative legal systems is strangely bifurcated. On the one hand, some of the most sophisticated comparative lawyers assert that there are few if any relevant differences between common and civil law today, judging by key characteristics of the legal system, such as case law vs. statute law, the systematization of the law, or the lasting influence of Roman law, which are the traditional markers of the common/civil law distinction.[1] On the other hand, a very influential literature in economics – known as the "legal origins literature" – claims that empirically the substantive rules in areas of economic policy ranging from investor protection to military conscription differ systematically between common and civil law countries.[2]

How can this bifurcation be explained? One possibility is that one of the two views is, in fact, incorrect. The economists' correlations between legal families and substantive rules and outcomes might be spurious – their measures of law might be incorrect conceptually or factually, and the true drivers of any existing differences might be other factors that just happen to be correlated with the legal families.[3] Or the

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[1] *See, e.g.*, James Gordley, *Common law und civil law: eine überholte Unterscheidung*, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 498 (1993) ["Common law and civil law: an obsolete distinction"]; Hein Kötz, *Abschied von der Rechtskreislehre?*, 6 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 493 (1998) ["Farewell to the theory of legal families?"]; Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997) (difference between Common and Civil law is minimal compared to differences between them and the non-Western systems, including Latin America); *but see*, *e.g.*, Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT'L & COMP. L. Q. 52 (1996) (arguing that there is an epistemological difference between common and civil law systems).

[2] *See*, *e.g.*, Simeon Djankov, Oliver Hart, Caralee McLiesh & Andrei Shleifer, *Debt Enforcement Around the World*, 116 J. POL. ECON. 1105 (2008) (finding that debt enforcement proceedings upon default of the debtor are more efficient in common law countries than in civil law countries); Casey B. Mulligan & Andrei Shleifer, *Conscription as Regulation*, 7 AM. L. & ECON. REV. 85 (2005) (finding that French civil law countries are more likely to use the draft than common law countries). For a survey of the entire literature, *see* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origin*, 46 J. ECON. LITERATURE 285 (2008) [hereinafter La Porta et al., *The Economic Consequences*]. Some of the early results of the literature have yielded to better data, in particular the paper that started the literature (Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998)), *see* Holger Spamann, *The "Antidirector Rights Index" Revisited*, REV. FIN. STUD. (forthcoming), and the paper covering the area closest to the historical common/civil law distinction (Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Courts*, 118 Q.J. ECON. 453 (2003)), *see* Holger Spamann, *Legal Origins, Civil Procedure, and the Quality of Contract Enforcement*, J. INSTITUTIONAL & THEORETICAL ECON. (forthcoming).

[3] *See, e.g.*, Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006) (arguing that devastations through war were almost perfectly correlated with civil law in the twentieth

comparative lawyers might have overstated the degree of convergence, perhaps by focusing on the wrong aspects of the legal system.

This paper suggests another possibility that would reconcile the economists' and the comparative lawyers' views – diffusion of law along legal family lines. Policy solutions developed in the core countries of Western Europe (and North America) may spread to the periphery and semi-periphery countries of their respective legal families by imitation, economic pressure, or otherwise.[4] This need not happen instantaneously or perfectly. But when the periphery countries do change their law, they may look to their legal family's core countries for guidance, and in so doing partake of some of the particularities of those core countries' regulation. This would create policy similarities within legal families as observed by the economists, even if there are no important intrinsic differences between common and civil law today, as asserted by the comparativists. In other words, this paper provides an explanation for legal differences between legal families that does not rely on anything in the "nature" of "the common law" and "the civil law," respectively. Conversely, the arguments of this paper imply that observed differences of positive law between countries of different legal families do not by themselves constitute evidence of deeper differences between "the common law" and "the civil law."

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century and set in motion a political cycle that explains the phenomena falsely attributed to the civil law in the legal origins literature); Raghuram G. Rajan & Luigi Zingales, *The great reversals: the politics of financial development in the twentieth century*, 69 J. FIN. ECON. 5 (2003) (arguing that civil law countries were as financially developed as civil law countries around 1913 but then declined because of incumbents' opposition to financial development); Jacek Rostowski & Bogdan Stacescu, *The Wig and the Pith Helmet – the Impact of "Legal School" versus Colonial Institutions on Economic Performance (second version)*, working paper of the Center for Social and Economic Research (Warsaw 2006) (arguing that differences in colonial education policies, not legal systems, drive observed economic differences today); Daniel Klerman, Paul Mahoney, Holger Spamann & Mark Weinstein, *Legal Origin and Economic Growth*, working paper, University of Southern California (November 2008) (on file with the author) (arguing that other elements of colonial policy, not the transmitted legal system, may drive economic differences today).

[4] Some other scholars reserve the term diffusion to processes that do not involve coordination, *see* Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33 (2005).

Diffusion of law has been an important topic in comparative law at least since the publication of Alan Watson's seminal book on "Legal Transplants" in 1974.[5] The very existence of legal families spanning the globe is due to the diffusion of legal models during colonial times.[6] The challenge, however, is to explain similarities within legal families – and differences between families – in areas of law that developed after de-colonization, such as investor protection and employment law.[7] Diffusion can only explain this if the legal families continued to be important for diffusion even after decolonization. While this is often implicitly or explicitly assumed[8], other parts of the

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[5] Alan Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd ed. 1993, 1st ed. 1974). On diffusion of law in colonial times, *see* Eric Agostini, DROIT COMPARÉ (1988) 244 et seq., and for even earlier times P.G. Monateri, *Black Gaius – A Quest for the Multicultural Origins of the "Western Legal Tradition"*, 51 HASTINGS L.J. 479 (1999).

[6] *See, e.g.*, for the common law countries J.N. Matson, *The Common law Abroad: English and Indigenous Laws in the British Commonwealth*, 42 INT'L & COMP. L.Q. 753 (1993) (noting that English law was codified for transplantation to India, and then other colonies); for Latin America Juan Carlos Gonzaléz, INFLUENCIA DEL DERECHO ESPAÑOL EN AMÉRICA (1992) (describing the role of Spanish law in Latin America before and after independence in the 19th century).

[7] In as far as relevant differences were already in place before de-colonization, the thesis of this paper is trivially true – whatever differences existed between England and France and the other colonial powers were presumably at least partially imposed on their respective colonies.

[8] *See* in particular Esin Örücü, *A Theoretical Framework for Transfrontier Mobility of Law*, in Robert Jagtenberg, Erin Örücü and Annie J. de Roo eds., TRANSFRONTIER MOBILITY OF LAW 1, 14-16 (1995) (drawing a map of the English Common law and the Continental European Civil law in ever decreasing distance from one another, but both influencing their separate peripheries); Konrad Zweigert & Hein Kötz, INTRODUCTION TO COMPARATIVE LAW § 3 IV (3rd ed., Tony Weir transl., 1998 [1996]) (recommending that comparative research can generally focus on the legal families' core countries and neglect the rest because the other countries follow the models of the core); Yves Dezalay & Bryant G. Garth, *The Import and Export of Law and Legal Institutions: International Strategies and National Palace Wars*, in David Nelken & Johannes Feest eds., ADAPTING LEGAL CULTURES 241 (2001) (suggesting that "comparative lawyers' division of the world into 'legal families' was in part designed to define segmented markets for transplantation of innovations and influence"); Mathias M. Siems, *Shareholder Protection Around the World (Leximetrics II)*, 33 DEL. J. CORP. L. 111, 141-42 (2008) (arguing that the degree of adaptability in transplant countries will in part depend on the closeness of ties with the mother country, particularly language); and *cf.*, *e.g.*, Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991) (borrowing possible only if elements are expressed in the same doctrine, which differ from family to family); Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in Joseph S. Nye ed., GOVERNANCE IN A GLOBALIZING WORLD 253, 260 (2000) (legal origin one influence in choice of template to copy); Christian von Bar, *Comparative Law of Obligations: Methodology and Epistemology*, in Mark van Hoecke ed., EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 123, 125 (2004); William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC'Y 203, 205 (2005) and *id.*, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM 1 (2005) (diffusion within legal families is the standard case).

literature assume that legal families are irrelevant for diffusion today[9], and nobody has undertaken to investigate the issue systematically.

Part I of this paper undertakes such a systematic investigation. The paper systematically traces visible foreign influence – citations, the involvement of foreign-trained lawyers, and evidence of outright copying of statutes – in the major corporate law treatises and the drafting histories of securities and corporate law statutes of 32 peripheral and semi-peripheral countries (9 common law countries, 7 civil law countries, plus OHADA) in the second half of the 20th century. Other countries are discussed in summary terms. In what follows, and for reasons that will become clear below, the paper refers to this as evidence of "formal diffusion."

The evidence shows that formal legal materials from the core countries continue to circulate surprisingly widely in the periphery even after de-colonization, and that there is a clear differentiation by legal families.[10] Contacts are particularly strong within the Commonwealth, which civil law materials do not seem to penetrate at all. Inversely, francophone Africa appears to be fully oriented towards French legal materials. Latin America countries exhibit mixed influences, as do countries on the fringes of the traditional families, such as East Asia or the post-soviet transition economies, that were never colonized by the Western powers.

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[9] *See* in particular Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in Mathias Reiman & Reinhard Zimmerman (eds.), OXFORD HANDBOOK OF COMPARATIVE LAW 441, 473-74 (2006) ("the boundaries of the world's legal systems are not watertight. Legal transfers regularly take place across those boundaries, irrespective of what comparative lawyers think about legal families and legal traditions."). Graziadei may implicitly be referring to the exchange of ideas between core countries.

[10] The restriction of this argument to periphery countries is important. Exchange between the core countries often crosses legal family lines, *see*, *e.g.*, Mathias Reimann (ed.), THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920 (1993) and Jan von Hein, DIE REZEPTION US-AMERIKANISCHEN GESELLSCHAFTSRECHTS IN DEUTSCHLAND ["The reception of US-American corporate law in Germany"] (2008); Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347 (1994); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994) (book review); Eric Agostini, *La Circulation des Modèles Juridiques*, [1990] REVUE TRIMESTRIELLE DE DROIT CIVIL 461 ["The circulation of legal models"]; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in David M. Trubek & Alvaro Santos (eds.), THE NEW LAW AND ECONOMIC DEVELOPMENT 19 (2006). This being said, it is possible – but not investigated in this paper – that even within the group of core countries, the exchange is more lively between countries of the same legal family. In any event, as long as differences between core countries remain, these will be reflected in the law of periphery countries that copy from them.

Part II of the paper documents some channels through which diffusion might occur. First, it maps the activities of the main core countries' legal development and cooperation agencies, and shows that they are almost exclusively directed at periphery countries of the same legal family (with the exception of US agencies' activities). Second, the paper probes into underlying economic and cultural ties between countries of the same legal family with statistical data about the location of trade and investment flows and the migration of students.

Part III reviews theories from comparative law, sociology, political science, and economics that can explain why (formal) diffusion happens, and why it is fully or partially segregated by legal family. There is now a vibrant literature in the social sciences documenting the importance of diffusion for policy-making in general.[11] The drivers of diffusion considered in the literature include mimicking, learning, competition, and imposition. This paper develops reasons why periphery countries might be primarily influenced by models of their own legal family. These include genuinely legal reasons such as institutional complementarities or the difficulty to integrate unknown legal concepts; ease of access based on linguistic, educational, or professional ties (such as those documented in this paper); and being part of the sphere of influence of the core country (cf. the differential trade flows documented in Part II). Consistent with these theories, countries for which these reasons are not applicable or strongly attenuated, such as Japan, indeed draw from a broader array of models and are outliers in the data of the legal origins literature (see Part I.A.2 below).

The evidence of legal family differences in formal diffusion (Part I), in possible channels of diffusion (Part II), and in substantive rules and outcomes (documented in the legal origins literature, and assumed to be true for the purposes of the argument), and the theory developed in Part III, fit together and form an appealing story. For various historical reasons, economic policy in Anglo-Saxon (common law) core countries is more market-oriented than in Continental European (civil law) core countries, as epitomized in

[11] *See* the references cited in Parts III and IV below.

the expression "Anglo-Saxon capitalism."[12] By copying from their respective core countries, countries of the periphery replicate some part of those differences. As a result, economic policy differs systematically between civil and common law countries even though no political or cultural explanation can account for this (outside the core). This is exactly what the legal origins literature finds.[13]

By contrast, theories attempting to explain the empirical differences between civil and common law countries outside the core with internal, structural attributes of the legal system have not fared well in the data (such theories will be referred to as "structural theories" in this paper[14]). In particular, explanations centered on the (beneficial) role of case law cannot explain the major differences documented in the data because these overwhelmingly derive from statutory law.[15] Explanations based on European comparative history by themselves cannot explain the differences in the periphery.[16] Reflecting the difficulty of formulating a structural theory that can explain the data, the leading authors of the legal origins literature now characterize the differences between

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[12] *See* http://en.wikipedia.org/Anglo-Saxon_capitalism (visited 04/11/2009); and for the more general argument Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in Peter A. Hall & David Soskice (eds.), VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1 (2001); Gosta Esping-Andersen, THE THREE WORLDS OF WELFARE CAPITALISM (1990); particularly for corporate law Mark J. Roe, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE (2003) (arguing that the respective strength of labor and business interest groups determine corporate governance arrangements); Marco Pagano & Paolo Volpin, 95 AM. ECON. REV. 1005 (2005) (arguing that corporate governance arrangements are determined by election rules).

[13] *See* La Porta et al., *The Economic Consequences*, *supra* note 2.

[14] Such "structural theories" are sometimes referred to as "internal determinants models" in the political science literature, *see*, *e.g.*, Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, in Paul A. Sabatier, THEORIES OF THE POLICY PROCESS 169, 170 (1999).

[15] *See* Roe, *supra* note 3.

[16] The deepest attempt at historical explanation is Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002) (tracing differences between common and civil law back to 12th and 13th century England and France, arguing that the introduction of the English judicial systems with its use of juries decentralized litigation, while France somewhat later centralized it). This interpretation of the historical record is questioned by Daniel Klerman & Paul G. Mahoney, *Legal origin?*, 35 J. COMP. ECON. 278 (2007) (locating the more important divergence of the two countries' litigation systems in the mid-17th to mid-19th century). Mark J. Roe, *Juries and the political economy of legal origin*, 35 J. COMP. ECON. 294 (2007) points out that the key institution singled out by Glaeser & Shleifer, the jury, is no longer in use in civil procedure outside the United States and was not generally transplanted to English colonies, and that in general historical events of many centuries ago by themselves cannot explain differences today without an argument for extreme path dependency.

legal families as different "style[s] of social control of economic life (and maybe of other aspects of life as well)," where "common law stands for the strategy of social control that seeks to support private market outcomes with state-desired allocations."[17] They offer a technological interpretation (civil and common law have different "toolkits"), and a cultural interpretation (different "beliefs about how the law should deal with social problems … become incorporated in legal rules, institutions, and education").[18] It is not yet clear, however, what exactly these technological constraints could be, or how colonial legal transplantation could have transmitted such deep cultural beliefs, or whether this indeed occurred.[19] This paper offers a third interpretation that allows for all possible drivers of differences within the core, and merely explains how these differences spread to the periphery through diffusion (abandoning the attempt to account for patterns in both regions with one unitary theory).

Part IV checks this diffusion theory against some additional empirical facts, and considers more formal tests. At present, the lack of requisite data prevents most formal tests of diffusion theories against structural theories. Moreover, such tests are considerably complicated by the fact that in their most general form – i.e., without specifying particular mechanisms of diffusion and relevant structural characteristics, respectively – diffusion and structural theories have broadly identical predictions. The current legal origins theory being broad as described above, it is hard if not impossible to reject it in the data. Essentially, the problem is that one cannot prove a negative – one cannot prove that there is no possible structural characteristic that could drive the observed differences between periphery countries of different legal families. The most one can do is to test those characteristics that appear plausible, and, inversely, to test whether the observed pattern is consistent with diffusion. On these counts, diffusion seems to be the better explanation, given the available evidence.

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[17] *See* La Porta et al., *The Economic Consequences*, *supra* note 2, 286.

[18] *Id.* at 308.

[19] *Cf.* Roe, *supra* note 3 (pointing out that both legal families use the full array of legislative, judicial, and administrative tools).

Before beginning with the detailed analysis, and previewing some of the arguments from Part III below, it will be helpful to position the analysis of this paper in relation to existing work on diffusion ("legal transplants") in comparative law. As theory would suggest, this literature finds that diffusion involves complicated interactions of domestic and foreign actors[20]; that these actors exercise choices about what, when, and how to transplant[21]; and that transplanted formal law often operates quite differently in the recipient country than its counterpart in the origin country.[22] This paper does not deny any of this. The argument of this paper is, however, that it is both theoretically plausible and borne out by the available evidence that the choices of domestic actors are constrained by the available models, that models of one's own legal family are more available and hence more likely to be adopted than others, and that at least some of the differences between core models survive the transplantation to the periphery. Evidence of formal diffusion alone would not be enough to support this. But the combination of

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[20] *See, e.g.*, Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007) (documenting the role of a network of Latin American lawyers in profound reforms of Latin American criminal procedure that introduced elements of an accusatorial system over the last two decades).

[21] *See, e.g.*, Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982) (book review) (emphasizing the importance of domestic politics for the decision if and when to adopt a foreign model).

[22] For examples, *see*, *e.g.* Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, especially 1754-57 (2000) (discussing how the Russian corporate law statute that the authors helped design failed to protect minority shareholdes in an environment where enforcement was lacking); Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527 (2001) (describing how Japanese corporate law diverged from its US model between 1950 and 2000). For systematic evidence, *see* Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic development, legality, and the transplant effect*, 47 EUR. ECON. REV. 165 (2003); *id.*, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (demonstrating empirically that countries that do not develop law internally, do not adapt a transplant, and did not have a population already familiar with basic principles of the adopted law tend to have ineffective legal systems); Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Innovation in Corporate Law*, 31 J. COMP. ECON. 676 (2003); *id.*, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791 (2002) (documenting that transplant countries do not change their laws as frequently as origin countries). That transplanted law often does not function as it does in the origin country is hardly surprising if the law is imposed abruptly and without preparation, as in the post-soviet transition countries in the 1990s that had neither the time nor the expertise to engage in a careful assessment and deliberation of the models being offered, *cf.* Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325, 340 (2000) (commenting that the process of legal adaptation was such that it "hardly gives the law receiving countries a chance to read, much less to understand or adapt the legal concepts embodied in the new statutes to specific conditions of their countries").

this evidence with that of the legal origins literature is. Thus, the paper does not argue that copying is everything, just that it is more than nothing: by copying English law, Ghana's legal system will not become the same as the English, but it will become more like the English than Senegal's legal system, which follows French models. Let us now turn to that evidence of copying.

I. EVIDENCE OF FORMAL DIFFUSION

This Part will lay out evidence of formal diffusion. Since the ultimate goal is to explain empirical regularities in samples of over 100 countries (as documented in the legal origins literature), the approach of this Part emphasizes breadth over depth. It systematically canvasses statutes and their legislative history as well as leading treatises for evidence of visible foreign influence in 9 common law countries, and 7 French civil law countries and OHADA (a uniform law organization of francophone African countries); it also reports various bits of evidence from other places.

The evidence presented in this Part is conclusive as far as the existence of formal diffusion is concerned. One cannot but see diffusion in identical statutes, citations to foreign materials, and the presence of foreign draftsmen in the legislative process. Whether formal diffusion is quantitatively important, and whether it is relevant for substantive outcomes, is another question that will be addressed in Part III below.

The evidence for the role of legal families is necessarily less strong. The statement that legal families matter is either negative (no influence of the other family) or relative (less influence). As a matter of logic, one cannot prove the former. Similarly, conclusions regarding the latter will always be probabilistic and rely on sampling assumptions. For all practical purposes, however, the picture that emerges is persuasive. The exchange of legal materials and personnel is much more prevalent within legal families than across legal family lines. In particular, civil law materials and personnel do not seem to penetrate the common law periphery at all.

Subpart A provides further details about the methodology, and discusses its validity. Subpart B presents the data.

A. Methodological considerations

To keep the work within manageable bounds, the inquiry focuses on statutes and treatises in corporate law in medium to large periphery or semi-periphery countries of the Common law and French Civil law families and which maintain a Western European language as the (or one) working language of lawyers. Section I.A.1 spells out the implications of these restrictions, i.e., what materials exactly this Part I will look at. Section I.A.2 explains why these restrictions do not affect the validity of the analysis. Sections I.B.1 and I.B.2 present the actual evidence for Common law and French Civil law jurisdictions, respectively.

1. Scope of inquiry

The restriction to countries in the French and Common law families mainly excludes mixed jurisdictions (which by definition partake of influences from different families[23]), the East Asian countries (Japan, South Korea, Taiwan, all of which were originally influenced by civil law models but came under US influence after WWII[24]), and transition countries (i.e., formerly socialist countries such as China, Russia, or Vietnam, which are now subject to a mix of influences)[25]. The additional restriction to countries

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[23] For example, the Philippines were originally influenced by Spanish law but then became a US colony and adopted large amounts of US materials; *cf.*, *e.g.*, Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia*, in Nelken & Feest, *supra* note 8, 199, 217 (reporting how Philippine casebooks on constitutional law use Philippino and US cases side-by-side).

[24] For example, under the US occupation, Japan completely revised its corporate law along the lines of the 1933 Illinois Business Corporation Act. It fits the theme of this paper that the Illinois model was selected for no other reason than that the US officials involved in this process happened to be attorneys from Illinois. *See* Thomas L. Blakemore & Makoto Yazawa, *Japanese Commercial Code Revisions Concerning Corporations*, 2 AM. J. COMP. L. 12 (1953) (the reference to the Illinois lawyers is at 15). Since then, the US influence has even increased, in particular with the adoption of the Securities and Exchange Law, *see*, *e.g.*, Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L. L. J. 3, 15-19 (1996); Curtis J. Milhaupt & Katharina Pistor, LAW & CAPITALISM 93-101 (2008) (reporting that the advent of hostile takeovers in Japan triggered the adoption of takeover guidelines along the lines of Delaware jurisprudence, including the poison pill); *but see* West, *supra* note 22 (arguing that in fact Japanese corporate law has diverged from the US model since 1950). US academics were active in Taiwan at the time as well, for example Roscoe Pound, *see* Roscoe Pound, *Progress of the Law in China*, 23 WASH. L. REV. & ST. B. J. 345 (1948). As a result, current corporate legislation in these two countries and South Korea looks much more similar to US than German statutes today.

[25] On the diversity of advisors and models found in the transition countries, *see*, *e.g.*, Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995);

operating their legal system in a Western language mainly concerns the middle east and Indonesia; surprisingly, other countries continue to utilize Western languages in legal discourse even though it differs from the national language.

The restriction to countries of the periphery and semi-periphery excludes phenomena like diffusion from the United States to Canada, the joint elaboration of a Scandinavian company law statute by Denmark, Sweden, Norway, and Finland in the 1960s and 1970s,[26] or the common germano-phone legal discourse of Austria, Germany, and Switzerland,[27] all of which may of course contribute to similarities within legal families.

For statutes, the paper looks for foreign influences in the legislative history as documented in official reports, treatises on the subject, or law journals. Such influences

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Esin Örücü, CRITICAL COMPARATIVE LAW 118-128 (1999). On the US side, USAID and ABA-CEELI were the most active participants. As the title of Ajani's piece suggests, the choice of model often seems to have been the results of mere chance, i.e., which advisor happened to be in the right place at the right time. For examples, *see* Katharina Pistor, *Patterns of Legal Change: Shareholder and Creditor Rights in Transition Economies*, 1 EUR. BUS. ORG. L. REV. 59, especially 69-71, 77, 84, and 93 (2000) (on Central and Eastern Europe); John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT'L & COMP. L.Q. 641 (2002) (on Vietnam); and Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L 179 (1999) (on Laos).

[26] *See* Krister Moberg, *Company Law*, in Michael Bogdan ed., SWEDISH LAW IN THE NEW MILLENIUM 374, 378 (2000); *cf.* Mogens Ebeling & Bernhard Gomard, CORPORATIONS AND PARTNERSHIPS IN DENMARK paras. 15-16 (1993) (the four countries' drafts of 1969-1971 were almost identical, but Denmark's EC accession in 1973 required some deviations in the Danish approach). Specifically on the drafting process, *see* Jan Skåre, *Det Nordiske Aksjelovsamarbeidet*, 101 TIDSSKRIFT FOR RETTSVITENSKAP 606 (1988). Subsequently, Denmark, Finland, and Sweden had to adapt to EU directives, and all four statutes have been recently more thoroughly revised, but the common imprint is still very visible; *see* Peter Wahlgren, introduction, 45 SCANDINAVIAN LEGAL STUDIES (2003) (special volume on company law). For example, one finds in all four jurisdictions a rather characteristic rule regarding charter provisions for the election/nomination of the board (at least half must be elected by majority of shareholders): *cf.* §§ 49, 77 Public Company Law (Denmark), Chs. 8:1.2, 9:13.2 Companies Act (Finland), Art. 9-13(3) Public Stock Companies Act (Norway), and Art. 8:6 Companies Act (Sweden) (in their current numbering). On the institutional framework for this cooperation in the Nordic Council, see Section II.A below.

[27] German case law and legal writing exerts a particularly strong influence on Austria because Austria copied the German public corporations statute (*Aktiengesetz*) in 1938, and most provisions in the Austrian and German statutes are therefore identical. One of the main German commentaries (written mainly for practitioners) on the German share corporation act has parallel commentary by Austrian academics on the corresponding Austrian provisions: Bruno Kropff & Johannes Semler eds., MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, 9 vols. (2nd ed. 2000-2006). Austrian commentaries refer to German sources as a routine matter. The Swiss corporate law statute is less close to the German one, but still the intellectual exchange is very strong, with German legal academics often occupying positions in Swiss universities and vice versa; Swiss lawyers also publish in German legal periodicals rather frequently.

include the involvement of foreign personnel and references to foreign models. The paper also points out various instances of verbatim copying of statutes, the strongest possible form of (formal) foreign legal influence. It does not, however, systematically compare statutes of core and periphery countries to ascertain quantitatively the amount of lexical overlap. This would be technologically feasible (even though the required software is much more complex than one might expect). But it would yield rather limited information – to prove the existence of literal copying, showing one instance is enough; to show the extent or impact of literal copying, even showing that 99% of the words are identical would not be enough because even just a 1% element of domestic additions might fundamentally alter, even reverse, the content of a copied statute (not to speak of the effect of enforcement).

In treatises, the paper looks for citation patterns: whom do they cite, and if they cite foreign sources, how quantitatively important are these compared to domestic and other foreign sources? Where possible, the paper also documents the educational background of the authors. The treatises are interesting for three reasons, besides being relatively easily accessible. First, they are written for (future) practitioners, so that it is reasonable to infer that the information contained therein must have practical relevance, i.e., that the amount of discussion of foreign law reflects the foreign law's influences on domestic law. Second, the books reflect the state of mind of the authors, and they or their colleagues with similar backgrounds and thinking are the people drafting the legislation and deciding the cases. Last not least, students reared on this information will reproduce the orientation to foreign sources in their careers. (In this sense, the use of foreign sources in textbooks not only reflects but also creates the influence of those foreign sources.[28])

By way of background, it is important to contrast the impressions from the periphery collected below with the situation in the leading jurisdictions. The leading US, French, and German treatises on corporate law do not contain a single reference to

[28] *Cf.* Alan Watson, *The Importance of "Nutshells"*, 42 AM. J. COMP. L. 1 (1994) (reporting the profound influence legal textbooks have had on legal development).

foreign law.[29] This is particularly remarkable because these are not practitioners' texts but foundational/instructional texts that try to cast the net wide. It is not surprising then that court decisions from these countries also never refer to foreign law, at least in corporate law. The situation is not much different in the UK, although the occasional reference to Australian or New Zealand cases can be found there.[30] In the periphery, we will see the inverse: for example, in Kenya the *only* cases cited are English; in Latin America outside Argentina, the *majority* of the cited literature is foreign.

2. Validity of inquiry

Before delving into the actual evidence, some comments are necessary to reassure the reader that the restrictions imposed on the breadth of the inquiry do not "stack the deck" in favor of the evidence sought after in this paper.

The focus on corporate law reflects the interests of the author. Perhaps diffusion is more prevalent in corporate law than elsewhere, but to make the point that formal diffusion exists and that legal families seem to matter for it, the area seems as good as any. (The question of the quantitative importance of diffusion is deferred to Parts III and IV below.)

To show the mere existence of diffusion, one might look at any number of different places where diffusion might manifest itself. The two places chosen here – statutes and the principal treatises, including practitioners' commentaries – appear particularly central. This is obvious for statutes and their legislative history. The importance of treatises was already explained above.

The choice of larger jurisdictions is primarily one of convenience. Larger jurisdictions produce more and better books in which to find the relevant information. If

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[29] The texts are Robert C. Clark, CORPORATE LAW (1986); George Ripert & Réné Roblot, TRAITÉ DE DROIT COMMERCIAL vol. 1(2) (18th ed. 2002 by Michel Germain); and Karsten Schmidt, GESELLSCHAFTSRECHT (4th ed. 2002). Other observers might think that other texts are more important in their respective jurisdictions than these three, but it seems safe to assume that consulting any other major treatise from these countries would show the same picture regarding foreign materials.

[30] The treatise sampled here is Paul L. Davies, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW (7th ed. 2003); English court decisions occasionally cite decisions from other Commonwealth jurisdictions (*cf.* I.B.1.b) below) and, rarely, from the US.

anything, this choice will understate the importance of diffusion because large countries are more likely to produce law autonomously, and hence less likely to copy from abroad.

What may appear problematic is the restriction of the sample to countries within the French and English families preserving a Western language – which excludes mainly East Asia, mixed jurisdictions, and transition countries. For the purposes of documenting the mere existence of diffusion, the restriction is again irrelevant – any sample will do (as long as one finds diffusion anywhere, existence is no longer in question). But one might be concerned that this construction of the sample overplays the importance of the legal families by excluding precisely those countries which are presumably subject to influences from various legal families.

The strongest possible criticism is that this paper's argument is circular as a matter of strict logic. The criticism would assert that countries are classified as member of a legal family *because* they continue to copy (only) from that family's core country, so that diffusion is limited to within legal families by definition. This argument is a special case of an endogeneity problem – while the researcher analyzes the effect of A on B, in reality B may have caused A. More broadly, one might ask if countries that are economically different *chose* legal families accordingly, rather than attributes of legal families causing such differences. For this particular criticism, however, the legal origins literature has a good answer. The vast majority of countries were colonized and could not choose their legal family; it was imposed on them by their colonial power. For those countries, legal family membership is exogenous and the argument of this paper is not circular. In fact, to avoid endogeneity problems, careful research *should* exclude countries that were never colonized, which comprises mainly those of East Asia, Thailand, Eastern Europe, and, arguably, those that belonged to the Ottoman Empire until World War I.[31] Likewise, countries that were successively colonized by Western powers of different legal families – which are mostly jurisdictions now classified as mixed – should be excluded because whether they later followed one or the other legal family, or a mix of both, is, without further information, endogenous.

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[31] *See* Klerman et al., *supra* note 3.

This leaves only a very small number of countries, such as Vietnam, for which the decision to exclude them from the analysis might be considered problematic. Quantitatively, there are too few such countries to outweigh the results for the countries in the sample. For what it is worth, these and other countries excluded here were never considered to be part of the civil or common law family by the comparativists who created the legal family classification around the time of de-colonization, i.e., before the relevant events analyzed in this paper and therefore, from this paper's perspective, exogenously.[32]

To be sure, the legal origins literature classifies the East Asian and transition countries as civil law countries, and mixed jurisdictions mostly as common law jurisdictions. From this perspective, these countries should be included in an analysis of legal families' role in diffusion. It is not necessary to do so explicitly, however, because whatever results one would find in these countries would not reverse the conclusions to be drawn from the evidence below. To see this, assume – as seems indeed to be the case[33] – that the East Asian and transition countries (by this count, civil law countries) also import formal materials from common law countries, and that mixed jurisdictions

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[32] The leading comparative law textbook today, Zweigert & Kötz, *supra* note 8, §§20-21 considers law in East Asian countries separate from the common and civil law family under the heading "far-eastern legal family." It already did so in its first edition, which also separated the socialist countries as a separate legal family, *see* Konrad Zweigert & Hein Kötz, I EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG §§ 23-27 (socialist legal family), § 28 (far-eastern law) (1971). As acknowledged *id.* at v, the book's position on the legal families was based on an earlier article with the same classification of legal systems separating socialist and far eastern systems from common and civil law, namely Konrad Zweigert, *Zur Lehre von den Rechtskreisen*, in Kurt H. Nadelmann, Arthur T. Von Mehren & John N. Hazard (eds.), TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW – LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 42, 55 (1961). What was to become the other main textbook of the second half of the 20th century, René David, LES GRAND SYSTÈMES DE DROIT CONTEMPORAINS (1st ed. 1964), also thought that the socialist legal systems were sufficiently distant from their civil law roots to treat them as a category apart (*id.* 22), and so he dedicated a separate part to socialist legal systems (*id.* 147-308) at the same level as common and civil law. David also dedicated a subpart to "law of the far east" comprising among others, Japan, Korea, and Taiwan (*id.* 519-47) and he notes that inspite of the adoption of codes, these countries have not internalized a Western understanding of the law, and explains further in the text that much of the formal law remains dead letter (*id.* 520); still, he does, with reservations, include these countries in the civil law family (*id.* 19). In his earlier work, David distinguished occidental law, soviet law, islamic law, hindu law, and chinese law, *see* René David, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ 224 (1950) (in this classification, East Asia and the transition countries would have been outside the "occidental" family comprising civil and common law, but on the other hand so would have been the African countries considered in this paper).

[33] *See* the references cited *supra* notes 24-25.

(by this count, common law countries) also import materials from civil law countries. This would certainly complicate the picture and introduce more elements of cross-family diffusion. But it would still be the case that the *likelihood* that a model will come from one core country rather than another differs by legal family. In particular, it would still be the case that civil law materials circulate only in the civil law family (now broadly defined to include East Asian and transition countries), with the exception of the few mixed jurisdictions. As repeatedly emphasized, this likelihood differential is all that is required for the argument of this paper to work. It is also worth noting that in most of the empirical results of legal origins literature, the East Asian countries resemble common law countries, and mixed jurisdictions do not do as well as common law countries, which would fit the diffusion pattern assumed in this paragraph.[34]

A weaker criticism is that omitting countries at the fringe of the English and French families suppresses evidence of cross-family diffusion, thereby creating the false impression that such cross-family diffusion is rare and, presumably, difficult. This is first and foremost an issue for the interpretation of the evidence and as such will be taken up in Part III.B below. It bears pointing out here, however, that the excluded countries are rather different as far as conditions for diffusion are concerned. The working language of lawyers in all of the excluded jurisdictions except the mixed jurisdictions is not a Western European one. Hence in as far as diffusion is tied to legal families by language, these ties are not operational for the excluded jurisdictions (for example, they would incur translation costs regardless of which model they copy). Moreover, the excluded jurisdictions are much less deeply rooted in either the common or French civil law families, so they will find it harder to adapt models from either family, and the incremental cost of taking a model from the more remote one will be less. In particular, the East Asian countries never adopted a Western legal system wholesale, and the transition countries were detached from their former legal family (the civil law) for between 45 and 70 years.

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[34] Indeed, Japan and South Korea have been classified as common law countries in the most recent legal origins literature, see Djankov, Hart et al., *supra* note 2, at 1120.

B. Data

1. The Common law family

This Section considers evidence of formal diffusion in peripheral and semi-peripheral countries of the Common law world. The countries sampled systematically were Ireland, Australia, New Zealand; India, Hong Kong, Malaysia, Singapore; Kenya and Nigeria.

Perhaps because English has remained the legal language in all Common law jurisdictions, even in those with a dominant national language other than English (such as Malaysia), formal diffusion between these jurisdictions – more precisely, between countries belonging to the Commonwealth, which excludes the US – appears to be continuing on a massive scale. By contrast, there is absolutely no mention of sources from outside the Common law world in any of the countries discussed below.

a) Treatises

Law books, court decisions, and legislative draftsmen throughout the Commonwealth appear to pay close to developments of statutory and case law in other Commonwealth countries.[35]

This is true even in the semi-periphery. Irish text books, for example, are mostly written by authors with English legal training, and Irish decisions make up at most one third of the cases cited, most of the remainder being English decisions, with occasional citations to Australian, Canadian, New Zealand, and US cases.[36] In Australia, the

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[35] In fact, even the British courts look to other Commonwealth jurisdictions for inspiration, *see* Esin Örücü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 219 n.68 (2002). According to Lord Keith in *Martin* v. *Watson*, [1995] All E.R. 559, 562-565, such Commonwealth precedents could even be *binding* for English courts if pertinent English precedents were inexistent. In Australia, English decisions were formally considered binding for a long time after independence (1902), *see* Zelman Cowen, *The Binding Effect of English Decisions Upon Australian Courts*, 60 L.Q. REV. 378 (1944) (considering Australian courts bound by decisions of the House of Lords unless the Privy Council rules otherwise); Ross Parsons, *English Precedents in Australian Courts*, 1 ANN. L. REV. 211 (1948-1950) (favoring treating all House of Lords decisions as binding). On the Privy Council, *see* below note 113.

[36] The texts sampled were Michael Forde, COMPANY LAW (3rd ed. 1999) (Forde has his PhD from Cambridge UK, is a barrister at Middle Temple [London], and also published a book on THE LAW OF EXTRADITION IN THE UK (1995)); Ronan Keane, COMPANY LAW (3rd ed. 2000); and Blanaid Clarke, TAKEOVERS AND MERGERS IN IRELAND (1999) (Clarke has her PhD from Manchester UK [*see*

standard textbook (2005) is written by two authors with Harvard and one with Oxford graduate legal education; and post-independence (1902) English cases make up about 1/6 of the citations, with occasional references to New Zealand and US cases.[37] The book also cites numerous articles from law journals from around the Common law world, in particular the US and the UK.[38] Chapter 4 of the standard Australian casebook for students (1999) consists almost exclusively of English decisions; of the 3 authors, one has a Harvard postgraduate degree, and another one studied only in Canada and the UK in the first place.[39] A similar picture emerges in New Zealand.[40] In all three countries, citations to statutes are predominantly domestic, but there are also a number of citations to UK statutes and occasionally to other developed Commonwealth countries.

With respect to cited statutes and training of the authors, a similar pattern emerges in the periphery countries. With respect to cases, however, the foreign influence is even more pronounced. First of all, the vast majority of cases cited in works from around the year 2000 are pre-independence English cases.[41] More importantly, even among the post-independence cases, foreign cases predominate (Hong Kong [UK], Kenya [UK],

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http://www.ecgi.org/members_directory/member.php?member_id=423] and also cites stock exchange rules from foreign, English speaking countries: LSE, NASDAQ, EASDAQ, NYSE).

[37] H.A.J. Ford, R.P. Austin & I.M. Ramsay, FORD'S PRINCIPLES OF CORPORATIONS LAW (12th ed. 2005).

[38] *Cf.* the list of journal abbreviations. The closest would have been the *McGill Law Review* (published in Quebec, but in English and at a mixed university) and the *South African Law Review* (from a mixed jurisdiction).

[39] Robert Baxt, Keith Fletcher & Saul Fridman, AFTERMAN AND BAXT'S CASES AND MATERIALS ON CORPORATIONS AND ASSOCIATIONS (8th ed. 1999).

[40] The books sampled were Buddle Findlay, COMPANIES, in THE LAWS OF NEW ZEALAND vol. 6 (2005 reissue); and Ross B. Grantham & Charles E.F. Rickett, COMPANY AND SECURITIES LAW – COMMENTARY AND MATERIALS (2002) (collectively, the two authors only hold one law degree from New Zealand, and a post-graduate one at that: Grantham's LLM from Auckland).

[41] The works sampled were: (a) Hong Kong: Betty M. Ho, PUBLIC COMPANIES AND THEIR EQUITY SECURITIES (1999); THE ANNOTATED ORDINANCES OF HONG KONG, Cap. 32: COMPANIES ORDINANCE (2005); HALSBURY'S LAWS OF HONG KONG, vol 6(1): COMPANIES AND CORPORATIONS (2005 Reissue); (b) Kenya: Samuel G. Kirika, PRINCIPLES OF COMPANY LAW IN KENYA (1991); and John Joseph Ogola, COMPANY LAW (1997); (c) Malaysia: Ben Chan Chong Choon & Philip Koh Tong Ngee, CHAN & KOH'S COMPANY LAW (looseleaf); Krishnan Arjunan, COMPANY LAW IN MALAYSIA – CASES AND COMMENTARY (1998) (this author explicitly tried to use as many Malaysian cases as possible, *see* introduction p. v); (d) Nigeria: Akintunde Emiola, NIGERIAN COMPANY LAW (2001); Christopher S. Ola, COMPANY LAW IN NIGERIA (2002); and J. Olakunle Orojo, COMPANY LAW AND PRACTICE IN NIGERIA (3rd ed. 1992); (e) Singapore: Walter Woon, COMPANY LAW (2nd ed. 1997); HALSBURY'S LAWS OF SINGAPORE, vol. 6: COMPANY LAW (2006 Reissue).

Malaysia [UK, AUS]) or number at least as many as domestic cases (Nigeria [UK], Singapore [UK, AUS]) (main source of imports in square brackets).[42] Hong Kong is an extreme case – most of the authors did not receive any part of their (legal) university education in Hong Kong and often do not even work there. The only exception is India, where domestic cases dominate.[43]

b) Statutes

The close connections are also reflected in statutory law. As a result of successive copying, Irish company statutes are so similar to English ones that textbook authors writing in the year 2000 find it necessary to warn Irish lawyers against uncritical reliance on English textbooks.[44] Kenya's Companies Act 1962, still in force, is largely a verbatim copy of the UK Companies Act 1948.[45] Similarly, the Indian Companies Act, 1956 is still based on the UK 1948 Act.[46] New Zealand's company law was largely a copy of the UK 1948 Act until 1993, when a new statute inspired by the Ontario Business Corporations Act and the US Model Business Corporation Act was adopted.[47] Such a

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[42] In addition, Malaysia and Singapore also cite each other's cases very frequently, which were published in the same case reporter until recently.

[43] The works sampled were Jehangir M.J. Sethna, INDIAN COMPANY LAW (10th ed. 1987 revised by D.C. Singhania & P.S. Sangal); K.J. Rusthomji, COMPANY LAW (3rd ed. 1991 revised by K.M.L. Nigam); and Sanjiv Agarwal, C.M. Bindal & Vijay K. Jain, COMMENTARY ON THE COMPANIES ACT, 1956 (2001). The educational background of most of the authors could not be established, since the books generally do not note it and the authors do not show up in standard biography handbooks or internet searches. Sethna has his LLM from Harvard. The preface to his book mentions that he has "also discussed, at some length, the Company Law of five important countries of the world with which India has very important and close business relations: these countries are – Japan, Federal Republic of Germany, France, USA, and Britain." However, I did not find any references to the first three (Civil law) countries in the main text.

[44] *Cf.* Keane, *supra* note 36, para. 2.31: "The differences between Irish and English legislation are sufficiently numerous and striking to make it a somewhat hazardous exercise for Irish practitioners and students to rely uncritically on the leading English textbooks." Similarly Forde, *supra* note 36, para. 1-39.

[45] *See* Kirika, *supra* note 41, at 1; Ogola, *supra* note 41, at vii (expressing his hope that Kenya will soon copy the intervening UK amendments).

[46] *See* Rustomji, *supra* note 43, at 5.

[47] *See* Buddle Findlay, *supra* note 40, para. 3 (new Act) and 11 (before 1993). *Cf.* New Zealand Law Commission Report No. 16, COMPANY LAW REFORM: TRANSITION AND REVISION xvii (September 1990) (mentioning the great assistance of the MBCA, and of the Canadian Dickerson report, while disclaiming that the draft presented is based on any one overseas model); also *cf.*, Report No. 9, COMPANY LAW REFORM AND RESTATEMENT paras. 143-153 (June 1989) (explaining that harmonization with Australian law is not attempted because of the latter's unorderly present state).

shift in orientation from the UK to other Commonwealth and US models can also be observed in Hong Kong, which until recently had slightly outdated "carbon copies" of UK companies and securities laws.[48]

Singapore's 1967 Companies Act was identical to the Malaysian 1965 Act, which in turn was based on the 1961 Act of Victoria, Australia, which in turn was based on the UK 1948 Act[49]; intervening amendments have complicated the picture, but the general reliance of Malaysian and Singaporean company law on Australian and other Commonwealth models remains.[50] Similarly, the securities laws of Malaysia and Singapore (adopted around 1983) were originally almost word-for-word copies from Australia, which, at least at the time, closely followed UK models.[51] While intervening amendments have again complicated the picture, the resemblance is still so close that The Annotated Statutes of Malaysia continuously refer (only) to the Australian counterparts and commentary on them.[52] And in Singapore, confusion has been caused by a cross-reference in the statute to another paragraph number that was not adjusted when the statute was copied to Singapore, which uses different paragraph numbering.[53]

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[48] Ho, *supra* note 41, at 18; also *see* HALSBURY'S LAWS OF HONG KONG 6(1)[2005], *supra* note 41, ¶¶ 95.0001-0002. The Review of the Hong Kong Companies Ordinance Consultancy Report 1997, available at www.cr.gov.hk/en/standing/docs/concmpny.pdf (visited July 2006), recommends in its preface (letter by the reporters Cally Jordan and Ermanno Pascutto to Donald Tsang, Hong Kong Financial Secretary) "that Hong Kong replace the existing Companies Ordinance with a modern, streamlined Business Corporations Ordinance drawing on the most appropriate aspects of existing North American and Commonwealth models."

[49] *See* HALSBURY'S LAWS OF SINGAPORE 6[2006], *supra* note 41, ¶ 70.009.

[50] *Cf.* for Malaysia Chan & Koh, *supra* note 41, para. 1.004: "The present-day development of Malaysian company law is not confined to developments in the United Kingdom but also includes references to Commonwealth case law (in particular from Australia, New Zealand, and Singapore) and statutory developments." Also see the example of insider trading laws in Australia, Malaysia, and Singapore below in Part IV.

[51] *See* the annotations in The Annotated Statutes of Malaysia, Securities Industry Act 1983 (Act 280) (2005 Reissue) on ss. 89 et seq. (which are the main Malaysian insider trading rules, *see* Low Chee Keong, SECURITIES REGULATION IN MALAYSIA 137 (1997)) (Malaysia); and Woon, *supra* note 41, at 543 (Singapore); for Australia's following UK models, *cf.* Ford et al., *supra* note 37, ¶ 9.620 (discussing history of s. 1002 Corporations Law).

[52] *See* The Annotated Statutes of Malaysia, previous note.

[53] *See* Woon, *supra* note 41, at 543 n.62.

This is not to say that there is no variation between the different statutes. Australia in particular started to emancipate itself from strictly following English statutes early on. Nevertheless, Australian (and other Commonwealth) courts still frequently refer to English judgments.[54] "Very often a provision in the [Australian] Corporations Act can be traced back to some pioneer legislation in the United Kingdom and expository views of courts there can be instructive."[55] Indeed, reading company statutes of different Commonwealth jurisdictions is a succession of *déjà vu*'s. For example, one finds a copy of the UK "oppression remedy" in all the Commonwealth jurisdictions sampled here, in different versions closely reflecting the timing, path, and type of copying discussed above.[56]

The probable cause of the enduring similarities is that even when the Commonwealth jurisdictions set out to develop their "own" company statute, they do so

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[54] *See, e.g.*, Ford et al., *supra* note 37, ¶ 1.020 for Australia; Chan & Koh, *supra* note 41, para. 1.004-005 for Malaysia; and HALSBURY'S LAWS OF SINGAPORE 6^{2006}, *supra* note 41, ¶ 70.010 for Singapore.

[55] Ford et al., *supra* note 37, ¶ 1.020.

[56] The "oppression remedy" was first adopted in the UK in 1948 and is now found in ss. 459-461 Companies Act 1985, incorporating a number of important subsequent amendments, *see* generally Davies, *supra* note 30, ch. 20. In particular, the 1948 provision only mentioned "oppressive" "conduct." In 1962, the Jenkins report suggested to broaden the scope of application to include "unfair prejudice," which was eventually implemented as s. 75 Companies Act 1980, *see* A.J. Boyle, MINORITY SHAREHOLDERS' REMEDIES 90-91 (2002). The old version of the "oppression remedy" mentioning only oppressive conduct is still found in countries that copied their statute from England before or just after the publication of the Jenkins report, such as India (s. 397 Companies Act, 1956; the provision adds, inter alia, prejudice to the public interest as an alternative criterion), Ireland (s. 205 Companies Act, 1963), and Kenya (s. 211 Companies Act of 1962). Statutes adopted after the Jenkins report also refer to "unfairly prejudicial" conduct, such as those of Malaysia (s. 181 Companies Act 1965), Singapore (s. 217 Companies Act of 1967), Hong Kong (s. 168A Companies Ordinance), New Zealand (s. 174 Companies Act 1993), and Australia (s. 232 Corporations Act 2001). The Hong Kong provision was adopted in 1978 based on the Jenkins report even though England itself had not yet implemented the recommendation, *see* Ho, *supra* note 41, at 656-657; ANNOTATED ORDINANCES OF HONG KONG, *supra* note 41, ¶ 168A.01. For Malaysia and Singapore, I was not able to ascertain whether the original acts of 1965 and 1967 or subsequent amendments introduced the modern version of the oppression remedy. The only sampled statute that genuinely innovated is Nigeria's s. 300 Companies and Allied Matters Act, which enumerates specifically what kind of conduct is prohibited, without mentioning "oppressive" or "unfairly prejudicial." The reason given by the Nigerian Law Reform Commission for this and other changes was that English sources explaining the meaning of the statute became less and less accessible in Nigeria, *see* REPORT ON THE REFORM OF NIGERIAN COMPANY LAW 1 (1991). This reasoning underlines, rather than detracts from, the importance of English influence in the Commonwealth countries. The importance of copying is underlined by the fact that most jurisdictions already had a (case law) remedy that, with appropriate refinements, could have assumed the role of the "oppression remedy", in particular the fraud on the minority doctrine (*cf.*, *e.g.*, in Australia *Peters American Delicacy Co Ltd v Heath* (1939)).

under the influence of other Common law models, and with the key involvement of people having studied in, or even being a national of, other Common law jurisdictions.[57] For example, the Nigerian Law Reform Commission (1991) performed an "in depth study" of company legislation in the UK, Canada, India, Ghana, and the Caribbean before drafting the new Companies and Allied Matters Act of 1990 (replacing a copy of the UK 1948 Act[58]); the Commission was chaired by J. Olakunle Orojo, who received his LLM from the University of London and is also a barrister there.[59] Of the two principal drafters of the New Zealand companies statute adopted in 1993, at least one had studied in Oxford and taught in Australia and the UK (David Goddard) (on the sources used in the process, see above).[60] Malaysia's 1965 Act had been drafted with assistance from the Australian uniform legislation draftsman J.C. Finemore.[61] Hong Kong is again an extreme case: the official Review of the Hong Kong Companies Ordinance completed in 1997 was entrusted to two Canadians and principally completed at McGill University in Canada, with input from various other Commonwealth lawyers, including, e.g., the aforementioned New Zealander David Goddard.[62] And so on.

The trend is not necessarily towards greater emancipation from the core's models, nor for that matter is there a uniform trend away from the UK model towards Canadian or US models. The Singaporean 2002 Report of the Company Legislation and Regulatory

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[57] *Cf.* Matson, *supra* note 6, at 778 et seq. (Commonwealth draftsmen look to other Commonwealth statutes as model).

[58] *See* Emiola, *supra* note 41, at 14-15.

[59] On the preparatory studies and the models considered, *see* Nigerian Law Reform Commission, *supra* note 56, at vii and 5; and on Orojo *see id.*, introductory page, and Orojo, *supra* note 41, inner sleeve.

[60] *Cf.* New Zealand Law Commission Report No. 9, at 415, and Report No. 16, at xx (both *supra* note 47) (mentioning Richard Clarke and David Goddard as principal drafters); and Victoria University of Wellington, POSTGRADUATE LAW HANDBOOK 16 (2005) (available at www.vuw.ac.nz/home/prospectuses/law-pg-05.pdf, visited 11 September 2006) for a reference to Goddard's education and teaching positions. Note also that the only special presentations that the Law Commission received were seminars with a New Zealand lawyers practicing UK financial services regulation in London (Report No. 16, at xix), and an accounting specialist with New Zealand and US experience (*id.*, at xx).

[61] *See* Chan & Koh, *supra* note 41, para. 1.001.

[62] *Cf.* the list of Working Party Members and the Preface to the Consultancy Report, *supra* note 48. On Pascutto, in particular his education at the University of Toronto, *see* www.troutmansanders.com/att/bio.asp?id=637 (visited July 2006).

Framework Committee[63] recommended wholesale adoption of the soon-to-be-reformed UK Companies Act with some minor, notably to eliminate EU influences[64], and even advised to delay some of the Singaporean reforms to wait for the new UK provisions.[65] Since "[a]s a global business centre, Singapore's company law should continue to be modeled on one of the two globally recognizable common law models", the only alternative model that was considered was Delaware law; it was ultimately rejected because Singaporean professionals were accustomed to the UK model and Singapore lacked the enforcement mechanisms (SEC, class actions, contingency fees) available in the US.[66]

2. The French legal family

In the French legal family, data is more difficult to obtain than in the Commonwealth. Some of the reasons *might* actually reflect deeper differences of legal style, such as the relative neglect of historical developments and the absence of published reports from the drafting of new statutes. But some reasons are very trite. For example, unlike in the Commonwealth countries, it is not customary in Latin America to list the author's educational background in a book's opening pages (in fact, this is the first element of diffusion: neither is this customary in France or Spain).[67] This means that biographies of influential lawyers are much harder to sketch, because these people usually do not reach the necessary fame to appear in biographic lexica.

The paper systematically surveys Argentina, Chile, Colombia, and Venezuela in Latin America; Algeria, Morocco and Tunisia in the Maghreb; and OHADA, an

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[63] At least one Committee member, Frank Blue, was an attorney from the US.

[64] Para. 1.2.

[65] Para. 1.4.

[66] Para. 1.1, (b) and (c).

[67] Another trite reason might be that the anglophone Harvard Law School library, where I work, is better stocked for English than for Spanish language publications, although I have endevoured to have the library purchase every relevant work around. If it turned out that the Latin American literature is in fact less dense than in other regions of the world (and there is anecdotal evidence for this, such as Mexican lawyers telling me that there is simply no book that they could recommend for companies or securities laws), this itself would teach something about the state of Latin American law.

organization of sixteen former French colonies in sub-Saharan Africa for the adoption of uniform laws. Information from other countries is noted where available.

a) Africa and the Middle East

The former French colonies in Sub-Saharan Africa remain francophone, at least in their official legal systems. They continued to copy the French reforms even after their independence, if legislation did not stagnate.[68] Since 1993, sixteen French speaking sub-Saharan African states adopt uniform commercial legislation in the OHADA.[69] The projects are far-reaching, and in particular a uniform company law closely following the French statute was adopted in 1997.[70]

Similarly, French language and French law remain a very strong influence in the Maghreb, at least in the area of business law. Legal education is offered in both French and Arabic, legal publications are often bi-lingual, and French legal materials are widely cited.[71] For example, in Morocco, even corporate law treatises written in Arabic cite mostly French sources; occidental sources other than French are not cited at all.[72] A

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[68] *See* Mamadou Koné, LE NOUVEAU DROIT COMMERCIAL DES PAYS DE LA ZONE OHADA para. 12, 14 (2003).

[69] *See* generally Joseph Issa-Sayegh, *L'Intégration Juridique des États Africains dans la Zone Franc*, 823 PENANT 5 (1997) and 824 PENANT 125 (1997); and Alain Fénéon, *Bilan et Perspectives de l'OHADA*, 55 REVUE JURIDIQUE ET POLITIQUE INDÉPENDANCE ET COOPÉRATION 243 (2001).

[70] *See* generally Koné, previous note; Jean Paillusseau, *L'Acte Uniforme sur le Droit des Sociétés*, 393(205) LES PETITES AFFICHES 19 (special issue 13 October 2004; and François Anoukaha, Abdoullah Cisse, Ndiaw Diouf, Joseete Nguebou Toukam, Paul-Gérard Pougoué & Moussa Samb, OHADA – SOCIÉTÉS COMMERCIALES ET G.I.E. 19 (¶ 25: "France and other countries of the EU") (Brussels 2002).

[71] For Algeria, *see* generally Mohand Issad & Nacéra Saadi, *Algérie*, in LA CIRCULATION DU MODÈLE JURIDIQUE FRANÇAIS 221, 232 (Travaux de l'Association Henri Capitant, vol. 44); and as an example of a bi-lingual legal publication, *see* the Revue Algérienne des Sciences Juridiques Economiques et Politiques [Algerian Review of Legal, Economic, and Political Sciences] published by the University of Algier's law faculty. For Morocco, *see* generally Azzedine Kettani, *Maroc*, *id.*, 272, 272-273. For Tunisia, *see* generally Derouichie-Ben Achour & Farouk Mechri, *Tunisie*, *id.* 283, 295 (1993); as an example of an official bi-lingual publication of a statute, *see* Imprimerie Officielle de la République Tunisienne, CODE DES SOCIÉTÉS COMMERCIALES, Tunis 2001; and as an example of bilingual journals, *see* the Revue de la Jurisprudence et de la Legislation [Review of Court Decisions and Legislation] published by the Ministry of Justice, and the Revue Tunisienne de Droit [Tunisian Law Review] published by the Centre de Publication Universitaire [University Publication Center].

[72] The works sampled were Hassania Cherkaoui, LA SOCIÉTÉ ANONYME (1997) (with a preface by Pierre Bézard, the president of a chamber of the French Cour de Cassation); Malika Talab & Michel Pabeun, LE DROIT MAROCAIN DES SOCIÉTÉS COMMERCIALES (1997); Mohammed Ouzgane, LE NOUVEAU DROIT DES SOCIÉTÉS À RESPONSABILITÉ LIMITÉE AU MAROC (2001); Izz al-Dīn Binastī, LINKAL-SHARIKĀT FĪ AL-

similar picture emerges in Tunisia.[73] Not surprisingly then, Maghrebi lawyers look to French precedents, both judicial and legislative, for solutions to new problems, even though the Arabic-trained part of the legal profession may at times resist this.[74]

To a lesser extent, other former French colonies or protectorates in the Arab world also continue to be influenced by France.[75]

b) Latin America

Latin America receives materials not only from civil law countries but also from the US, and seems to transform these materials more than other regions covered above. Three reasons suggest themselves for this. For one thing, most of the Latin American countries have been independent for much longer than other former colonies, which gave them the time to emancipate themselves from the core countries' legal models (inversely, one may find the remaining foreign influences all the more surprising).[76] Second, economically and militarily, Latin America has been dominated by its neighbor, the US, for a good century, which could not but direct attention to US models. Third, the former colonizers,

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TASHRĪ AL-MAGHRIBĪ WA-AL-MUQĀRAN : DIRĀSAH MUQĀRANAH WA-ALÁ ḌAW AL-MUSTAJIDDĀT AL-TASHRĪIYAH AL-RĀHINAH FĪ AL-MAGHRIB (Casablanca 1996) [Corporations in Moroccan Legislation and other countries: a comparative study in light of current legislative developments in Morocco]; Muḥammad Bilmualim, LINKAL-SHUFAH FĪ ASHUM SHARIKĀT AL-MUSĀHAMAH : DIRĀSAH LIL-MĀDATAYN 253 WA 257 MIN QĀNŪN SHARIKĀT AL-MUSĀHAMAH AL-MAGHRIBĪ (Rabat 2007) [Preemptive rights in public corporations: a study of articles 253 and 257 of the Moroccan Law of Corporations].

[73] I did not have access to treatises. However, I could sample two recent law review articles: Nouri Mzid, *Groupes de sociétés et relations de travail*, 42(9) REVUE DE LA JURISPRUDENCE ET DE LA LEGISLATION 9 [Corporate groups and labor relations] (citing both French and Tunisian court decisions, five Tunisian doctrinal pieces, and many more French [*cf.*, *e.g.*, footnote 1]); and Taoufik Ben Nasr, *Aspects de la Fusion dans le Code des Sociétés Commerciales*, [2005] REVUE TUNISIENNE DE DROIT 67 [Some Aspects of Mergers in the Corporate Law Code] (citing only two Tunisian court decisions and three Tunisian pieces of doctrinal writings, and for the rest French writers).

[74] *See* for Algeria Issad & Saadi, previous note, at 230 (reporting *inter alia* that the Algerian commercial code of 1975, which contained Algeria's corporate law, was a simplified version of the French code of the time); for Morocco Kettani, previous note, at 273; for Tunisia Achour & Mechri, previous note, at 298-299.

[75] *See* for Egypt, Mohamed El Sayed Arafa, *Égzpte*, in LA CIRCULATION DU MODÈLE JURIDIQUE FRANÇAIS 234 (Travaux de l'Association Henri Capitant, vol. 44); for Lebanon, Pierre Gannagé, *Liban*, in *id.* 253; for Syria, Jacques El Hakim, *Syrie*, in *id.* 275; and generally Philippe Ardant, *Rapport Introductif*, in *id.* 215.

[76] This is particularly true in those countries, like Argentina, that were very wealthy during at least some of their independence, so that enough resources could have been available for legal development.

Spain and Portugal, were economic backwaters and dictatorships for much of the 20th century, which limited the appeal of transplants from there.[77, 78]

Latin American observers report that to this day, European, especially French, treatises are considered the pinnacle of legal authority in Latin America, even before the domestic ones, and as such they are constantly cited by Latin American lawyers.[79] Written work in law school training throughout Latin America was reported to be mere cut-and-paste from German, French, Italian, and Spanish authors as late as in 1975.[80] Even judges' role models (in particular of activist judges) are still thought to be found in Italy and Spain, rather than in the US.[81]

Not surprisingly then, Latin American legal works are full of references to European sources. For example, the standard Venezuelan work on corporate law (2004) cites foreign sources almost exclusively, mostly Argentinean, French, Italian, and

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[77] As soon as Spain reverted to democracy, it reemerged as a legal influence in Latin America, *see* Diego López-Medina, COMPARATIVE JURISPRUDENCE – RECEPTION AND MISREADING OF TRANSNATIONAL LEGAL THEORY IN LATIN AMERICA 39 n.73 and 398 (undated) (unpublished S.J.D. Dissertation, Harvard Law School) (on file with the Harvard Law Library). In particular, the 1978 Spanish Constitution was highly influential in the Latin American democratization of the 1980s (*id.*), *e.g.*, the expression that judges are only subject to "el emperio de la ley" (Art. 117.1 Spanish Constitution; *cf. id.*, 345 n.30).

[78] Similarly, Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 870-882 (2003) (with note 159) argues that Latin American countries modeled their constitutions on the US because at the time they adopted them, a suitable, i.e., republican and stable, European model was lacking. By contrast, when administrative law started to grow in the late 19th century, France had stabilized and could provide a suitable model. Miller also argues that as a consequence, still today Argentinian constitutional lawyers speak English, studied in the US, and advocate US models, while the administrative lawyers speak French, teach in Spain, and advocate French models. This last point is put into doubt by the report in López-Medina, previous note, at 350 n.49 of similarly divided loyalties to US and European models in Colombia, although the Colombian constitution follows an Austrian model.

[79] *See, e.g.*, López-Medina, *supra* note 77, at 396-397 (*cf.* n.110: during a field trip to Bolivia, Colombian students were examined by a Bolivian judge on the content of *Planiol*, one of the foremost French treatises on civil law).

[80] Kenneth L. Karst & Keith S. Rosenn, LAW AND DEVELOPMENT IN LATIN AMERICA – A CASE BOOK 67 (1975).

[81] *See* Rogelio Pérez-Perdomo, LATIN AMERICAN LAWYERS: A CRITICAL INTRODUCTION 135 (2006); *but see* López-Medina, *supra* note 77, at 430 for a different assessment (progressive judges now take US judges, in particular the Warren court, as role models, at least in Colombia).

Spanish, with isolated citations to UK and US titles.[82] The author, Alfredo Morles Hernández, who studied in both the US and France, was the president of the commission that produced the draft of a new general corporations law (1988), so his citation practice presumably reflects on the materials considered in that drafting process.[83] Similarly, the current Argentinean corporate law statute (law no. 19.550 of 1972) was influenced by French, Italian and German, rather than US input.[84] In a colloquium of the drafting committee in 1968, speakers discussed mainly German and Italian law, as well as French, Spanish, Brazilian, Mexican and Uruguayan codes and drafts, with only one or two references to UK or US law.[85] For example, only Italian, Spanish, Mexican, and German rules were considered as benchmarks for setting the percentage of shares to call an extraordinary shareholders' meeting.[86] And while Argentinean corporate law treatises in the 1990s only contain occasional references to foreign sources (all of them to Continental European authors)[87], about half the references in Chilean works of the time are to foreign sources from Continental Europe and Latin America (primarily Argentinean and Spanish; German treatises only in translation).[88]

At the same time, there has always been US influence, and it has been increasing in the second half of the 20th century, as young Latin American lawyers increasingly went

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[82] The work in question is Alfredo Morles Hernandez, 2 CURSO DE DERECHO MERCANTIL – LAS SOCIEDADES MERCANTILES (7th ed. 2004). The citation pattern in Manuel Acedo Mendoza & Luisa Teresa Acedo de Lepervanche, LA SOCIEDAD ANONIMA (3rd ed. 1996) is similar.

[83] For Hernández's biography, *see* http://es.wikipedia.org/wiki/Alfredo_Morles_Hernández (visited April 2009).

[84] *See* Guillermo Cabanellas de las Cuevas, INTRODUCCIÓN AL DERECHO SOCIETARIO vol. 1, 140-144 (1993), also for the influences before 1971.

[85] Colloquium held on 2-4 September 1968 at the Buenos Aires Law Faculty, with interventions by the Minister of Justice Conrado Etchebarne and the members of the drafting committee Issac Halperin, Horacio P. Fargosi, Carlos Odriozola, Gervasio R. Colombres, and Enrique Zaldivar, printed in *Anteproyecto de Ley de Sociedades Comerciales. Su Análisis*, 1 REVISTA DEL DERECHO COMERCIAL Y DE LAS OBLIGACIONES 587 (1968).

[86] Odriozola, previous note, at 609.

[87] The works sampled were Roberto A. Muguillo, LEY DE SOCIEDADES COMERCIALES (2005); Ricardo Augusto Nissen, LEY DE SOCIEDADES COMERCIALES vol. 5 (2nd ed. 1996); and Alberto Victor Veron, SOCIEDADES COMERCIALES vol. 5 (1996).

[88] The works sampled were Alvaro Puelma Accorsi, SOCIEDADES (1996); and Ricardo Sandoval Lopez, DERECHO COMERCIAL vol. 1 (4th ed. 1994).

to the US for graduate legal studies, rather than to Europe as their fathers had done.[89] Such changes have in part been actively promoted by the US since the 1950s.[90] Some statutes have been copied from the US, such as the Mexican securities law in 1953 or the Argentinean bankruptcy law in 1995.[91] In corporate law, US influence has increasingly made itself felt in the last 30 years. The Brazilian company law of 1976, the Chilean company law of 1981, and the Colombian company law of 1995 are generally said to incorporate some US features.[92]

The changing lineage of the Colombian corporate law statute is mirrored in, and can perhaps be traced to, the writings of the leading Colombian corporate lawyers. While the 1996 book by the principal draftsman of the 1995 law, Reyes Villamizar, cites as many US as foreign civil law sources[93], the 2002 books by his predecessor as

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[89] *See* Matthew C. Mirow, LATIN AMERICAN LAW 168 and 187 (2004). At the same time, the US influence may be weaker than it sometimes appears. For example, recent reforms enabling prosecutors to make "deals" with criminal defendants involved US funds, but the main initiator of the reforms, Argentinian law professor Julio B.J. Maier, completed graduate studies in Germany and returned to Germany many times during the reform activities; European legal development organizations were heavily involved in the project, notably in setting up the Iberian American Institute of Procedural Law that carried the reforms throughout Latin America; and the ultimate reform product resembles German criminal procedure (sections 153 et seq. of the German Code of Criminal Procedure) much more than it resembles US criminal procedure (*see* Langer, *supra* note 20, at 637 et seq., 642 et seq., 649 et seq., 652 et seq.). By contrast, few of the hundreds of participants in the reform movements seem to have had exposure to US law, beyond USAID's involvement in funding the project. The German model, in turn, was not copied from the US. Even a different German practice, so far not regulated by the German Code of Criminal Procedure and often discussed as "plea bargains" in Germany, arose endogenously, i.e., "as a response to practical needs, rather than as a product of deep cultural influences of the American system over the German one," *see* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L.J. 1, 39 (2004). Langer emphasizes that "Americanization" does not accurately describe these processes, but perhaps even characterizing them as the outcome of attenuated and mitigated American influence, as Langer does, exaggerates the American role.

[90] *See* Mirow, previous note, at 187-89.

[91] On Mexico, *see* Mirow, *supra* note 89, at 169; on Argentina, *see* Miller, *supra* note 78, at 877 n.155.

[92] *See, e.g.*, Accorsi, *supra* note 88, at 398 for Argentina; and Arnoldo Wald, *Brézil*, in LA CIRCULATION DU MODÈLE JURIDIQUE FRANÇAIS 125, 126 (Travaux de l'Association Henri Capitant, vol. 44) for Brazil. In scholarship, the US influence can be seen, *e.g.*, in Guillermo Carey Bustamante, DE LA SOCIEDAD ANONIMA Y LA RESPONSABILIDAD CIVIL DE LOS DIRECTORES (1992), who does not only cite US sources (including cases and statutes), but partly follows a US structure of exposition (duty of diligence, duty of loyalty, etc.) – interestingly, Carey Bustamante was professor of *economics* within the law faculty.

[93] *Cf.* Francisco Reyes de Villamizar, REFORMA DEL REGIMEN DE SOCIEDADES Y CONCURSOS (1996). Reyes (who got his LLM from Miami) was the Superintendente de Sociedades and active at the Ministry of Justice during the reform (*see* p. 16 of the book and http://derecho.uniandes.edu.co/derecho1/export/derecho/nosotros/cuerpodoc/,

Superintendente de Sociedades and legislative draftsman, José Ignacio Narváez García, cite many European civil law, very few Colombian, and no US sources.[94] More generally, the shift to US legislative models may have been delayed as compared to the shift in educational patterns by the fact that drafting statutes is usually entrusted to older, experienced lawyers, who, as the Argentine committee in 1968, still had received their education in, or with an eye to, Europe.

Interestingly, Latin American lawyers tend to cite core materials that are in one way or another outdated, and use these materials in a discourse that is of an entirely different type than the discourse in the source countries, at least the *contemporary* discourse in the source countries. In particular, the European-oriented Latin American corporate law treatises of the 1990s and early 2000s still indulge in theoretical questions such as the nature of the corporation citing many Europeans from the first half of the 20th or even the 19th century (such as Gierke), but they cite few if any court decisions or *modern* European works (it is also noteworthy that they never cite foreign court decisions). By contrast, modern European treatises tend to say nothing on the theoretical questions, rarely if ever cite the older works, and focus instead intensely on the actual working of the corporate law, citing and discussing innumerable court decisions and (modern) doctrinal commentary thereon.[95] Those Latin American treatises that use US materials (e.g., Reyes Villamizar in Colombia, or Carey Bustamante in Chile) tend to cite more modern works and even a few US cases, but the number of cases cited is minuscule compared to US doctrinal works,[96] and there is no trace of the profound transformation of US corporate law scholarship by law & economics over the last three decades. So in spite of the invocation of authorities from the core countries, the discourse is distinctively

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http://www.law.lsu.edu/index.cfm?geaux=facultyandresearch.visitingfaculty, and http://www.cavelier.com/area_juridica/nuestrosases/reyesfrancisco.htm (visited July 2006)). Still, Reyes de Villamizar cites *France* as the main inspiration of the new Colombian corporate law statute (*id.* 37).

[94] José Ignacio Narváez García, DERECHO MERCANTIL COLOMBIANO, III. TEORÍA GENERAL DE LAS SOCIEDADES (9th ed 2002); IV. TIPOS DE SOCIEDAD (2nd ed 2002).

[95] *See*, *e.g.*, Ripert & Roblot, *supra* note 29, and Schmidt, *supra* note 29.

[96] *See*, *e.g.*, Clarkt, *supra* note 29.

Latin American.[97] The Latin Americans also read each other, and often copy statutes from another Latin American country.[98]

II. DIFFUSION CHANNELS

What drives the formal diffusion documented in the previous Part? Part III below will discuss this question in a theoretical perspective. To prepare that discussion, this Part will provide some more data on possible channels.

Diffusion can be driven by a vast variety of factors. For example, US dominance in the entertainment industry might drive diffusion of US-style criminal justice by providing frequent examples in US television shows and movies.[99] This Part only looks at three channels that are easy to capture with data, and that appear particularly relevant: organizations specifically designed to transport law across borders, trade flows and cross-border investment, and student flows.

For trade flows and cross-border investment, economists have already done the work, documenting a concentration of trade and investment between countries of same legal origin, above and beyond a concentration of trade between colonizers and their

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[97] To some extent, this was already the case at the time the Latin American legal systems formed. Even though Latin America was mostly colonized by the Spanish and the Portuguese, the main model was the French civil code. Moreover, inspite of its enormous prestige at the time, the French code was not simply copied but woven into a domestic blend together with certain other European sources.because that formation saw the adoption of civil codes modeled on (not: copied from) the French civil code. *See* Eugen Bucher, *Zu Europa gehört auch Lateinamerika!*, 12 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 515 (2004) (for examples of copying between Latin American countries, *see*, *e.g.*, note 33).

[98] *Cf.* generally Mirow, *supra* note 89, at 167-70 (noting the increased reliance of Latin American countries on each others' legal products in the 20th century). Argentina developed a good amount of domestic legal scholarship and drafted its own codes, which are often cited and copied, respectively, throughout Latin America. Certain home-grown textbooks were used throughout Latin America (*see* Pérez-Perdomo, *supra* note 81, at 87, mentioning in particular Belló in the 19th century, and Jimenez de Asua's "La ley y el delito" (1954) in the 20th century), and there is now also some limited cooperation in private law-making, as in the Ibero-American Institute and Model Code of Procedure Law, on which *see* José Barbosa Moreia, *Le code-modèle de procédure civile pour l'Amérique Latine de l'Institut Ibero-américain de Droit Processuel*, 3 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 437 (1998).

[99] For an example of the diffusion of criminal law, *see* Langer, *supra* note 89. As discussed *supra* note 89, however, Langer's attribution of the changes to a US model is open to question.

former colonies.[100] The following paragraphs document similar patterns in student flows and legal cooperation.

A. Legal cooperation and development aid

The main developed Western European and North American countries are all actively promoting legal development around the world, primarily in business and commercial law.[101] With the exception of activities in the formerly socialist transition countries[102], all of these organizations are strongly focused on periphery countries of their own legal family. In theory, foreign advise need not favor the advisor's native legislative models, or promote any foreign model for that matter. In reality, however, foreign legal consultants' recommendations are generally at least strongly influenced by their home law.[103] The reason need not be legal imperialism. Even the most well-meaning consultant will have difficulties working with a foreign model, and the familiar home model will usually seem as good as any other to the consultant. Hence even highly sophisticated advisors critical of parochial biases in comparative law end up proposing models inspired by their home country's laws.[104] Less sophisticated advisors recommend even those aspects of their home model that are completely unsuited to the recipient country. [105]

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[100] *See* for trade most recently and convincingly Elhanan Helpman, Marc Melitz, and Yona Rubinstein, *Estimating Trade Flows: Trading Partners and Trading Volumes*, 123 Q.J. ECON. 441 (2008), and for investment Jordan I. Siegel, Amir N. Licht & Shalom H. Schwartz, *Egalitarianism and International Investment*, working paper, Harvard Business School, available at http://ssrn.com/abstract=899082, at 24-25 and Table 5 (2008).

[101] *See* John C. Reitz, *Systems Mixing and in Transition: Import and Export of Legal Models*, in John W. Bridge ed., COMPARATIVE LAW FACING THE 21ST CENTURY 57, 67 and 70 et seq. (2001).

[102] *Cf.* the references in note 25 *supra*.

[103] *See, e.g.*, deLisle, *supra* note 25, especially at 203-204

[104] *See, e.g.*, the confession of Günther Frankenberg on his advise given to the Albanian government for the new Albanian administrative procedure code: Günther Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 UTAH L. REV. 259.

[105] The results are at times grotesque. For example, deLisle, *supra* note 25, at 180, tells of US lawyers proposing US-style securities regulation (the uncommented text of which fills multiple loose-leaf volumes) to Mongolia, a country without a stock exchange at the time. Worse, French consultants inserted provisions requiring the intervention of notaries into the company law of Laos, a country that, at that time, did not have any notaries, *see* Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1, 11 n.54 (1996).

In the UK, legal development aid is primarily channeled through the British Institute of International and Comparative Law (BIICL).[106] The BIICL has a Commonwealth Legal Advisory Service exclusively for assisting Common law countries.[107] Of the 27 countries that received BIICL assistance in the last 5 years, 20 belong to the Common law family[108], and all but one of those that did not received aid under unusual circumstances.[109]

Another unifying force for the common law family is the Commonwealth. Commonwealth institutions provide formal settings of exchange.[110] The Commonwealth Secretariat's Legal and Constitutional Affairs Division provides model statutes, among other things[111], and the Economic and Legal Section of the Special Advisory Services Division supports private sector development through activities including in particular the design of regulatory frameworks for financial markets.[112] Furthermore, the Judicial Committee of the Privy Council remained the jurisdiction of last resort in many Commonwealth countries long after independence, in some cases to this day. This not

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[106] *See* generally Esin Örücü, *The United Kingdom as an Importer and Exporter of Legal Models in the Context of Reciprocal Influences and Evolving Legal Systems*, in John W. Bridge ed., UK LAW FOR THE MILLENIUM 206 (2nd ed., 2000), with references to other institutions involved, such as the British Council (which focuses on governance issues).

[107] *See* Annual Report 2005, at 106-107 (available at http://www.biicl.org/files/341_report_2005.pdf). On the activities of the Commonwealth Secretariat itself, see below Section I.B.1.

[108] *Cf.* www.biicl.org/legalconsultants/ (visited 26 July 2006).

[109] Afghanistan is a current hot spot, where British troops are currently committed. In Iran, BIICL advises on human rightan rights as contractor for the EU (*see* www.biicl.org/iran/ (visited 26 July 2006)). Armenia, China, Mongolia and Russia are transition countries (on which more in the main text below). The only "normal" case where BIICL advises in a "foreign" legal family is Indonesia.

[110] In particular, member countries' top lawyers meet annually in the Commonwealth Law Conference (www.commonwealthlawyers.com/CLC.asp, visited July 2006), and the Commonwealth Magistrates' and Judges' Association provides a permanent forum of exchange (www.cmja.org).

[111] *Cf.* www.thecommonwealth.org/Internal/20728/151470/lcad/ (visited July 2006).

[112] *Cf.* the Maldives, Sierra Leone, and Tanzania projects described at http://www.thecommonwealth.org/Internal/153522/141772/els_articles/, and on the Economic and Legal Section generally www.thecommonwealth.org/Internal/153522/economic_and_legal_services/ (both visited July 2006).

only enhanced the credibility of these countries' judicial systems, it also ensured a constant exchange of legal ideas.[113]

The case of Hong Kong deserves special mention. Although Hong Kong is treated as an independent observation throughout the legal origins literature, Hong Kong was under formal British rule until 1997. English common law and equity were formally in force in as far as applicable to the circumstances in Hong Kong, and the practice of staffing the Hong Kong courts almost exclusively with expatriates from England or other Commonwealth countries ensured that Hong Kong law closely followed English developments and minimized the influence of Chinese law.[114]

On the French side, the sub-directorate for international affairs of the French National Magistrates' School (ENM-SDI), founded in the late 1950s to train judges in the newly independent former French colonies, cooperates almost exclusively with Civil law countries, training about 3,000 foreign judges per year.[115] Likewise, the information dissemination by the legal branch of the *Organisation internationale de la francophonie* is explicitly aimed only at French-speaking (and hence Civil law) countries[116], and the *Maisons du droit* (houses of law) seem to be found only in civil law countries.[117]

Similarly, the activities of the German Foundation for International Legal Cooperation (IRZ) are divided into "States in Central and Eastern Europe, Newly

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[113] For an overview of the Judicial Committee and empirical evidence of its beneficial effect for the countries that accepted its jurisdiction, *see* Stefan Voigt, Michael Ebeling & Lorenz Blume, *Improving credibility by delegating judicial competence – the case of the Judicial Committee of the Privy Council*, 82 J. DEV. ECON. 348 (2007).

[114] *See* Robert Jagtenberg, *The Honoratiores and Mobility of Law: The Example of Hong Kong*, in Jagtenberg et al., *supra* note 8, at 85.

[115] *See* http://www.enm.justice.fr/relations_internationales/chiffres.htm (list of countries where ENM-SDI is active) and http://www.enm.justice.fr/relations_internationales/programme/programme2006.pdf, p. 2 (number of judges trained). Information on French aid directly to *legislation* is not readily available, but it stands to reason that it is probably heavily focused on the former French colonies, since even non-legal development aid from France is highly concentrated on these countries, *cf.* the lists of projects at http://www.afd.fr/jahia/Jahia/home/NosProjets/accessecteur/cache/offonce;jsessionid=E3841C5DCD22561C6C8DA09DFA4605C5 (visited 10 September 2006).

[116] http://droit.francophonie.org/df-web/.

[117] There is one in Vietnam, *see* www.maisondudroit.org, and a *Casa Franco-Andina de Derecho* in Latin America, *see* López-Medina, *supra* note 77, at 341 n.22.

Independent States of the former Soviet Union, States in South Eastern Europe" [118], all of which are Civil law Countries, and many of them are often counted as belonging to the German legal family. The Dutch Center for International Legal Cooperation has projects only in Civil law countries, mostly transition countries and the former Dutch colony Indonesia.[119]

Particularly close legislative cooperation can be found in Scandinavia.[120] The five Scandinavian countries develop much important private law legislation jointly, even though each country may ultimately deviate from the commonly agreed template. Such legislative cooperation is formally carried out through the Nordic Council and enshrined in the Helsinki Agreement of 1962, which calls for the "greatest possible uniformity of law in the area of private law".[121] Even more important, however, is the extensive informal cooperation of people active in the national legislative processes.[122] The annual Scandinavian "juristmøders" (meeting of lawyers) facilitates such ties. As one Finnish commentator states: "As a result [of Scandinavian legislative cooperation], the development of Finnish legislation has retained its Scandinavian features, and for this reason, the legal system of present-day Finland is basically and largely the same [sic] that in Scandinavia."[123]

The only country whose legal advisory/cooperative work is not focused on its own legal family is the US, which has been active all over the world, notably in Latin

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[118] www.irz.de/startseite_e.htm (visited July 2006). In the 1990s, Germany also provided legal development aid to transition countries in the Caucasus and Central Asia through its Corporation for Technical Cooperation (GTZ) with the project "Law Reform in Transition States" (and the people involved did Moldova and Mongolia before) (*cf.* www.jura.uni-bremen.de/institute/gtz.htm (visited July 2006)).

[119] *See* www.cilc.nl/projects.html (visited July 2006).

[120] On Nordic legislative cooperation generally, *see* Gebhard Carsten, *Europäische Integration und nordische Zusammenarbeit auf dem Gebiet des Zivilrechts*, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 335 (1993); Frantz Wilhelm Wendt, COOPERATION IN THE NORDIC COUNTRIES 257 et seq. (1980); and Hellner, *Unification in Scandinavia*, 16 AM. J. COMP. L. 88 (1968).

[121] *Cf.* www.norden.org and http://www.norden.org/pub/velfaerd/lagstiftning/sk/US2002472.pdf (visited July 2006).

[122] *See* Carsten, *supra* note 120.

[123] Yrjö Blomstedt, *A Historical Background of the Finnish Legal System*, in Jaakko Uotila ed., THE FINNISH LEGAL SYSTEM 26, 38 (2nd ed. 1985, Leena Lehto transl.).

America and transition economies.[124] However, outside of the transition economies, US advise seems to have focused on rule-of-law projects, rather than on business law.[125]

B. Student migration

The survey of treatise authors and legislative draftsmen in Sections I.B.1 and I.B.2 revealed that many of them had obtained all or part of their legal education abroad in a core country of the same legal family. Unfortunately, systematic data specifically on the migration of law students is unavailable. But UNESCO collects annual data on student migration in general (confounding all majors), by country of origin to the 10 most popular places to study: Australia, Belgium, France, Germany, Japan, Portugal, Singapore, Spain, United Kingdom, and United States.[126] The table below analyzes these data. (The legal family membership data used here may be overinclusive by the standards laid out in Section I.A above, but to the extent this is the case, it would only bias the results towards zero.)

Student migration			
	Dependent variable: ln[1+(number of students from sender country studying in host country, average 2001-2005)]		
Host and sender country from same legal family	.83*** (.12)	1.20*** (.08)	.33*** (.12)
Host country is colonizer of sender country			3.25*** (.22)
Sender country fixed effect	Yes	Yes	Yes

[124] For an overview of US legal development aid, *see* deLisle, *supra* note 25, and for the earlier "Law and Development" movement of the 1960s, *see* James A. Gardner, LEGAL IMPERIALISM – AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980).

[125] *Cf.* the project descriptions for the Asian, African and Latin American projects of the American Bar Association at www.abanet.org/aba-asia/home.html, www.abanet.org/aba-africa/home.html, and www.abanet.org/lalic/home.html (visited July 2006).

[126] Available at http://stats.uis.unesco.org/ (accessed 02/05/2009). Naturally, the number of students received varies greatly between these countries: while the US receives on average over 2,700 students per country per year, Portugal only receives 76.

Host country dummies	No	Yes	Yes
Number of host-sender pairs	2030	2030	2030
R^2	.02	.43	.78

The table shows estimated coefficients and OLS standard errors from fixed-effects regressions. Observations where host and sender country are identical are omitted from the sample. The colonizer is defined as the last colonizer before independence. Data on colonizers and common legal family come from the data set of Klerman et al., *supra* note 3.

As shown in these simple fixed-effects regressions, more than twice ($e^{.83}$=2.29) as many students from any country studying abroad study in a country of the same legal family as in a country of a different legal family (first column). In fact, holding the attraction of host countries fixed (second column), the effect is even larger – to the extent student migration flows from any given country deviate from the global average, 3.3 times more students go to a country of the same legal family. As the third column reveals, most of the effect is accounted for by colonial ties – students from former colonies are 25 times more likely to study in a university of the former colonizing power than elsewhere, holding the attraction of host countries fixed. Remarkably, however, the legal family effect is still noticeable above and beyond the colonizer effect. It stands to reason that if anything, these data will considerably underestimate the role of a shared legal family. While most majors' knowledge is easily transferable – e.g., engineering or, subject to licensing requirements, medical knowledge –, legal knowledge is still overwhelmingly national or, as shown above, at least specific to legal families.

Some readers of drafts of this paper have wondered how the evidence above relates to the fact that thousands of LL.M. students from all over the world, including civil law countries, come to study law at US law schools every year. The first thing to note in relation to the LL.M. as a one-year graduate degree is that it is unlikely to leave nearly as deep an impact on the students as their multi-year primary legal education in universities of (usually) their own legal family. Moreover, at least at Harvard Law School, the pattern for general student migration shown above also holds true for the LL.M. population. For example, over the last five years (2005-2009), Harvard Law School's LL.M. program welcomed 48 students from the UK (population 59m) and 31

from Australia (population 6m) as opposed to only 30 from Germany (population 83m), 26 from France (population 60m), and 19 from Brazil (population 178m).[127]

III. MAKING SENSE OF FORMAL DIFFUSION

Having documented pervasive formal diffusion and some of its possible channels in the previous Parts, the paper now turns to interpret these facts in view of the crucial question: is there *substantive* diffusion along legal family lines?

Unlike formal diffusion, substantive diffusion is invisible: a country can slavishly follow a foreign model without copying a foreign statute or ever explicitly acknowledging – or even being conscious of – a foreign influence; inversely, a country can develop a policy totally autonomously and yet utilize foreign statutory language for technical simplicity or as a decoy. Nevertheless, the existence of formal diffusion informs the discussion of substantive diffusion. In particular, theories that deny substantive diffusion must explain why formal diffusion occurs even though it is, according to these theories, substantively irrelevant.[128] Subpart III.A reviews this question in its general form. Subpart III.B turns to interpreting the pattern of legal family differences of formal diffusion documented above. The conclusion of this discussion will be that the *existence* of substantive diffusion and some role of the legal families is hard to deny. The quantitative importance of such diffusion can hardly be ascertained theoretically.[129] It is an empirical question. For the time being, the legal origins literature provides reason to believe that diffusion is indeed quantitatively important –

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[127] Martin Gelter has coded the data of all the Graduate Program participants for 2002-2004 (including S.J.D.s and Visiting Researchers). His data (on file with the author) show that common law countries are marginally overrepresented, with details depending on specifications etc.

[128] *See* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995). Ewald argues that the force of the argument of Watson, *supra* note 5 and other writings, comes from his documentation of instances of legal borrowing that do not fit into existing theories and thereby challenge them.

[129] This seems to be a major reason why comparativists have been debating the relevance of legal transplants so passionately. *Cf.* Watson, *supra* note 5; Abel, *supra* note 21; and Legrand, *supra* note 131; Ewald, previous note (distinguishing a "Strong Watson" who would implausibly claim that law always develops autonomously by transplantation independently of social pressures and needs, and a "Weak Watson" who would only claim that this happens sometimes).

unless another theory can be marshaled to explain the differences documented in that literature, they should be attributed to diffusion.

A. Formal diffusion in general

1. Dimensions of the relationship between foreign models and domestic law

A discussion of the relationship between foreign models and domestic law must sharply distinguish two dimensions. One dimension is mere *similarity*, i.e., whether the domestic law ends up being similar to the foreign model. The other dimension is *influence* properly speaking, i.e., whether the foreign model has any causal role in shaping the substantive content of the domestic law. Different *processes* produce different combinations of the two dimensions of similarity and influence. Schematically, the different combinations of (substantive) similarity and influence can be represented in a little diagram. The processes mentioned in the four boxes, particularly in the right column, should be taken as examples, rather than exhaustive.[130]

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="2">Substantive similarity</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td rowspan="3">Substantive influence</td><td>Yes</td><td>(successful) diffusion</td><td>(1) Chaos theory
(2) Unsuccessful transplant
(3) Model as negative example</td></tr>
<tr><td>No</td><td colspan="2">Autonomous legal systems that
are | are not
structurally similar</td></tr>
</table>

This schematic description of the possibilities needs to be explained and refined in a number of ways.

First, the question being asked here is merely whether the foreign model and the domestic law can be *similar* in their actual operation. (In principle, one could have a

[130] For an attempt to create a typology of legal transplants, *see* Miller, *supra* note 78.

third column on the left asking whether the two countries' laws are *identical*.) There has at times been heated argument in comparative law about the question whether the domestic copy of a foreign law ("transplant") could ever be identical to the original.[131] The answer to that question is obviously no. (In terms of discourse, the very act of copying means that the recipient country is doing something different than the origin country.[132]) The real question is whether they can at least be expected to be similar.[133] Some have argued that this is not the case in certain instances, such as the transplantation of the concept of "good faith" to England through European directives.[134] In general, however, it is reasonable to assume that copying a foreign model will yield results that go at least in the right direction.[135] Similarly, when formally identical law is transplanted (i.e., a statute is copied), only someone who denies all constraining power of a text could argue that the operation of the transplant will be completely random, rather than at least directionally similar to the original.

Second, similarity is a question of degree (inversely, one could phrase this in terms of "difference"). To judge the real world importance of foreign influence, this question is obviously crucial. It can be bracketed, however, in a discussion of the *theoretical* possibilities of foreign influence. (In principle, it can also be bracketed in empirical tests as long as the similarity is strong enough to show up in the data and the null hypothesis is that there is no systematic similarity.)

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[131] *Cf.* in particular Pierre Legrand, *What "Legal Transplants"?*, in Nelken & Feest, *supra* note 8, 55 (arguing that legal transplantation is impossible because the "transplant" changes during the process).

[132] For example, Latin American lawyers that receive legal concepts from French authors as valid elaborations of Latin American law must be doing something profoundly different than the French because the French are working with different, *French* legislative materials. *Cf.* López-Medina, *supra* note 77, at 94 et seq., 397; id., TEORÍA IMPURA DEL DERECHO 138 et seq. (2004) (pointing out that Latin American lawyers' claims about the originality of the Bello code are inconsistent with their simultaneous use of French doctrinal materials for interpreting this "original" code).

[133] *Cf.* Alan Watson, *Legal Transplants and European Private Law*, 4.4 ELECTRONIC J. COMP. L. (December 2000), available at www.ejcl.org/ejcl/44/44-2.html (arguing that the transplant obviously changes in the process but that this does not go as far as transformiing it into something unrecognizable).

[134] *See* Günther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998) (arguing in the spirit of chaos theory that the dynamics triggered by importing an alien element will result in new cleavages).

[135] *But see* Teubner, previous note.

Third, as usual in social science, the theoretical hypotheses in this Section are meant to be probabilistic, not deterministic. For example, raising the possibility of diffusion does not imply that it always happens, or that it happens in all periphery countries. It merely means that it happens sometimes, for some countries.

Fourth, and relatedly, the four boxes of the diagram above describe conceptual categories, not mutually exclusive theories. Various processes falling into all four boxes can happen simultaneously even within the same country. For example, a periphery country may be structurally similar to some core country and might therefore adopt similar rules in some areas anyway (lower left box), but foreign influence causes additional similarity beyond that (upper left box); at the same time, remaining differences in the interest group structures cause some prior legal differences to persist (lower right box), while misinterpretation of some foreign concept introduces some additional unexpected difference (upper right box).

2. Plausibility of different scenarios

This Section discusses the plausibility of the different scenarios described by the two dimensions similarity and influence, as represented in the diagram above, in light of the evidence of formal diffusion presented in the empirical part above.

Most social science research considers only domestic determinants of policy-making such as interest group politics, which leave no room for substantive diffusion (although they do leave room for international influences on the economic and technological background conditions against which such policy-making operates).[136] Such purely domestic theories, however, do not provide an explanation for formal diffusion. *Something* else has to be going on.

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[136] *Cf.*, *e.g.* Masahiko Aoki, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS (2001) (considering only self-contained models of individual countries). In most of these models, diffusion of ideas cannot be an issue because the actors are assumed to possess perfect knowledge of the action space. This obviously does not necessarily reflect the full world view of the authors of these models, who may make these assumptions merely for simplicity to develop a particular aspect of lawmaking.

A growing body of research primarily in sociology and political science considers the possibility of substantive diffusion in areas such as the form of government[137], family policy[138], or trade arrangements[139].[140] The reasons for diffusion considered in the literature include coercion, competition, learning, and emulation.[141] For example, world polity theorists argue that mere *mimicry* lead countries around the world to conform to the global model of the modern nation state, leading to at least superficial isomorphism way beyond what functionalist theories would have predicted.[142]

Even in post-colonial times, foreign pressures presumably drive some diffusion in the corporate law sphere. For example, foreign multinationals may demand a cognizable model (competition), and multilateral institutions have pressured developing countries to conform to global models of corporate, bankruptcy, and financial law (coercion).[143]

There is good reason to think, however, that substantive diffusion can also happen absent outside pressure. One reason why most social science models of law-making, particularly in economics, have no role for foreign templates is that they assume perfect foresight / zero information processing costs. In this case, the general consequences of

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[137] *See*, *e.g.*, Kristian Skrede Gleditsch & Michael D. Ward, *Diffusion and the International Context of Democratization*, 60 INT'L ORG. 911 (2006).

[138] *See* Katerina Linos, *How International Norms Spread*, AM. J. INT'L L. (forthcoming); *id.*, DIFFUSION OF SOCIAL POLICIES ACROSS OECD COUNTRIES (2007) (unpublished Ph.D. dissertation, Harvard University, UMI Dissertation # AAT 3285506).

[139] *See*, *e.g.*, Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006).

[140] For more references, *see* the notes to Parts III.B and IV below. For a general overview, *see* Katerina Linos, Note, *When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing*, 119 HARV. L. REV. 1467 (2006).

[141] *See* Beth A. Simmons, Frank Dobbin & Geoffrey Garrett, *Introduction: The International Diffusion of Liberalism*, 60 INT'L ORG. 781 (2006).

[142] *See* John W. Meyer, John Boli, George M. Thomas, and Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997).

[143] The need for a cognizable model is acknowledged in, *e.g.*, the 2002 Report of the Company Legislation and Regulatory Framework Committee of Singapore, *supra* note 62 (noting at para 1.1 that "Singapore's company law should continue to be modeled on one of the two globally recognisable common law models"). For examples of imposition, or attempts thereof, *see*, *e.g.*, Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007), 1153-1167, 1172 (describing how Indonesia and South Korea were under pressure from the IMF and the World Bank to adopt new bankruptcy laws during and after the Asian financial crisis of 1997).

any possible policy, such as the adoption of a certain type of takeover law, are universally understood, and there is nothing to learn from foreign experience. This assumption is made for simplicity and tractability, however, and does not mean that social scientists believe these costs do not exist. After all, social scientists spend their lives trying to figure out how society and hence the laws regulating it work, and there is now a very active formal literature on learning and peer effects.[144]

If perfect foresight fails and relevant actors do not oversee all the consequences of a contemplated legislative act, it is implausible to think that they could perfectly tailor a foreign model to their needs in a way that eliminates all fortuitous traces of foreign influence. In fact, the absence of perfect foresight can explain why actors would look to foreign models in the first place. The foreign models contain information about possible solutions to policy problems. Tinkering with the model might introduce unexpected difficulties, and designing a domestic statute from scratch would be even riskier. Pure imagination cannot beat experience.

On reflection, lawyers should not find this at all surprising. Transactional lawyers always start drafting from the template of a prior transaction. Given all the contingencies that need to be considered, starting from a blank page would probably be considered professional negligence. To be sure, the template (foreign model) will be adapted to the special circumstances of the transaction (recipient country), and drafters aspire to choose a suitable model. Still, there is good reason to think that some of the substance of the precedent (foreign model) will find its way into the final product (domestic law) even though the drafters would not have put it in had they started from scratch, or if they had perfect foresight and could draft a perfect contract (statute). This is perhaps most obvious in a situation where a particular clause does *not* occur to the drafters because the models they work with do not deal with this problem. In corporate law, one might think of certain mechanisms to prevent self-dealing transactions – a subtle regulatory task that

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[144] For two randomly chosen examples from economics, *see* Glenn Ellison & Drew Fudenberg, *Rules of Thumb for Social Learning*, 101 J. POL. ECON. 612 (1993); Harrison Hong, Jeffrey D. Kubik & Jeremy C. Stein, *Thy Neighbor's Portfolio: Word-of-Mouth Effects in the Holdings and Trades of Money Managers*, 60 J. FIN. 2801 (2005).

has to weigh the disadvantages of deterring beneficial transactions – that are conceivable but just do not enter a drafter's mind because the country where he draws the models from does not know that particular mechanism either (but another one does).

Even when perfect adaptation of the model would in principle be possible, actors may not find it in their interest to do so because doing so is costly. Domestic interest groups may accept the deviation of a foreign model from the optimum achievable under domestic bargaining if the private cost of bargaining (including lobbying etc) outweigh the private cost of the deviation. In this sense, the choice between a foreign model and an autonomously developed alternative resembles the choice between a custom-made good and a cheaper but less well adapted good off the shelf. Alternatively, the foreign model could also be focal point in a game with multiple equilibria.

Since one cannot observe the counterfactual, one cannot prove that recipient countries do not perfectly adapt the template to their domestic policy preferences, and that they do not choose a model that corresponds perfectly to these preferences to begin with. In other words, one cannot prove that the legislation ultimately adopted differs substantively from what the recipient country would have developed autonomously. Nevertheless, perfect adaptation (= no substantive diffusion) seems implausible. First, countries take models from countries that are economically and socially rather different. For example, Malaysia and Singapore, authoritarian states with concentrated corporate ownership, copy their corporate and securities law from Australia and the UK, democratic countries with dispersed corporate ownership.[145] Second, the adaptation to local circumstances often does not appear to be very thorough. To take the same example, Singapore decided to adapt the new English company law outright before the English had even finished drafting it, and they did not even adjust the numbering in cross-references of their securities law copied from Australia.[146] As already mentioned above, the mastery of the problem required for full adaptation seems to be at odds with the decision to use a foreign precedent in the first place, which would be redundant if the

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[145] *See supra* text accompanying notes 49 to 52.

[146] *See supra* text accompanying notes 49-52 and 53, respectively.

drafters had the ability to foresee all contingencies and craft perfectly adapted agreements.

Besides, some instances of formal diffusion do not even claim to adopt the foreign materials to domestic needs. Doctrinal works citing foreign materials as persuasive authority use such materials as authority for the law as it is, or as it should be. To square such behavior with an absence of substantive diffusion, one needs to assert that the behavior is irrelevant, or that it serves other purposes than those explicitly stated, such as signaling expertise or giving cover to political projects.[147]

The forgotten re-numbering and the "misuse" of foreign authority raises another possibility that is in some sense the opposite of the perfect foresight / perfect adaptation view. This is the possibility that copies of foreign models simply do not work, at least not as they were meant to. The comparative law literature is replete with examples of "failed transplants" or, as Teubner has called them, "legal irritants."[148] Of particular

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[147] *Cf.* Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 346-350 (1996) (stressing that non-legislative law-making requires authority, which can be provided by respected legal materials, possibly from a different legal system); Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 55 FLA. L. REV. 41 (2003) (the use of foreign authorities, and the stress on their doctrinal and theoretical rather than jurisprudential parts, may have served to protect law's role "above politics" in a charged political atmosphere); López-Medina, *supra* note 77, at 397 (formal reliance on doctrinal, including foreign, sources "was a convenient way of shifting responsibility to unrooted and faceless legal analysis that strengthened the idea of objectivity"); Kennedy, *supra* note 10 (arguing that the globalized form of discourse of the time can be used for any political project). Observers of Latin American law have argued that expertise in US law was often used by groups of lawyers outside the ruling political circles as a means to establish their rival projects, using US ideas, prestige, and connections to their favor, even though the substantive project they advocated could also have been found in the European models. *See* in detail Yves Dezalay & Bryant G. Garth, THE INTERNATIONALIZATION OF PALACE WARS (2002); and *id.*, *supra* note 8 (compare, *e.g.*, the Argentinian's mediation movement's reliance on US sources, although as far as content goes, European sources would have served just as well).

[148] *See* Teubner, *supra* note 134; and for general problems of "receptiveness" to transplants the references cited *supra* note 22. To say that a transplant "failed" does not mean that the ultimate outcome is bad. Part I.B.2.b) observed that Latin American corporate law treatises use foreign sources in different ways than they are used in their countries of origin. Similarly, López-Medina, *supra* note 77 and note 132, shows how Latin American lawyers, in particular Colombians, rearrange(d) jurisprudential materials from the core in ways that were flatly incompatible with the understanding of these materials in the core. This use, however, is not necessarily deficient. By way of comparison, Continental European Civilians clearly used Roman sources differently than the Romans, but nobody has suggested that this use was deficient as a normative-doctrinal discourse (although it was clearly ill-conceived as a historical inquiry). *Cf.* generally William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986); Esquirol, previous note; *id.*, *The Failed Law of Latin America*, 58 AM. J. COMP. L. 75 (2008) (arguing that many of the alleged failures of Latin American law are general limitations of law, problems limited to

interest from a corporate law point of view, Pistor has argued that the promotion of standardized international models especially by multilateral organizations hurts developing countries by preventing endogenous legal development adapted to local circumstances.[149]

There is no doubt that some transplants "fail" and that domestic forces in the recipient countries do influence the course of their legal development There is even reason to think that both of these aspects are very important. This does not mean, however, that foreign influences are fully screened out by domestic politics or totally lost by the recipient's inability to implement them. In fact, it is hard to believe that domestic actors are either smart enough to screen the foreign model perfectly, or stupid enough to misunderstand it completely (mis-numbered cross-references also occur in very developed jurisdictions). More likely, they are human and do what they can with the materials they find. In this case, some (substantial?) residue of the foreign influence is likely to survive and find its way into the domestic law.

B. Role of legal families

If substantive diffusion occurs, there is good reason to believe that the rules that diffuse differ by legal family. On the one hand, the empirical part above documented that formal diffusion mostly follows legal family lines. In particular, materials and personnel from the core civil law countries do not reach the periphery countries of the common law. On the other hand, social scientists have for some time recognized that the developed Anglo-Saxon countries (= common law core countries) pursue more market-friendly policies than the Continental Europeans (= civil law core countries),[150] and the legal origins

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particular sectors or countries, or not shortcomings at all when measured against local exigencies, and hence that "failed law" is a rhetorical device used to justify legal change).

[149] Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2002).

[150] *See, e.g.*, the references cited *supra* note 12.

literature argues that these differences re-appear in the periphery.[151] The pieces of the puzzle fit together.[152]

One possibility why substantive diffusion may follow legal family lines is that periphery lawyers trained in some core country, familiar with and perhaps admiring that core country's law, and operating in a legal system that already employs many constructs and templates from that core country, will find it easier to seek out and transplant new rules from that core country rather than from another of which they may not even know the language. In this connection, it is interesting to note that the only legal materials that seem to be able to cross legal family lines are those from common law countries, which operate in the modern world's lingua franca, English; and that none of the civil law periphery countries that have preserved French as one of their working languages (i.e., those in Africa) shows traces of common law materials.

At least some sociologists are comfortable with the idea that diffusion is driven by the emulation of others that are perceived as fundamentally similar and who are hence perceived to be facing the same problems and adopting suitable solutions.[153] Emulation is especially likely in areas in which relations between means and ends are not well understood and hence alternatives are difficult to evaluate – a description that presumably fits large parts of legislative activity, especially in times of drastic changes (such as the

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[151] *See* generally the survey by La Porta et al., *The Economic Consequences*, *supra* note 2.

[152] Of course, one may not believe the empirical findings of the legal origin literature. If one does believe them, the plausibility of the story just sketched should be judged in comparison to other possible theories that purport to explain the legal origins findings.

[153] *See* in particular David Strang & John W. Meyer, *Institutional conditions for diffusion*, 22 THEORY & SOC'Y 487, 487 and 490-91 (1993). The notion that the spread of ideas is important for policy diffusion is also prominent in political science, *see*, *e.g.*, Dennis P. Quinn & A. Maria Toyoda, *Ideology and Voter Preferences as Determinants of Financial Globalization*, 51 AM. J. POL. SCI. 344 (2007) (arguing that shifts in ideology drove financial liberalization in the 1950s and 1990s and financial closure in the 1960s and 1970s). The leading exposition of the legal origins theory ascribes the differences between common and civil law countries to different ideologies but sees these ideologies as fixed, *see* La Porta et al., *The Economic Consequences*, *supra* note 2, at 286 (adopting "a broad conception of legal origin as a style of social control of economic life (and maybe other aspects of life as well). … we argue that common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations."). More precisely, La Porta et al. obviously recognize a role for diffusion, but argue that the relevant diffusion occurred during colonial times as the European powers spread their legal systems around the world, *see id.* 287-90.

first-time adoption of a securities law).[154] Theorization constitutes entities as being similar, i.e., as being part of a group in which diffusion makes sense because the model can be expected to have similar effects.[155] If this is correct, the almost universally accepted classification of countries into the common and civil law families may have been instrumental in channeling diffusion through legal families, and in so doing preserving the very differences that gave rise to the classification in the first place.[156] Elite lawyers involved in the law-making process are acutely aware of the difference between common and civil law systems (and have possibly been told over and over again that the other system is generally inferior).[157] They are likely to have trained in the core country and to believe their country's legal system to be in some way fundamentally similar to, if less developed than, the core country's. And they are the ones choosing the models.[158]

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[154] Regarding the general hypothesis, *cf.* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 154 (1983) ("Hypothesis A-3: The more uncertain the relationship between means and ends the greater the extent to which an organisation will model itself after organizations it perceives to be successful."). *Cf.* the recognition that "[w]here the question of which rule to adopt is not finally settled in other terms, adherence to one legal tradition or another may supply the answer," Roger Cotterrell, *Is There a Logic of Legal Transplants?*, in Nelken & Feest, *supra* note 8, 70, at 86.

[155] *See* Strang & Meyer, *supra* note 153, at 492-97. The importance of theorization of the *model* may partially explain the attraction of US law over the last couple of decades – interdisciplinary legal scholarship is far more advanced in the US than elsewhere, and since theorists have a tendency to rationalize their environment, this produces theoretical arguments in favor of the US model. *Cf.* Mattei, *supra* note 10 (arguing that international leadership in law is inversely related to the degree of positivism and localism in the legal scholarship of a given country).

[156] Dezalay & Garth, *supra* note 8, at 241 even argue that "[t]he comparative lawyers' division of the world into 'legal families' was in part designed to define segmented markets for transplantation of innovations and influence." As shown in Part II.A above, the core countries do indeed focus their legal devlepment aid activities on countries of their respective legal family. But the *de facto* partition is not evidence of anti-competitive behavior. The core countries could simply be using their comparative advantage, i.e., focusing their activities in places where they have superior expertise. It is easier to give advise to countries within the same legal family that share similar legal concepts, often speak the same or at least a related language, and, perhaps partly because of past collaboration, have laws that resemble those of the core country.

[157] *See, e.g.*, the statement by the Singaporean Company Legislation and Regulatory Framework Committee that Singaporean law should continued to be modeled on a common law model, *supra* note 66 and accompanying text.

[158] On the importance of experts in the diffusion process, *see* Strang & Meyer, *supra* note 153, at 498 (arguing that the importance of theorization leads to diffusion following relations of theorists rather than those linking adopters).

From the point of view of rational actor models used in economics and political science, it may at first seem puzzling why countries would cling to models of their legal family rather than make a conscious decision of a suitable normative model.[159] If one believes the legal origin literature, as a result of differences in regulation, labor force participation is on average about one to two percent higher in common law countries than in French civil law countries, stock market capitalization per GDP is 28 percent higher, and so on.[160] It is hard to imagine that the cost of translating a foreign model from an alien language and alien legal terminology could be of this magnitude.

As in many political economy models, however, the explanation for the puzzling persistence of the legal family allegiance may lie in the divergence of private and social costs and benefits, and resulting collective action problems. The cost of learning about a foreign model is generally private, while the benefit of adopting it is shared (if not by the society as a whole, at least among similarly situated individuals). Moreover, an individual lawyer will not be rewarded for learning the law of a rival legal family if others stick to the old allegiance. An aspiring lawyer in a civil (common) law country who set out to obtain her legal education in a common (civil) law country might find herself unemployable at home, at least at a responsible level, as long as the legal profession as a whole continues in the old civil (common) law ways. Similarly, an interest group that spent money on learning about a new model might find it impossible

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[159] Sociologists explicitly acknowledge that their theories differ from those that would flow from "rational decision-making at the individual (adopter) level," *see* Strang & Meyer, *supra* note 153, at 500.

[160] These numbers are calculated from the means of regulatory indices by legal family and regression coefficients from Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Regulation of Labor*, 119 Q.J. ECON. 1339 (2004) (tables 3 and 8) and Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008) (tables 3 and 6). For the whole range of documented differences, *see* La Porta et al., *The Economic Consequences*, *supra* note 2. There is a vast literature on differences in business law between developed economies. For two excellent examples, *see* Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993); Sergei A. Davydenko & Julian R. Franks, *Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K.*, 63 J. FIN. 565 (2008).

to overcome resistance to the new model by others who do not understand it and are suspicious about the first group's motives.[161]

Another possibility is that the actors involved do not fully realize the size of the stakes involved in choosing a model. Especially if actors have little credible information about models from the other legal family, they may think that the Western models are more or less the same, at least in their consequences, an opinion expressed by even extremely sophisticated Western lawyers.[162] Alternatively, they may find it too difficult to predict the effects of changing to a radically different model, as opposed to making incremental changes to a familiar one. Political economy models do not usually assume such severe information imperfections, but then again the standard models also do not predict the pervasive formal diffusion documented in the empirical part. By contrast, international organization scholars who study diffusion explicitly acknowledge the role of uncertainty and complexity, arguing that they create space for foreign advice processed through networks of specialists which are seen as possessing the requisite knowledge[163] – in the case of commercial law-making, only lawyers from the same legal family might be seen as possessing such knowledge.

Lastly, the cost of adopting an alien model may be higher than it at first appears. Besides the costs of translating and adapting the model, there may be institutional complementarities that are hard to overcome except by changing many elements of the legal system at once. For one thing, legal systems may lack certain institutions that make a particular arrangement work elsewhere. The Singaporean Company Legislation and

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[161] One could imagine a bargaining game in which the outer boundaries of the bargaining space are set by the traditional model, i.e., each group has a credible threat to boycott any solution completely outside of that model.

[162] *See, e.g.*, Lawrence Friedman, *Some Comments on Cotterrell and Legal Transplants*, in Nelken & Feest, *supra* note 8, 93, at 96 ("The end results, however, seem either to be the same, or at least functionally equivalent."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001) ("The basic law of corporate governance – indeed, most of corporate law – has achieved a high degree of uniformity across developed market jurisdictions, and continuing convergence toward a single, standard model is likely.").

[163] *See* Peter M. Haas, *Introduction: epistemic communities and international policy coordination*, 46 INT'L ORG. 1, 1-3, 12 (1992). Elite lawyers from one legal family might indeed by considered an "epistemic community" as defined by Haas (*id.* 3) because their training in the universities of the core country imparts shared perceptions about the normative goals and positive effects of the law.

Regulatory Framework Committee rejected the Delaware model in 2002 because, inter alia, "Singapore lacked the enforcement mechanisms (SEC, class actions, contingency fees) available in the US."[164] But there are also more subtle problems of understanding and interplay of doctrine. The grand Italian comparativist Sacco wrote:

> "[A] legal system cannot borrow elements that are expressed in terms that are foreign to its own doctrine. Conversely, if two systems have the same codes or both have a system of judge-made law, the judges of each country may find it easy to borrow from each other."[165]

In this context, it is worth noting that no country ever fully switched from one legal family to another.[166] Some countries, like Japan or to some extent Latin America, re-oriented themselves from models of one family to those of another (in both cases, to US models). But even that took over a century in the Latin American case, and only came about under US military occupation in Japan. By analogy, consider the evidence from the trade literature cited above which documents a concentration of trade flows between former colonies and their former colonizer, and between countries of the same legal origin.[167] It is not obvious why the costs of translating shipping documents or drafting a contract under the law of another legal family would be sufficient to divert trade flows to this extent. And yet they appear to be.

One set of theories easily compatible with the rational actor model involves outside pressure. In particular, given that countries tend to trade more with countries of the same legal origin, particularly their former colonizer, competition to offer trade partners a recognizable legal model may drive periphery countries to adopt their legal

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[164] *See* Report of the Company Legislation and Regulatory Framework Committee (Singapore 2002), discussed *supra*, text accompanying notes 62-66.

[165] Sacco, *supra* note 8, at 400.

[166] Zweigert, *supra* note 32, at 45 wonders whether Japan might be passing from German civil law influence to common law influence, and postulates a principle of temporary relativity ("zeitliche Relativität") because systems can change. But he did not then classify Japan as being part of the German family then (*id.* at 55) nor did he later classify it as part of the common law family (*see* Zweigert & Kötz, *supra* note 8, §§20-21). The only country that Zweigert asserts changed its legal family, and that Zweigert & Kötz later re-classified, were the socialist countries when they passed into or out of communism.

[167] *See* Helpman, Melitz & Rubinstein, *supra* note 100.

family's model.[168] Core countries might also politically pressure periphery countries to adopt their own model.

The preceding paragraphs discussed a variety of theories that might explain why substantive diffusion follows legal family lines. Inversely, one may ask what sort of argument would be necessary to deny this, given that formal diffusion does follow legal family lines, as documented in the empirical part above. In terms of the scheme developed above, one possibility is to deny substantive *similarity*. One might argue that in spite of formal similarity, the legislation adopted by the periphery country does not substantively resemble the origin country's beyond some elements common to all core countries. This would require that the periphery country purges all idiosyncratic elements of the model. In light of the difficulties of adopting foreign models discussed above, however, periphery countries should find this hard to do. It is also contradicted by the evidence adduced in the legal origins literature.

The other possibility is to deny substantive *influence*. One might argue that the normative preferences of periphery countries of one legal family differ from those of another, and resemble those of their core country. Hence they autonomously choose to adopt rules similar to their core country, even though they may then use statutory language from that core country to facilitate the drafting. This is the theory currently advanced in the legal origins literature.[169] But is it plausible that the normative commitments of Malaysia and Singapore, countries with heavy state involvement and

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[168] Competition has been identified as a driver of diffusion in other fields. *See, e.g.*, Elkins, Guzman & Simmons, *supra* note 139 (arguing that host country competition for foreign direct investment drives the diffusion of bilateral investment treaties – once a competitor signs one, other countries follow suit); Duane Swank, *Tax Policy in an Era of Internationalization: Explaining the Spread of Neoliberalism*, 60 INT'L ORG. 847 (2006) (arguing that competition for mobile assets drove developed countries to reform their tax regime following the Reagan tax reforms in the United States in the 1980s). *But see* Chang Kil Lee & David Strang, *The International Diffusion of Public-Sector Downsizing: Network Emulation and Theory-Driven Learning*, 60 INT'L ORG. 883 (2006) (arguing that another "neo-liberal" policy, shrinking the public sector, diffused by emulation driven by theories that legitimize this policy). Periphery countries explicitly state that it is important for them to follow a recognizable model, *see*, *e.g.*, the statement by the Singaporean Company Legislation and Regulatory Framework Committee that "[a]s a global business centre, Singapore's company law should continue to be modeled on one of the two globally *recognisable* common law models" (emphasis added), *supra* note 66 and accompanying text (Singapore is, of course, a common law country).

[169] *See* La Porta et al., *The Economic Consequences*, *supra* note 2.

concentrated corporate ownership, resemble those of England? And that they resemble those of England more than those of France with its more interventionist policies and more concentrated corporate ownership?[170] Similarly, why was co-determination – mandatory employee representation on companies' boards – adopted in countries anxious to shake off communism like the Czech Republic, Hungary, Slovakia, and Slovenia, but not in India with its long-time socialist aspirations?[171] Such choices are hard to explain with general normative commitments of these countries, or economic background conditions under which they operate. By contrast, diffusion provides an easy if disturbing answer: Germany has co-determination and England has not; and the legal family classification constitutes Germany as the relevant reference country for the Czech Republic, Hungary, Slovakia, and Slovenia, while it designates England as the reference for India.[172]

IV. FORMAL EVIDENCE?

The paper has argued empirically and theoretically that substantive diffusion along legal family lines is a plausible explanation of the legal origins evidence, and more plausible than other, structural theories that have been put forward in the literature. Is it possible to supply more rigorous evidence for substantive diffusion? It turns out that this is much more difficult than it may at first appear, due to a difficulty of distinguishing diffusion and structural theories known as *Galton's Problem*, which will be discussed in Section 3

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[170] On the anti-self-dealing index of Djankov et al., *supra* note 160, England and Malaysia score .95 and Singapore a perfect 1, while France's score is only .38. At the same time, almost all French, Malaysian, and Singaporean publicly traded companies have blockholders as opposed to only about 83% of the British, and the average aggregate block ownership is around 50% in France and Malaysia, above 40% in Singapore, but less than 30% in the UK. *See* Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377, 1394 (2009) (showing the position of various countries with respect to average aggregate block ownership and the proportion of firms having blockholders).

[171] For an overview of co-determination in European countries, *see* Walter Gagawczuk, *Mitbestimmung auf Unternehmensebene in Europa*, [11/2006] ARBEIT & WIRTSCHAFT 8, and current data at www.seeurope-network.org.

[172] *Cf.* Anthony Forsyth, *Worker Representation in Australia: Moving Towards Overseas Models?*, 33 AUSTRALIAN BULLETIN OF LABOUR 1 (2007) (reporting that the Australian debate on worker representation is influenced [only] by US, UK, Canadian, and New Zealander models). On the possibility that non-geographic factors define "proximity" for diffusion processes, *see*, *e.g.*, Nathaniel Beck, Kristian S. Gleditsch & Kyle Beardsley, *Space is more than geography: Using spatial econometrics in the study of political economy*, 50 INT'L STUD. Q. 27 (2006).

below. One can at least verify, however, that some further predictions of the diffusion theory, particularly regarding timing, are borne out by the data, and Section 2 below does just that. First, however, Section A will comment on the available data, which imposes some severe constraints on the tests that can be done for the time being.

A. Data problems

If good data were available, there would be no excuse not to run quantitative tests on, e.g., time-clustering as discussed below, even if their informative value would be limited due to *Galton's Problem*. Unfortunately, the data currently available will not permit most of those tests, particularly those involving a time dimension and hence requiring panel data.

To be helpful, the data need to provide reliable, *comparable* estimates at least of law-on-the-books, rather than just fragments of formal law. The empirical part above already provided conclusive evidence for *formal* diffusion within legal families, as in the spread of the English oppression remedy to the common law world.[173] To do so, it was enough to point out identical sentences that are found in one set of countries but not in the other. To show differential substantive diffusion, however, one would at least have to show that the other countries do not have a similar if differently phrased rule on the books.

The data must also be fine-grained enough to identify differences between legal families. For example, it may not be enough to have only a dummy for the existence of insider trading laws if the relevant difference between core countries is the design of such laws, rather than their presence.

For many tests, the data must also vary over time. Given the difficulty of collecting fine-grained legal data even for a simple cross-section, however, there are

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[173] *See supra* note 56. Cross-sectionally, Djankov et al., *supra* note 160 indeed find that shareholder rights to challenge decisions that are "unfair, prejudicial, oppressive, or abusive" are much more commonly found in common law jurisdictions (89% vs. 40%). The question is, however, whether the 40% really count all other jurisdictions that have equivalent rules couched in different terms, *see* Holger Spamann, *On the Insignificance and/or Endogeneity of the 'Anti-Director Rights Index' under Consistent Coding*, HARVARD JOHN M. OLIN FELLOWS' DISCUSSION PAPER No. 7 (March 2006) = ECGI LAW WORKING PAPER No. 67/2006 (May), at 38-42.

hardly any such data available. The World Bank's Doing Business data on corporate law only span four years.[174] Data on creditor protection in 129 countries are available for 1978-2003, but there are very few changes in these data.[175]

Since diffusion and structural theories have broadly identical predictions, distinguishing between them will necessarily hinge on relatively subtle features of the data. This places great demands on the reliability of the data. For example, available data on the year of adoption of insider trading legislation in 103 countries suggests that Malaysia and Singapore adopted insider trading legislation in 1973, much earlier than the UK (1980) or Australia (1991).[176] If correct, this fact might contradict the diffusion theory proposed in this paper. The fact is untrue, however. Both Malaysia and Singapore imported their insider trading regulation much later from Australia. The rule adopted by Malaysia and Singapore in 1973 was a copy of a precursor provision from Australian law that, whether it counts as an insider trading provision or not, was certainly adopted first in Australia.[177]

For these reasons, the cross-sectional data from the legal origins literature seem to be the best legal data one can get for the time being.[178] As to other relevant data, they are often quite limited as well. For example, Part II.B above mentioned that the available student migration data do not separate out law students from other majors. Data on languages spoken do not separate out second languages of elites, or the language of the courts. And so on. These data could all be gathered, but for the time being they are not available.

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[174] *See* www.doingbusiness.org (visited April 2009).

[175] *See* Simeon Djankov, Caralee McLiesh & Andrei Shleifer, *Private credit in 129 countries*, 84 J. FIN. ECON. 299, 319 (2007) (reporting only 32 changes, mostly in transition economies towards the end of the sample).

[176] Utpal Bhattarcharya & Hazem Daouk, *The World Price of Insider Trading*, 57 J. FIN. 75 (2002).

[177] *Cf.* Woon, *supra* note 41, at 543 (with n.26) (noting that the predecessor of the current Singparean insider trading laws was s. 132A introduced in 1973 and based on s. 124A of the Companies Act of Victoria, Australia); Alexander F. Loke, *From the Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the U.K, Australia, and Singapore*, 54 AM. J. COMP. L. 123, 126 and 153 (2006) (Singapore imported its insider trading law from Australia).

[178] Naturally, some of these data are better than others, and in particular, the newer data sets are conceptually more convincing. *Cf. supra* note 2 for some problems with the earliest data sets.

B. Further Tests of Diffusion Theories' Predictions

There are a number of further predictions of diffusion theories, however, that one can at least check against known facts, as well as, obviously, against the data that are available.

This paper has considered various channels of diffusion, such as emulation, learning, imposition, or competition, and, correspondingly, various factors that could predispose a country to follow one or the other legal family's model, such as a common legal heritage, linguistic ties, or colonial ties more broadly conceived, including economic ties and post-colonial spheres of influence.

At the broadest level, these various diffusion theories are all consistent with the legal origins literature's evidence of cross-sectional differences between common and civil law countries, which was obviously the motivation to develop these theories in this paper in the first place. There are also some more nuanced predictions, however, that are borne out in the data. First, the countries with the loosest ties on all aforementioned counts now follow primarily US models, the earlier influence of civil law models notwithstanding. These are the East Asian countries which were never colonized, never adopted a European language for their legal system, were later occupied or protected by the US military, and trade predominantly with the US. Similar things can be said about the Philippines, which were, however, initially colonized by Spain. These countries also tend to do very well on the legal and outcome measures of the legal origins literature. Second, countries that have lost touch with the developments in their legal family under socialism now use a larger variety of models. They tend not to do well on the measures of the legal origins literature, but this can be explained by the special problems of transition economies.

The most basic timing prediction of the diffusion theories – core countries adopt first, periphery countries follow – is borne out by semi-systematic and casual evidence about patterns of legal change in core and periphery countries, which shows core

countries to be the leaders (and, often, show that periphery countries explicitly follow the core models).[179]

In much of the diffusion research surveyed above, diffusion is marked by temporal proximity between adoption in the leader and the follower country. Such proximity makes it easier to distinguish diffusion from other phenomena (see Section 3 below), but it is not a necessary consequence of diffusion.[180] Diffusion merely implies that the adoption of a certain technology, regulation, etc. is more *likely* given that it has already been adopted elsewhere. More precisely, many of the arguments in favor of diffusion reviewed above stated that *if* and *when* a periphery country decides to adopt a certain type of law (for example, insider trading legislation), it will turn to the model of its core country for guidance. Hence the argument of this paper is not undermined by studies showing that periphery countries often lag considerably behind core countries, and enact far fewer changes to their law than core countries.[181]

Allowing a considerable lag between adoption in the leader country and adoption in the follower country is to recognize that other, complimentary forces affect the timing of adoption in the follower country. Such modesty, however, is a feature shared by all theories attempting to explain differences between legal families, which are obviously just a fraction of the variance between countries around the world.[182] For example, the

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[179] *See* Pistor et al., *supra* note 22 (tracking legal change in 10 jurisdictions); and all of the evidence cited in Part I.B above.

[180] *Cf.* Alberto Paloni, *Diffusion in Sociological Analysis*, in Committee on Population, DIFFUSION PROCESSES AND FERTILITY TRANSITION: SELECTED PERSPECTIVES (John B. Casterline ed.) 66, 76 (2001), who notes that "[t]he observed rate of change in the prevalence of behavior by itself will generally be of limited help to identify a diffusion process because the effects of the basic elements of a diffusion process may lead to outcomes that can also be produced by mechanisms not associated with diffusion at all.").

[181] *See* Pistor et al., *supra* note 22 (tracking legal change in 10 jurisdictions).

[182] *Cf.* the concluding sentence of the first article of the literature, which generally argues that legal rules in common law countries are superior, La Porta, Lopez-de-Silanes, Shleifer & Vishny, *supra* note 2, 1152: "France and Belgium, after all, are both very rich countries." Later debates regarding the relationship of legal origins to other factors did not question the relevance of the other factors, and focused instead on the question whether they explain *all* of the effect attributed to legal origins by parts of the literature, cf. La Porta et al., *The Economic Consequences*, *supra* note 2, 287: "Our strong conclusion is that, while all these factors influence laws, regulations, and economic outcomes, it is almost certainly false that legal origin is merely a proxy for any of them." Nevertheless, some observers have ironically called legal origins the "Da Vinci code of legal development," Association Henri Capitant, LES DROIT CIVILISTES EN QUESTION 33 (para. 25) (2006).

almost universal adoption of insider trading laws in the first half of the 1990s in both common and civil law countries cannot be explained by any theory focused on differences between common and civil law countries.[183] What might be explained by such theories, however, is why the details of the laws adopted differ between common and civil law countries.[184]

C. Distinguishing Diffusion from Structural Theories

The interaction of theories of legal family differences with other forces affecting legal change complicates what is already a difficult task, testing diffusion and structural theories against one another.[185] The basic problem is known in the literature as *Galton's Problem*.[186] It derives from the observation, already stated numerous times in this paper and further explained below, that diffusion and structural theories can have broadly the

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[183] On this wave of adoptions, *see* Bhattarcharya & Daouk, *supra* note 176, 88-90 (subject to the qualifications expressed in the main text accompanying notes 176-177). The wave may have been prompted by some country or multilateral organization pushing for the adoption of such laws (a phenomenon that in the terminology of this paper would be called diffusion), or by technological developments, particularly the advance of computer technology, that shifted the cost-benefit calculus of monitoring and persecuting insider trading. By contrast, structural theories based on political economy or financial market development should have a hard time explaining why countries like Ecuador, Egypt, Ghana, Jamaica, and Zambia on the one hand, and Australia and Germany on the other all adopted an insider trading laws around the same time.

[184] Some systematic differences are documented by Laura Nyantung Beny, *Do Insider Trading Law Matter? Some Preliminary Comparative Evidence*, 7 AM. L. & ECON. REV. 144, 159 (2004).

[185] On the problems involved, *see* generally Robert J. Franzese & Jude C. Hays, *Interdependence in Comparative Politics*, 41 COMP. POL. STUD. 742, 751 et seq. (2008) [hereinafter Franzese & Hays, *Interdependence*]; id., *Empirical Models of Spatial Interdependence*, in Janet Box-Steffensmeier, Henry E. Brady & David Collier (eds.), OXFORD HANDBOOK OF POLITICAL METHODOLOGY 570 (2008); Charles F. Manski, *Economic Analysis of Social Interactions*, 14(3) J. ECON. PERSP. 115, 128-30 (2000); Paloni, *supra* note 180.

[186] Galton made his point in 1899 at a meeting of the Royal Anthropological Institute, commenting on a presentation of Edward Tylor:

> "Tylor had compiled information on institutions of marriage and descent for 350 cultures and examined the correlations between these institutions and measures of societal complexity. Tylor interpreted his results as indications of a general evolutionary sequence, in which institutions change focus from the maternal line to the paternal line as societies become increasingly complex. Galton disagreed, pointing out that similarity between cultures could be due to borrowing, could be due to common descent, or could be due to evolutionary development; he maintained that without controlling for borrowing and common descent one cannot make valid inferences regarding evolutionary development."

http://en.wikipedia.org/wiki/Galton's_problem, visited 04/15/2009.

same predictions.[187] Empirically disentangling these theories hence requires attention to fine differences in their predictions.[188] In the current context, however, the available data hardly allow this; in addition, the theories in question may not be well enough developed to deliver sufficiently differentiated predictions.

To recapitulate, structural theories as understood in this paper postulate that there are internal, structural differences between civil and common law countries, such as different court systems or different attitudes to regulation of markets, which lead them to adopt different policy solutions.[189] As reported in the introduction, the leading authors of the legal origins literature envision that certain technological limitations or cultural predispositions lead common law countries to support private market outcomes, while they lead civil law countries to favor state-desired allocations. The precise nature of these limitations or predispositions is not specified.[190] Formal diffusion of law could be rationalized by these theories as a drafting aid.

How could these broad structural theories distinguish themselves from the diffusion theories discussed in this paper? Cross-sectionally, these structural theories obviously predict the same differences between common and civil law families in the periphery as the diffusion theories proposed in this paper – both theories were designed with that purpose in mind (and the structural theories also purport to explain differences within the core). Both sets of theories would or could also predict the observed

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[187] The diffusion theories discussed in this paper would be easier to test than other examples in the literature because the posited diffusion is uni-directional, i.e., only from a handful of core countries to the periphery, not vice versa, or, for most purposes, between periphery countries (interactions between core countries are also interesting but not part of the theories considered here). This eliminates the "reflection problem" (Manski, *supra* note 185, 128), namely that each unit of observation in turn influences all others, *see id.* 128-30; Franzese & Hays, *Interdependence*, *supra* note 185, 755.

[188] *See See* Franzese & Hays, *Interdependence*, *supra* note 185, at 13 and 19-20; Manski, *supra* note 185.

[189] *See* in particular La Porta et al., *The Economic Consequences*, *supra* note 2 (arguing that common and civil law systems differ in their strategy of social control); Glaeser & Shleifer, *supra* note 16 (arguing that common law countries possess more independent judiciaries); Thorsten Beck, Aslı Demirgüç-Kunt & Ross Levine, *Law and finance: why does legal origin matter?*, 31 J. COMP. ECON. 653 (2003) (arguing that common law systems are more adaptable); Peter Grajzl & Peter Murrell, *Lawyers and politicians: The impact of organized legal professions on institutional reforms*, 17 CONST. POL. ECON. 43 (2006) (arguing that stronger, unitary organized legal professions in common law countries have a beneficial influence on law-making).

[190] *See supra* text accompanying notes 17-19.

attenuation of the legal family effects on the fringes of the families. The diffusion theories would predict this because, e.g., language or trade ties bind less on the fringes. Structural theories could plausibly assert that the core's technological or cultural imprint from colonial times is less deep on the fringes, for similar historical reasons.

Unlike structural theories, diffusion theories are inherently dynamic. This does not mean, however, that the mere introduction of a time dimension (legal change) is enough to identify diffusion and refute the structural theories. The world does not stand still. As conditions change, so do the policy responses predicted by structural theories, including by the structural theories of legal family differences.[191] One possibility is that conditions change purely due to internal developments, such as internal population dynamics.[192] In that case, structural theories would predict that policy changes in different countries are independent of one another, a prediction that is falsifiable by identifying waves of adoption in the data. The other, more difficult possibility, however, is that conditions change for several countries at once, for example due to changes in world commodity prices or technological discoveries ("common shocks"). In that case, waves of adoption can also be driven by independent reactions to common shocks, rather than diffusion.[193] Distinguishing between independent reactions to common shocks and interdependent diffusion processes is the key problem of modern diffusion research.[194]

In particular, diffusion within legal families might be difficult to distinguish from shocks that are common to countries of the same legal family, for example because of the

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[191] *See* in particular Aron Balas, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Divergence of Legal Procedures*, AM. ECON. J. POL'Y (forthcoming), manuscript 15-17 (arguing that civil law countries reacted to an increase in litigation after the second world war by formalizing and centralizing civil procedure, while common law countries did the opposite).

[192] One might object that even seemingly internal developments, like population dynamics, are directly or indirectly influenced by external factors, such as cultural role models or migration possibilities. For purposes of this paragraph, this would only mean that the problem discussed here is basically inevitable.

[193] In the technology example, it would probably be the case that the *technology* diffuses (e.g., computers), but one would still wonder whether the particular *policy* (which might be only indirectly connected with computers, such as the example of insider trading surveillance mentioned above) is an autonomous response to the technology diffusion, or itself the result of policy diffusion.

[194] *See* Franzese & Hays, *Interdependence*, *supra* note 185, at 11 and 13-17; id., web appendix available at http://www-personal.umich.edu/~franzese/FranzeseHays.CPS.InterdependenceCP.WebAppendix.pdf, 2; Gleditsch & Ward, *supra* note 137, at 923.

close(r) economic ties between countries of the same family. In general, diffusion in corporate and securities law may be hard to distinguish from common shocks because the integration of world financial markets will transmit many relevant shocks to all or many of the world's financial markets.[195] Some "shocks," such as new technological developments, are likely to affect only the core countries at first, so that structural theories would predict the core countries to lead in issues of regulatory change, just like the diffusion theories predict they do. To make progress, one would at least have to identify candidate shocks that might policy changes under the structural theories.

The problem of distinguishing diffusion and structural theories of legal families at a general level becomes wholly unsolvable, however, if policy changes are triggered by some third, complimentary force, and the legal family differences merely influence the *form* of the policy change. For example, as mentioned in the previous Section, both common and civil law countries participated in the wave of new insider trading laws of the early 1990s. Hence the timing of this wave reveals nothing about legal family differences. What may differ between legal families is the content of the adopted laws, but differential content could be explained both by structural differences, or by the use of different models (assuming the adopted laws correspond to the models in the predicted way).

Thus it appears that the most promising way forward will be to distinguish diffusion and structural theories by the particular channels through which they operate. To wit, diffusion theories may emphasize the importance of shared languages, close economic ties, or the activity of foreign advisors, while structural theories may emphasize the structure of the judiciary, or prevailing cultural norms. With appropriate data, quantitative research can investigate which of these factors better predicts observed patterns. Importantly, these tests can be done with cross-sectional data, which is already available at least as far as the legal, left-hand side data is concerned.

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[195] *Cf.* Franzese & Hays, *Interdependence*, *supra* note 185, at 744 (noting that globalization implies interdependence).

In fact, many of these tests have already been run, and some of them have been discussed in this paper. The upshot is that these tests have not yet identified any structural factors that could explain the legal family differences in the periphery.[196] If the literature has not abandoned the idea that structural theories might be driving the legal family differences in the periphery, it is because *some* such factor might yet be identified. This possibility can obviously not be ruled out in the abstract, and there have been some interesting recent proposals relating to the structure of the judiciary and the legal profession that remain to be brought to the (as yet unavailable) data.[197]

Given the state of the evidence presented in this paper, diffusion must at least be treated as a plausible alternative to structural theories. In particular, it is improper to take cross-sectional estimates of differences between legislation in common and civil law countries as evidence of structural differences between common and civil law. Tests that do so have to assume that individual observations are statistically independent. But as Galton pointed out in 1899, the possibility of diffusion implies that this is improper. Developing suitable tests of the two sets of theories provides ample opportunity for future research.

V. CONCLUSION – IMPLICATIONS FOR THE ROLE OF LEGAL FAMILIES IN COMPARATIVE LAW

Using corporate and securities law as an example, this paper has documented the pervasive circulation of formal legal materials (statutes, precedents, and doctrinal sources) from the core developed countries to periphery and semi-periphery countries even after de-colonization, and some channels through which these materials might spread (legal cooperation and development aid, trade ties, and student migration). The

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[196] *See*, *e.g.*, La Porta et al., *The Economic Consequences*, *supra* note 2 (arguing that cultural and political theories cannot explain the evidence); Roe, *supra* note 3 (arguing that case law cannot explain the evidence); Roe, *supra* note 16 (arguing that the existence of juries cannot explain the evidence).

[197] *See* Grajzl & Murrell, *supra* note 189; Gillian K. Hadfield, *The levers of legal design: Institutional determinants of the quality of law*, 36 J. COMP. ECON. 43 (2008) (stressing the role of selection and career paths of judges, among other things).

paper emphasized that this "formal diffusion" is contained largely within legal family boundaries.

The paper then interpreted this evidence in light of theories from comparative law, sociology, political science, and economics. It argued that it is plausible that the legal families channel not only formal but substantive diffusion, i.e., that periphery countries continue to be influenced disproportionately by substantive legal models of the core countries of their legal family. To be sure, with rapid improvements in communication technologies and ever increasing economic integration, this observation from the second half of the 20th century may yield to more standardized global models in the 21st century.

Finally, the paper identified the demanding conditions for rigorously empirically distinguishing such substantive diffusion from other, structural theories that purport to explain differences between common and civil law countries around the world. Both sets of theories predict different regulatory regimes in civil and common law countries, and both are compatible with dynamic patterns observed or likely to be observed in the data. Until rigorous tests are available, both theories need at least to be taken into consideration. In particular, cross-sectional evidence of differences between common and civil law countries cannot be interpreted as evidence for structural differences between common and civil law as long as diffusion is not ruled out.

Many aspects of legal diffusion remained outside the paper's scope. In particular, the paper did not address diffusion between core countries. Nor did it address the intriguing possibilities that the models of the core countries may differ in their suitability for less developed countries (particularly Anglo-Saxon *laissez-faire* vs. Continental-European welfare state models), or that the periphery countries of different legal families may differ in their ability to absorb legal transplants successfully.[198] For instance, it was

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[198] On the idea that some core models may be more inappropriate for developing countries than others *see* Simeon Djankov, Edward Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The New Comparative Economics*, 31 J. COMP. ECON. 595, 609-612 (2003) (arguing that heavy regulation that may work in countries with a well-developed bureaucracy fails when transplanted to less developed countries). On the importance of "receptiveness" to transplants generally, *see* Berkowitz et al., *supra* note 22.

shown that common law periphery countries continue to work with current case law from England and other developed common law countries, while Latin American civil law countries do not do so at all. This might be a symptom or a cause of successful and unsuccessful transplantation, respectively.[199]

The paper's evidence of legal families' role for (at least formal) diffusion is an important addition to comparative law's picture of the legal families. The paper showed the continuing relevance of the legal families at least for superficial processes of legal change and for the "external relations" of the world's legal systems.

[199] *Cf.* John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996) (arguing that attempts of the French revolution to make the law "judge-proof" were relatively quickly rejected in France but keep a grip on the countries to which French law was transplanted); Sandra F. Joireman, *Colonization and the Rule of Law: Comparing the Effectiveness of Common law and Civil law Countries*, 15 CONST. POL. ECON. 315 (arguing that a difference between the ability of common and civil law countries to provide the rule of law is only observed in former colonies).