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A Law and Economics Perspective on Legal Families

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I. Introduction

The discussion about the comparative advantages of civil law and common law, or statutory law and judge-made law, has a long intellectual pedigree. From Sir Fortescue's 1475 opus to Jeremy Bentham, Max Weber, and Friedrich Hayek, scholars have presented competing views about the benefits of these different systems of legal adjudication.[1] Both the U.K. and the U.S witnessed a significant and intense debate over the advantages of codifying the common law in the nineteenth century.[2] In the last decades, however, a series of empirical works has reignited this debate by providing new evidence that the common law system is more conducive to the development of financial markets – and perhaps even to economic growth – than the civil law system, especially that of French origin.[3] Although highly controversial, this perspective has become popular in academia as well as in policy circles (in particular, under the auspices of some programs associated with the World Bank) under the designation of "legal origins theory."[4]

The literature on legal origins sought to contribute to the understanding of the relationship between law and economic development. Inaugurated in the mid-1990s by economist Andrei Shleifer and his co-authors (which came to be known by the acronym LLSV), the originality of this line of work was twofold.[5] First, the authors employed

[1] *See* Fortescue (1468) (defending the superior properties of English law compared to Roman law); Bentham (1843) (criticizing the unpredictable and arbitrary character of decisions by common law judges); Weber (1978) (attributing the persistence of the common law in England to special interest pressure from lawyers' guilds, despite the "rational form of Roman law" and the "technically superior training of Roman-law jurists"); Hayek (1973) ("the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated").

[2] *See* discussion by Garoupa and Morriss, (2012).

[3] For a review of this literature, *see* La Porta, et. al (2008). Even though this literature has identified correlations between legal origin and a number of regulatory and economic outcomes, the link between legal tradition and economic growth is certainly more tenuous. Paul Mahoney, the author of the main study identifying a direct relationship between legal origin and economic growth has backed off from this claim in subsequent work. *See* Mahoney (2001) (finding that "common-law countries experienced faster economic growth than civil law countries during the period 1960–92"). *But see* Klerman, et al. (2011) (finding that "that the identity of the colonizer is indeed a better predictor of post-colonial growth rates than legal origin").

[4] *See*, among others, Grosswald Curran (2009).

[5] For the first and most-cited work in this literature, *see* La Porta, et al. (1998).

quantitative methods to compare a multitude of legal systems to a greater extent than their predecessors.[6] Second, LLSV relied heavily on the lessons of comparative law scholars to overcome the endogeneity problem that plagues most attempts to determine the causal relationship between law on the one hand, and economic outcomes on the other. That is, in view of the correlation between "good" legal institutions and economic development, one may be tempted to conclude that law causes economic development. But the reverse is equally plausible, with effective legal institutions being a superior good whose desirability increases as countries become richer.

In LLSV's model, legal rules and institutions derived from certain legal families, which were, in turn, the result of involuntary processes of conquest and colonization that took place in the distant past.[7] Legal families could therefore be deemed to be exogenous, which permitted the authors to conclude that legal institutions had a causal impact on economic outcomes, and not the other way around. Although the first studies in this literature used legal families as an instrumental variable in two-stage regressions, later studies abandoned that approach, as they increasingly understood that legal families had a direct and independent effect on the variables of interest.[8]

The rapidly-expanding legal origins theory now relates conventional legal-family classifications to major economic variables and relevant puzzles in the development literature (why some countries grow successfully and others do not, the extent to which there is a trap for middle-income countries, the relevance of legal institutions in explaining successful and unsuccessful reforms[9]) as well as in the finance literature (in this case, under the original name of "law and finance"). There are now empirical studies employing legal families to explain cross-country variation in issues as diverse labor markets regulation, entry restrictions, government ownership of banks and the media, and military conscription.[10]

Nevertheless, the very application of economic methodology to legal-family categories is subject to significant difficulties. We will focus here on the serious methodological critique of this line of work, which reflects both conceptual and empirical concerns about the distinction between common law, and French, German and Scandinavian civil law systems.

The paper goes as follows. The following section describes the non-economic perspectives on the rise and decline of legal families in comparative law. Section three summarizes the main critiques to the premises, methods, and conclusions of the legal

[6] For a discussion of the benefits and pitfalls of quantitative methods, *see* Spamann, "Large-Sample, Quantitative Research Designs for Comparative Law?", (2009).

[7] La Porta et al.'s debt here is to comparativist Alan Watson's theory of legal transplants. Watson (1974). Their influential article on "Law and Finance" begins by citing Alan Watson and taking as its starting point "the recognition that laws in different countries are not written from scratch, but rather transplanted." La Porta et al., *supra* note 5, at 1115.

[8] La Porta et. al., *supra* note 3, at 298 ("even if instrumental variable techniques are inappropriate because legal origin influences finance through channels other than rules protecting investors, legal origins are still exogenous, and to the extent that they shape legal rules protecting investors, these rules cannot be just responding to market development").

[9] *See* generally discussion by Trebilcock and Prado (2012).

[10] La Porta et. al., *supra* note 3

origins literature. In section four, we describe the hypothesis of the efficiency of the common law and its shortcomings. Section five concludes the paper.

II. Legal Families[11]

The relationship between the comparative law and the economic literature on legal families is replete with ironies. The legal origins theory relies heavily on the classifications of legal families devised by comparative law scholars. Yet economists have popularized the concept of legal families precisely when comparative lawyers have begun to abandon this landmark contribution of their field.[12] The output of the economic literature on legal origins arguably came to exceed that of all comparative law scholarship combined,[13] but comparativists have by and large ignored or strongly rebuffed this line of work.

Comparisons among foreign legal systems, whether casual or profound, have a long history – and so does the idea that English law is profoundly different from French and Roman law.[14] The effort to extrapolate from differences between individual legal systems and divide the world map into a handful of "legal families" based on the heritage and character of the underlying legal systems is far more recent. This project is closely intertwined with the history of modern-day comparative law itself, a discipline whose birth, for most scholars, dates back to 1900.[15] And, as we will see, reigning conceptions of legal families varied dramatically over time, which cast doubt on the reliability and historicity of these categories that are key to the economists' purposes.

Notions of legal families or traditions played a relatively minor role in comparative studies in the nineteenth century. At the time, a number of jurisdictions had recently acquired independence, so anti-colonialist sentiment often led them to view legal tradition as inherently suspect. This phenomenon was, in turn, reinforced by the model of economic liberalism prevailing at the time, which encouraged economic integration and the free flow of goods, people, and ideas to an extent that was not replicated until the last decades of the twentieth century. Nineteenth-century works on 'comparative legislation,' as the field was then known, had an eminently practical orientation. Rather than emphasizing genetic differences among legal systems, they focused on paving the way for legal convergence.

The first categorizations of legal systems conceived in the nineteenth century had modest ambitions. They served primarily to organize the exposition of the laws of different jurisdictions, as in Spanish scholar Gumersindo de Azcárate's 1874 study on

[11] This section is based on Pargendler, "The Rise and Decline of Legal Families" (forthcoming 2012).

[12] *See* notes 32-35 *infra* and accompanying text.

[13] Vagts (2002) (judging the recent developments in comparative corporate governance, inspired by the law and finance literature, as an "astonishing phenomenon" whose output "outdoes all of the publications in the rest of comparative law put together").

[14] *See, e.g.*, Fortescue, *supra* note 1.

[15] Gutteridge (1946) (noting that the International Congress on Comparative Law held in Paris in 1900 "came to be regarded by many as the occasion in which modern comparative law first came into being"); Zweigert and Kötz (1987) ("[c]omparative law as we know it started in Paris in 1900, the year of the World exhibition").

comparative legislation.[16] These early taxonomies looked significantly different from their later counterparts. Take, for instance, Ernest Glasson's pioneer classificatory scheme developed in his book on Marriage and Divorce.[17] Glasson's defining criterion for grouping different jurisdictions was the degree of Roman law influence: (i) Spain, Portugal, Italy, and Romania shared a strong Roman influence; (ii) England, Russia, and Scandinavian countries were grouped as legal systems exempt from the influence of Roman law; and (iii) France and Germany belonged to a third category of jurisdictions that combined elements of Roman and barbaric inspiration. These resulting categories have little in common with contemporary classifications. For instance, England, Russia, and Scandinavian countries are now habitually classified as belonging to distinct groups. Perhaps more strikingly, an overarching division between civil law and common law jurisdictions was conspicuously absent from Glasson's scheme.

Glasson's framework soon spread to the other side of the Atlantic. In Brazil, Clovis Bevilaqua, a professor of comparative legislation and future draftsman of the Brazilian Civil Code of 1916, adapted Glasson's classification to cover Latin American as well as European countries. In contrast to twentieth-century authors, however, Bevilaqua did not classify Latin American jurisdictions as direct descendants of European systems, but rather as members of a fourth category of jurisdictions boasting original legal systems that could not possibly be pigeonholed into existing European groupings.[18]

It was not until the International Congress on Comparative Law (*Congrès international de droit comparé*) held in Paris in 1900 that legal families came to assume a central role in the then emerging agenda of comparativists to make their field more scientific. Up until that point, comparative works typically provided short summaries of the laws of a large number of jurisdictions, often with the aim of instructing merchants about legal variation around the globe in a period marked by economic liberalism and growing international trade. The comparative law scholars present at the Congress revolted against this prevalent model of merely collecting and juxtaposing foreign laws as a futile exercise unworthy of academic attention.

In this context, comparativists came to view the classification of different jurisdictions into families – akin to the family taxonomies then popularized by linguistics and biology – as a more constructive model for the scientific aspirations of the discipline. Gabriel Tarde, a participant in the meeting, argued that "under this new viewpoint, the task of comparative law is less to indefinitely collect exhumed laws than to formulate a natural – that is, rational – classification of juridical types, of branches and families of law."[19] Moreover, legal family classifications held the promise of not only complementing, but also effectively replacing the need for effective knowledge of numerous legal systems. For Tarde, the right taxonomy would encompass all legal systems "known or to be known."

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[16] de Azcárate's (1874) (organizing his exposition of legal systems according to the ethnicity of their people: (i) Neo-Latin peoples, (ii) Germanic peoples (which included not only Germany and some of its neighbors, but also England and the United States), (iii) Scandinavian peoples, (iv) Slavic peoples, and (v) a residual categories for "other peoples of Christian-European civilizations," including Greece, Malta and the Jonic Islands).

[17] Glasson (1880).

[18] Bevilaqua (1897).

[19] Tarde (1905) at 439-440.

In his contribution to the Congress, Adhémar Esmein likewise emphasized the need to "classify the legislations (or customs) of different peoples, by reducing them to a small number of families or groups, of which each represents an original system; creating awareness about the historical formation, the general structure, and the distinctive traits of each of these systems seems to be a first, general, and essential part of the scientific comparative law education."[20] Esmein's suggested categorization divided Western legal systems into groups of Latin, Germanic, Anglo-Saxon, and Slavic laws.

Nevertheless, despite the growing intellectual force of the legal families' project, Esmein's proposed scheme soon fell into oblivion, as the relevant criteria to guide such taxonomies remained highly contested. In 1913 Georges Sauser-Hall advanced a different classification that grouped legal systems according to the race of the peoples concerned. Ten years later, Henri Levy-Ullman also refuted Esmein's approach as "terribly obsolete," and proposed a new categorization based on "scientifically determined affinities" among legal systems.[21] Levy-Ullman's approach was to group jurisdictions according to their dominant "sources of law": (i) legal systems of continental Europe, which rely on written sources of law; (ii) legal systems of English-language countries, which adopt the common law; and (iii) legal systems of Islamic countries.

Meanwhile, Latin American scholars continued to rely on modified versions of Glasson's classificatory scheme, which regarded their jurisdictions as members of a family that was distinct from that of their European colonizers.[22] Brazilian jurist Candido Luiz Maria de Oliveira included Latin American countries in a category of its own. For Argentinean author Enrique Martinez Paz, the countries in the region, combined with Switzerland and Russia, formed a separate group of Roman-Canon-Democratic legal systems. In their comprehensive comparative law treatise of 1950, Pierre Arminjon, Boris Nolde, and Martin Wolff divided the globe into "parent systems" and "derived systems," which together comprised seven different legal families of French, German, Scandinavian, English, Russian, Islamic, and Hindu jurisdictions.[23]

But the final ascendancy of legal families as one of the main theoretical achievements of comparative law came in the 1960s as a result of the work of René David, as well as of Konrad Zweigert and Hein Kötz. Retreating from his earlier view that the distinction between common law and civil law systems was of only modest importance,[24] the French author's celebrated opus '*Les grands systèmes de droit contemporain*' divided the globe into three main families of Romano-Germanic, Common Law, and Socialist legal systems. This partition was based not only on the principal legal concepts and techniques employed in different jurisdictions, but also on their dominant worldview and ideology.[25] In doing so, however, David was acutely

[20] Esmein (1905).

[21] Levy-Ullman (1923).

[22] Luiz Maria de Oliveira (1903); Martinez Paz (1934).

[23] Arminjon, et al. (1950).

[24] David (1950).

[25] David (1962).

aware that categorizations were inherently arbitrary, serving merely "didactic ends" rather than as depictions of a "biological reality."[26]

In 1969, Zweigert & Kötz proposed another equally well-known classificatory scheme.[27] Exemplifying the national bias of comparativists when devising such taxonomies,[28] the German authors subdivided the civil law family into three separate strands – the French, the German, and the Scandinavian civil law systems – thus elevating their country of origin as a parent of a family of its own. The three civil law families, together with the common law, far-Eastern law, Islamic law, and Hindu law families, defined the main "styles" of legal systems around the globe. The scheme advanced by Zweigert and Kötz was widely popular and subsequently came to serve as the basis for the large empirical literature seeking to ascertain the economic consequences of legal institutions. This categorization was however of relatively minor importance in their treatise, whose primary purpose was to redefine the study of comparative law in functional terms – an intellectual ambition that was dramatically different from the legal families project.[29]

The works of David and Zweigert and Kötz came to form the mainstream of legal family classifications, and, for some, should have put an end to the need for further taxonomies.[30] But studies seeking to supersede or refine existing legal family categorizations continued to emerge,[31] as did some of the most sophisticated works on the peculiarities of different legal traditions, such as John Merryman's study on the civil law[32] and Mirjan Damaska's seminal work on the distinct systems of legal procedure in continental and Anglo-American jurisdictions.[33]

Yet, since the end of the twentieth century, a number of prominent scholars, no doubt inspired by the world's increasing globalization and rapid legal convergence, began to challenge the continued utility of legal family classifications for comparative law. James Gordley has described the distinction between common and civil law as "obsolete."[34] Hein Kötz, co-author of one of the most influential of such taxonomies, has questioned whether the time has come to bid farewell to legal family

[26] *Id.*

[27] Zweigert and Kötz (1969).

[28] Laithier (2009).

[29] Kennedy (2003) ("'[l]egal families' and 'functions' mark poles of the functional-technical spectrum for comparative law in the nineteen fifties").

[30] Langbein (1995) (arguing, with respect to legal family classifications, that "once René David has written, once you have Zweigert and Kötz on the shelf, there seems to be less reason to keep doing it").

[31] Mattei (1997), at 9 (advocating a new categorization of jurisdictions as subject to the rule of professional law, the rule of political law, or the rule of traditional law); Palmer (2001) (defending that mixed jurisdictions form a legal family of their own); Whitman (2007) (arguing that the distinction of consumeirism and producerism as categories are "more revealing" than legal families in analyzing modern legal systems).

[32] Merryman (1969).

[33] Damaska (1986).

[34] Gordley (2003).

classifications.[35] All in all, a significant strand of the comparative law literature has come to believe that legal family distinctions are largely outmoded.[36]

III. The Critiques to the Legal Origins Theory

The legal origins theory has proved to be as controversial as it is influential. Despite its popularity, the criticisms both to its methodology and conclusions are numerous – in fact, too numerous to be addressed in full here. We will focus on only a few of the most conspicuous challenges to this line of inquiry. First, there is a growing literature, produced mostly by French scholars, that simply rejects efficiency as a relevant metric to compare different legal systems. Although specifically directed to the legal origins theory, the criticism here is broader in nature; it applies to the entire field of law and economics and to any kind of economic-oriented argument.[37] Researchers affiliated with this approach will invariably conclude that efficiency or other economic measures are inadequate in describing and evaluating legal regimes.[38]

Second, other authors have attacked the legal origins literature as a defective exercise in comparative law due to the irrelevance or fluidity of legal family categories as well as the inherent difficulties in measuring legal institutions.[39] Legal family categories were without exception designed by lawyers and for lawyers. The defining criteria of such classifications – such as the "sources of law" – are of interest to legal scholars, but hardly relevant for most questions that are the object of social science research.[40] In fact, these categorizations had didactic purposes, and did not seek to accurately describe the laws of affiliate legal systems. Zweigert and Kötz go so far as to urge comparatists to "ignore the affiliate [legal system] and concentrate on the parent system."[41] Relatedly, comparative law scholars have always regarded the defining criteria for legal family categories, as well as the classification of individual countries under one group or another, as highly problematic, which arguably makes them unbefitting variables for statistical regressions.[42]

Third, the use of legal families by economists relies on the assumption that such groupings have deep historical (and exogenous) roots. It is revealing that what

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[35] Kötz (1998).

[36] *See, e.g.*, Fauvarque-Cosson and Kerhuel (2009), at 829 ("the legal origins thesis bases its analysis on a classification of legal systems divided into legal families which is now by and large outdated"); Spamann (2009), at 1815 (describing the growing consensus among sophisticated comparativists that there are "there are few if any relevant differences between common and civil law today").

[37] For an English overview, *see* Ménard and Marais (2008). Other critiques in the same venue include Aguilera and Williams (2009) (proposing economic sociology as a better methodology) and Legrand (2009). *See* response by Hadfield (2009).

[38] For a different perspective, *see* Glenn (2001); Siems (2005); and Spamann, *supra* note 6. *See also* Siems (2008).

[39] *See*, among others, Engelbrekt (2010).

[40] Whitman, *supra* note 31.

[41] Zweigert and Kötz, *supra* note 15, at 64 (suggesting that scholars interested in the Romanistic tradition focus exclusively on France and Italy, as "[t]he legal systems of Spain and Portugal (…) do not often call for or justify very intensive investigation").

[42] *See* Siems (2007).

comparative lawyers call "legal families" economists have come to term "legal origins," an expression that highlights the purported historicity of these categories that is key to their proponents' purposes. Not only did the relevant classifications undergo significant change over time, but the comparativists who designed them explicitly recognized that their taxonomies were temporally grounded. David's famous work was translated into English as "Major Legal Systems in the World *Today*,"[43] while Zweigert and Kötz expressly warned that any taxonomy "depends on the period of which one is speaking," so that "the division of the world's legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events, and can therefore be only temporary."[44]

Moreover, the view of law as a "politically neutral endowment" reflected in the legal origins literature has also come under attack.[45] Some of the most significant differences in corporate governance and capital market development across jurisdictions are arguably due to context-specific political developments in the twentieth century.[46] There is also evidence that at least some countries voluntarily picked and chose their rules of commercial law ever since the nineteenth century, thereby challenging the view that legal origins are necessarily exogenous.[47]

Fourth, the studies on the relationship between law and development carry an implicit assumption: law and legal institutions matter a great deal for economic outcomes.[48] Inevitably this is an empirical question. Not surprisingly, many authors have focused on the particular econometrics to criticize the legal origins literature.[49] A number of studies have provided countervailing empirical evidence to challenge the claim that common law is superior to civil law from an economic standpoint. These works identify the advantages of civil law over common law institutions,[50] show reversals in the patterns of financial development across legal traditions over time,[51] or find that other variables are superior to legal origins in predicting economic outcomes.[52]

Last, but not least, even if one were to accept the conclusions of econometric studies showing the purported advantages of common law institutions, the inquiry

[43] Emphasis added. David and Brierley (1985).

[44] Zweigert and Kötz, *supra* note 15, at 66.

[45] Milhaupt and Pistor (2008).

[46] *See, e.g.*, Roe (2006); Pargendler, "State Ownership and Corporate Governance" (2012).

[47] Pargendler, "Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil" (forthcoming 2012).

[48] Cross (2002).

[49] *See*, among others, Ahlering and Deakin (2007); Armour, et al., "How do Legal Rules Evolve? Evidence from Cross-Country Comparison of Shareholder, Creditor and Worker Protection", (2009); Armour, et al., "Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis", (2009); Armour, et al., "Law and Financial Development: What We are Learning from Time-Series Evidence", (2009); Spamann, "The "Antidirector Rights Index" Revisited", (2009); Spamann, supra note 6; Spamann, (2010); Siems and Deakin (2010); Armour, et al. (2011); Helland and Klick (2011) and Klerman et al., *supra* note 3.

[50] *See, e.g.*, Lamoreaux and Rosenthal (2005); Guinanne et al., (2007).

[51] Rajan and Zingales (2003); Musacchio (2010).

[52] *See, e.g.*, Acemoglu, et al. (2001); Berkowitz, et al. (2003); Licht, et al. (2005); Roe, *supra* note 46; Klerman et al., *supra* note 3.

would remain incomplete without identifying the mechanisms and channels that account for the superiority of the common law system – an issue to which we now turn.

IV. The Law and Economics of Legal Families[53]

The legal origins literature suggests that legal systems stemming from the English common law have institutions that are more conducive to economic development than those of civil law jurisdictions (in particular, those of French origin).[54] The mechanism for the economic superiority of the common law versus French civil law is however intrinsically convoluted and debatable.[55] In searching for a sound theoretical background, some economists have related to two standard discussions within law and economics, namely the efficiency hypothesis of the common law and the inferiority of legislation.

The so-called efficiency of the common law has generated discussion among legal economists quite early in the law and economics literature.[56] According to Richard Posner's early work, there is an implicit economic logic to the common law. In his view, the doctrines of the common law provide a coherent and consistent system of incentives which induce efficient behavior, not merely in explicit markets, but in all social contexts (the so-called implicit markets). For example, the common law reduces transaction costs to favor market transactions when that is appropriate. Quite naturally, Posner recognized that not all doctrines in common law are economically justifiable or even easy to understand from an economic perspective.

Posner's hypothesis of the efficiency of the common law begged for a more detailed explanation from the start. In particular, it lacked a more explicit mechanism for why it should be so. A remarkable literature emerged as a consequence. Law and economics scholars proposed different explanations, which are based essentially on evolutionary models that identify the forces that have shaped the common law to generate efficient rules.[57]

One explanation is that judges have a preference for efficiency.[58] Another explanation is that efficiency is promoted by the prevalence of precedent (more efficient rules are more likely to survive through a mechanism of precedent).[59] A third explanation relies on the incentives to bring cases and the role of court litigation (since inefficient rules are not welfare maximizing).[60] Nevertheless, the precise nature of the

[53] This section is based on Garoupa and Gómez Ligüerre (2011)**;** Garoupa and Gómez Ligüerre, 'The Evolution of the Common Law and Efficiency', (2012); Garoupa and Gómez Ligüerre, 'The Efficiency of the Common Law: The Puzzle of Mixed Legal Families', (2012); and also Pargendler, *supra* note 11.

[54] *See* the extensive discussion by Dam (2006); *also*, Roe and Siegel (2009).

[55] For an attempt to identify the channels for the relationship between legal origin and financial development, *see* Beck, et al. (2003).

[56] Posner (1972).

[57] Evolutionary theory models is the denomination used by Rubin (2005).

[58] Posner (1979).

[59] Rubin (1977).

[60] Priest (1977).

mechanism that justifies the efficiency hypothesis is problematic even taking these early explanations into account.[61]

The search for a more convincing setup for the efficiency of the common law hypothesis has sparked important academic work. This literature essentially looks at how litigation improves the law, or some specific legal doctrine, taking into consideration that only a self-selected number of cases is actually litigated.[62] In particular, the efficiency of the common law is unequivocally related to the observation that litigation follows private interests. Presumably bad rules are challenged more often than good rules, so naturally court intervention will improve the overall quality of the law. However, this line of reasoning is not without problematic shortcomings. It could be that the subset of cases that are actually litigated is not representative enough to trigger the necessary improvements, hence biasing evolution of legal rules against efficiency.[63] Furthermore, the emergence of efficiency in common law depends on a number of factors in the evolutionary mechanism, namely initial conditions, path dependence and random shocks.[64]

The literature on the efficiency of the common law that followed Posner's hypothesis is not comparative in nature, but effectively looks at judge-made law. The Posnerian hypothesis does not set a common law system in a better position than a civil law system in the evolution towards efficient rules. It does not provide a convincing framework to argue that judicial precedent is a superior way to promote an efficient solution than a statutory rule precisely because the focus is on judge-made law. Under the common law reasoning, bad decisions are overruled, in the same way that under civil law, bad statutes can be effectively corrected by the judiciary.[65] There is no (theoretical or empirical) basis to assert that courts and juries are in a better position in common law than in civil law jurisdictions to calculate the consequences of their decisions more appropriately than the government. Moreover, that judge-made law can be better understood as a set of rules designed to maximize economic efficiency, as Judge Posner proposed, is not an exclusive feature of common law jurisdictions.

If the Posnerian hypothesis is true, at least in the long run, rules that do not promote efficient results should be repealed in any legal system. Therefore, the central question is not whether one legal family or the other promotes an economic efficiency solution, but which of these two main legal families reaches the adequate result (always from the economic perspective) at a lower cost in terms of delays and opportunity costs. From a cost perspective solely, it is not clear that the type of cost attached to general axiomatic legal solutions, characteristic of civil law approaches, is necessarily higher than litigation costs incurred in the approach developed by common law.

The mere Posnerian efficiency hypothesis of the common law cannot alone support the conclusion that lawmaking by legislation is necessarily less efficient than

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[61] *See* Gennaioli and Shleifer, "The Evolution of Common Law", (2007); Gennaioli and Shleifer, "Overruling and the Instability of Law", (2007); and Miceli (2009).

[62] *See* Goodman (1978); Cooter and Kornhauser (1980); Terrebonne (1981); Rubin (1983); von Wagenheim (1993); Fon and Parisi (2003); Depoorter, et al. (2005); Fon and Parisi (2006); Parisi and Fon (2009).

[63] Hadfield (1992).

[64] Roe (1996). In fact, more recently, Shleifer (2012) defends that the rise of regulators in common law jurisdictions largely reflects the failure of judges in providing efficient social control.

[65] *See*, for example, Fon and Parisi (2006), *supra* note 62.

court intervention. One of the main arguments for the superiority of judge-made law is that private interests are more likely to capture the legislature than the courts, although such argument is debatable at the theory as well as at the empirical level.[66] In fact, there is no systematic evidence that rent-seeking is more persistent with the legislature than with the courts, since demand and supply conditions are fundamentally different.[67] Moreover, courts and legislators have their own goals in terms of enhancing their influence which complicates the potential effect of private interests in lawmaking.[68]

The more adversarial nature of litigation in common law than in civil law could well generate more rent-seeking and more rent dissipation in the process of rulemaking.[69] Furthermore, given the growing predominance of statutes in common law jurisdictions, the inevitable conclusion would be that the overall efficiency has been reduced. This conclusion seems to be reinforced by the argument that the efficiency of the common law is not really demand-side induced (i.e., through the incentives provided by litigation) but supply-side induced. The historical competition between common law and equity courts was the driving force; once these courts were merged and monopoly had been achieved, the efficiency forces had lost stimulus.[70] Nevertheless, a similar historical competition between royal, guild, and ecclesiastical courts existed in civil law jurisdictions.

Notice that the relative efficiency of judge made versus statutory law by itself does not provide a good framework to justify the superiority of the common law system as compared to the civil law system. First, statutes are important in common law jurisdictions and many key areas of private law such as torts are essentially case law in civil law jurisdictions. Second, the biases of legislation and litigation are not qualitatively and quantitatively similar in both legal systems due to procedural and substantive differences. As argued by scholars, the efficiency hypothesis of the common law, coupled with the alleged bias of legislation for private capture, is insufficient to support the argument that French civil law is necessarily inferior to the common law from an economic perspective.[71]

In fact, as noted in the literature, the traditional Posnerian analysis could be transposed to French civil law in many ways and multiple forms. It could be argued that general law (code) is more efficient than specific statutory interventions (potentially prone to more capture). It could be also said that bottom-up law (for example, case law pilling up under general code provisions) is more appropriate than top-down law (including very detailed code provisions as well as specific statutes). Nothing in the

[66] *See* Crew and Twight (1990) (arguing that common law is less subject to rent-seeking than statute law) and Rubin (1982) (arguing that both are influenced by private interests to advance their goals). The most devastating criticism is Tullock (1997) and Tullock (2005), at 184-95. *See also* Luppi and Parisi (2012).

[67] *See*, among others, Landes and Posner (1975); Tollison and Crain (1979); Crain and Tollison (1979); McChesney (1987) (discussing several theories of capture in rulemaking); Merrill, "Does Public Choice Theory Justify Judicial Activism After All?", (1997) and Merrill, "Institutional Choice and Political Faith", (1997).

[68] *See* discussion by Pritchard and Zywicki (1999). For a very interesting comparison between lawmakers and its influence under English and French systems, *see* Allison 1996.

[69] Zywicki (2008).

[70] Zywicki (2003). A more comprehensive discussion is provided by Klerman (2007).

[71] See Garoupa and Gómez, *supra* note 53.

discussion so far makes the argument unique to common law or provides a complete framework to derive implications for comparative law.

The pro-market bias of the common law (the idea of some Hayekian bottom up efficiencies in the English legal system and top down inefficiencies in the French legal system) might be an important argument in its favor, but the existence of some anti-market bias in French law is debatable. It could be that traditional French legal scholarship has been less concerned with efficiency arguments. However, the lack of interest exhibited by French legal scholars concerning pro-market legal policies (which might be explained by cultural reasons) does not constitute strong evidence that French law itself is inefficient.[72]

Even the thesis that French law is less effective than the common law in protecting property rights from state predation is also subject to dispute.[73] The current models developed to explain these differences are the object of serious criticism.[74] Stability of the law is another possible argument to favor judge-made law with deference to precedent against systematic and chaotic legislative production. In this respect, however, the existence and importance of dissenting opinions – which are pervasive in the United States, but absent in France – cannot be seen as a contribution to the stability of the law. Furthermore, empirically it is not clear that case law is more stable and less ambiguous than legislation.[75] Another possibility is the enhanced willingness in common law jurisdictions to allow choice of law. But globalization of business transactions has exerted enormous pressure for change in civil law jurisdictions in this respect. Overall, it might well be that the common law is more efficient and positively correlated with positive economic outcomes, but the causation is definitely under-theorized to a larger extent.[76]

Furthermore, the competition between common law and civil law in a hybrid system does not provide an empirical answer as to which legal system prevails in the long-run (since we would expect the most efficient legal system to be chosen by the relevant legal actors in a hybrid system). Finally, even if common law systems were more conducive to economic growth, the question of how to move from one to the other remains largely unaddressed. Legal culture, rent-seeking, and the accumulated human capital raise the costs of such transplantation.[77]

V. Final Remarks

[72] *See* discussion by Valcke (2010). *See also* Fauvarque-Cosson and Kerhuel, *supra* note 36.

[73] *See*, for two different perspectives, Djankov, et al. (2003) and Arruñada (2003).

[74] For the economic models, *see* Glaeser and Shleifer (2001) and Glaeser and Shleifer (2002). For discussion, *see* Cross (2007); Klerman and Mahoney (2007); Roe (2007); Rosenthal and Voeten (2007); Hadfield (2008); Michaels (2009); Milhaupt (2009); Reitz (2009); and Harris (2009).

[75] *See* mixed evidence by Cross, *supra* note 48.

[76] Moreover, alternative theories might explain why certain institutions, related or unrelated to legal origin, cause economic growth. *See*, among others, Grier (1999); Acemoglu, et al. (2001), *supra* note 32; Acemoglu and Johnson (2005); Acemoglu and Johnson (2007); Acemoglu, et al. (2009).

[77] *See*, among others, Garoupa and Ogus (2006).

This paper has discussed the role of legal families in the comparative law and in the economic literature. We have summarized the traditional approach taken by comparativists in this matter and the different perspective taken by economists. While mainstream comparative law has lost interest in legal families to a large extent, economists have used these categories to explain the cross-country variation not only in the depth of financial markets but also in other factors and institutions relevant for economic development. The significant criticism faced by the legal origins theory from both conventional comparativists and economists only underscores the importance of this literature.

The economic literature has identified six factors to explain why a legal system could matter for economic growth: (1) the costs of identifying and applying efficient rules; (2) the system's ability to restrain rent-seeking in rule formulation and application; (3) the cost of adapting rules to changing circumstances; (4) the transaction costs to parties needing to learn the law; (5) the ease of contracting around rules; and (6) the costs of transitions between systems.[78] How these six factors relate in a meaningful way to legal families is largely under-theorized and generally unanswered.

And yet the premise of the economic superiority of the common law is now the model for legal reform embodied by the Doing Business reports promoted by the World Bank.[79] Nevertheless, without a better understanding of the relationship between legal traditions and economic outcomes, there are good reasons to be skeptical about the legal origins theory as well as the Doing Business reports and related prescriptions that they have inspired.[80]

[78] See Garoupa and Morriss, *supra* note 2.

[79] http://www.doingbusiness.org.

[80] Arruñada (2007); and Davis and Krause (2007). A more comprehensive criticism is provided by du Marais, "Les Limites Méthodologiques des Rapports Doing Business", (2006); Blanchet (2006); and du Marais (ed), "Des Indicateurs pour Mesurer le Droit ? Les Limites Méthodologiques des Rapports Doing Business", (2006).

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