

# A LAW AND ECONOMICS PERSPECTIVE ON LEGAL FAMILIES

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*The relationship between comparative law and the field of economics is increasingly important, but controversial. In the legal origins literature, economists have drawn from comparative law scholarship to suggest that common law systems may be more conducive to financial and economic development than civil law systems. Yet comparativists have been skeptical of the use of legal families to explain economic outcomes. After reviewing the discussion of legal families in the disciplines of comparative law, on the one hand, and economics, on the other, we conclude that a more nuanced approach is advisable. At the same time, we urge comparativists to engage in this debate more actively.*

Keywords: Legal families, Civil law, Common law, Law and economics, Legal origins theory.

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## I. INTRODUCTION

The discussion about the relative comparative advantages of civil law over common law and vice-versa, or statutory law over judge-made law or vice-versa, 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 and decision-making.<sup>1</sup> Both the U.K. and the U.S

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<sup>1</sup> See Sir J Fortescue, *De Laudibus Legum Angliae (In Praise of the Laws of England)* (CUP 1825), defending the superior properties of English law compared to Roman law); J Bentham, 'Law as It Is', in J Browning (ed), *The Works of Jeremy Bentham*, vol. 5 (William Tait 1843), criticizing the unpredictable and arbitrary character of decisions by common law judges); M Weber, *Economy and Society: An Outline of Interpretive*

witnessed a significant and intense debate over the advantages of codifying the common law in the nineteenth century.<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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.<sup>5</sup> First, the authors employed quantitative methods to compare a multitude of legal systems to a greater extent than their

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*Sociology*, vol. 1 (University of California Press 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”; F Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge & Kegan 1973): “the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated”.

<sup>2</sup> See discussion by N Garoupa and A P Morriss, ‘The Fable of the Codes: The Efficiency of the Common Law, Legal Origins and Codification Movements’ (2012) 5 *University of Illinois Law Review* 1443-1497.

<sup>3</sup> For a review of this literature, see R La Porta, F Lopez de Silanes and A Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46(2) *Journal of Economic Literature* 285-332. 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 P Mahoney, ‘The Common Law and Economic Growth: Hayek Might Be Right’ (2001) 30(2) *Journal of Legal Studies* 503-25, finding that “common-law countries experienced faster economic growth than civil law countries during the period 1960-92”. Cf see D Klerman, P Mahoney, H Spamann, and M Weinstein, ‘Legal Origin or Colonial History?’ (2011) 3(2) *Journal of Legal Analysis* 379-409, finding that “that the identity of the colonizer is indeed a better predictor of post-colonial growth rates than legal origin”.

<sup>4</sup> See, among others, V Grosswald Curran, ‘Comparative Law and Legal Origins Thesis: [N]on Scholae Sed Vitae Discimus’ (2009) 57 *American Journal of Comparative Law* 863-80.

<sup>5</sup> For the first and most-cited work in this literature, see R La Porta, F Lopez de Silanes, A Shleifer and R Vishny, ‘Law and Finance’ (1998) 106(6) *Journal of Political Economy* 1113-150.

predecessors.<sup>6</sup> Second, LLSV relied heavily on the categories devised by 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 statistical correlation (as shown by many studies) between “effective” legal institutions and economic development, one may be tempted to conclude that law causes economic development.<sup>7</sup> However, the reverse is equally plausible, with effective legal institutions being a superior good whose desirability increases as countries become richer.<sup>8</sup>

In LLSV’s model, legal rules and institutions derived from certain legal families, which, in turn, resulted from involuntary processes of conquest and colonization that took place in the distant past.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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<sup>6</sup> For a discussion of the benefits and pitfalls of quantitative methods, see H Spamann, 'Large-Sample, Quantitative Research Designs for Comparative Law?' (2009) 7(4) *American Journal of Comparative Law* 5797-810. A recent survey summarizes forty-nine scholarly articles on this matter (with around two-thirds proposing empirical evidence to support the legal origins claim; G Xu, 'The Role of Law in Economic Growth: A Literature Review' (2011) 25 *Journal of Economic Surveys* 833-871).

<sup>7</sup> There are in the literature significant controversies concerning the concept and measurement of “effective” institutions.

<sup>8</sup> See, among others, D Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' (2007) 19(2) *Pacific McGeorge Global Business & Development Law Journal* 427-434.

<sup>9</sup> R La Porta et al. base their approach to legal systems on Alan Watson's theory of legal transplants. 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.” R La Porta, F Lopez de Silanes, A Shleifer and R Vishny, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113-150.

<sup>10</sup> The alleged “exogeneity” of legal families has been disputed. The process of colonization was not historically random. The United Kingdom defeated all other European powers in the eighteenth and nineteenth centuries. Therefore, the British Empire resulted from those areas of the world that the United Kingdom understood as more valuable in the eighteenth and nineteenth centuries. If so, the current common law jurisdictions were partially determined by economic variables (namely perceived resources) and not the output of a random process.

<sup>11</sup> R La Porta, F Lopez de Silanes and A Shleifer, 'The Economic Consequences of

The rapidly-expanding legal origins theory now relates conventional legal-family classifications to major economic variables and relevant puzzles in the development literature (e.g. why some countries grow successfully and others do not, why there is a trap for middle-income countries, which legal institutions are important in explaining successful and unsuccessful reforms<sup>12</sup>). At the same time, significant developments on the finance literature have taken place (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 as labor markets regulation, entry restrictions, government ownership of banks and the media, and military conscription.<sup>13</sup>

The initial works by LLSV provided no clear theory. Later works by these and other authors have conceptualized two potential mechanisms to explain the empirical patterns observed by LLSV.<sup>14</sup> The first one, the so-called “adaptability channel” proposes that the common law is more effective in promoting financial markets (and possibly economic growth) because common law judges have more power to adapt the law to economic needs. At the same time, civil law judges are supposedly more constrained by codified principles. Comprehensive statutory codification undermines judicial ability to make law in new circumstances and where economic needs are pervasive. The “adaptability channel” evidently echoes the so-called efficiency of the common law hypothesis, a point we will explore later.

The second suggested mechanism has been known to be the “political channel”. Here the argument is that the common law emphasizes private property rights and contractual approaches while the civil law gives a greater play to social or collective rights and mandatory rules. As a consequence, common law courts are more independent and more effective in restraining state expropriation, while civil law courts are presumably weak in constraining executive power. In this reasoning, the

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Legal Origins’ (2008) 46(2) *Journal of Economic Literature* 285-332, p 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”.

<sup>12</sup> See generally discussion by M Trebilcock and M Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Edward Elgar 2012).

<sup>13</sup> R La Porta, F Lopez de Silanes and A Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46(2) *Journal of Economic Literature* 285-332.

<sup>14</sup> See generally T Beck, A Demirgüç-Kunt and R Levine, ‘Law and Finance: Why Does Legal Origin Matter?’ (2003) 31(4) *Journal of Comparative Economics* 653-75.

efficiency of the common law hypothesis is implicit; it only makes sense if courts are better than legislators at promoting law more conducive to economic growth.

As others have recognized, these two mechanisms are actually the same.<sup>15</sup> The “adaptability channel” only works if the “political channel” exists. Moreover, these two potential channels are introduced as exogenous mechanisms while, in fact, they are endogenous to the political process. In this light, these channels are themselves shaped by economic and social outcomes. If so, we might have an argument for reverse causality which inevitably undermines the alleged theoretical argument.

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 on one hand, and French, German and Scandinavian civil law systems on the other.

The Article goes as follows. The following section describes the rise and decline of legal family categories in comparative law scholarship. The goal is both to understand the promise of their use in economic models and the reasons behind comparativists’ resistance to the legal origins theory. By highlighting the historical contingency of legal-family distinctions, the intellectual history of legal families casts doubt on their use as instrumental variables. This analysis also shows that the legal origins theory emerged in the economic literature precisely when comparative law scholars were growing skeptical about the continued relevance of these categories which, in turn, might explain the lack of interest in the topic they have largely shown so far. In section three, we then summarize the main critiques of the premises, methods, and conclusions of the legal origins literature, some developed by legal economists and a few by comparative law scholars. In section four, we examine the hypothesis of the efficiency of the common law and its shortcomings, as it constitutes the most solid theoretical foundation for the legal origins model. Section five concludes with explicit proposals for more involvement by comparative law scholars.

## II. LEGAL FAMILIES<sup>16</sup>

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<sup>15</sup> See J Reitz, 'Toward a Study of the Ecology of Judicial Activism' (2009) 59 *University of Toronto Law Journal* 185-196.

<sup>16</sup> This section is inspired by M Pargendler, 'The Rise and Decline of Legal Families' (2012) 60(4) *American Journal of Comparative Law* 1043-1074.

The relationship between the comparative law literature 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.<sup>17</sup> The output of the economic literature on legal origins arguably came to exceed that of all comparative law scholarship combined,<sup>18</sup> but comparativists have by and large ignored or strongly rebuffed the legal origins 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 significantly different from French and Roman law.<sup>19</sup> 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.<sup>20</sup> As we will see, reigning conceptions of legal families varied over time, which cast doubt on the reliability and historicity of these categories. Still, these categories 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 (the imposed) 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

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<sup>17</sup> See fn 33-36 *infra* and accompanying text.

<sup>18</sup> D Vagts, ‘Comparative Company Law – The New Wave’, in R Schwizerl, H Burkert, and U Gasser (eds), *Festschrift für Jean Nicolas Duey zum 65. Geburtstag* (Schulthess 2002), pp. 595-605, 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”.

<sup>19</sup> See, eg, Sir J Fortescue, *De Laudibus Legum Angliae (In Praise of the Laws of England)* (CUP 1825).

<sup>20</sup> See H C Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (CUP 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”; K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Mohr Siebeck 1969): “[c]omparative law as we know it started in Paris in 1900, the year of the World exhibition”.

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.<sup>21</sup>

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 study on comparative legislation.<sup>22</sup> 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.<sup>23</sup> 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 Bevilacqua, 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, Bevilacqua 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

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<sup>21</sup> See G de Azcárate, *Ensayo de una Introducción al Estudio de la Legislación Comparada*, (Revista da Legislacion 1874).

<sup>22</sup> *Ibid*, 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.

<sup>23</sup> E Glasson, *Le Mariage Civil et le Divorce dans l'Antiquité et dans les Principales Législations Modernes de l'Europe*, 2nd ed (A. Durand 1880).

European groupings.<sup>24</sup>

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, branches and families of law.”<sup>25</sup> 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.”

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.”<sup>26</sup> Esmein’s suggested categorization divided Western legal systems into groups of Latin, Germanic, Anglo-Saxon, and Slavic laws.

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<sup>24</sup> C Bevilacqua, *Resumo das Licções de Legislação Comparada sobre o Direito Privado*, 2nd ed (Magalhães 1897).

<sup>25</sup> G Tarde, ‘Le Droit Comparé et la Sociologie’, in *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents*, Librairie générale de droit de jurisprudence (1905) pp 439-40.

<sup>26</sup> A Esmein, ‘Le Droit Comparé et l’Enseignement du Droit’, in *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents*, Librairie générale de droit de jurisprudence, (1905), pp 445-51.

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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

Yet, 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,<sup>30</sup> the French author's celebrated opus '*Les grands systèmes de droit contemporain*' divided the globe

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<sup>27</sup> H Levy-Ullman, 'Observation Générales sur les Communications Relatives au Droit Privé dans les Pays Etrangers', in *Les Transformations du Droit dans les Principaux Pays depuis Cinquante Ans (1869-1919) (Livre du cinquantenaire de la Société de Législation Comparée)*, Librairie Générales de droit et de Jurisprudence (1923), pp 81-108.

<sup>28</sup> C Luiz Maria de Oliveira, *Curso de Legislação Comparada* (J. Ribeiro dos Santos 1903); E Martinez Paz, *Introducción al Estudio del Derecho Civil Comparado* (Imprenta de la Universidad 1934).

<sup>29</sup> P Arminjon, B Nolde and M Wolff *Traité de Droit Comparé* (Librairie Générale de Droit et de Jurisprudence 1950).

<sup>30</sup> R David, *Traité Élémentaire de Droit Civil Comparé* (Librairie Générale de Droit et de Jurisprudence 1950).

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.<sup>31</sup> In doing so, however, David was acutely aware that categorizations were inherently arbitrary, serving merely “didactic ends” rather than as depictions of a “biological reality.”<sup>32</sup>

In 1969, Zweigert and Kötz proposed another equally well-known classificatory scheme.<sup>33</sup> Exemplifying the national bias of comparativists when devising such taxonomies,<sup>34</sup> 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 different from the legal families project.<sup>35</sup>

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.<sup>36</sup> However, studies seeking to supersede or refine existing legal family categorizations continued to emerge,<sup>37</sup> as did

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<sup>31</sup> R David, *Les Grands Systèmes de Droit Contemporain* (Daloz 1962).

<sup>32</sup> Ibid.

<sup>33</sup> K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Mohr Siebeck 1969).

<sup>34</sup> Y-M Laithier, *Droit Comparé* (Daloz 2009).

<sup>35</sup> D Kennedy, ‘The Methods and Politics of Comparative Law, The Methods and Politics of Comparative Law’, in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003), pp. 345-433: “[l]egal families’ and ‘functions’ mark poles of the functional-technical spectrum for comparative law in the nineteen fifties”.

<sup>36</sup> J Langbein, ‘The Influence of Comparative Procedure in the United States’ (1995) 43 *American Journal of Comparative Law* 545-554, 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”.

<sup>37</sup> U Mattei, ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’ (1997) 45 *American Journal of Comparative Law* 5-44, p 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; V Palmer ‘Introduction to the Mixed Jurisdictions’, in V V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal*

some of the most sophisticated works on the peculiarities of different legal traditions, such as John Merryman's study on the civil law<sup>38</sup> and Mirjan Damaska's seminal work on the distinct systems of legal procedure in continental and Anglo-American jurisdictions.<sup>39</sup>

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."<sup>40</sup> 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 classifications.<sup>41</sup> All in all, a significant strand of the comparative law literature has come to believe that legal family distinctions are largely outmoded.<sup>42</sup> This literature shows that legal families are problematic, variant and subject to many different classifications in comparative law. We suggest that it explains why comparativists are conceptually skeptical of the legal origins theory.

### 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 of 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

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*Family* (CUP 2001), pp. 3-6. (defending a view that mixed jurisdictions form a legal family of their own); D Whitman, 'Consumerism versus Producerism: A Study in Comparative Law' (2007) 117 *Yale Law Journal* 340-406, arguing that the distinction of consumerism and producerism as categories are "more revealing" than legal families in analyzing modern legal systems.

<sup>38</sup> J Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press 1969).

<sup>39</sup> M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986).

<sup>40</sup> J Gordley, 'Common Law und Civil Law: eine überholte Unterscheidung' (2003) 3 *Zeitschrift für europäisches Privatrecht* 498-518.

<sup>41</sup> H Kötz, 'Abschied von der Rechtskreislehre?' (2008) 3 *Zeitschrift für europäisches Privatrecht* 6493-505.

<sup>42</sup> See, eg, B Fauvarque-Cosson and A-J Kerhuel 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law' (2009) 57 *American Journal of Comparative Law* 811-32, p 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"; H Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' (2009) 6 *Brigham Young University Law Review* 1813-877, p 1815, describing the growing consensus among sophisticated comparativists that there are "there are few if any relevant differences between common and civil law today".

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.<sup>43</sup> Researchers affiliated with this approach will invariably conclude that efficiency or other economic measures are inadequate in describing and evaluating legal regimes.<sup>44</sup>

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.<sup>45</sup> 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 and lawyers, but hardly relevant for most questions that are the object of social science research.<sup>46</sup> 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.”<sup>47</sup> Relatedly, comparative law scholars have always regarded the defining criteria for legal family

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<sup>43</sup> For an English overview, see C Ménard and B du Marais, ‘Can We Rank Legal Systems According to their Economic Efficiency?’ (2008) 26 *Washington University Journal of Law and Policy* 55-80. Other critiques in the same venue include R Aguilera and C Williams, ‘Law and Finance: Inaccurate, Incomplete, and Important’ (2009) 9 *Brigham Young University Law Review* 1413-434, proposing economic sociology as a better methodology; and P Legrand ‘Econocentrism’ (2009) 59(2) *University of Toronto Law Journal* 215-22. See response by G Hadfield, ‘The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law’ (2009) 59(2) *University of Toronto Law Journal* 223-235.

<sup>44</sup> For a different perspective, see H P Glenn, ‘Are Legal Traditions Incommensurable?’ (2001) 49(1) *American Journal of Comparative Law* 133-45; M Siems, ‘Numerical Comparative Law - Do We Need Statistical Evidence in Order to Reduce Complexity?’ (2005) 13 *Cardozo Journal of International and Comparative Law* 521-40; and H Spamann, ‘Large-Sample, Quantitative Research Designs for Comparative Law?’ (2009) 57(4) *American Journal of Comparative Law* 797-810. See also M Siems, ‘Legal Originality’ (2008) 28(1) *Oxford Journal of Legal Studies* 147-64.

<sup>45</sup> See, among others, A B Engelbrekt (2010) ‘Toward an Institutional Approach to Comparative Economic Law?’, in A B Engelbrekt and J Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar 2010), pp 213-51.

<sup>46</sup> D Whitman, ‘Consumerism versus Producerism: A Study in Comparative Law’ (2007) 117 *Yale Law Journal* 340-406.

<sup>47</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law*, vol. 2 (Clarendon Press 1987), p 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”.

categories, as well as the classification of individual countries under one group or another, as highly problematic, which arguably makes them unbecoming variables for e.g. statistical regressions or social science explanations more broadly.<sup>48</sup>

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 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*,”<sup>49</sup> 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.”<sup>50</sup>

Moreover, the view of law as a “politically neutral endowment” reflected on the legal origins literature has also come under attack.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

Fourth, the studies on the relationship between law and development carry

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<sup>48</sup> See M Siems, ‘Legal Origins: Reconciling Law & Finance and Comparative Law’ (2007) 52(1) McGill Law Journal 55-82.

<sup>49</sup> Emphasis added, R David and J Brierley, *Major Legal Systems in the World Today: An Introduction to Comparative Study of Law*, 3d ed (Stevens 1985).

<sup>50</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law*, vol. 2 (Clarendon Press 1987), p 66.

<sup>51</sup> C Milhaupt and K Pistor, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development around the World* (University of Chicago Press 2008).

<sup>52</sup> See, eg, M Roe, ‘Legal Origins, Politics and Modern Stock Markets’ (2006) 120 Harvard Law Review 460-527; M Pargendler, ‘State Ownership and Corporate Governance’ (2012) 80 Fordham Law Review 2917-973.

<sup>53</sup> M Pargendler, ‘Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil’ (2012) 60(3) American Journal of Comparative Law 805-850.

an implicit assumption that law and legal institutions matter a great deal for economic outcomes.<sup>54</sup> Inevitably this is an empirical question. Not surprisingly, many authors have focused on the particular econometrics to criticize the legal origins literature.<sup>55</sup> 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,<sup>56</sup> show reversals in the patterns of financial development across legal traditions over time,<sup>57</sup> or find that other variables are superior to legal origins in predicting economic outcomes.<sup>58</sup>

<sup>54</sup> F Cross, 'Law and Economic Growth' (2002) 80(7) *Texas Law Review* 1737-775.

<sup>55</sup> See, among others, B Ahlering and S Deakin, 'Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity'(2007) 41 *Law and Society Review* 865-903; J Armour, et al., 'How do Legal Rules Evolve? Evidence from Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 *American Journal of Comparative Law* 579-630; J Armour, S Deakin, P Sarkar, A Singh and M M Siems, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis'(2009) 6(2) *Journal of Empirical Legal Studies* 343-80; J Armour, S Deakin, V Mollica, and M M Siems 'Law and Financial Development: What We are Learning from Time-Series Evidence'(2009) *Brigham Young University Law Review* 1435-500; H Spamann, 'The "Antidirector Rights Index" Revisited' (2009) 23 *Review of Financial Studies* 467-86; see H Spamann, 'Large-Sample, Quantitative Research Designs for Comparative Law?' (2009) 7(4) *American Journal of Comparative Law* 5797-810; H Spamann, (2010) 'Legal Origins, Civil Procedure, and the Quality of Contract Enforcement'(2010) 166(1) *Journal of Institutional and Theoretical Economics* 171-77; M Siems and S Deakin, 'Comparative Law and Finance: Past, Present, and Future Research' (2010) 166(1) *Journal of Institutional and Theoretical Economics* 120-40; E Helland and J Klick, 'Legal Origins and Empirical Credibility', in M Faure and J Smits (eds), *Does Law Matter? On Law and Economic Growth* (Intersentia 2011), pp 99-113; and D Klerman P Mahoney, H Spamann, and M Weinstein, 'Legal Origin or Colonial History?'(2011) 3(2) *Journal of Legal Analysis* 379-409.

<sup>56</sup> See, eg, N Lamoreaux and J-L Rosenthal (2005) 'Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States during the Era of Industrialization'(2005) 7(1) *American Law and Economics Review* 28-61; T Guinane R Harris, N Lamoreaux, J-L Rosenthal, 'Putting the Corporation in its Place' (2007) 8(3) *Enterprise and Society* 687-729.

<sup>57</sup> R Rajan and L Zingales, 'The Great Reversals: The Politics of Financial Development in the Twentieth Century' (2003) 69 *Journal of Financial Economics* 5-50; A Musacchio, 'Law and Finance c. 1900'(2010) NBER working paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648016).

<sup>58</sup> See, eg, D Acemoglu, D Cantoni, S Johnson, and J A Robinson, 'The Consequences of Radical Reform: The French Revolution'(2011) 101(7) *American Economic Review* 3286-3307; D Berkowitz, K Pistor and J-F Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47(1) *European Economic Review* 165-95; A Licht, C Goldschmidt and S H Schwartz, 'Culture, Law, and Corporate Governance' (2005) 25 *International Review of Law and Economics* 229-55; M Roe, 'Legal Origins, Politics and Modern Stock Markets'(2006) 120 *Harvard Law Review* 460-527; D

Last but not least, even if one was to accept the conclusions of econometric studies showing the purported advantages of common law institutions, the inquiry 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<sup>59</sup>

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).<sup>60</sup> The mechanism for the economic superiority of the common law versus French civil law is however intrinsically convoluted and debatable.<sup>61</sup> 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.<sup>62</sup> 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 markets, but in all social contexts (the so-

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Klerman P Mahoney, H Spamann, and M Weinstein, 'Legal Origin or Colonial History?' (2011) 3(2) *Journal of Legal Analysis* 379-409.

<sup>59</sup> This section develops economic arguments suggested by N Garoupa and C Gómez Ligüerre, 'The Syndrome of the Efficiency of the Common Law' (2011) 29 *Boston University International Law Journal* 287-355; N Garoupa and C Gómez Ligüerre, 'The Evolution of the Common Law and Efficiency' (2012) 40 (2) *Georgia Journal of International and Comparative Law* 307-340; N Garoupa and C Gómez Ligüerre, 'The Efficiency of the Common Law: The Puzzle of Mixed Legal Families' (2012) 29(4) *Wisconsin International Law Journal* 671-693; and also M. Pargendler 'The Rise and Decline of Legal Families' (2012) 60(4) *American Journal of Comparative Law* 1043-1074.

<sup>60</sup> See the extensive discussion by K Dam, *The Law-Growth Nexus: the Rule of Law and Economic Development* (Brookings Institution 2006); also, M Roe and J I Siegel, 'Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus' (2009) 47(3) *Journal of Economic Literature* 781-800.

<sup>61</sup> For an attempt to identify the channels for the relationship between legal origin and financial development, see T Beck, A Demirgüç-Kunt and R Levine, 'Law and Finance: Why Does Legal Origin Matter?' (2003) 31(4) *Journal of Comparative Economics* 653-75.

<sup>62</sup> R Posner, *Economic Analysis of Law*, 8th edn (Aspen 2011).

called implicit markets). For example, as Posner claims, 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 efficiency perspective.<sup>63</sup>

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 the common law should be efficient. A remarkable literature emerged in order to find such mechanism. 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.<sup>64</sup>

One explanation for the efficiency of the common law is that judges themselves have a preference for efficiency.<sup>65</sup> Another possible justification is that efficiency is promoted by the prevalence of precedent (more efficient rules are more likely to survive through a mechanism of precedent).<sup>66</sup> A further argument relies on the incentives to bring cases and the role of court litigation (since inefficient rules are not welfare maximizing).<sup>67</sup> Nevertheless, the precise nature of the mechanism that justifies the efficiency hypothesis is problematic, even taking these early explanations into account (these explanations were produced almost immediately after the publication of Richard Posner's thesis).<sup>68</sup>

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 doctrines, taking into consideration that only a self-selected number of cases is actually litigated (that is, not all conflicts get to be solved by courts;

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<sup>63</sup> Ibid.

<sup>64</sup> Evolutionary theory models is the denomination used by P Rubin, 'Micro and Macro Legal Efficiency: Supply and Demand' (2005) 13 *Supreme Court Economic Review* 19-34.

<sup>65</sup> R Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 *Journal of Legal Studies* 103-40.

<sup>66</sup> P Rubin, 'Why is the Common Law Efficient?' (1977) 6(1) *Journal of Legal Studies* 51-63.

<sup>67</sup> G Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6(1) *Journal of Legal Studies* 65-82.

<sup>68</sup> See N Gennaioli and A Shleifer, 'The Evolution of Common Law' (2007) 115(1) *Journal of Political Economy* 43-68; N Gennaioli and A Shleifer, 'Overruling and the Instability of Law' (2007) 35(2) *Journal of Comparative Economics* 309-28; and T J Miceli, 'Legal Change: Selective Litigation, Judicial Bias, and Precedent' (2009) 38(1) *Journal of Legal Studies* 157-76.

common law evolution depends on which conflicts are addressed by courts while legal stagnation is expected for those areas that are not addressed by courts).<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup> 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

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<sup>69</sup> See J Goodman, 'An Economic Theory of the Evolution of the Common Law' (1978) 7(2) *Journal of Legal Studies* 393-406; R Cooter and L Kornhauser, 'Can Litigation Improve the Law without the Help of Judges' (1980) 9(1) *Journal of Legal Studies* 139-63; P Terrebonne, 'A Strictly Evolutionary Model of Common Law' (1981) 10(2) *Journal of Legal Studies* 397-407; P Rubin, *Business Firms and the Common Law: The Evolution of Efficient Rules*, (Praeger 1983); G von Wagenheim, 'The Evolution of Judge-made law' (1993) 13(4) *International Review of Law and Economics* 381-411; V Fon and F Parisi, 'Litigation and the Evolution of Legal Remedies: A Dynamic Model' (2003) 116(3-4) *Public Choice* 419-33; B Depoorter, V Fon and F Parisi, 'Litigation, Judicial Path-dependence, and Legal Change' (2005) 20(1) *European Journal of Law and Economics* 43-56; V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26(4) *International Review of Law and Economics* 519-35; F Parisi and V Fon, *The Economics of Lawmaking* (OUP 2009).

<sup>70</sup> G Hadfield, 'Biases in the Evolution of Legal Rules' (1992) 80 *Georgetown Law Journal* 583-616.

<sup>71</sup> M Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard Law Review* 641-671. In fact, more recently, A Shleifer, *The Failure of Judges and the Rise of Regulators* (MIT Press 2012) defends the rise of regulators in common law jurisdictions largely reflects the failure of judges in providing efficient social control.

<sup>72</sup> See, for example, V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26(4) *International Review of Law and Economics* 519-35.

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 (in the short run, transaction costs might explain why inefficient laws survive). 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 for 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 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 theoretical as well as at the empirical level.<sup>73</sup> 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.<sup>74</sup> Moreover, courts and legislators have their own

<sup>73</sup> See M Crew and C Twight, 'On the Efficiency of Law: A Public Choice Perspective' (1990) 66 *Public Choice* 15-36, arguing that common law is less subject to rent-seeking than statute law; and P Rubin, 'Common Law and Statute Law' (1982) 11 *Journal of Legal Studies* 205-33, arguing that both are influenced by private interests to advance their goals. The most devastating criticism is G Tullock, *The Case Against the Common Law* (Carolina Academic Press 1997) and G Tullock, 'Rent-Seeking and the Law', in C K Rowley (ed), *The Selected Works of Gordon Tullock*, vol. 5 (2005), pp 184-95. See also B Luppi and F Parisi, 'Litigation and Legal Evolution: Does Procedure Matter?' (2012) 152 *Public Choice* 181-201; and J Biser, 'Law-and-Economics: Why Gordon Tullock Prefers Napoleon Bonaparte over the Duke of Wellington, and Why He May End Up on St. Helena' (2014) 158 *Public Choice* 261-279.

<sup>74</sup> See, among others, W Landes and R Posner, 'The Independent Judiciary in an Interest Group Perspective' (1975) 18 *Journal of Law and Economics* 875-901; R. Tollison and W M Crain 'Constitutional Change in an Interest-Group Perspective' (1979) 8(1) *Journal of Legal Studies* 165-175; W M Crain and R Tollison, 'The Executive Branch in the Interest-Group Theory of Government' (1979) 8(3) *Journal of Legal Studies* 555-67; F McChesney, 'Rent Extraction and Rent Creation in the Economic Theory of Regulation' (1987) 16(1) *Journal of Legal Studies* 101-18, discussing several theories of capture in rulemaking; T Merrill, 'Does Public Choice

goals in terms of enhancing their influence, which complicates the potential effect of private interests in lawmaking.<sup>75</sup>

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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

In fact, as noted in the literature, the traditional Posnerian analysis could

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Theory Justify Judicial Activism After All?' (1997) 21(1) *Harvard Journal of Law & Public Policy* 219-30; and T Merrill, 'Institutional Choice and Political Faith' (1997) 22(4) *Law and Social Inquiry* 959-98.

<sup>75</sup> See discussion by A C Pritchard and T J Zywicki, 'Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation' (1999) 77 *North Carolina Law Review* 409-521. For a very interesting comparison between lawmakers and its influence under English and French systems, see J W F Allison, *A Continental Distinction in the Common Law. A Historical and Comparative Perspective on English Public Law* (Clarendon Press 1996).

<sup>76</sup> T J Zywicki, 'Spontaneous Order and the Common Law: Gordon Tullock's Critique' (2008) 135(1-2) *Public Choice* 35-53.

<sup>77</sup> T J Zywicki, 'The Rise and Fall of Efficiency in the Common Law' (2003) 97 *Northwestern Law Review* 1551-633. A more comprehensive discussion is provided by D Klerman, 'Jurisdictional Competition and the Evolution of the Common Law' (2007) 74(4) *University of Chicago Law Review* 1179-226.

<sup>78</sup> See N Garoupa and C Gómez Ligüerre, 'The Syndrome of the Efficiency of the Common Law' (2011) 29 *Boston University International Law Journal* 287-355.

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 piling 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 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<sup>79</sup>) 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.<sup>80</sup>

Even the thesis that French law is less effective than the common law in protecting property rights from state predation is subject to dispute.<sup>81</sup> The current formal models developed to explain these differences are the object of serious criticism.<sup>82</sup> Stability of the law is another possible

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<sup>79</sup> See P Mahoney, 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30(2) *Journal of Legal Studies* 503-25.

<sup>80</sup> See discussion by C Valcke, 'The French Response to the World Bank's Doing Business Report' (2010) 60 *University of Toronto Law Journal* 197-217. See also B Fauvarque-Cosson and A-J Kerhuel, 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law' (2009) 57 *American Journal of Comparative Law* 811-32.

<sup>81</sup> See, for two different perspectives, S Djankov, E Glaeser, F López-de-Silanes, and A Shleifer, 'The New Comparative Economics' (2003) 31 *Journal of Comparative Economics* 595-619; and B Arruñada, 'Property Enforcement as Organized Consent' (2003) 19(2) *Journal of Law, Economics and Organization* 401-44.

<sup>82</sup> For the economic models, see E L Glaeser and A Shleifer, 'The Rise of the Regulatory State' (2001) 41(2) *Journal of Economic Literature* 401-25; and E L Glaeser and A Shleifer, 'Legal Origins' (2002) 117(4) *Quarterly Journal of Economics* 1193-230. For discussion, see F Cross, 'Identifying the Virtues of the Common Law' (2007) 15(1) *Supreme Court Economic Review* 21-59; D Klerman and P Mahoney, 'Legal Origin?' (2007) 35 *Journal of Comparative Economics* 278-93; M Roe, 'Juries and the Political Economy of Legal Origin' (2007) 35(2) *Journal of Comparative Economics* 294-308; H Rosenthal and E Voeten, 'Measuring Legal Systems' (2007) 35(4) *Journal of Comparative Economics* 711-28; G Hadfield, 'The Levers of Legal Design: Institutional Determinants of the Quality of Law' (2008) 36(1) *Journal of Comparative Economics* 43-73; R Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Comparative Law' (2009)

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.<sup>83</sup> Another possibility is the enhanced willingness in common law jurisdictions to allow choice of law. However, 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.<sup>84</sup>

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.<sup>85</sup>

## V. FINAL REMARKS

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57(4) *American Journal of Comparative Law* 765-97; C Milhaupt, 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy' (2009) 57(4) *American Journal of Comparative Law* 831-45; J Reitz, 'Legal Origins, Comparative Law and Political Economy' (2009) 57(4) *American Journal of Comparative Law* 847-862; and R Harris, 'Law, Finance and First Corporations', in J J Heckman, R L Nelson and L Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge 2009), pp 145-72.

<sup>83</sup> See mixed evidence by F Cross, 'Law and Economic Growth' (2002) 80(7) *Texas Law Review* 1737-775.

<sup>84</sup> Moreover, alternative theories might explain why certain institutions, related or unrelated to legal origin, cause economic growth. See, among others, R M Grier, 'Colonial Legacies and Economic Growth' (1999) 98(3-4) *Public Choice* 317-35; D Acemoglu, S Johnson, and J A Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91(5) *American Economic Review* 1369-401; D Acemoglu and S Johnson, 'Unbundling Institutions' (2005) 113(5) *Journal of Political Economy* 949-95; D Acemoglu and S Johnson, 'Disease and Development: The Effect of Life Expectancy on Economic Growth' (2007) 115(6) *Journal of Political Economy* 925-85; D Acemoglu, D Cantoni, S Johnson, and J A Robinson, 'The Consequences of Radical Reform: The French Revolution' (2011) 101(7) *American Economic Review* 3286-3307.

<sup>85</sup> See, among others, N Garoupa and A Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) 35(2) *Journal of Legal Studies* 339-64.

This Article discussed the role of legal families in the comparative law and in the economic literature. We have summarized the traditional approach taken by comparativists 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.<sup>86</sup> How these six factors relate in a meaningful way to legal families is largely under-theorized and generally unanswered.

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.<sup>87</sup> 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.<sup>88</sup>

Statistical analysis seems to show consistent patterns by which a distinction between common and civil law matters for economic development. Extensive critique has challenged the empirical methodology.

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<sup>86</sup> See N Garoupa and A Morriss, 'The Fable of the Codes: The Efficiency of the Common Law, Legal Origins and Codification Movements' (2012) 5 *University of Illinois Law Review* 1443-1497.

<sup>87</sup> <http://www.doingbusiness.org>.

<sup>88</sup> B Arruñada, 'Pitfalls to Avoid when Measuring the Institutional Environment: Is 'Doing Business' Damaging Business?' (2007) 35(4) *Journal of Comparative Economics* 729-747; and K Davis and M Krause, 'Taking the Measure of Law: The Case of the Doing Business Project' (2007) 32 *Law and Social Inquiry* 1095-120. A more comprehensive criticism is provided by B du Marais, 'Les Limites Méthodologiques des Rapports Doing Business' (2006) Working paper AED-2006-01; D Blanchet, 'Analyses Exploratoires des Indices Proposés par les Rapports Doing Business 2005 et 2006 de la Banque Mondiale' (2006) Working paper AED-2006-03; and B du Marais (ed), *Des Indicateurs pour Mesurer le Droit? Les Limites Méthodologiques des Rapports Doing Business* (La Documentation française 2006).

Still, in our view, there is no clear robust theory for the legal origins account, that is, the allegedly consistent patterns suggested by LLSV have not been fully explained. Law seems to matter for growth, and legal institutions are regarded as important by economists. Therefore, a sound theory is needed. Effective legal policymaking cannot possibly be based on mere statistical patterns; it requires a deep understanding of causation mechanisms. Comparativists should get involved in that discussion instead of avoiding engagement based on the prevailing skepticism about legal families.