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CORPORATE LAW FIRMS, NGOS, AND ISSUES OF LEGITIMACY FOR A GLOBAL LEGAL ORDER

Yves Dezalay & Bryant G. Garth***

INTRODUCTION

The dream of legal globalization was well stated by then-Secretary of State Warren Christopher in his 1995 article in *Foreign Policy*.¹ Explicitly drawing on the legacy of the elite corporate lawyers identified with the U.S. foreign policy establishment,² he characterized the Clinton Administration's foreign policy as follows: "We have put in place the building blocks of a more prosperous, more secure, more democratic world that will serve our national interests well into the twenty-first century."³ Enumerating achievements and outlining an agenda for the future, Christopher called for the strengthening and elaboration of institutional structures that aspire to entrench the norms of free trade and democracy: "These institutions have set and enforced rules of conduct among an increasing number of nations. . . . They have given structure, legitimacy, and strength to the common enterprise of Western democracies: avoiding war and promoting global economic growth."⁴

Christopher's perspective connected the legal structures designed to entrench the rules for global trade and investment to the role of law in protecting democracy and human rights. The legitimacy of the new global order, he believed, depended on success on both sides of global law.⁵ But the dynamics of world politics have changed considerably since Christopher posited his views in 1995. The War on Terror and the global recession have shaken the faith in an emerging global rule of law.⁶ The emergence of China as a huge economic power has raised the question whether it is a

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1. See generally Warren Christopher, *America's Leadership, America's Opportunity*, 98 FOREIGN POL'Y 6 (1995).

2. See generally Yves Dezalay & Bryant G. Garth, *Law, Lawyers, and Empire*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–) 718, 722–30 (Michael Grossberg & Christopher Tomlins eds., 2008) [hereinafter LAW IN AMERICA].

3. Christopher, *supra* note 1, at 7.

4. *Id.* at 13.

5. *Id.*

6. See generally PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* (2005).

“threat to the west or model for the rest,” as Randall Peerenboom states.⁷ But the various projects of legalization continue apace in most parts of the world, including within China.⁸ There is no inevitability to this U.S. global aspiration, but there continues to be growth in the role of law and lawyers in global governance.⁹

The proliferation of U.S.-style corporate law firms is one well-documented feature of legal globalization. As Carole Silver’s research shows, from 1988 to 2008, the number of overseas offices supported by the *National Law Journal*’s list of the 250 largest U.S. firms nearly quadrupled, and the number of lawyers working in these overseas offices increased by a factor of twelve.¹⁰ Despite the increasing prevalence of U.S. law degrees, two-thirds of the lawyers in the overseas offices were educated exclusively outside the United States.¹¹ The large multinational law firms based in the United States have assimilated local connections and talent to go with U.S. and global expertise.¹² The Magic Circle of British solicitors’ firms, as well as firms from Australia and elsewhere, are also aggressively pursuing the global-local path with considerable success.¹³

Additionally, a number of local firms of varying sizes can be counted among the globally oriented corporate firms. They often act as a modern-day version of the compradors, who historically served as brokers for the colonial ventures of dominant Western states.¹⁴ Like the compradors of an earlier era, these local firms have learned to speak two legal and cultural languages—one oriented internationally and one locally.¹⁵ The local

7. This language is borrowed from RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2007).

8. See THOMAS LUM, CONG. RESEARCH SERV., RS 22663, U.S. ASSISTANCE PROGRAMS IN CHINA 5–6 (2011) (discussing China).

9. See generally YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE (2010); David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757 (2000). A recent book by DAVID C. KANG, EAST ASIA BEFORE THE WEST: FIVE CENTURIES OF TRADE AND TRIBUTE (2010), makes the point that the social, cultural, and political hegemony of China in the earlier period has not been replicated despite China’s recent global ascendancy. See *id.* at 169.

10. Carole Silver, *The Variable Value of U.S. Legal Education in the Global Legal Services Market*, 24 GEO. J. LEGAL ETHICS 1, 1–2 (2011).

11. See *id.* at 16.

12. See *id.*

13. See Caroline Binham, *Beyond the Magic Circle*, FIN. TIMES (June 29, 2011, 10:27 PM), <http://www.ft.com/cms/s/0/cf1fbf90-a278-11e0-9760-00144feabdc0.html#ixzz1UkndKLeS>. The *American Lawyer*’s Global 100 lists Magic Circle firms as two of the top four and four of the top seven in gross revenue for the 2009 fiscal year. Magic Circle firms made up four of the top eight in fiscal year 2010 gross revenue. Five Australian firms were in the top 100 in both fiscal years 2009 and 2010. See *The Am Law Global 100*, AM. LAW., <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202514393371> (last visited Apr. 21, 2012) (listing Magic Circle firms Clifford Chance, Linklaters, Freshfields Bruckhaus Deringer, Allen and Overy, and Slaughter and May, and Australian firms Minter Ellison, Mallesons Stephen Jacques, Allens Arthur Robinson, Freehills, and Clayton Utz).

14. See Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China’s Corporate Law Market*, 42 LAW & SOC’Y REV. 771, 778–80 (2008).

15. See YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 284–88 (1996).

relationship varies considerably for these double agents, who are situated between global corporate law and local structures of power.¹⁶ In the extreme case, as occurred in the past in a number of colonial outposts such as late nineteenth-century Shanghai,¹⁷ foreign and foreign-oriented ventures are confined to a limited geographic or economic sphere.¹⁸ The local impact from international influence is then relatively limited. In other cases, the lawyers serving international business interests may use transnational connections to build their political and economic position within local structures of state power.

These lawyers can even play the role of modernizers, armed with the expertise and credibility that comes from connections with foreign trade and investment. In these cases, the lawyers import the transnational legal expertise, and deploy (and transform) it in local contexts.¹⁹ They may bring New York, British, and French contract law, the practices of international commercial arbitration, rules governing trade stemming from the World Trade Organization (WTO) and its decisions, corporate governance rules connected to global finance, anti-corruption practices, and much more.²⁰ Ultimately, they may facilitate the importation of sets of transnational rules and practices, and promoters of globalization and the rule of law indeed aspire to this “modernizing” result.

The well-documented spread of corporate law firms globally and nationally is paralleled by a rise in the number of legally oriented Non-governmental Organizations (NGOs) also operating at all levels.²¹ NGOs now occupy a wide variety of positions locally and at the transnational level.²² A number are opposed to, or seek to moderate, the neo-liberal

16. See DEZALAY & GARTH, *supra* note 9, at 19–20.

17. See *id.* at 35–37. See generally Tahirih V. Lee, *Risky Business: Courts, Culture, and the Marketplace*, 47 U. MIAMI L. REV. 1335 (1993) (describing the evolution of the “mixed court” based in a foreign enclave in Shanghai).

18. See DEZALAY & GARTH, *supra* note 9, at 35–37.

19. See generally YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002) (examining the import and export of technologies of governance from the North to Latin America).

20. See *id.* at 198–219.

21. On the globalization of public interest law, see generally Scott L. Cummings and Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT’L L. & FOREIGN AFF. 1 (2008); Fabio de Sa e Silva, *The World of Public Interest: Law and Globalization in the Everyday Lives of Advocates* (2011) (unpublished Ph.D. research project, Northeastern University School of Law) (on file with author).

22. Reportedly, “the number of known international NGOs increased from about 13,000 in 1981 to over 47,000 by 2001.” Shepard Forman & Derk Segaar, *New Coalitions for Global Governance: The Changing Dynamics of Multilateralism*, in 12 GLOBAL GOVERNANCE 205, 214 (2006). The World Bank estimates that the number of World Bank projects led by NGOs, as opposed to governmental organizations, increased from an average of 28 percent in 1987–96, to 50 percent in 1998. WORLD BANK, ANNUAL REPORT 1999, at 139 (1999), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/06/13/000094946_99101505321247/Rendered/PDF/multi_page.pdf. See generally GLOBALIZATION, PHILANTHROPY, AND CIVIL SOCIETY: PROJECTING INSTITUTIONAL LOGICS ABROAD (David C. Hammack & Steven Heydemann eds., 2009) (showing how philanthropic efforts from the United States project U.S. approaches and therefore seek to enhance “civil society” abroad); RESTRUCTURING WORLD POLITICS:

policies associated with globalization—such as free trade, privatization, free movement of capital—in favor of indigenous rights and environmental protection, for example. The World Social Forum has brought together many of these groups.²³ Numerous NGOs are conduits for projects funded by the World Bank and national development agencies.²⁴ Those employing law and lawyers tend to be among the more elite and better funded NGOs.²⁵ Prominent philanthropic foundations, such as the Asia Foundation and the Ford Foundation, and development agencies, such as the United States Agency for International Development (USAID), the World Bank, and many others, also continue to invest heavily in legally oriented NGOs and the idea of “legal empowerment.”²⁶ Considerable investment, for example, is going from the Ford Foundation to legal aid and to civil and criminal justice reform in China.²⁷

There is a body of prescriptive literature that sees these proliferating legal organizations—law firms and NGOs—as tools for the spread of liberal democracy and the rule of law.²⁸ The literature is consistent with a longstanding belief of the liberal establishment in the United States that free trade, open doors to foreign investment, the rule of law, and democracy all go hand in hand.²⁹ This approach took shape notably in the Philippines after the Spanish-American War at the turn of the twentieth century.³⁰ The Philippines became the model, training ground, and to some extent, the showplace for this kind of desired evolution.³¹ Warren Christopher descended from this tradition.³²

The community of rule-of-law supporters operates as if law is a form of contagion that can spread from any number of bases. As Matthew Stephenson wrote, focusing on China, one way to see this is that reform in one area represents a “Trojan horse” for the legalization of the state and the

TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS (Sanjeev Khagram et al. eds., 2002) (tracing the rise and impact of NGOs as transnational advocacy groups).

23. See Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 29, 44–46 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

24. See WORLD BANK, *supra* note 22, at 139.

25. See de Sousa Santos, *supra* note 23, at 56.

26. JOHN W. BRUCE ET AL., U.S. AGENCY FOR INT’L DEV., *LEGAL EMPOWERMENT OF THE POOR: FROM CONCEPTS TO ASSESSMENT* (2007).

27. See *Grant Search Results*, FORD FOUND., <http://www.fordfoundation.org/Grants/Search?searchphrase=law> (last visited Apr. 21, 2012).

28. See, e.g., Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for Int’l Peace Rule of Law Series, Working Paper No. 41 2003), <http://www.carnegieendowment.org/files/wp41.pdf>; David B. Wilkins, *Globalization, Lawyers and the Rule of Law: Private Practice and Public Values in the Global Market for Corporate Legal Services* (June 21, 2011), http://www.law.harvard.edu/programs/plp/pdf/Globalization_Lawyers_Rule_of_Law.pdf (remarks at the World Justice Forum).

29. See DEZALAY & GARTH, *supra* note 9, at 57–61; EMILY ROSENBERG, *SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC AND CULTURAL EXPANSION 1890–1945* (Eric Foner ed., 1982).

30. See ROSENBERG, *supra* note 29, at 51–57.

31. See *id.*

32. See Christopher, *supra* note 1, at 7–8.

economy more generally.³³ Many observers hope, for example, that reform in the area of commercial law will lead to more recognition of individual civil rights.³⁴ Similarly, they hope that reform in the method of legal instruction, or the development of legal clinics, will teach critical thinking that will lead to more leadership by law graduates in expanding the role of law and lawyers.³⁵ Or, as mentioned above, they look to the rise of corporate law firms as a means to expand legal opportunities for individuals and build the autonomy of the courts.³⁶ With respect to China, for example, the creation of legal aid organizations, membership in the WTO, the rise of corporate law, and the reform of legal education to create a more U.S.-style of teaching³⁷ have all been hailed at various times as bases to bring the rule of law to China's economy and government.³⁸ There is particular attention, as we suggested in our introduction, to the role of corporate law firms on one side and legally oriented NGOs on the other.³⁹

We frame this issue of spillover in a somewhat different manner than the literature on corporate law firms, legal educational reform, legal NGOs, or legal aid.⁴⁰ Our sociological approach to spillover focuses on institutions that facilitate or accelerate spillover processes by providing mechanisms for circulation (and conversion) of legal capital. Drawing on Pierre Bourdieu here, as in our other studies,⁴¹ we employ the concept of a field—for the present study, the legal field. We use the concept of the field to describe semi-autonomous spaces in which actors compete by using various forms of capital (economic, social, cultural, or political). They compete both about and in terms of the rules of the game of the field. Thus, the term “field”

33. Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 78 (2000).

34. *See id.*

35. *See generally* Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 J. LEGAL EDUC. 60 (2009).

36. *See* Wilkins, *supra* note 28, at 4–6.

37. Jeffrey Lehman, the founding dean of a U.S. law school in Beijing, claimed that “a rigorous application of legal pedagogy can train students who might in the future work to strengthen China's rule of law and its institutions.” Andy Guess, *An American Law School in China*, INSIDE HIGHER ED (May 22, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/05/22/china>.

38. Erie, *supra* note 35, at 76–80, 86–90. *See generally* ESTHER LAM, CHINA AND THE WTO: A LONG MARCH TOWARDS THE RULE OF LAW (2009) (linking WTO membership with evolution toward the rule of law).

39. *See generally* Golub, *supra* note 28 (focusing on legal empowerment through NGOs); Wilkins, *supra* note 28 (discussing how corporate law firms could contribute to the spread of the rule of law).

40. Portions of the following discussions draw on Yves Dezalay and Bryant G. Garth, *Conclusion: How to Convert Social Capital into Legal Capital and Transfer Legitimacy Across the Major Practice Divide*, in LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 260 (Yves Dezalay & Bryant G. Garth eds., 2011) [hereinafter LAWYERS AND THE RULE OF LAW], and Yves Dezalay and Bryant G. Garth, *Marketing and Legitimizing Two Sides of Transnational Justice: Possible Trajectories Toward a Unified Transnational Field*, in LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE 277 (Yves Dezalay & Bryant G. Garth eds., 2012) [hereinafter TRANSNATIONAL JUSTICE].

41. *See, e.g.*, PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY (1992).

embodies a broader concept than simply the sum of the institutions that operate in any given field.

We employ the concept of the legal field for our research, but the contours and operation of any legal field cannot be determined a priori. To say there is a national or transnational legal field, for example, does not necessarily mean that different subfields operate by rules that lead to the prosperity of the field as a whole. The relationships can only be determined through empirical research, in particular through qualitative research into the actors, the capital that they bring to the field, the institutions and organizations that they create and operate, and the trajectories that actors and institutions follow.

For the question of spillover, it is especially important to examine channels for the circulation of agents between different national (and transnational) legal fields or within different domains (for example, corporate vs. human rights), as well as between the legal and political arenas. In other words, processes of spillover can be multi-directional, both within national spaces and between different areas of legal practice. The convergence and complementarity between parallel phenomena determine whether spillover is accelerated or limited. The crossing of borders provides opportunities for reconversion and acceleration of this kind of spillover. The topic opens up many possibilities for research. Here, we offer only some tentative suggestions based largely on research that we have undertaken, while focusing mainly on other questions.⁴² Drawing on that research, we take up the issue of whether what can be termed potential “subfields” of a more general legal field may be linking up in the way that Christopher idealized and deemed central to the legitimacy of transnational and national governance.⁴³

Studies of law—or the legal field, which as we noted is a broader and more open concept—in the United States reveal structures of rewards and careers that orient actors toward both corporate law and public service, combining to build the prosperity of the field as a whole.⁴⁴ Those who have the highest position in corporate law draw in part on stature earned through public service, and correspondingly, public interest law firms (and also the government, for example) gain credibility and stature through the corporate lawyers who typically serve on their boards.⁴⁵ Higher-status public interest entities have higher-status corporate law firms providing pro bono volunteers and higher-status corporate lawyers serving on their boards.⁴⁶ Similarly, the same elite credentials that qualify law graduates for the top law firms also qualify them for the top public interest

42. See, e.g., DEZALAY & GARTH, *supra* note 9; DEZALAY & GARTH, *supra* note 15; DEZALAY & GARTH, *supra* note 19.

43. See Christopher, *supra* note 1, at 7.

44. See DEZALAY & GARTH, *supra* note 9, at 49–51.

45. See Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in 12 *SOCIOLOGY OF CRIME, LAW, AND DEVIANCE, ACCESS TO JUSTICE* 145, 151–57 (Rebecca L. Sandefur ed., 2009). See generally Bryant Garth, *Noblesse Oblige as an Alternative Career Strategy*, 41 *HOUS. L. REV.* 93 (2004).

46. See Daniels & Martin, *supra* note 45, at 151–53.

organizations.⁴⁷ Even within elite legal education, the debates about the choices of careers are framed as if these two elite careers—by contrast, for example, a career in small firms primarily serving individuals—define the set of appropriate options.⁴⁸

This orientation of the legal field in the United States gives strength and legitimacy to law in the more general field of state power, which is central to the overall prosperity of law and lawyers. The massive commitment of elite law graduates to the service of major corporations⁴⁹ does not disqualify law as the leading language of governance and lawyers as key members of the ruling elite. The reason is that public service and public interest law remain central to the legal field. As Robert Gordon and others have noted, the legitimization of Wall Street law firms at the turn of the twentieth century through investment in good government and progressive politics built the position of corporate lawyers as the key players of the foreign policy establishment.⁵⁰ They built complementary places in the fields of economic and state power.⁵¹ The incentives of actors in different subfields promoted the success of the field as a whole.⁵² Furthermore, law schools became national law schools, and success in national law schools and in nationally oriented careers translated into power and success within local legal fields.⁵³

It is not surprising that the globalization of law in the era of U.S. hegemony has raised the question of the ability to construct something similar globally to what has long existed in the United States. Christopher's prescription for U.S.-style globalization, as noted above, follows precisely in the tradition of his mentor, Cyrus Vance, and other pillars of the foreign policy establishment.⁵⁴ The recipes include human rights and democracy on one side, and liberal trade policy on the other—with the link between the two as the key to lasting legitimacy.⁵⁵ As Scott Cummings and Louise Trubek note:

That public interest law has come to play an important role in simultaneously advancing and contesting globalization should in some ways come as no surprise. To the degree that globalization is built upon the legal architecture of American-style liberal capitalism, one would

47. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 914–15 (1995).

48. See, e.g., RICHARD D. KAHLENBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* 3–10 (1992).

49. See, e.g., JOHN HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 42 (2005).

50. See, e.g., Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 51–74 (Gerald W. Gawalt ed., 1984).

51. See Robert W. Gordon, *The American Legal Profession 1870–2000*, in *LAW IN AMERICA*, *supra* note 2, at 73, 92–98; see also Dezalay & Garth, *supra* note 2, at 722–26.

52. Cf. Dezalay & Garth, *supra* note 2, at 722–26; Gordon, *supra* note 51, at 92–98.

53. Cf. Gordon, *supra* note 51, at 75–81.

54. See DEZALAY & GARTH, *supra* note 9, at 57–61.

55. See *id.*

expect public interest law to occupy a similar position on the global stage as it does in the United States⁵⁶

The mutually reinforcing legal credibility in political and economic fields that we see in the United States provides a potential indicator of success in the project of building a stronger position of lawyers—and the so-called rule of law—at national and transnational levels. Despite its taken-for-granted history in the United States,⁵⁷ spillover cannot be presumed either at the national or transnational level. The U.S. model is a historical product embedded in U.S. politics and the U.S. social structure.⁵⁸ There has long been an emphasis in the United States on circulation and conversion as mechanisms for continuously reproducing and reinventing the social legitimacy of lawyers.⁵⁹ This process is much more limited in Europe and in colonial settings.⁶⁰ The profession has been less open and more limited in terms of social class in Europe and in European colonies, and the links between lawyers serving business and politically active lawyers have been more attenuated.⁶¹

U.S. discourse—coming from the distinctive U.S. approach⁶²—naturally focuses on spillover. The traditional European model,⁶³ whether in Europe or transplanted as part of European colonial processes, poses significant challenges to the successful export and import of the U.S. model. As was the case for the earlier export of European models,⁶⁴ the U.S. model relies on a process of hegemonic diffusion into dependent societies.⁶⁵ And, as with respect to earlier periods and other hegemonic nations, imperial strategies are promoted as universal. They are presented as part of a civilizing process, as modernization, or as some other benevolent project to improve others according to the standards of the imperial power.⁶⁶ And, as with respect to other empires and universals, success is by no means assured.

In the following parts of this Article, we explore two complementary channels of diffusion of the U.S.-style rule of law. The first is symbolic export from the global North to the global South. There, the focus is on national justice and the domestic rule of law. The second form of diffusion is the construction of transnational justice involving purportedly global norms. We examine each of these closely related channels in turn, focusing on whether the process of diffusion and spillover potentially brings both sides of justice—economic and political—and whether any emerging

56. Cummings & Trubek, *supra* note 21, at 3.

57. *See generally* Gordon, *supra* note 51.

58. *See* DEZALAY & GARTH, *supra* note 9, at 49–61, 107–11.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See* Gordon, *supra* note 51, at 92–104.

63. DEZALAY & GARTH, *supra* note 9, at 22–31.

64. *See id.* at 2–34.

65. *See id.* at 49–61.

66. *See generally* JENNIFER PITTS, *A TURN TO EMPIRE: THE RISE OF IMPERIAL LIBERALISM IN BRITAIN AND FRANCE* (2005).

transnational legal field is strong enough to play a major role in shaping national legal fields, another form of spillover.

I. CONVERTING SOCIAL CAPITAL INTO LEGAL CAPITAL:
THE NATIONAL RULE-OF-LAW ALCHEMY

From the perspective of many countries, the question of spillover can be restated as the age-old question of whether the rule of law will replace the power of personal relations.⁶⁷ The issue is especially pervasive in writing about the enduring power of *guanxi* in China.⁶⁸ A variation of that same dichotomy seen in recent literature on Asian law is that of administrative regulation versus the rule of law.⁶⁹ The power of the Korean or Japanese bureaucracy or the Chinese Communist Party, for example, is contrasted with the law and the courts.⁷⁰

One manifestation of the perceived problem is the close relationship between the bureaucracy (or the party) and business.⁷¹ One criticism is that the mutual dependence of business and bureaucracy inhibits investment from outsiders and independent entrepreneurs; another is that the lack of transparent rules and practices deters investment generally.⁷² Reformers seek to make law and lawyers the key to the interactions between the state and business, and between businesses.⁷³ Another manifestation is in the dichotomy of machine politics and patronage versus law.⁷⁴ As suggested at the outset, both of these manifestations are especially salient with respect to Asia, which is seen as a particular challenge to the universals hailed in the U.S.-style rule of law. The term “crony capitalism” is in part meant to capture the kind of governance of the state and the economy thought to be inconsistent with transparency and the rule of law.⁷⁵

67. See generally Carol A.G. Jones, *Capitalism, Globalization, and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 SOC. & LEGAL STUD. 195 (1994) (contrasting Confucian approaches in Asia versus the Western rule of law).

68. See *id.* at 197 (describing *guanxi* as the “rule of relationships”); see also *id.* at 211–15.

69. See Tom Ginsburg, *The Politics of Transparency in Japanese Administrative Law*, in LAW IN JAPAN: A TURNING POINT 304, 304–33 (Daniel H. Foote ed., 2007).

70. See *id.*

71. A typical example is a 2006 Special Edition of the *McKinsey Quarterly*, which begins with the statement, “Two starkly contrasting futures exist for China; a market economy under the rule of law or crony capitalism.” Wu Jinglian, *The Road Ahead for Capitalism in China*, MCKINSEY Q. (2006), available at http://www.relooney.info/00_New_2477.pdf

72. See, e.g., Kanishka Jayasuriya, *Introduction: A Framework for the Analysis of Legal Institutions in East Asia*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 1, 1–10 (Kanishka Jayasuriya ed., 1999).

73. This point is made by Saegusa in her discussion of legal education reform in Japan. Mayumi Saegusa, *Why the Japanese Law School System Was Established: Cooptation as a Defensive Tactic in the Face of Global Pressures*, 34 LAW & SOC. INQUIRY 365, 377–78 (2009).

74. See Jinglian, *supra* note 71, at 119–20.

75. See DAVID C. KANG, CRONY CAPITALISM: CORRUPTION AND DEVELOPMENT IN SOUTH KOREA AND THE PHILIPPINES 1–20 (2002).

The problem of spillover in this context is whether the rule of law can be strengthened by the various activities that are now being promoted by reformers from the West. There is the hope that, for example, better teaching in the law faculties will strengthen the position of lawyers and make them leading problem solvers; that the creation of legal aid programs will lead citizens to see the law as a tool for the enforcement of rights; or that the proliferation of corporate lawyers and law firms will reshape business conduct away from the dominance of personal relationships toward more legally based transactions. Each program, according to reformers, has the potential to make law count more and personal relations count less in China.

Our approach begins with the idea that these dichotomies—variations on law versus personal relations—are not in opposition to each other but rather are potentially complementary. The social capital of personal relationships and legal capital do not represent opposing approaches. The legal requires the personal, and the personal may gain from the legal. Legal capital gains value to the extent that social capital is embedded in the law. Similarly, the power of social and economic relations can be strengthened through the legitimacy that the law can provide.

The issue of spillover at the national level therefore turns on the question of how and whether activities in a sector of law and the legal field lead to the accumulation of social capital that can be transformed into legal capital. Put in our sociological terms, therefore, we examine the continuing renegotiation of the rate of exchange and division of role in that process. The renegotiation process involves not only personal relations, the state, and the party, but also relationships between different governing knowledge and different ideologies. Stated simply, the power and legitimacy of law and lawyers depends on the law's relationship to state capital, family capital, and economic capital in particular. To the extent that those with the advantages of family, resources, and access to the machinery of government invest in law and use law and legal language to legitimate their power, the legal field will gain strength. Conversely, if lawyers do not attract the well connected and powerful, and if lawyers are cut off from state and economic power, the legal field will be weakened.

Focusing on Asia as a particular test, the challenge can be stated simply. China, Japan, and South Korea are the largest economies in Asia; each developed historically within the Chinese Confucian sphere, and that history arguably fortifies a different approach to governance than the approach promoted in the West.⁷⁶ Further, since World War II, the models for development of all three countries have differed from the West's preferred paradigm.⁷⁷ South Korea and Japan helped define the East Asian model of state-led and export-driven development,⁷⁸ and China, led by the

76. See generally KANG, *supra* note 9.

77. See, e.g., FISHLOW ET AL., *MIRACLE OF DESIGN? LESSONS FROM THE EAST ASIAN EXPERIENCE* (1994).

78. ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 73–112 (2003).

Communist Party, has experienced a gradual opening to capitalist initiatives.⁷⁹

We do not have the space to explore the particular mechanisms of governance in these three countries, but we can make a few observations about the place of law and lawyers, and how that place might be changing in relation to globalization. We draw on the recent literature to see if there is evidence of a strengthened role for law and lawyers in the state or in the economy—or gaining strength in both, as in the idealized version of law in governance.

The first concern, as noted above, is the extent to which social capital is becoming embedded in the law. The Chinese legal profession is divided between a relatively small corporate bar and the large rank and file of mainly criminal lawyers.⁸⁰ The literature suggests that the criminal bar remains relatively marginal and, for the most part, weak in valued capital such as relationships to the Communist Party and the government.⁸¹ In fact, Ethan Michelson explains that those in the criminal bar with the closest connections to the government or former government careers are more likely to have a relatively high opinion of the legal system.⁸² The relative status of these lawyers leads them to be taken more seriously and therefore to be better able to resist the interference of local party officials and bureaucrats.⁸³ The corporate bar in China has accumulated more status, but it remains in a situation reminiscent of the colonial bar found historically in foreign enclaves.⁸⁴ The corporate lawyers mainly serve as go-betweens for foreign clients investing in or trading with the Chinese.⁸⁵ It does not appear that corporate lawyers are playing any role in Chinese politics, much less in any effort to legalize politics.⁸⁶ Thus, the evidence to date for spillover fueled by the accumulation of social capital into legal capital is very thin in China, despite any number of reform projects promoted by the West.⁸⁷

The Japanese bar, by contrast, has a long commitment to social justice issues, and Japanese lawyers enjoy the prestige that accompanies the bar's very small size and prosperity.⁸⁸ From that perspective, again in contrast to

79. See, e.g., PEERENBOOM, *supra* note 7, at 26–81.

80. See Randall Peerenboom, *Searching for Political Liberalism in All the Wrong Places: The Legal Profession in China as the Leading Edge of Political Reform?*, in *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 239, 248, 250.

81. See Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, in *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 39, 42–43; Peerenboom, *supra* note 80, at 250–52.

82. Michelson, *supra* note 81, at 50–53.

83. *Id.*

84. See Sida Liu, *Client Influence and the Contingency of Professionalism: The Work of Elite Corporate Lawyers in China*, 40 *LAW & SOC'Y REV.* 751, 758–63 (2006).

85. See *id.*

86. Peerenboom, *supra* note 80, at 248.

87. Dezalay & Garth, in *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 263–65.

88. Malcolm Feeley & Setsuo Miyazawa, *The State, Civil Society, and the Legal Complex in Modern Japan: Continuity and Change*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL CHANGE* 151, 175 (M. Feeley et al. eds., 2008).

China, the bar appears to have built up credibility and social capital. But there are strong limits that disconnect the Japanese bar from politics and the economy. When the increasingly powerful military asserted itself in the period between World Wars I and II, the independent bar found a small but highly profitable niche as litigators, and its lawyers were fortified with legitimacy as moral champions of social justice.⁸⁹ Lawyers in Japan had considerable prestige, but the number of lawyers admitted to the bar was very small. The state had relatively little difficulty thwarting the efforts of lawyers to take on new terrain and play a role representing new social groups or interests.⁹⁰ Similarly, the Japanese corporate bar did not develop in a way that facilitated movement into state power or economic power.⁹¹

We can surmise that the long pedigrees of the Japanese business interests—the keiretsu groups—linked them directly to the Japanese state bureaucracy and governing party.⁹² The existing establishment in Japan was relatively cohesive, and that cohesiveness was maintained after World War II.⁹³ Legitimacy was assured with the continuity of the Emperor on the one hand, and electoral democracy on the other. As with China, there was no crisis of legitimacy—for example, a discredited authoritarian state, overactive military, etc.—which internationally oriented lawyers could use to build up their role in the field of state power. Further, since the economy was relatively closed for much of the period after World War II,⁹⁴ the corporate bar did not benefit from the growth and legitimacy that might be grounded on a strong foreign clientele. The corporate bar is certainly growing. There is evidence that graduates of the most prestigious schools have shifted career priorities in favor of the corporate law firms,⁹⁵ but this growth has been relatively recent.

In these circumstances, the social capital that Japanese lawyers possessed has not converted to state capital. Stated in the language of spillover, the legitimacy for one part of legal practice—the more traditional litigation practice—has moved slowly both to corporate law and to state power, and vice versa. To date, the spheres are very separate. Lawyers have not been able to accumulate the requisite social capital. In some respects, therefore, the bar in Japan is in a far better position than its Chinese counterpart, but there has not been much opportunity for lawyers to make themselves useful as brokers between business and state interests, and between such interests and international investors.

89. *Id.* at 163.

90. *Id.*

91. See Kay-Wah Chan, *The Reform of the Profession of Lawyers in Japan and Its Impact on the Role of Law*, in *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 185, 191–97.

92. See *id.* at 186–87.

93. See, e.g., CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925–1975* (1982).

94. *Id.* at 83–115.

95. See Chan, *supra* note 91, at 196–97; Curtis J. Milhaupt & Mark D. West, *Law's Dominion and the Market for Legal Elites in Japan*, 34 *LAW & POL'Y INT'L BUS.* 451, 466–74 (2003).

In South Korea, by contrast, we see a faster transformation than in the other contexts largely because of the decline in legitimacy for the military and authoritarian government.⁹⁶ As in Japan, there was a small but relatively prestigious legal profession (indeed built by the Japanese),⁹⁷ and a well-established corporate bar focused on foreign trade and investment.⁹⁸ The authoritarian regime, which lasted until the late 1980s, saw a number of lawyers who championed the victims of military repression.⁹⁹ They could then present themselves as organic intellectuals of the new social forces emerging with the transition to democracy. The activists and the corporate bar had very strong ties to the United States, and could draw on those links and the ideology of empowering civil society and law to promote non-radical democratic politics.¹⁰⁰ The politics offered a strong role for lawyers who had previously been marginalized in the military regime.¹⁰¹ In the language of capital exchange, these lawyers were well positioned to obtain a favorable rate of exchange for their legal capital in the relationship between the representatives of the old regime—the chaebols,¹⁰² economists linked to the United States, and others—and the new groups emerging after democracy and liberalization. The circumstances of a political crisis of the authoritarian regime—fueled both by domestic and international opposition (since the United States, with the end of the Cold War, no longer supported authoritarian anti-communist regimes)¹⁰³—changed the terms quickly and moved lawyers, including a number of corporate lawyers, into much stronger positions in the field of state power. Another feature of South Korea was the number of Korean-Americans who returned both before and after democratization, with many working in the large corporate law firms.¹⁰⁴ They strengthened the ability of Korean firms to handle major transactions involving global trade and commerce, and they also brought a capital of relationships and credentials from the United States.

When guns and economists were not enough for international credibility, lawyers could speak the international language of democracy and human rights, and build U.S.-like institutions to promote those views. The relatively quick accumulation of social capital into legal capital in South Korea has, in contrast to China and Japan, strongly increased the value of legal capital and therefore the strength of the legal field.

Indonesia represents a similar case worthy of note. Because of its importance in the Cold War,¹⁰⁵ Indonesia, like South Korea, was strongly

96. See Kim Seong-Hyun, *The Democratization and Internationalization of the Korean Legal Field*, in *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 217, 230–32.

97. See *id.* at 220–21.

98. See *id.* at 222–28.

99. See *id.* at 228–30.

100. See *id.*

101. See *id.* at 230–32.

102. See DEZALAY & GARTH, *supra* note 9, at 242–45.

103. See *id.* at 237–42.

104. *Id.* at 241; Kim, *supra* note 96, at 225.

105. See ADAM SCHWARZ, *A NATION IN WAITING: INDONESIA'S SEARCH FOR STABILITY* 22 (1999).

embedded in the U.S. marketplace of ideas and intellectual exchange.¹⁰⁶ Here, too, U.S.-trained economists as technocrats provided an essential part of the original legitimacy of the military's authoritarian regime, and the U.S. generally helped to sustain the regime as a bulwark against communism.¹⁰⁷ Although lawyers were mainly outside the government, they built a role as corporate lawyers serving investors from abroad who poured money into Indonesia when Suharto opened up the economy in the mid-1960s.¹⁰⁸ The attraction of raw materials and a divided economy, owned in part by the government and the military and in part by ethnic Chinese families,¹⁰⁹ provided opportunities for elite lawyers to build a brokering and mediating role. Their elite status and foreign connections also allowed these lawyers to combine their profitable service as corporate lawyers with investment in legal aid and human rights. These initiatives were more or less tolerated by the Suharto government because of their relative moderation, as well as the social position of the lawyers and their ties to the United States.¹¹⁰ They were therefore able to rebuild some of the stature lost during the Cold War and the developmental state.

What began in the 1970s in Indonesia gained strength in the 1980s—especially after the financial crisis toppled Suharto—and now has emerged a generation later as a taken-for-granted role for lawyers in and especially around state power.¹¹¹ As in China, philanthropy and development assistance have gone into legal aid and a variety of forms of public interest law, but the spillover successes came from the relationship of that investment to brokers well connected to the Indonesian state and economy. Lawyers with international connections and training are at the forefront of today's modernization in Indonesia.

There is another dimension to the question of the legitimacy of law and lawyers—and the likely spillover across sectors of the profession—that we have not yet addressed. The market of legal education has a potential role to play. Legal education is one of several important places for the production of the legitimacy of law. It is a place where social capital and political capital can be turned into legitimate legal capital. We develop this point further in the concluding part of this Article, but first continue the emphasis on Asian countries and the potential challenge they provide for spillover and more general legal legitimacy. Interestingly, China, Japan, and South Korea have all recently stepped up their efforts to Americanize their legal education.¹¹² We contrast these efforts in the remainder of this part.

Lawyer-activists in South Korea early in the twenty-first century came up with the idea of moving the undergraduate system of legal education toward

106. See DEZALAY & GARTH, *supra* note 9, at 121–28.

107. See BRADLEY SIMPSON, *ECONOMISTS WITH GUNS: AUTHORITARIAN DEVELOPMENT AND U.S.-INDONESIAN RELATIONS 1960–68*, at 219–36 (2008).

108. See DEZALAY & GARTH, *supra* note 9, at 218–26.

109. *Id.*

110. *Id.* at 223.

111. See *id.* at 224–26.

112. Dezalay & Garth, *in* *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 263.

the graduate J.D. model found in the United States.¹¹³ The idea was picked up in Japan, and in 2004, Japan was the first of the two to adopt this new approach.¹¹⁴ The hope of reformers in Japan was to increase the supply of lawyers—in particular, corporate lawyers—who would serve Japanese and foreign businesses and increase the role of law as compared to that of personal relations and the Japanese state bureaucracy.¹¹⁵ They sought to make bar passage simpler in an effort to encourage law students to learn problem-solving and practical skills rather than focus only on the bar, which often led students to attend bar prep courses rather than their law school courses.¹¹⁶ The reformers also hoped to encourage more well-rounded students to come to law, since the model contemplated law as a graduate rather than undergraduate degree.¹¹⁷

Despite the creation of some seventy law schools,¹¹⁸ the system does not appear to have been changed dramatically to date. Bar passage is not as high as reformers had hoped, and the bar in particular has strongly resisted the increase in the supply of lawyers and the relaxation of the bar passage standards.¹¹⁹ It is relatively early, but commentators do not deem the reforms a success in converting the position and potential role of lawyers in Japan.¹²⁰

By contrast, South Korea built upon a closer connection with the growing position of law and lawyers in the Korean state.¹²¹ Part of the difference is time. We can see in retrospect that South Korean lawyers in the 1980s began to build their position in relation to changes in the state and what the state sought in international credibility.¹²² The passage of time allowed the change to become embedded and naturalized. It is not surprising that the cosmopolitan political role for lawyers now seems to be taken more for granted. The new law schools in South Korea fit this new context.¹²³ They are geared to admit and train students who are not just the traditional law students selected because they can perform well on an exam that mainly tests memorization. Such examinations tended to favor lower-middle-class students driven to succeed.¹²⁴ The new schools select not only on the basis

113. *Id.*

114. See generally D.H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, 7 AUSTRALIAN J. ASIAN L. 214 (2006); Saegusa, *supra* note 73; Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese 'American' Law Schools*, 24 WIS. INT'L L.J. 197 (2006).

115. See Saegusa, *supra* note 73, at 372–78.

116. See Chan, *supra* note 91, at 188–91; Saegusa, *supra* note 73, at 372–78.

117. Saito, *supra* note 114, at 197.

118. *Id.*

119. Chan, *supra* note 91, at 207–08.

120. For a suggestion that the entire effort is counterproductive, see Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3 (2009).

121. See Kim, *supra* note 96, at 232–33.

122. See *id.* at 228–34.

123. *Id.* at 233.

124. Yves Dezalay & Bryant G. Garth, *International Strategies and Local Transformations: Preliminary Observations of the Position of Law in the Field of State*

of exams, but also on travel experience, linguistic ability, service to NGOs, and the like—potentially a recognition of the new elite role for lawyers.¹²⁵ Legal education reform in South Korea, as sought in Japan, is about improving the engagement of students, enhancing skills and problem-solving, and enlarging the corporate bar; but it is also about matching those improved legal capabilities with students better endowed with social capital.

Let us turn to the situation of China. As noted before, the hope of many rule-of-law proponents has been that various reforms or innovations might serve as Trojan horses on behalf of individual rights and the rule of law. What happens in one area will spill over into others, in particular the Chinese state. Administrative or party guidance will turn into a more neutral rule of law. Spillover applies directly to the issue of lawyers as brokers, taking advantage of opportunities—especially crisis moments—to make connections that strengthen their own position and provide a new version of state legitimacy. In China, there has also been some investment in the reform of legal education, including modeling a J.M. degree program after the U.S. J.D. degree¹²⁶ and the introduction of clinical education—again modeled after the United States.¹²⁷ It is also indicative—and reminiscent of the early days of the Soochow Law School and its foreign-trained faculty—that the effort, beginning in 2007, to build an American-style law school at Beijing University, has attracted considerable attention inside and outside of China.¹²⁸ The undergraduate faculties of law, however, seem still to be more prestigious, and most lawyers remain in a relatively marginal position.¹²⁹ Those with the most prestige, namely the relatively small corporate bar, remain outside of the main world of Chinese politics and the state.¹³⁰ As elsewhere in Asia, the market in legal education reveals much about the prospects for any kind of spillover from corporate law into state governance.

Corporate law firms provide another potential site for the conversion of capital. The example of South Korea is but one of many where corporate law firms bring together people moving in and out of the government, leading families, legal expertise, and domestic and international legal capital. One part of the success to date in South Korea has been the credibility within South Korea—built through Cold War projects of educational exchange, links to human rights NGOs and corporate law firms,

Power in Asia: South Korea, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 81, 94–96 (William P. Alford ed., 2007).

125. See DEZALAY & GARTH, *supra* note 9, at 245–46.

126. Erie, *supra* note 35, at 61.

127. See Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE HUM. RTS. & DEV. L.J. 117, 128–29 (2005); see also Cai Yanmin & J.L. Pottenger, Jr., *The “Chinese Characteristics” of Clinical Legal Education, in* THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE 87, 87–91 (Frank S. Bloch ed., 2011).

128. See generally Anne M. Burr, *Law and Harmony: An In-Depth Look at China’s First American-Style Law School*, 28 UCLA PAC. BASIN L.J. 25 (2010).

129. Erie, *supra* note 35, at 75.

130. Peerenboom, *supra* note 80, at 248.

and considerable economic exchange—of approaches emanating from and consistent with the United States.¹³¹ By contrast, to the extent that such approaches are deemed to lack domestic credibility, it will be more difficult for corporate law firms to make such conversions of transnational exported capital into legitimate national capital.

The ideals of Christopher and those linked to his position seek more than building the rule of law in national settings throughout the globe. They seek also to take the principles of free trade and investment, democracy, and human rights, and embed them in transnational institutions.¹³² We turn now to this parallel strategy, which faces the same issues of spillover and credibility. Given the challenges we have already seen at the national level, the question is whether activity at the transnational level can entrench the same kinds of rules and institutions into some form of transnational governance.

II. TRANSNATIONAL JUSTICE: POSSIBLE TRAJECTORIES TOWARD A UNIFIED TRANSNATIONAL FIELD

The ultimate fate of transnational justice—and transnational rules as the bases for determining “modern” and legitimate local rules—depends on the ability of legal entrepreneurs to make the case that the globalization of law is not just about allowing multinational corporations to profit globally according to transnational rules of the game. Transnational law must be more than a tool to overcome more restrictive policies promoted by individual states. The challenge, as we have noted, is to build credibility for propositions such as that transnational law and procedures may prevent states from committing injustices to their own and other citizens. It may also prevent corporations from using their global reach to enhance profits by abusing individuals and harming the environment, in addition to restricting the ability of states to regulate foreign investment within their boundaries. The question, therefore, is whether two sides of a potential transnational legal field will both take hold. One is the transnational political side, exemplified by international human rights and peacekeeping; the other is the transnational economic side, exemplified by international commercial arbitration, corporate law, the global trade regime, and the global rules for intellectual property.

The first section of this part explores the development of a transnational legal field. It draws on studies of transnational phenomena that we have undertaken in the past.¹³³ In particular, international commercial arbitration

131. See generally GREGG BRAZINSKY, *NATION BUILDING IN SOUTH KOREA: KOREANS, AMERICANS, AND THE MAKING OF A DEMOCRACY* (2007).

132. According to Cummings and Trubek,

While Rule of Law initiatives have embedded public interest law at the nation-state level, the evolution of the institutional framework of global governance—the second globalizing factor we highlight—has drawn public interest law into the contest over the impact of open markets and the power of human rights at the supranational level.

Cummings & Trubek, *supra* note 21, at 6.

133. See generally DEZALAY & GARTH, *supra* note 15; DEZALAY & GARTH, *supra* note 19.

provides a prime example of transnational economic justice, and the field of international human rights exemplifies transnational political justice. Drawing on others' work, we also briefly examine peacekeeping, transnational criminal law, and transitional justice on one side, and trade and intellectual property on the other.¹³⁴ Taken together, these domains cover much of what exists as the potential for a transnational legal field. They encompass the potential linkage between corporate law firms on one side, and legally oriented NGOs on the other.

Our approach in this section requires a little more elaboration of our research strategy. As we have emphasized in all of our work, sociological research into the operation of national or transnational fields requires analyses of the people who operate in and define the various fields.¹³⁵ Personal interviews reveal where key actors come from, what forms of capital they bring to the field, how that capital is valued in terms of career trajectories, and what drives the competition for dominant positions in the field. By tracking a number of individuals' activities, we can also link the national and transnational. Actors use their national capital to gain stature internationally, and vice versa. The synchronic approach focusing on the present structure of fields is then joined with a more diachronic approach—examining, in particular, the genesis of the fields being studied and the institutions that inhabit those fields.

For the purpose of this part of the Article, we use both the geneses and further evolutions to contrast the developments on the political and economic side of a potential transnational legal field. We explore whether the two subfields provide possible paths toward a more unified field—a transnational manifestation of the spillover effect. As we will show, the major differences between the political and economic sides appear after the period of the geneses. The geneses of the transnational fields or subfields in fact reveal many parallels between the political and economic developments.

As with respect to institutions and the fields in which they operate more generally, the forces evident at the beginning are typically obscured once institutions become more established and appear more natural. The passage of time, consistent with the Weberian paradigm,¹³⁶ brings routinization—evidenced by the repeat players who operate the institutions. We can see this development on both the political and the economic sides. This second phase, however, despite the apparent success and naturalness of the legal developments, is characterized by much more distinction between the two subfields. From this comparative perspective, the prospects for the economic side of transnational justice appear much brighter than those for the more political side. In this sense, we suggest a lack of spillover, or more precisely, an asymmetry in the development of the transnational field.

134. See generally TRANSNATIONAL JUSTICE, *supra* note 40 (an edited collection of case studies of the transnational sphere).

135. See, e.g., Yves Dezalay & Bryant G. Garth, *Constructing Transnational Justice*, in TRANSNATIONAL JUSTICE, *supra* note 40, at 3, 4–6.

136. DEZALAY & GARTH, *supra* note 15, at 36–37.

The parallel paths appear to be diverging, and divergence poses an obstacle to the unified transnational field that enhances the credibility of law and lawyers.

In order to see potential means for further convergence, we introduce the example of the transnational legal field in Europe. The study of the relatively successful process of building transnational justice at the European level helps to generate potential hypotheses for how a similar process might proceed in the more general transnational legal field. It is also not just a matter of comparison and hypothesis generation. As discussed in Part II.B, the process in Europe involves lawyers drawing on their national capital, scholarly investment, transnational contacts and capital, and courts initially established with very limited roles—the European Court of Justice (ECJ) on the economic side and the European Court of Human Rights (ECHR) on the more political side—to develop and legitimate law on both sides.

Both European courts moved from their relatively limited initial agendas to become quasi-constitutional courts.¹³⁷ Furthermore, as they moved, they built—and competed with each other in constructing—transnational legal credibility that facilitated a transnational knowledge that crossed the boundaries between the corporate and regulatory domains and the human rights or governance domains.¹³⁸ The post-World War II history of Europe, in short, provides both a key example and a component of the development of transnational legal fields.

Finally, drawing on hypotheses generated by the European example and the history of the United States, we examine other potential factors that may bring the two dimensions of the transnational legal field together. In particular, we briefly examine what has been termed the globalization of legal education.

A. Initial Phases in the Development of a Transnational Legal Field

The initial phase in both the economic side and the political side of the emerging transnational field was very similar. For both the human rights side and international commercial arbitration, there was a crisis situation or shock effect that allowed the initial accumulation of legal investment.¹³⁹ The shocks can be seen as external to the legal world—they were experienced as political or economic events—but they provided opportunities that played out in the legal world.

The process involves an almost accidental production of “avatars” representing a potential legalization in a particular arena.¹⁴⁰ As is true with

137. See generally Antonin Cohen, *The European Court of Justice in the Emergent European Field of Power: Transnational Judicial Institutions and National Career Paths*, in *TRANSNATIONAL JUSTICE*, *supra* note 40, at 239.

138. See *id.* at 239–49.

139. See NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

140. Andrew Abbott, *Linked Ecologies: States and Universities as Environments for Professions*, 23 *SOC. THEORY* 245, 265–66 (2005).

respect to legal production generally, transnational law is not a product that simply arises in response to a demand or need. Neither international human rights nor international commercial arbitration, despite what may appear in retrospect, developed simply because there was a problem that the law naturally came in to solve. Rather, lawyer-brokers played a key role in building and legitimating the market for their services and expertise. One key to the creation of new institutions is the inability of existing courts and more traditional law to adjust quickly to dramatic social and political changes precipitated by particular crises.

1. International Commercial Arbitration

The development of international commercial arbitration is closely linked to crises associated with decolonization and the battles for the control of oil production in the period after World War II.¹⁴¹ Oil nationalizations were symptomatic of the rise of nationalism and the erosion of the paternalistic relationship between the Seven Sister oil companies and national leaders.¹⁴² These tensions led to the creation of the Organization of Petroleum Exporting Countries (OPEC), and culminated in the oil crisis of the 1970s.¹⁴³ As the price of oil went up, the stakes of the control over oil profits increased dramatically.¹⁴⁴ Oil companies whose positions were threatened lined up the support of their home countries, and together invested substantial resources into rebuilding their prior lucrative positions.¹⁴⁵ Law was not at the core of the response. Managers and lawyers of the oil industry used diplomacy, the threat of gun boats, and personal relationships to respond to the nationalizations and other attacks on their position. For the most part, they were successful in maintaining their role in the production and distribution of petroleum resources.¹⁴⁶ Histories of these events typically do not even mention law or lawyers,¹⁴⁷ but lawyer-entrepreneurs took advantage of the situation.

The longstanding concession agreements entered into between the oil companies and the oil-producing states contained arbitration clauses.¹⁴⁸ The clauses were inserted because of the perceived legitimacy of state-state arbitration and the role of international law experts who consulted with the large oil companies.¹⁴⁹ The companies chose to invoke the arbitration clauses as one additional option, but they paid very little attention to the processes or outcomes since the key—no matter what the outcome of the arbitration—remained negotiations and the power that could be mobilized

141. See DEZALAY & GARTH, *supra* note 15, at 74–86.

142. *See id.*

143. *See id.* at 77–78.

144. *See id.* at 78–81.

145. *See id.* at 83–85.

146. *See id.*

147. *See, e.g.*, DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* (1991).

148. *See DEZALAY & GARTH, supra* note 15, at 86–88.

149. *See id.*

to support them.¹⁵⁰ Arbitration was very much a sideshow, and the blank check for the arbitrations was dwarfed by the resources used for other strategies.

The experts in arbitration were at that point a group of law professors and others, centered in Paris at the International Chamber of Commerce, who studied and promoted arbitration as a kind of hobby.¹⁵¹ They professed the virtues of international commercial arbitration as a way to resolve transnational commercial disputes.¹⁵² Their ties to the oil industry were relatively weak at the time, but they were brought into the arbitrations and provided them with what amounted to essentially unlimited resources.¹⁵³ They already had produced a body of legal scholarship that could provide some of the raw material necessary to equip the field.¹⁵⁴ Further, their students from the global South—including Algeria and Egypt—were ready to see the virtues of arbitrations that would involve their mentors and likely also themselves.

Partly because it was a sideshow, the arbitration lawyers on both sides were able to treat the legal disputes as epic legal battles involving grand legal principles. Lawyers in the nationalization cases developed highly formal legal arguments while the actual resolutions of the disputes proceeded by other means.¹⁵⁵ The result was a series of closely reasoned arbitral opinions that have long been the staple of international law courses.¹⁵⁶ They had virtually no practical impact at the time, but here, as elsewhere, that lack of practical impact allowed the field to develop.

Legal capital accumulated through initial investments, and then later, through the outpouring of scholarship promoting, rationalizing, and elaborating the jurisprudence of the arbitration cases—and making the cases central to casebooks.¹⁵⁷ Those with key positions in the cases gained stature and credibility, and this combination of factors jump-started this transnational legal field and put it in a perfect position to take advantage of the disputes that emerged in the 1970s and 1980s as petrodollars and Eurodollars were invested in major infrastructure projects leading to major arbitrations.¹⁵⁸ The oil crises, in short, provided the funding and credibility to a group of self-proclaimed amateurs and hobbyists who later became the backbone of the international commercial arbitration industry in the 1980s.

2. International Human Rights

As with respect to international commercial arbitration, the key actors and events that led to the creation of the field of international human rights

150. *See id.* at 83–84.

151. *See id.* at 34–36.

152. *See id.*

153. *See id.* at 84–85.

154. *See id.* at 88–89.

155. *See id.* at 85.

156. *See id.* at 74–75.

157. *See id.* at 84–85.

158. *See id.* at 93–97.

involved a very different group than the legal actors who developed and then profited from the field.¹⁵⁹ Again, the starting point was a series of international crises, in this case revolving around the politics of the Cold War. Guerrilla movements existed in much of Latin America;¹⁶⁰ there was a democratic socialist movement in Chile,¹⁶¹ and there were violent military reactions in Argentina, Brazil, Chile, and elsewhere.¹⁶² The hardening of U.S. positions after Fidel Castro came to power in Cuba helped to fortify these authoritarian reactions.¹⁶³ As with respect to the early period of international commercial arbitration, there existed a group that could almost be called international human rights hobbyists.

The relatively small group of human rights activists played a fairly marginal role in the so-called cultural Cold War, exemplified by the CIA sponsorship of the International Commission of Jurists (ICJ) on one side, and by communist ties to the International Association of Democratic Jurists (IADJ) on the left.¹⁶⁴ Amnesty International, founded in 1961, was an outgrowth of the ICJ seeking to gain more of a distance from the partisanship of the Cold War.¹⁶⁵ As with respect to the amateurs of international commercial arbitration, there were idealistic actors in and around these groups who sought to build on the human rights developments that came in the aftermath of World War II. But again, it is instructive that histories of the Cold War generally do not view human rights activists as influential enough to merit discussion.¹⁶⁶

In the United States, palace wars related to the Cold War took a major turn in the late 1960s in relationship to the U.S. militancy exemplified in the support of authoritarian regimes, and especially in the Vietnam War.¹⁶⁷ Campus uprisings and the split in the Democratic Party over Cold War tactics led to the election of Richard Nixon.¹⁶⁸ The so-called “hawks” in power in the United States supported the coup that brought Pinochet to power in Chile in 1973.¹⁶⁹ The so-called “doves,” whose growth had split the U.S. establishment, retained considerable power.¹⁷⁰ They controlled the elite universities, the major philanthropic foundations, a good portion of the Congress, and much of the establishment media.¹⁷¹ Nevertheless, they were powerless to stop the Nixon Administration’s embrace of

159. See DEZALAY & GARTH, *supra* note 19; Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of International Human Rights*, 2 ANN REV. L. & SOC. SCI. 231, 231–55 (2006).

160. See generally THOMAS E. SKIDMORE & PETER SMITH, MODERN LATIN AMERICA (5th ed. 2001).

161. See *id.* at 126–32.

162. See *id.* at 93–95, 133–35, 169–72.

163. See *id.* at 269–73.

164. Dezalay & Garth, *supra* note 159, at 240.

165. See DEZALAY & GARTH, *supra* note 19, at 70–72.

166. See generally JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY (2005).

167. See DEZALAY & GARTH, *supra* note 19, at 127–30.

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.* at 241–47.

authoritarianism in Latin America and elsewhere.¹⁷² There were continued demonstrations on campuses, peace campaigns, and other oppositional activities that are the center of what historians depict when they examine the 1960s and early 1970s.¹⁷³

The out-of-power elite invested in the legal terrain as one of their strategies. They found in the discourse of human rights a tool that they could use at least rhetorically against the Nixon Administration.¹⁷⁴ They discovered and began to work with groups like Amnesty International.¹⁷⁵ They also found that many lawyers and activists in the South were pleased to embrace and contribute to this discourse, since it freed them from the more politicized mantle of simply defending communists or revolutionaries.¹⁷⁶ In particular, leftist labor lawyers in Argentina,¹⁷⁷ and a group of elite lawyers in Chile close to the administration of Salvador Allende, became connected to, among others, the international media, elite bar groups, Amnesty International, and the Ford and MacArthur Foundations.¹⁷⁸ Later, when they were exiled, those elite lawyers joined groups such as Amnesty International and became human rights professionals.¹⁷⁹

The moral, political, religious, and economic resources that now mobilized to question Cold War tactics and the support of repressive states were invested in this new transnational field. An outpouring of academic research brought further credibility. Amnesty International won the Nobel Peace Prize in 1977, and the Chilean model of human rights advocacy spread around the globe with the aid of the Ford Foundation.¹⁸⁰ Human rights activism and scholarship became very prominent in elite law schools in the North and the South.¹⁸¹ By the end of the Reagan Administration, the international human rights movement was powerful enough to have a very strong practical impact on U.S. foreign policy.¹⁸² When Pinochet sought to stay in power, for example, the United States under Reagan—and led by Reagan Administration officials who came to embrace human rights—forced him to submit to an election that pushed him from office.¹⁸³

In both cases, the relatively weak links between the shocks and the legal repercussions created opportunities for autonomous investment using outside resources, both economic and scholarly. These outside investments built the transnational legal infrastructure for both arbitration and human

172. *See id.*

173. *See, e.g.,* GADDIS, *supra* note 166, at 146.

174. *See* DEZALAY & GARTH, *supra* note 19, at 127–33.

175. *See id.* at 70–72.

176. *See id.* at 52–54.

177. *See* Virginia Vecchioli, *Human Rights and the Rule of Law in Argentina: Transnational Advocacy Networks and the Transformation of the National Legal Field*, in *LAWYERS AND THE RULE OF LAW*, *supra* note 40, at 93, 97.

178. *See* DEZALAY & GARTH, *supra* note 19, at 145–48.

179. *Id.* at 147.

180. *See* Dezalay & Garth, *supra* note 159, at 239–44.

181. *See* DEZALAY & GARTH, *supra* note 19, at 164–67.

182. *See id.* at 134–36.

183. *Id.* at 135.

rights. It turned the hobbyists of arbitration into well-paid lawyers and arbitrators in the service of transnational private justice, and it turned labor lawyers in Argentina, criminal lawyers in Chile, and civil rights lawyers in the United States into human rights lawyers in the service of a global human rights regime prominent in foreign policy decision making around the globe.

Part of this process can be portrayed as a boomerang effect: initially weak institutions and legal fields turn into much stronger ones with altered and ambitious agendas. Mikael Madsen focuses on this impact for the human rights field in Europe,¹⁸⁴ where the French and British governments initially endorsed European human rights developments—the creation of the Council of Europe, the European Commission on Human Rights, and the ECHR—because they were sure that they were immune from any challenges.¹⁸⁵ They were on the human rights side in the Cold War as representatives of the anti-Communist West.¹⁸⁶ They also were careful to make sure that their relationships with colonies were not included in the treaties that created these institutions.¹⁸⁷ But the initial Cold War orientation shifted, and the evolving European human rights regime took aim at the repressive means by which European countries policed their colonies, especially the French in Algeria and the British in Northern Ireland.¹⁸⁸ The boomerang impact of investment made for other purposes was not limited to activities in the colonies. The ECHR now regularly takes on the criminal justice systems of the countries under its jurisdiction.¹⁸⁹ The institutions literally bounce back on the original objectives of the founders—very much contrary to the founders' aims and expectations.

Another phenomenon that contributes to these developments toward institutionalization has long typified initiatives in the law. Often a new principle is announced in a judicial opinion, for example, but not enforced or implemented.¹⁹⁰ It represents a kind of trial balloon; professors may then pick it up, it may be discussed and legitimated for particular purposes, and finally, it can be enforced and elaborated upon in new cases as if it was not really a new departure. This is the classic approach of cases such as *Marbury v. Madison*,¹⁹¹ but it is also the story of arbitration and human

184. See generally Mikael Rask Madsen, *France, the UK, and the 'Boomerang' of the Internationalisation of Human Rights (1945–2000)*, in HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 57 (Simon Halliday & Patrick Schmidt eds., 2004).

185. See *id.* at 59–60, 63, 77.

186. See *id.*

187. *Id.* at 60.

188. *Id.* at 71, 85.

189. See, e.g., Jacquelin S. Hodgson, *Safeguarding Suspects' Rights in Europe: A Comparative Perspective*, 14 NEW CRIM. L. REV. 611, 657–65 (2011).

190. Cf. Antonin Cohen & Antoine Vauchez, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, 7 ANN. REV. L. & SOC. SCI. 417, 426 (2011); Antoine Vauchez, *The Transnational Politics of Judicialization*, Van Gend en Loos and the Making of EU Polity, 16 EUR. L.J. 1, 17 (2010).

191. 5 U.S. (1 Cranch) 137 (1803).

rights (and the ECJ).¹⁹² The academic credibility takes hold before the practical political and economic impacts. It is easy to see how this process played out with respect to both international commercial arbitration and international human rights.

In short, political and economic crises may contribute to change by setting events in motion that at some point find their way to new institutional approaches to law. There are many other examples of major political and economic events triggering—almost by accident—relatively weak but later significant legal initiatives, but only a few of them have been studied in depth from this perspective. For example, the unsuccessful effort by the Argentine generals to take back the Malvinas/Falkland Islands from the British led to the fall of the military regime. This provided an opportunity to invest in new legal institutions, almost as sideshows, leading to the Argentine Truth Commission and ultimately to the phenomenon of transitional justice, which spread around the globe.¹⁹³ Similarly, the environmental disaster associated with Union Carbide and Bhopal set in motion more legalized approaches to transnational environmental issues.¹⁹⁴ The drafting of the Universal Declaration of Human Rights after the end of World War II is an antecedent to the human rights movement that is part of the story we earlier summarized, but it too can be placed into a similar pattern. As with respect to all these examples, any starting point can be moved back to find earlier antecedents and crises. In any event, the role that the Universal Declaration came to play went far beyond what was initially envisioned.¹⁹⁵

Finally, the legalization of transnational trade brought about through the WTO can be linked especially to the Japan-U.S. trade crisis in the 1970s and, again, to the relatively few legal idealists—among them U.S. academics Robert Hudec and John Jackson—who helped to take major foreign policy trade issues and build a scholarly infrastructure that later served as the basis to legalize international trade with the transition from the General Agreement on Tariffs and Trade (GATT) to the WTO.¹⁹⁶ In each of these cases, as with respect to international commercial arbitration and human rights, we see the emergence of new institutions in part because the dramatic social and political changes precipitated by crises do not translate into changes that courts and traditional legal doctrine can readily absorb.

There were some links between the human rights side and the economic regulation side in the account provided above, but they were relatively weak at the initial stages. Each came into its own in the 1980s after a period of

192. See DEZALAY & GARTH, *supra* note 15, at 81–86; Madsen, *supra* note 184, at 77–80.

193. See DEZALAY & GARTH, *supra* note 19, at 235–42.

194. See, e.g., Developments in the Law—International Environmental Law, 104 HARV. L. REV. 1484, 1487 (1991).

195. See WILLIAM KOREY, NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: “A CURIOUS GRAPEVINE” 51–75 (1998).

196. See JOSEPH A. CONTI, BETWEEN LAW AND DIPLOMACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION 28–58 (2011); Dezalay & Garth, *supra* note 2, at 743–49.

crisis-generated investment in the 1970s. The paths that they followed were relatively similar, even though the people were for the most part quite different.

The relative success in institutionalization with respect to both human rights and arbitration, coupled with the passage of time, brought a degree of routinization. Institutions through this process become naturalized and decontextualized such that the particular crises and political and economic configurations that produced them become obscured. Instead of appearing as the product of particular strategies and configurations of interests, such as those at play in the Cold War or the oil crises, the semi-autonomous field and its institutions come to appear much more neutral and universal. Legal doctrines are taught as such in law schools, sustained and further formalized through legal scholarship, used to resolve disputes, and in general legitimated and taken for granted—treated as simply the law. As a result, the legal fields generally develop some distance from the specific interests evident at the inception and embedded in the structures of the fields.

The field of international commercial arbitration in the 1960s and 1970s worked out a set of rules to enforce oil concessions against sovereign states.¹⁹⁷ As noted above, the rules had little impact at the time they were developed. But when arbitration took off in the 1980s, the so-called *lex mercatoria* developed by Continental arbitrators provided a legally principled manner to treat multinational agreements with sovereign states in the Middle East and Africa as if they were private contracts.¹⁹⁸ The circumstances of the genesis were by then mostly obscured. Similarly, the link of human rights law to the U.S. legal elite and palace wars within the United States was especially apparent in the 1970s and early 1980s, when human rights arguments were specifically used to challenge first the Nixon and then the Reagan Administrations in favor of a more benevolent form of U.S. hegemony.¹⁹⁹ At the end of the 1980s, however, international human rights concerns were generally accepted as central to foreign relations.²⁰⁰

The framing of social and political interests and issues into the language of law, mediated by academic intellectuals who translate non-legal economic, political, and social problems into the law, and the movement in one form or another of disputes into court-like forums, has an accumulated impact. Political conflicts between oil-producing countries and multinational corporations accordingly shift into the subtleties of the *lex mercatoria*. Arguments over the relationship between human rights and national sovereignty replace political battles associated with the Cold War, between competing empires, or claims for colonial independence. The credibility and further evolution of the fields gave each of them some distance from the political and economic fights that were embedded in them.

197. See DEZALAY & GARTH, *supra* note 15, at 83–95.

198. See *id.*

199. See Dezalay & Garth, *supra* note 159, at 234–47.

200. See *id.* at 247–53.

3. Diverging Paths

These two types of fields, however, once established and given a certain level of credibility, then began to diverge. The international circulation of ideas and approaches involves the movement of texts without the contexts that give them their meaning.²⁰¹ When a particular legal technology moves from one setting to another, how it becomes translated (or mistranslated) depends on the structures of power and the positions of the translators who deploy the technology. Similar mistranslations, we hypothesize, also occur when there is movement from the national to a transnational level and even from one symbolic field—for example, human rights or arbitration—to another. Therefore, after the similar positions developed out of initial shocks and periods of legal accumulation, each transnational field necessarily developed in its own way. The different contexts and brokers at play continued to shape each area.

Within the arbitration world, most of the brokers came from a more informal network of arbitrators concentrated in Europe but covering much of the globe—constituting what is often called the arbitration mafia.²⁰² They served alternatively as lawyers and arbitrators in high stakes transnational disputes. The relatively informal and small community at the core could take advantage of many others who profited from investment in the field.²⁰³ Corporate law firms, for example, developed arbitration expertise that enhanced their stake in the field.²⁰⁴ The knowledge and essentials of arbitration practice could be taken off the shelf and applied to a wide range of business disputes. The practice gained legitimacy and developed some autonomy such that it could be transported to new places and new types of disputes. It became simply “offshore justice,” even if the courts were private and not public.²⁰⁵ Indeed, one of the leading arbitrators in the generation that followed the pioneers even explained the evolution as a matter of Weber’s “routinization of charisma.”²⁰⁶ Repeat players came to dominate the terrain.²⁰⁷ The routinizers became the “stars” of the next generation of arbitrators.²⁰⁸ These characteristics allowed the field to grow and prosper in new terrains along with economic and corporate law more generally.

The field of arbitration evolved through the gradual extension of the field into new markets in terms of types of disputes and geographical reach. International commercial arbitration facilitated the relatively easy conversion of various forms of capital into arbitration, making for a

201. See Pierre Bourdieu, *Les Conditions Sociales de la Circulation Internationale des Idées*, 145 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 3, 4 (2002).

202. DEZALAY & GARTH, *supra* note 15, at 34–38.

203. See *id.* at 51–58.

204. See *id.* at 51–54.

205. *Id.* at 58.

206. *Id.* at 37.

207. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–104 (1974).

208. DEZALAY & GARTH, *supra* note 15, at 40.

relatively smooth expansion from North-South disputes to transnational contracts generally, and to new markets, such as Latin America, which had once been hostile to international arbitration.²⁰⁹ Each expansion brought new capital and subtle adjustments in the doctrine and approaches, while at the same time reinforcing the value of the core of the field. In particular, high barriers to entry to become an arbitrator allowed the gradual cooptation of national legal notables who could provide the credibility necessary to gain the support of the national court systems.²¹⁰ The local notables in turn invested in the legal capital connected to international commercial arbitration as a condition of entry,²¹¹ again reinforcing the core while extending the field to new terrains.

This relatively strong entrenchment of international commercial arbitration comes not through any single transnational institutional structure but rather through a multiplicity of forums following the same business model. It is a strength that comes from weak links, with a highly flexible set of institutions that structure an internationalized market of legal expertise. That market allows national legal notables to accumulate or diversify their own portfolios by exchanging their respective forms of national capital. The local impact is therefore relatively limited. There is a spillover into national settings, but it is segmented in a way similar to the former colonial courts of Shanghai or Cairo.²¹² It is a Western justice—off-shore “litigociation” handled by corporate law firms—with only a few local characteristics.

The area of trade provides a similar example. As Gregory Shaffer, Michelle Rattón Sanchez Badin, and Barbara Rosenberg show, Brazil found ways to push the WTO to accommodate its trade agenda against the Western developed world, thereby opening up the field somewhat.²¹³ As a result, the politics of the South put the fairness of the trade regime on the agenda.²¹⁴ But Brazil’s actions also involved a commitment to work within the prevailing WTO regime, which brought increased legitimacy to the core of the field. The gradual move outside the core, as in the case of international commercial arbitration, enhanced the legitimacy of the core. The process of bringing Brazil in, for example, meant that when the stakes were highest, the Brazilian players would take their claims to the law firms and expertise tied to the center in Washington, D.C. Again, the Brazil experience suggests the same pattern of national notables participating locally in a relatively discrete part of well-entrenched Western justice.

209. *See id.* at 283–91.

210. *See id.*

211. *See id.*

212. *Id.* at 231–35; *see also* Lee, *supra* note 17, at 1375–1414.

213. *See* Gregory Shaffer, Michelle Rattón Sanchez Badin, & Barbara Rosenberg, *The Transnational Meets the National: The Construction of Trade Policy Networks in Brazil*, in *TRANSNATIONAL JUSTICE*, *supra* note 40, at 170, 180–84.

214. *See generally* Chiedu Osakwe, *Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behavior and Performance*, 20 *MINN. J. INTL L.* 365 (2011) (detailing the changing agenda of the WTO in relation to assertions of power by Brazil and others).

In other areas of economic law, we see evidence of a similar phenomenon. Economic law may occasionally be politicized and transformed, such as when the steady expansion of U.S.-style intellectual property law was challenged and rerouted in response to the AIDS epidemic, the high prices that drug companies sought to charge, and political changes in the United States that made the government more sympathetic to those seeking AIDS medications. The general story, however, is of a gradual expansion under the radar involving corporate law firms and national players joining in the spread of a set of transnational practices and a business model that goes with it.²¹⁵

The field of human rights, by contrast, could not really follow a specifically legal evolution. The initial mix was an unstable alliance of political activists, media entrepreneurs, and academic idealists. The political issues connected to human rights were often front page news, and the institutions created to handle them, such as Truth and Reconciliation Commissions and International Criminal Tribunals, were not easily separated from the contexts that produced them.²¹⁶ Those who constructed these institutions tended to be lawyer-diplomats who continued to use them as part of diplomacy. For instance, questions of who would be prosecuted for what crimes were closely connected to substantial issues of realpolitik. Julian Seroussi, for example, documents the contested politics within the human rights community about who ought to be prosecuted after the Pinochet case opened up the potential for so-called universal jurisdiction.²¹⁷ The public visibility translated into relatively few cases, and the institutions created remained fragile and lacking in legitimacy.

In contrast to international commercial arbitration, political actors could force quick changes in the terms of engagement in the field of human rights. A relatively early example was the apparent decision of the Pinochet government and the generals in Argentina to use the brutal tactic of disappearances—instead of explicitly taking political prisoners—to avoid the spotlight that Amnesty International brought to prisoners of conscience.²¹⁸ A more recent example of such a phenomenon, mass executions to avoid witnesses that might sustain a court prosecution, took place in the Sri Lankan purge of the Tamil rebels.²¹⁹ The shifting context from the Cold War and decolonization to ethnic genocides and civil wars made it hard to develop repeat players. The only real continuity was in the academic elaboration of legal principles. But even if legal debates and legal

215. See Diana Rodriguez Franco, *Globalizing Intellectual Property Rights: The Politics of Law and Public Health*, in TRANSNATIONAL JUSTICE, *supra* note 40, at 139, 160–61.

216. See generally KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011) (detailing the evolution of human rights prosecutions and their relationship to politics).

217. Julien Seroussi, *The Cause of Universal Jurisdiction: The Rise and Fall of an International Mobilization*, in TRANSNATIONAL JUSTICE, *supra* note 40, at 48, 57–58.

218. We cannot document this statement, but the timing and conduct are consistent with this theory.

219. See Jon Lee Anderson, *Death of the Tiger: Sri Lanka's Brutal Victory over Its Tamil Insurgents*, NEW YORKER, Jan. 17, 2011, at 41.

doctrines of human rights reoccur often in the field, in practice they are reinvented and reconfigured in relatively short time intervals for battle in new political contexts.

We see some of this dynamic in the three generations of human rights NGOs that we have described elsewhere.²²⁰ The ICJ, as mentioned above, was very much a product of the Cold War.²²¹ Amnesty International, the major embodiment of the second generation, sought to find neutrality by limiting its activities initially to prisoners of conscience found in the various camps of the Cold War.²²² The third generation, epitomized by Human Rights Watch, returned the focus to domestic politics and reflected a close relationship between U.S. foreign policy and NGO activities.²²³ Initially focused instrumentally on the Reagan Administration, the goal was to influence the United States to implement policies that drew on the expertise and approach of Human Rights Watch (and the scholars and political and social entrepreneurs associated with it).²²⁴ In many respects, the culmination of this strategy was the Balkan War, pursued by the Clinton Administration on the grounds that human rights violations had occurred.²²⁵ The agenda of NGOs has shifted dramatically according to domestic political concerns such as the War on Terror.²²⁶ There is a new generation, in fact, exemplified by International Alert, that focuses on conflict resolution and peacekeeping.²²⁷ It is therefore not a matter of extending the field gradually to new arenas and places. The field jumps around in relation to highly visible politics. There is a strong contrast, in short, between the high symbolic value of human rights principles and doctrines and the limited autonomy of the legal practices associated with this sphere, which are politicized, segmented, and discontinuous.

Not only are there strong divergences between the economic side and the political side, but there is also very little spillover between the two subfields. As we have seen, they have different structures and diverging dynamics. To be sure, national elites have increasingly invested their resources—whether professional, political, or learned—into international legal practice and transnational quasi-judicial institutions on the human rights side. The proliferation of human rights courts, however, even involving prominent symbolic investments with high visibility in symbolic discourses, has not led to any significant impact on national legal practices. The transnational political and human rights subfield, in fact, facilitates a

220. See DEZALAY & GARTH, *supra* note 19, at 62–72, 131–34.

221. *See id.* at 62–64.

222. *See id.* at 70–72.

223. *See id.* at 131–32.

224. *See id.*

225. Dezalay & Garth, *supra* note 159, at 252–53.

226. *See generally* SANDS, *supra* note 6 (exemplifying the shift in concern of activists toward U.S. behavior with respect to human rights).

227. *See* Sara Dezalay, *Lawyering War or Talking Peace: On Militant Usages of the Law in the Resolution of Internal Armed Conflicts: A Case Study of International Alert*, in *TRANSNATIONAL JUSTICE*, *supra* note 40, at 60, 74–80; Sandrine Lefranc, *From Peace-Building in War-Torn Countries to Justice in the Global North*, in *TRANSNATIONAL JUSTICE*, *supra* note 40, at 84, 93–101.

kind of reverse spillover from the South to the North. The imported expertise of human rights and peacekeeping is structured around transnational NGOs funded from the North and embedded in hegemonic politics. The Save Darfur coalition is one of many such examples of an entity that arises very much out of politics in the North and in particular the United States.²²⁸ The local roots in Africa are very meager. Such entities serve to reinforce the legitimacy of the rule of law promoters within the United States. Northern NGOs facilitate a kind of moral brain drain exemplified by the earlier reconversion of Latin American human rights pioneers into human rights professionals based in the North.

Indeed, the general failure of transitional justice as a catalyst for turning ad hoc justice into reform of the courts reinforces the idea that the courts are not adequate for transnationally oriented challenges such as human rights violations. This sense of the courts' failure builds the credibility of forums such as international commercial arbitration for transnational corporate disputes. Instead of spillover from the corporate to the human rights side, therefore, the problems in the human rights or political subfield contribute to the autonomization of corporate transnational justice.

B. *The Example of Europe*

Before examining the transnational legal field more generally, it is helpful to examine the relatively successful development of a transnational legal field in Europe. The institutional "success" is that the ECJ and the ECHR have both been successfully institutionalized and today serve a complementary role in Europe. The ECJ is seen as the Supreme Court of Europe and the cornerstone of Europe constructed as a state of law.²²⁹ The huge caseload of the ECHR has become routinized, and the Court focuses on reforming judicial procedures to enhance the rule of law.²³⁰ The two courts have also converged in recruitment with a heavy focus on academic capital.²³¹ Yet we must also recognize that Europe shares many of the structural features detailed in the above examination of the transnational legal field. Europe provides one channel for the internationalization of national legal fields, and some of the issues we see in Europe also arise with respect to the transnational legal field.

After World War II, the project of rebuilding Europe was part and parcel of the attempt to contain the spread of communism.²³² The dynamic between the United States and European countries at that time brought a set

228. See, e.g., *About Us*, SAVE DARFUR, <http://www.savedarfur.org/pages/about> (follow hyperlinks "Organizational Members" and "Unity Statement") (last visited Apr. 21, 2012).

229. See Cohen & Vauchez, *supra* note 190, at 417.

230. See Hodgson, *supra* note 189 (showing through comparative study the relative activism of the ECHR); Mikael R. Madsen, *Human Rights and the Hegemony of Ideology: European Lawyers and the Cold War Battle over International Human Rights*, in *TRANSNATIONAL JUSTICE*, *supra* note 40, at 258, 271–72 (showing the process through which the ECHR gained its prominent role).

231. See generally Cohen, *supra* note 137 (showing the differences in the early recruitment).

232. See Madsen, *supra* note 230, at 258.

of new European institutions—the beginnings of what became the European Community (EC).²³³ Again, crisis was an opportunity, as the beginning of the Cold War set the initial stage for construction of a transnational legal field. Law, as in the above examples, was initially at the margins of the main events. Nevertheless, cosmopolitan lawyer intermediaries who were well connected to prominent counterparts in the United States, such as George Ball, were central to the process of seeking to organize Europe.²³⁴ As Antonin Cohen points out, the activities of “a small set of multi-positioned politico-legal entrepreneurs” planted seeds for later developments by making sure that each of the two major European organizations, the predecessors to the European Community on one side, and the Council of Europe on the other, were provided with courts.²³⁵ The two courts, the ECJ and the ECHR, contributed very little at the outset to the European project.²³⁶ This very limited role, moreover, was consistent with the expectations of those who created the courts.

The key actors in building a European legal field were, as shown by Antoine Vauchez, an early transnational legal network located at the crossroads between the national and the European levels.²³⁷ This group took advantage of early EC investment aimed toward facilitating the development of European scholarly knowledge beyond national legal literature.²³⁸ One indicator of the success of this investment is that the various Jean Monnet projects focused on European law now bring together 1,500 professors and approximately 500,000 students every year. There are also specifically European legal specialties and even a couple of academic institutions, namely the College of Europe in Bruges and the European University Institute in Florence.²³⁹ In addition, the actors built their network of European professionals through a diplomatic logic that took advantage of the fact that judges were appointed by nation states with parity among the key countries. Cases were argued in the language of the defending party,²⁴⁰ which limited competition and promoted within each country a small European bar with appropriate expertise and linguistic abilities, and with an interest in the academic promotion of European law. The group thus blurred the differences in legal status at the national levels.

One particular EU-subsidized academic and professional group, the *Fédération internationale pour le droit européen* (FIDE),

233. *See id.*

234. *See* JAMES A. BILL, GEORGE BALL: BEHIND THE SCENES IN U.S. FOREIGN POLICY 101–35 (1997).

235. Cohen, *supra* note 137, at 242.

236. *See* Vauchez, *supra* note 190, at 7.

237. *See generally* Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of Europe*, in TRANSNATIONAL JUSTICE, *supra* note 40, at 219.

238. *See id.* at 225–29.

239. *Id.* at 228.

240. *See* 1 D.G. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 46–47 (1965); Antoine Vauchez, *Une Élite d'intermédiaires: Genèse d'un Capital Juridique Européen*, 166 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 54, 57–61 (2007).

spearheaded the efforts to define a rationality that would make sense of the set of EC institutions built in the Paris and Rome treaties, one that would be distinguishable from that of national political systems and yet, at the same time, autonomous from the other European arenas (economic, bureaucratic, etc).²⁴¹

They drew on their domestic legal expertise and capital and on models from abroad, especially from the United States, to build and legitimate something European.²⁴² They were able to take advantage of a perceived crisis of the EC late in the 1950s to transform the position of the ECJ.²⁴³

The famous cases of the early 1960s were designed to take advantage of this growing network of Europrofessionals. There was a very close relationship between the European scholarship emanating from FIDE, the judges and advocate generals of the ECJ, and the lawyers who staged, decided, interpreted, and celebrated the two key ECJ cases: *Van Gend en Loos*,²⁴⁴ decided in 1962, and *Costa v. ENEL*,²⁴⁵ decided in 1964.²⁴⁶ The ECJ's pathbreaking legal rhetoric was carefully mixed with unobtrusive judicial results in the particular cases.²⁴⁷ The cases then became the material for the elaboration of an ambitious constitution for Europe, and a new role and agenda for the ECJ as a kind of constitutional court.

The story of the ECHR proceeds differently, but again reveals the dramatic shift from origins to institutionalization. Madsen documents the very weak initial role of the ECHR in addressing human rights violations within Europe and the orientation of the Council of Europe as an instrument of the Cold War carefully constructed to avoid issues connected to European colonies.²⁴⁸ In Madsen's terms,

The main objective of the European Convention of 1950 was, therefore, not the development of a detailed European jurisprudence that should substantially alter national traditions of human rights, but instead producing a document that confined the area of Free Europe; that is, the [European] Convention was an early form of containment politics.²⁴⁹

Early cases, however, challenged the policing approaches used to maintain colonial relationships, building the role of the court even if the court carefully refrained at the outset from any direct challenge to colonial activities.²⁵⁰ Expanding on the early cases, the ECHR in the late 1970s both participated in and took advantage of the emerging global human

241. Vauchez, *supra* note 237, at 222.

242. *Id.* at 228.

243. Cohen, *supra* note 137, at 243–44.

244. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* 1963 E.C.R. 1.

245. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

246. Vauchez, *supra* note 190, at 9–26.

247. *See id.* at 13.

248. *See* Madsen, *supra* note 230, at 262–68.

249. *Id.* at 269.

250. *See id.* at 265–68.

rights movement.²⁵¹ It became a kind of Supreme Court reviewing the human rights policies of individual European countries. The court became solidly institutionalized. Again, the agenda dramatically changed from the period of the establishment of the court, leading the ECHR in the individual rights sphere to a position parallel to the ECJ in the economic sphere.

The two courts—and indeed the organizations to which they belonged—were initially quite different. The judges of the two courts, for example, originally came from very different backgrounds.²⁵² But the strong differences in career paths of those appointed to each court have diminished recently, which is an indicator of competition and reciprocal influence. Indeed, the courts now overlap much more in the issues they examine, complementing each other while building a more unified European legal field—fueled also by the continued flourishing of European academic programs and scholarship inside and outside of Europe (which has, of course, also expanded to the East). In this manner, both sides of the European legal field show signs of coming together more explicitly. Advocates comfortable within the European legal field can begin to engage in forum shopping in order to advance their interests, further developing the field as a whole.

This relatively successful transnational development, however, has not had a major impact at the national level. Few judges and European practitioners return to national judiciaries.²⁵³ The clerks of the ECJ and the lawyers of the European Commission are mainly recruited by national law firms of the multinational firms centered in London.²⁵⁴ More generally, training and experience in European legal practice tends to provide a stepping stone from national legal fields toward more international—including transatlantic—positions.²⁵⁵ The analysis suggests, therefore, that the supranational field is still relatively weak in the sense that it serves mainly as a crossroad between national legal fields where legal expertise is accumulated and valorized. The actual law schools, for example, are national despite the existence of European legal departments in Bruges and Florence.²⁵⁶ Still, there has been a slow process of the valorization of European (and international) legal expertise as a legitimate resource in national careers, even if still not sufficient to provide access to top positions in the judiciary or among the elite of the bar.²⁵⁷ And within Europe, there remains a pronounced division between the elite of the corporate bar and human rights circles.²⁵⁸

251. *Id.* at 272.

252. Cohen, *supra* note 137, at 245–49.

253. See Vauchez, *supra* note 237, at 229–33.

254. See generally Yves Dezalay, *From a Symbolic Boom to a Marketing Bust: Genesis and Reconstruction of a Field of Legal and Political Expertise at the Crossroads of a Europe Opening to the Atlantic*, 32 *LAW & SOC. INQUIRY* 161 (2007).

255. See Vauchez, *supra* note 237, at 229–33.

256. *Id.* at 228.

257. See generally Cohen, *supra* note 137 (showing the career paths changing over time).

258. Dezalay, *supra* note 254, at 164.

C. *The Changing Market for Legal Education*

The market for legal education provides a potential forum to bring together different sides at national and transnational levels. Potentially, the children of top business executives can connect with the children of the clergy; old money can connect with new money and emerging social groups; moral entrepreneurs can link with profit maximizers; and local know-who can connect with imported know-how. The law faculty in many countries of the world is a melting pot to produce what Bourdieu termed the degree of the bourgeoisie.²⁵⁹ It is the place where, historically, the old elite represented by the aristocracy and feudalism could be converted into the advisers and conflict managers for emerging states and multinational enterprises. Those who brought social capital, as noted by Ralf Dahrendorf about Germany,²⁶⁰ might specialize in social skills such as drinking and dueling, while those lacking social endowments could over-invest in learning and the production of law, making for a division of labor bringing legitimacy and stature to the profession.

There is no question that there is an emerging global competition in legal education.²⁶¹ New or substantially reformed law schools in many parts of the world—including India with first the National Law Schools and now the Jindal Global Law School; South Korea and Japan with the shift from undergraduate legal instruction toward U.S.-style law schools; and the FGV Law School in Brazil’s globalized program—are seeking to gain stature as global law schools.²⁶² The implications of these developments merit further study, but at present the competition is still dominated by the elite U.S. law schools, which provide the only common breeding ground for corporate lawyers, European politico-legal entrepreneurs, and a small number of NGO activists who export agendas shaped by U.S. hegemonic politics, such as Darfur and the field of transitional justice (aided by European funding).²⁶³

CONCLUSION: SPILLOVER AND LEGITIMACY

The basic question of this Article is the possibility of spillover in the creation of legitimacy—the conversion of social capital into legal capital and the corresponding transfer of legitimacy from one sector of legal practice to another. At the national level, focusing on Asian examples, we

259. See PIERRE BOURDIEU, *THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER* 300–35 (1998).

260. See Ralf Dahrendorf, *Law Faculties and the German Upper Class*, in *SOCIOLOGY OF LAW* 294, 294–309 (Vilhelm Aubert ed., 1969).

261. John Flood, *Legal Education in the Global Context: Challenges from Globalization, Technology, and Changes in Government Regulation*, *LEGAL SERVICES BOARD* 1 (Oct. 12, 2011), http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/lsb_legal_education_report_flood.pdf (“From an empirical point of view there is an inexorable move in the world towards the Americanization of legal education, in the form of the widespread adoption of the JD degree over the LLB.”).

262. Yves Dezalay & Bryant G. Garth, *Marketing and Legitimizing Two Sides of Transnational Justice*, in *TRANSNATIONAL JUSTICE*, *supra* note 40, at 277, 293.

263. *Id.*

observed that the conversion process of social into legal capital has so far been relatively limited in China, which means a relatively limited spillover from the small corporate bar into an enhanced role of lawyers in the field of political power.²⁶⁴ Similarly, experiments in legal aid or clinical education have not in the short term served as Trojan horses to get lawyers a stronger position in state governance. There are examples of such crossovers in Asia, however. In particular, lawyer-brokers took advantage of the changing political situation in South Korea, and they built on the small and elite profession, which was a legacy of Japanese colonialism.²⁶⁵ Similarly, Indonesia provides a particularly good example of the kind of process that is evident in South Korea²⁶⁶: A corporate bar moves out of a relatively isolated and foreign-oriented enclave into a broader role in the state and in the national economy.

Such relative successes provide the bases for strengthening the role of law more generally in the economy and the state. The process is never simple, however. Law is a symbolic good. As such, it must be legitimated before it can successfully be exploited. Legitimation comes when there is a collective belief that legal authority will provide something of value to the holders of economic and political power. It may take a generation or more of work by lawyers and institutions before the (re)production of legal knowledge is in a position to offer legitimacy to the holders of economic and political power, and for there to be sufficient distance to make that offer credible. Within the United States, over a long period of time and as a result of a very specific history, corporate lawyers in conjunction with law schools and philanthropic organizations succeeded in becoming the essential experts according to rules that they shaped, which allowed their clients to thrive under an umbrella of legal legitimacy. It is no surprise that the era of U.S. hegemony brings efforts to reproduce at the transnational level something akin to that which made elite lawyers thrive in the United States.

The complex development of legal Europe provides an example of the interplay of courts, legal education, corporate law firms, and U.S.-generated expertise. The result of legal entrepreneurship taking advantage of its national capital and external situations—the Cold War and the related rise of the international human rights movement, for example—succeeded in giving a role to law, lawyers, and courts far beyond what the founders of the various European institutions envisioned. But the relative success in bridging two sides in Europe has also been consistent with the relative weakness of the European legal field in comparison to the national legal fields.

There is no inevitability to the overcoming of the divide between the political and the economic sides of transnational justice, and the credibility of one or both sides could erode quickly—as has happened many times in

264. See *supra* notes 80–87 and accompanying text.

265. See DEZALAY & GARTH, *supra* note 9, at 237–46.

266. See *id.* at 218–26.

domestic settings. Too close or transparent connections between elite lawyers and large financial interests or repressive politics, for example, can derail the potential trajectory toward transnational justice that we have described. Furthermore, as we noted at the outset, the kind of legitimate hegemony that was the ideal of Warren Christopher and represented the legacy of the foreign policy establishment in the United States is contested in U.S. palace wars and potentially through rival hegemonies seeking to shape the global rules of the game. Lawyers are seeking to construct a field of transnational justice and to take advantage of this field. They have achieved some successes. Reforms in legal education may provide greater opportunities to build on those successes and further bridge the divide between the political side of transnational justice and the economic side. But at present, there is a strong divide between the political and economic sides of a transnational legal field, potentially threatening the legitimacy of both sides.