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Introduction

> We are witnessing a paradigm change, an unchecked slide into an era in which the scale of global forced displacement as well as the response required is now clearly dwarfing anything seen before.
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> UN High Commissioner for Refugees António Guterres, June 2015

As Europe deals with a so-called 'refugee crisis', Australia's harsh border control policies have been touted as a possible model to emulate. Former Australian Prime Minister, Tony Abbott has called on European leaders to regain control of their borders by implementing elements of the military-led operation introduced in Australia under his leadership to prevent asylum seekers reaching Australia by boat.[1] This call has been echoed in newspaper stories across Europe, particularly in Germany, Austria and the United Kingdom.[2] When President Donald Trump announced his travel ban for persons from specified Muslim-majority countries and tough border security reforms in January 2017, Australian politicians were quick to claim that Trump was emulating Australia's example.[3] The irony is that these policies, which form what has been dubbed the 'Australian solution', are not Australian innovations. Key measures such as long-term mandatory detention, intercepting and turning boats around at sea and the extraterritorial processing of asylum claims were used in the United States long before they were adopted in Australia. This book examines the process through which these policies were transferred between the United States and Australia and the way the courts in each jurisdiction have dealt with the measures. This is done with reference to an innovative framework of analysis which draws on scholarship from law, political science and sociology. The experience of the United States and Australia is used as an example from which to glean lessons for states which may be considering adopting these measures in the future, and to shed light on the broader interdependence of asylum and border control policymaking.

The international refugee protection regime is under unprecedented pressure. There are now more people fleeing their homes in search of asylum than at any other time since

[1] Tony Abbott, 'Second Annual Margaret Thatcher Lecture' (Speech delivered at the Margaret Thatcher Centre, London, 27 October 2015).

[2] David Wroe, 'Refugee Crisis: Europe Looks to Australia for Answers', *Sydney Morning Herald* (online), 24 April 2015 www.smh.com.au/national/refugee-crisis-europe-looks-to-australia-for-answers-20150424-1ms804.html.

[3] Katharine Murphy, 'Scott Morrison Says Trump Travel Ban Shows "World Is Catching Up" to Australia', *The Guardian* (online), 30 January 2017 www.theguardian.com/australia-news/2017/jan/30/scott-morrison-trump-travel-ban-world-is-catching-up-to-australia-border-protection.

records began. The United Nations High Commissioner for Refugees (UNHCR) reports that there were 65.6 million people forcibly displaced around the world in 2016.[4] This was up from 33.9 million two decades ago.[5] While most of these people remain in their region of origin, a growing number are choosing to travel further afield in search of protection. Visa requirements mean that most asylum seekers cannot make this journey legally. Travel by clandestine means is the only option. This is facilitated by increasingly sophisticated people-smuggling routes that link the refugee-producing regions in the developing world to wealthier and safer destinations in Europe, North America and Australia. Other migrants also utilise these routes, presenting themselves as asylum seekers in a bid to overcome immigration barriers. These complex flows of asylum seekers and economic migrants pose significant challenges for governments. The ability to distinguish persons who have a well-founded fear of persecution from people who are migrating for other reasons is essential to the integrity of the international refugee protection regime. But this distinction is becoming blurred as governments resort to blanket exclusion policies aimed at limiting and controlling access to their territories. In this context of securitisation of borders, asylum seekers have become stigmatised as persons attempting to break the law. The policy imperative is to deter and deflect all irregular migrants, asylum seekers or otherwise.

Governments have always been concerned about what other jurisdictions are doing when it comes to regulating asylum and irregular migration more broadly. This is because of the potential for changes in the policies of one state to influence migration flows to other nations. Rogers Brubaker describes the most direct manifestation of this influence: 'a person cannot be expelled from one territory without being expelled into another, cannot be denied entry into one territory without having to remain in another'.[6] This interdependence also operates at a more indirect level. A more permissive policy in one state can lead to a reduction of immigration flows in neighbouring states, while a more restrictive policy may increase the number of migrants seeking entry into other states.[7] The recent increase in the sophistication and proliferation of people-smuggling routes has further heightened this interdependence. Asylum seekers and other irregular migrants now have more choice in selecting their destinations and can travel further away from their home regions. The result is that changes in the policy of one jurisdiction no longer only just affect neighbouring countries, but can influence flows to nations on the other side of the globe. The longer journeys also mean asylum seekers are travelling through multiple jurisdictions to reach their final destination. Changes in the stringency of the asylum and border control policies of any of these transit states can have major ramifications for asylum flows to the final destination country, as well as other transit nations further along the route.

I explore this interdependence with reference to an in-depth analysis of measures adopted in the United States and Australia aimed at limiting asylum-seeker flows. I argue that the existence of similar policies in these jurisdictions is the result of a process of legal and policy transfer. The focus is on three measures: (1) long-term mandatory administrative detention of unauthorised arrivals; (2) maritime interdiction and deflection of

[4] UNHCR, *Global Trends: Forced Displacement in 2016* (UNHCR, 2017) 5. [5] Ibid.
[6] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992) 26.
[7] Sandra Lavenex and Emek Uçarer, 'The External Dimension of Europeanization: The Case of Immigration Policies' (2004) 39 *Cooperation and Conflict* 417, 425.

asylum-seeker vessels, which involves intercepting boats at sea and returning them to their point of departure or other locations and (3) the use of extraterritorial sites on external territories or third countries for the processing of asylum claims.

I utilise an original interdisciplinary framework for identifying transfers to document how policymakers in Australia and the United States have monitored developments in each other's asylum policies and have borrowed laws and policies they perceive as successful. I identify the motivations of the players involved, examine the multilateral and bilateral forums which facilitate the practice, and critically analyse the information sources on which policymakers rely when engaging in transfers.

I then turn my attention to assessing the *success* of the transfers that have taken place. This is done with a view to answering the question of why some transfers of restrictive measures succeed, while others fail. I begin with the assumption that transfers can be an effective tool for the development of law and policy. When faced with a problem, it makes sense to examine the practice of comparator jurisdictions. My concern, however, is that states may be adopting migration control measures devised by other countries, without effective evaluation and study of the laws and policies in question. Moreover, I explore the degree to which policymakers ought to consider differences in legal structures and systems when considering undertaking transfers. The restrictive policies examined in this book have pushed the boundaries of what is acceptable under both international and domestic law. They have been the subject of numerous judicial challenges in the highest courts in the United States and Australia. I undertake a detailed comparative analysis of the case law to determine the similarities and differences in the challenges made and the ways in which these have been treated by the respective judicial bodies. This is done with a view to evaluate how different legal structures and political contexts impact judicial decision-making.

The book concludes with an examination of the ramifications of my findings for policymakers considering adopting the case-study policies in other jurisdictions. I highlight the need to critically engage with claims made by politicians about the efficacy of the policies in reducing asylum-seeker flows. Any decision to adopt the US and Australian models would also have to factor in the high costs involved. These include exorbitant monetary costs, damage to the governments' international reputations and the devastating impact on the health and well-being of asylum seekers subject to the policies.

I outline how elements of the case-study policies may contravene the *Refugee Convention,* human rights treaties and the international law of the sea.[8] I caution that if other countries were to adopt harsh border protection mechanisms modelled on the US and Australian precedents, this would add further fuel to the competitive nature of the legal and policy transfers occurring in the asylum space. The result would be a 'race to the bottom' as states seek to outdo the deterrent measures introduced in comparator jurisdictions. I raise concerns that this competition has the potential to unravel the international refugee protection regime. I examine competing theories on why nations conform to international human rights norms. I argue that all these theories point to the conclusion that repeated non-compliance with international protection norms, particularly by wealthy liberal democracies, severely undermines the legitimacy of these norms.

[8] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').

1.1 Legal Transfer, Policy Transfer and Diffusion

The book utilises an interdisciplinary methodological framework which draws on the approaches taken in legal transfer/transplant scholarship, public policy work on policy transfer and international relations and sociology scholarship on diffusion. While rooted in different disciplinary frameworks, all these approaches focus on the spread of policy, law and other innovations across jurisdictional boundaries. While there have been studies comparing the policy transfer and diffusion literature and identifying lessons from each discipline,[9] to date the legal scholarship has developed in relative isolation.[10] Given the close similarity in the subject matter examined, the lack of dialogue is surprising. It is ironic that bodies of literature devoted to studying the transfer of ideas between governments have been resistant to the transfer of ideas across disciplines. This book aims to bridge this long-standing interdisciplinary gap.

Legal scholars examining the transfer of law across jurisdictions have given the process a number of different labels. Alan Watson coined the term 'legal transplant' to describe 'the moving of a rule . . . from one country to another, or from one people to another'.[11] Other terms and metaphors used by legal scholars to refer to this phenomenon include 'diffusion',[12] 'reception',[13] 'circulation',[14] 'transposition',[15] 'borrowing',[16] 'migration',[17] 'transmigration',[18] 'translation'[19] and 'transfer'.[20] It is beyond the scope of this study to engage with the subtle differences in the meanings of these various terms and with the ongoing debate as to which metaphor/term best captures the characteristics of the transfer process. I adopt the term 'transfer' to describe the phenomenon, as it is comparatively neutral and aligns with the language used in policy transfer and diffusion scholarship.

[9] See, eg, David Marsh and JC Sharman, 'Policy Diffusion and Policy Transfer' (2009) 30 *Policy Studies* 269; Adam Newmark, 'An Integrated Approach to Policy Transfer and Diffusion' (2002) 19 *Review of Policy Research* 151.

[10] In fact, it is very rare to see legal scholars cite the policy transfer or diffusion literature at all. For a notable exception, see Mathias Siems, *Comparative Law* (Cambridge University Press, 2014) 193–4 (acknowledging the fact that political scientists are asking very similar questions to legal scholars in regard to interjurisdictional transfers).

[11] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974) 21.

[12] William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1; William Twining, 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203.

[13] Wolfgang Wiegand, 'The Reception of American Law in Europe' (1991) 39 *American Journal of Comparative Law* 229. The 1970 International Academy of Comparative Law Congress dedicated a section to 'The global reception of foreign law': Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 441, 442.

[14] Edward Wise, 'The Transplant of Legal Patterns' (1990) 38 *American Journal of Comparative Law* 1.

[15] Esin Örücü, 'Law as Transposition' (2000) 51 *International and Comparative Law Quarterly* 205.

[16] Barry Friedman and Cheryl Saunders, 'Symposium: Constitutional Borrowing' (2003) 1 *International Journal of Constitutional Law* 177.

[17] Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

[18] Nicholas Foster, 'Transmigration and Transferability of Commercial Law in a Globalised World' in Andrew Harding and Esin Örücü (eds), *Comparative Law in the 21st Century* (Kluwer Academic, 2002) 55.

[19] Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1.

[20] Graziadei, above n 13.

The study of legal transfers is currently in a state of flux, with long-standing assumptions being questioned. As William Twining notes, until relatively recently, legal scholars were focused on what he labels as the 'naïve model' of transfers based around the following paradigm example: '[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change.'[21]

These generally involved wholesale adoption of entire legal systems or codes. Typical case-studies included the imposition of legal systems by colonists in settled states and the more voluntary modernisation efforts of developing nations. Starting in the late 1980s, the focus shifted to the legal reforms of former socialist countries.

The contemporary legal scholarship has moved on from the assumptions which underpinned the 'naïve' model identified by Twining to better reflect the realities of the transfer process. The vast majority of contemporary legal transfers concern discrete legal rules (or fragments of such rules) rather than entire legal codes or systems.[22] Moreover, in addition to formal legal rules, transfers are also occurring at the level of policy, executive or administrative orders, or judicial decisions. Verbatim copying has become increasingly rare, with the laws more likely to be transferred in some degree of abstraction. A general idea may be borrowed and implemented using a completely different mechanism.[23] Lawmakers in the receiving country may deliberately tweak the imported legal rule to meet local needs and conditions. Changes may also be made inadvertently during the transfer process.[24] Contemporary transfers are usually multi-event interactions under which the original and transferred rules continue to interact after the initial transfer is made.[25] This gives rise to multi-directional transfers, with the original exporting country drawing lessons and implementing developments from the original importing country.[26] The actors involved in the transfer process are much broader than conceptualised in the old model. Transfers often include more than two jurisdictions and can be the product of interactions between several players.[27] This includes non-government agents, such as international institutions, international companies, global law firms and other private actors.[28] In an era of globalisation, importers may choose fragments of rules from various legal systems and integrate

[21] William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers, 2011) 51–2.
[22] Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 *American Journal of Comparative Law* 583, 596–7.
[23] Jörg Fedtke, 'Legal Transplants' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Elgar, 2006) 434, 436.
[24] Langer, above n 19, 33 (setting out a typology of ways in which rules can change in the transfer process).
[25] Cohn, above n 22, 601–2 (identifying several models of long-term interaction); John Paterson and Gunther Teubner, 'Changing Maps: Empirical Legal Autopoiesis' (1998) 7 *Social & Legal Studies* 451 (drawing on autopoietic theory to identify modes of ongoing interaction).
[26] Twining, 'Diffusion of Law: A Global Perspective', above n 12, 20; Daniel Ghezelbash, 'Forces of Diffusion: What Drives the Transfer of Immigration Policy and Law across Jurisdictions?' (2014) 1(2) *International Journal of Migration and Border Studies* 139.
[27] Cohn, above n 22, 585.
[28] See Li-Wen Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *American Journal of Comparative Law* 711 (on legal transplants through private contracting).

them into a single law.[29] Esin Örücü's culinary metaphors of a mixing bowl, salad bowl, salad plate and purée are devised to capture the various forms of eclectic multi-source transfers.[30] Transfers are drawn not only horizontally from other municipal jurisdictions, but also from different levels of legal ordering such as international law or supranational law.[31] Examples of such vertical transfers include European harmonisation efforts,[32] as well as the domestic implementation of the *Refugee Convention* and *Protocol*.[33]

Legal scholars are still grappling with how to come to terms with this radical re-conception of legal transfers and the new methodological issues to which they give rise. It is thus an opportune time to take stock of how the transfer of law and policy across jurisdictions has been conceptualised in other disciplines. Diffusion and policy transfer scholars are examining the same subject matter as contemporary legal transfer scholars: namely, the transfer of law, policy, programs, innovations and ideas across jurisdictional boundaries. The diffusion scholarship has been described as the study of 'chronological and geographic patterns of the adoption of a policy innovation across government units'.[34] It encompasses work done across a number of different disciplines, including sociology, international relations and economics. A central objective of the research is explaining why some states adopt policies and practices more readily than others. Examples of relevant factors identified include cultural similarities;[35] geographic proximity;[36] the role of policy networks;[37] and political, economic and social characteristics.[38] Diffusion scholars use quantitative techniques to analyse a large number of case-studies to produce generalisations about the reasons for, and the results of, the process.

Policy transfer scholars examine the 'process by which knowledge of policies, administrative arrangements, institutions and ideas in one political system (past or present) is used

[29] Ibid 712; Takao Tanase, 'Global Markets and the Evolution of Law in China and Japan' (2006) 27 *Michigan Journal of International Law* 873, 876.

[30] Esin Örücü, 'A Theoretical Framework for Transfrontier Mobility of Law' in Robert Jagtenberg, Esin Örücü and Annie J de Roo (eds), *Transfrontier Mobility of Law* (Kluwer Law International, 1995) 5.

[31] Twining, 'Diffusion of Law: A Global Perspective', above n 12, 19.

[32] See David Nelken, 'Comparatists and Transferability' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 437; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11 (analysing the transplant of the European continental principle of *bona fides* into British contract law through the EU Directive on Unfair Terms in Consumer Contracts).

[33] *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). See Chapter 2.

[34] Karen Mossberger and Harold Wolman, 'Policy Transfer as a Form of Prospective Policy Evaluation: Challenges and Recommendations' (2003) 63 *Public Administration Review* 428, 429.

[35] Beth Simmons and Zachary Elkins, 'The Globalisation of Liberalisation: Policy Diffusion in the International Political Economy' (2004) 98 *American Political Science Review* 171.

[36] Frances Stokes Berry and William D Berry, 'State Lottery Adoptions as Policy Innovations: An Event History Analysis' (1990) 84 *American Political Science Review* 395, 396.

[37] Everett M Rogers and F Floyd Shoemaker, *Communication of Innovations: A Cross-Cultural Approach* (Free Press, 1971); Robert L Savage, 'Diffusion Research Traditions and the Spread of Policy Innovations in a Federal System' (1985) 15 *Publius* 1; Everett M Rogers, *Diffusion of Innovations* (Free Press, 5th ed, 2003).

[38] Jack L Walker, 'The Diffusion of Innovations among the American States' (1969) 63 *American Political Science Review* 880 (identifying the following internal characteristics as facilitating innovation: per capita income; interparty competition; legislative professionalism; and percentage of urban population); Rogers and Shoemaker, above n 37 (emphasising the role of higher education levels, higher literacy rates and greater upward mobility).

in the development of policies, administrative arrangements, institutions and ideas in another political system'.[39] While diffusion is concerned with outcomes, policy transfer is more process-orientated. To this end, studies tend to employ small sample qualitative case-studies that focus on a detailed analysis of the transfer of a policy between two, or several, countries. Lesson-drawing refers to transfers based on the rational choice of policy-makers who identify a gap in policy knowledge and look for examples in other similarly situated jurisdiction.[40] However, the transfer process will not always involve this form of deliberate and rational policy choice. Policy transfer scholars recognise that transfers encompass both 'voluntary' and 'coercive' forms of practice. The latter can occur when 'one government or supra-national institution [is] pushing, or even forcing another' to adopt policy innovations.[41]

The different methodological approaches taken by legal transfer, policy transfer and diffusion scholars each have benefits and drawbacks. The large-sample, highly quantitative studies employed by diffusion scholars allow for generalisations to be made about the causes and consequences of the diffusion process. The downside of the large sample size is that the data is prone to oversimplification. For example, diffusion is generally presented as a dichotomous ('adopt'/'not adopt') variable. The policy transfer and legal transfer approaches recognise that there can be many degrees of transfer, with complete transfer being very rare. Their small-sample qualitative approach allows for a far more nuanced examination of reasons for and outcomes of the process. However, findings are less generalisable. The policy transfer approach is most suited to capturing the *process* underlying transfers, while the legal transfer methodology focuses on the detailed *content* of transfers. Finally, the diffusion literature takes for granted the fact that the diffusion process is inevitable and beneficial.[42] In contrast, the policy transfer and legal transfer literature recognise the possibility that transfers can result in failures and provide frameworks to test prerequisites for good policy-making and policy success.

Drawing on these strengths and weaknesses, I propose new interdisciplinary approaches to dealing with a number methodological issues that are central to this study. The first relates to how you identify whether a transfer has taken place. I propose a framework that combines the policy transfer focus on *process,* with rigorous doctrinal comparative law methods. The second relates to how you measure the success or failure of transfers. I survey the legal and public policy approaches to answering this question and propose a new measure I label *legal success.* In Chapter 2, I draw on the legal transfer, policy transfer and diffusion literature to identify the mechanisms driving the transfer of asylum and immigration law and policy across jurisdictions.

1.2 Identifying Transfers

The recent expansion of the focus of legal transfer scholarship has made it better equipped to capture the complexity and richness of the transfer phenomenon. However, the

[39] David Dolowitz and David Marsh, 'Who Learns What from Whom: A Review of the Policy Transfer Literature' (1996) 44 *Political Studies* 343, 344.
[40] Richard Rose, *Learning from Comparative Public Policy: A Practical Guide* (Routledge, 2005).
[41] Dolowitz and Marsh, 'Who Learns What from Whom', above n 39, 344.
[42] Simon Bulmer et al, *Policy Transfer in European Union Governance: Regulating the Utilities* (Routledge, 2007) 12.

1. Identify a policy problem (or *motive*)
2. Undertake a detailed comparative analysis of the suspected transferred law or policy in both the sending and receiving country
3. Search for physical evidence that a transfer has occurred (evidence of *opportunity*, and the *direct transfer* of information)
4. If necessary, identify and carry out interviews with key agents involved in the transfer process.

Figure 1.1 A framework for identifying contemporary legal transfers

acknowledgement of this complexity has given rise to a new challenge. Transfers that fit the 'naïve model' of legal transfer, as described by Twining above,[43] are easy to identify. A framework for identifying legal transfers was not necessary in the context of verbatim transfers of entire legal systems (or large parts thereof). The existence of the transfer in such a context was self-evident. As Holger Spamann notes, '[one] cannot but see diffusion in identical statutes'.[44] However, the identification of more subtle forms of transfers gives rise to evidentiary issues that cannot be overcome by a simple comparison of formal legal instruments and institutions.

While the problem of determining whether a legal transfer has taken place has been noted,[45] to date no solution has been proposed to tackle the issue. In Figure 1.1, I set out a framework for this task. It builds on the process-orientated approaches put forward in the policy transfer literature,[46] but incorporates the detailed legal comparison carried out by comparative lawyers. The identification of specific instances of transfers is not seen as an end in and of itself. Rather, such identification is an essential prerequisite for making observations about the processes and pathways of exchange, thereby gaining a deeper understanding of why transfers are occurring and identifying the factors that lead to their success or failure.

1 Identifying a Policy Problem

The first step involves identifying the *motive* for lawmakers to engage in legal transfer. In the case of voluntary transfers, this will be the common policy problem in the suspected source and importing country. The political climate in which the suspected transfer occurred may also be a relevant factor. The temptation to engage in legal borrowing may be more prevalent at times of crisis when a policy solution needs to be developed

[43] See Twining, *Globalisation and Legal Scholarship,* above n 21 and accompanying text.
[44] Holger Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' (2009) 6 *Brigham Young University Law Review* 1813, 1823.
[45] Ibid 1852; Fedtke, above n 23, 436; Graziadei, above n 13, 454.
[46] See, in particular, the frameworks set out by Colin J Bennett, 'Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability' (1997) 10 *Governance* 213; Mark Evans and Jonathan Davies, 'Understanding Policy Transfer: A Multi-Level, Multi-Disciplinary Perspective' (1999) 77 *Public Administration* 361.

quickly.[47] In the case of coercive transfers, the policy problem needs to be identified from the point of view of the agent or agents imposing the transfer.

2 Comparative Analysis of Legal and Policy Responses

The next step involves a detailed comparative analysis of the suspected source and imported laws or policies. Key documents examined at this stage include legislation, regulations, policy documents and government statements. This requires two distinct levels of analysis. The first is a doctrinal comparison of the sources outlined above to ascertain the degree of similarity in drafting and design. The existence of laws that are drafted in similar terms and language raise a presumption that a transfer has taken place. The more alike the laws and policies are in the suspected source and receiving country, the more likely it is that a transfer has taken place. The second is a functional analysis, where the focus is on examining whether, in practice, the suspected source and imported laws serve the same function in both legal systems. The existence of functionally equivalent laws also raises a presumption that a transfer has taken place. However, the existence of doctrinal or functional similarities are not conclusive evidence of transfer. Two jurisdictions may come up with similar innovations independently as a response to similar domestic pressures. This process is referred to as parallel path development.[48] Just as individuals collectively open their umbrellas simultaneously during a rainstorm, governments may decide to adopt the same policy in response to similar policy problems.[49]

3 Physical Evidence

The third stage involves examining sources in the receiving state for evidence that a transfer has taken place. The focus here is to find evidence that rebuts the alternative explanation that the doctrinally or functionally similar laws were the result of independent development. Two types of evidence are relevant in this context. The first relates to whether lawmakers from the suspected source and importing country had an *opportunity* to transfer information relating to the suspected imported law. Relevant evidence includes the existence of forums, meetings or avenues of communication which could be used to share information relating to the suspected imported rule. The second is *direct evidence* demonstrating that the source law was consulted, or formed the basis of the suspected imported law. Examples include government statements acknowledging the role the source law played in the development of the imported rule; government press releases or reports acknowledging discussions between the source and receiving country; or references to the

[47] Richard Rose, 'What Is Lesson-Drawing?' (1991) 11 *Journal of Public Policy* 3, 12 (stating '[a]doption is often contingent upon an exogenous crisis generating sufficient dissatisfaction to create a demand for doing something new').
[48] Randall Hansen and Patrick Weil, *Towards a European Nationality: Citizenship, Immigration, and Nationality Law in the EU* (Palgrave, 2001).
[49] This analogy is adapted from Katharina Holzinger and Christoph Knill, 'Causes and Conditions of Cross-National Policy Convergence' (2005) 12 *Journal of European Public Policy* 775, 786.

source law in the parliamentary debates, parliamentary hearings, explanatory memorandum, or policy material.

4 *Interviews*

The absence of physical evidence does not always mean that a transfer has not taken place. Interactions between policymakers often occur behind closed doors and are not always publicly acknowledged. Further, in this digital age, lawmakers can instantly access a wealth of material about the detail and operation of foreign law and practice without leaving their desks. Lessons drawn from such materials may not be documented. This stage of analysis goes beyond publicly available sources and involves identifying and interviewing key agents involved in the transfer process. This step takes the policy transfer focus on agents and processes of transfer to its logical conclusion. Transfers cannot occur without agents. Identifying and interviewing these agents provides the richest source of evidence about the existence and degree of the transfer which has occurred.

In the present study, I utilised a reputational snowballing approach to identify relevant policymakers involved in the development of mandatory detention, interdiction and extraterritorial processing policies in the United States and Australia. The method draws a purposive sample that includes the most important players who have participated in the event being studied.[50] The first stage of sample selection involved identifying a subset of relevant respondents through an examination of government press releases, media reports, conference proceedings, parliamentary speeches, explanatory memoranda and other parliamentary and departmental reports.[51] This initial sample was used to initiate a snowballing/chain-referral process whereby each interview respondent was asked to provide a list of people they felt were influential in the suspected transfer under study. This procedure was repeated with each round of new nominees, until respondents began repeating names. This method has the additional advantage of assessing the level of influence of each interview subject, as the number of nominations each person receives provides an indication of their stature within the law and policymaking process.[52]

A total of thirty-five Australian and twenty-five US policymakers were identified as being potentially involved in the case-study transfers. Of these, sixteen Australian and eight US policymakers agreed to be interviewed. The breakdown between politicians, bureaucrats, and others is set out in Table 1.1. Confidentiality for interview subjects was guaranteed so as to maximise participation and encourage full and frank disclosure. Each interview respondent is referred to in the study with reference to a codename. The first two letters of the code indicate which country the policymaker is from: AU (Australia) or US (United States). The third letter indicates if the policymaker is a politician (P), bureaucrat (B) or other (O). This latter category consists of NGO actors and academics who were directly involved in the policy development process. The last two digits are randomised numbers from 01–99 which are used to provide a unique identifier for each respondent.

[50] Oisín Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling' (2007) 40 *PS: Political Science and Politics* 765; Karen Farquharson, 'A Different Kind of Snowball: Identifying Key Policymakers' (2005) 8 *International Journal of Social Research Methodology* 345.

[51] These are what I identify as sources of 'physical evidence' in my framework for identifying transfers set out above.

[52] Farquharson, above n 50, 349–50.