Maine Law Review

Volume 41 | Number 2 Article 4

June 1989

From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830

Bruce Wardhaugh

FROM NATURAL LAW TO LEGAL REALISM: LEGAL PHILOSOPHY, LEGAL THEORY, AND THE DEVELOPMENT OF AMERICAN CONFLICT OF LAWS SINCE 1830

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> It is necessary to understand that war is universal, and justice is strife, and everything takes place in accord with strife and necessity.
> Heraclitus (circa 540 B.C.)[1]

I. INTRODUCTION

There has been an alleged "revolution"[2] in American conflict of laws during the past sixty or so years. Yet, like most revolutions in intellectual pursuits, this revolution did not arise *ex nihilo*. Indeed, the revolution can be correlated with a change in the manner in which both law and legal reasoning have come to be viewed by members of the legal profession in the twentieth century. It is this correlation that the present article explores.

In particular, this article demonstrates the effect that the legal realist movement has had in the way conflict of laws problems have come to be viewed. Indeed, if this thesis is correct, the so-called revolution in conflicts is not only a legal realist-inspired movement, but it also provides some empirical evidence for the validity of some of the theses for which those involved in the legal realist movement argued.

Accordingly, the next section of this present study examines the theoretical and jurisprudential background of the writings of Joseph Story. Story's influence on the way conflict of laws problems have come to be viewed in America is profound. Given this, Story represents perhaps the most important figure in pre-revolution American conflict of laws.

The third section of this article is devoted to an examination of Story's immediate successors, in order to elicit the theoretical foundations of the position against which those responsible for the so-

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* Assistant Professor of Philosophy, Trent University, Peterborough, Ontario, Canada. M.A., Ph.D., LL.B, University of Toronto.

1. Heraclitus, *Fragment 22 B 80, reprinted in* H. DIELS & W. KRANZ, DIE FRAGMENTE DER VORSOKRATIKER (6th ed. 1956) (present author's translation).

2. The term "revolution" is not the present author's. *See, e.g.*, Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1585 (1985); Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 775 (1983).

called revolution reacted. Moreover, being inspired by the legal realist movement, the revolution also attacked the way in which legal reasoning was viewed. Accordingly, the fourth section of this article analyzes the manner in which the pre-revolution conflicts theorists viewed legal reasoning. This analysis also traces the historical origins of their views on legal science. By so doing, the purpose of much of the traditional (i.e. pre-revolution) program becomes evident.

The fifth and sixth parts of the study then detail the legal realist challenge to the traditional view of legal reasoning and the approach to conflicts.

As the so-called revolution in conflicts has attracted critics, the seventh section of the article briefly discusses these criticisms and also indicates some potential problems involved with the criticisms of the revolution. Finally, this article concludes by showing the results and limits of the present study.

II. Joseph Story and the Natural Law

Joseph Story's views on natural law exhibit a bizarre syncretism. On the one hand, Story's views stem from traditional Christian theories regarding the relationship between the human being and God. On the other hand, however, Story incorporates some of the traditional liberal conception of natural rights into his views on natural law and civil society. This latter position is essentially atheistic, notwithstanding the glosses of Christian theism with which philosophers such as Hobbes and Locke cloaked their theories. As a result, Story's natural law philosophy contains internal tension.

In the following section, the internal tension in Story's natural law philosophy is examined. First, this discussion elicits the traditional natural law components of this philosophy. This, it is argued, is almost entirely based on the philosophy of William Paley. Following this exposition is a discussion of the traditional liberal "natural rights" strand to Story's thought, demonstrating why this latter component is contradictory to the former component.

A. Story's Natural Law Philosophy

The core of Story's natural law philosophy is caught in an 1836 article entitled "Natural Law," which he wrote for Francis Lieber's *Encyclopaedia Americana*.[3] Although this article was unsigned at Story's insistence, his authorship is undisputed.[4] The article opens with a brief statement of its subject matter, from which Story's

3. 9 Encyclopaedia Americana 150 (F. Lieber ed. 1836).

4. *See, e.g.*, J. McClellan, Joseph Story and the American Constitution 66 (1971); Hogan, *Joseph Story's Anonymous Law Articles*, 52 Mich. L. Rev. 869, 883-84 (1954).

antecedents become very apparent:

> Natural Law, or, as it is commonly called, the law of nature, is that system of principles, which human reason has discovered to regulate the conduct of man in all his various relations. Doctor Paley defines it to be the science, which teaches men their duty and the reasons of it.[5]

Story next assumes the two axioms of his natural law theory: first, the existence of the Judeo-Christian God-Creator, and second, that human happiness consists in the practice of virtue (with unhappiness necessarily following from vicious conduct).[6] From this, a series of sets of duties follow:

> 1. His [that is, man's] duties towards God. In the just performance of this consists piety or devotion. . . .
>
> 2. The duties of man towards himself, or those which terminate in himself. Among these we may enumerate the duty of personal holiness; of self-preservation; of temperance; . . . .
>
> . . . .
>
> 4. We next come to the duties of man as a member of political society. And, here, we shall briefly treat of certain rights and duties, which may arise from the law of nature independent of any organization into political societies, but which more naturally find a place here, because they constitute the principal grounds for such organization. Thus the right of property, the obligation of contracts, the duty of speaking the truth, the sanctity of oaths, with other corresponding duties, strictly speaking, may be perfect in a

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5. Story, *Natural Law, reprinted in* J. McCLELLAN, *supra* note 4, at 313. *See also* W. PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (10th Am. ed. 1821). Paley observed that "Moral Philosophy, Morality, Ethics, Casuistry, Natural Law, mean all the same thing; namely, *that science which teaches men their duty and the reasons of it.*" *Id.* at 21.

6. Story writes:

> For the purposes of the present article, we shall assume, without undertaking to prove, that there is a God of infinite power, knowledge, wisdom, benevolence, justice and mercy; that God has created man with suitable powers and faculties to pursue and obtain happiness; that man is a moral, dependable and accountable being; that his soul is immortal; that his ultimate happiness or misery is dependent upon individual conduct; that there is a future state of retribution, in which the inequalities of the present life will be adjusted according to supreme wisdom and goodness; that, by a right application of divine powers and faculties, man may always discern and pursue the divine duty; that virtue, or doing good to mankind in obedience to the will of God, has attached to it the reward of everlasting happiness; and that vice, or doing wrong is disobedience to that will, is, by the very constitution of humanity's nature, necessarily connected with suffering and misery, directly or ultimately.
>
> In short, that man cannot be permanently happy by the practice of vice, and must be permanently happy by the practice of virtue. We shall assume these propositions, [not for reasons of proof, but because they] form the basis of the subsequent remarks.

Story, *Natural Law, reprinted in* J. McCLELLAN, *supra* note 4, at 313-14.

> mere state of nature, without the recognition of any fixed society; for they may exist and have a necessary application independent of such society. But their value and importance are far more felt, and far better provided for, in political society, and, therefore, properly belong to the present head.[7]

The third set of duties imposes a set of correlative rights; this set of rights is further subdivided. Story's subdivision is well worth quoting in detail, for as will soon be seen, Paley's influence on this topic is considerable. Thus Story writes:

> Rights are usually divided into such as are natural or adventitious, alienable or inalienable, perfect or imperfect. We call those rights natural, which belong to all mankind, and result from our very nature and condition; such are a man's right to life, limbs and liberty, to the produce of his personal labor, at least to the extent of his present wants, and to the use, in common with the rest of mankind, of air, light, water, and the common means of subsistence. Adventitious rights are those, which are accidental, or arise from peculiar situations and relations, and presuppose some act of man, from which they spring; such as the rights of a magistrate, of a judge, of electors, of representatives, of legislators, etc.
>
> We call those rights alienable, which may be transferred, by law, to others, such as the right to property, to debts, houses, lands and money. We call those rights unalienable, which are incapable by law, of such transfer, such as the right of life, liberty and the enjoyment of happiness.
>
> We call those rights perfect, which are determinate, and which may be asserted by force, or in civil society by the operation of law; and imperfect, those which are indeterminate and vague, and which may not be asserted by force or by law, but are obligatory only upon the consciences of parties. Thus a man has a perfect right to his life, to his personal liberty, and to his property; and he may by force assert and vindicate those rights against every aggressor. But he has but an imperfect right to gratitude for favors bestowed on others, or to charity, if he is in want, or to the affection of others, even if he is truly deserving of it.
>
> It is difficult to make any exact enumeration of what may be deemed the general rights of mankind, which may not admit of some exceptions, or which may not be deemed capable of modification under peculiar circumstances. Thus the most general rights, which belong to all mankind, may be said to be the right to life, to liberty, to property, and to the use of air, light, water, and to the fruits of the earth. And yet, under certain circumstances, life, and liberty, and property, may justly be taken away; . . . .[8]

At this point it is worthwhile to examine William Paley's writings, particularly his *Principles of Moral and Political Philosophy*[9] in or-

7. *Id.* at 314-17.
8. *Id.* at 314-15.
9. *See supra* note 5.

der to demonstrate the origins of Story's philosophical views. Perhaps as a consequence of the format of his work, Paley, unlike Story, gives no concise list of one's natural duties. Nevertheless, they can be readily elicited:

> In one sense, every duty is a duty towards God, since it is his will which makes it a duty; but there are some duties of which God is the object, as well as the author; and these are peculiarly, and in a more appropriated sense, called *duties towards God.*
>
> [This duty includes] [t]hat silent piety . . . of referring the blessings we enjoy to his bounty . . . .
>
> Our duty towards God, so far as it is external, is divided into *worship* and *reverence.*[10]

Regarding duties to oneself, Paley notes:

> In strictness, there are few duties or crimes which terminate in a man's self; and so far as other's are affected by their operation, they have been treated of in some article of the preceding book. We have reserved to this head the *rights of self-defence*; also the consideration of *drunkenness* and *suicide*, as offences against that care of our faculties, and preservation of our persons, which we account duties, and call *duties to ourselves.*[11]

Paley has no concise enumeration of relative duties. This is not to say that he did not regard such duties to be sufficiently important to include them in his ethical theory, for the opposite is true. Indeed, the entire Book III of *Principles of Moral and Political Philosophy* is devoted to detailed discussions of specific relative duties.[12]

Assuming a correlative relationship between duties and rights,[13] Paley divides rights thus:

> Rights, when applied to persons, are
> Natural or adventitious:
> Alienable or unalienable:
> Perfect or imperfect.
>
> I. Rights are natural or adventitious.
>
> Natural rights are such as would belong to a man, although there subsisted in the world, no civil government whatever.
>
> Adventitious rights are such as would not.
>
> *Natural rights* are, a man's right to his life, limbs, and liberty; his right to the produce of his personal labour; to the use in com-

10. W. PALEY, *supra* note 5, at 265.

11. *Id.* at 249.

12. Book III, *Relative Duties* consists of part I, "Of Relative Duties Which are Determinate," *id.* at 86, part II, "Of Relative Duties Which are Indeterminate, and of the Crimes Opposite to These," *id.* at 161, and part III, "Of Relative Duties which Result from the Constitution of the Sexes, and of the Crimes Opposed to These," *id.* at 196.

13. Paley states that "[r]ight and obligation are reciprocal; that is, wherever there is a right in one person, there is a corresponding obligation upon others. If one man has a 'right' to an estate; others are 'obliged' to abstain from it . . . ." *Id.* at 72.

> mon with others, of air, light, water. . . .
>
> *Adventitious rights* are [for example], the right of a king over his subjects; . . . For none of these rights would exist in [a] newly inhabited island.
>
> . . . .
>
> II. Rights are alienable or unalienable.
>
> Which terms explain themselves.
>
> . . . .
>
> III. Rights are perfect or imperfect.
>
> Perfect rights may be asserted by force, or, what in civil society comes into the place of private force, by course of law.
>
> Imperfect rights may not.[14]

This division, we have seen, is accepted almost verbatim by Story.

Paley has no extended separate treatment of what Story has termed "the duties of man as a member of political society."[15] Rather, he devotes part of his work to "The Elements of Political Knowledge,"[16] in which he discusses, among other things, the origins and forms of civil government. The duties that one has in a civil government, on the other hand, are correctly discussed in Paley's extended treatment of the various relative (interpersonal) duties, and in particular the determinative relative duties. Clearly, inasmuch as political duties arise from human political relationships, it is unnecessary to treat them, like Story, as separate from other duties arising out of similar political relationships.

This brief account of Paley's theory of natural law (or natural theology) clearly demonstrates its effect on Story's own views. With the exception of Story's new category of political duties, the accounts of natural duties are all taken (often verbatim) from Paley's *Principles of Moral and Political Philosophy.* It is now appropriate to return to Story's philosophy and examine some of its peculiar features.

Story's views regarding the origins of civil society are rather odd. Initially, he accepts the classical theory (stemming from Aristotle) that civil society is an outgrowth of the establishment of families. Consequently, he rejects the classical liberal theory (stemming from Hobbes) that civil society emerged from compact, that is to say, social contract. Thus Story writes:

> The origin of political society may be traced back to the primitive establishment of families. From the union of a number of related families grew up tribes; and from tribes gradually grew up colonies and nations. Accidental associations for offence or defence may, in some instances, have introduced the first elements of fixed society between strangers; and a sense of mutual interest and mutual dependence may have rendered them permanent. Coeval with the es-

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14. *Id.* at 74-76.
15. *See supra* text accompanying note 7.
16. *Id.* at 315.

tablishment of civil societies was the origin of civil government.[17]

Yet in the following paragraph, Story remarks:

> Governments, then, may be properly deemed to arise from voluntary consent, or from long acquiescence and prescription, or from superior force. The fundamental objects of all civil governments are, or ought to be, to promote the welfare and safety of the whole society. It is obvious, that no single individual can protect himself to the same extent, or by the same means, as an organized society or government can protect him. The latter has the powers, authority, union and resources of numbers. *Men enter, then, into civil societies for the protection of their persons, and personal rights and property.* In a state of nature, if either be invaded, the only redress is by the application of positive force by the individual, who is injured. But under the establishment of civil governments, the redress is taken from the individual, and is administered by the government . . . . *The entering into civil society, therefore, necessarily, or, at least, naturally, induces the surrender of all those private rights,* which are indispensable for the good order, peace and safety of the whole society.[18]

This paragraph is clear evidence that Story, at least to a limited extent, incorporates classical liberal social contract theory into his own theory of the state. This is rather interesting, for the social contract, state of nature, and original private rights are concepts that are alien to traditional natural law thought. Indeed, it must be noted that these concepts are explicitly rejected by Pufendorf[19] and Paley,[20] the natural law theorists who directly influenced Story.[21]

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17. Story, *Natural Law, reprinted in* J. McCLELLAN, *supra* note 4, at 317. *See also* ARISTOTLE, POLITICS I.2, 1252 a 24 to 3, 1253 b 23.

18. Story, *Natural Law, reprinted in* J. McCLELLAN, *supra* note 4, at 317-18 (emphasis added). *See also* T. HOBBES, LEVIATHAN ch. 17 (1651); J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ¶ 95 (1690).

19. Writing in Latin, Pufendorf states:

> Igitur naturalis status actu ipso nunquam extivi, nisi temperatus, & velut partialis, dum nempe cum quibusdam hominibus singuli in statum civilem, aut illi analogum coaluerunt; adversus reliquos naturalem adhuc libertatem retinuerunt. Etsi quo plures, quoque minores in coetus genus humanum suit divisum, eo propius ad istum statum mere naturalem accessit.

2 S. PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 111 (Oxford ed. 1934).

20. After discussing social contract theory, Paley concludes: "Wherefore, rejecting the intervention of a compact, as unfounded in its principle, and dangerous in the application, we assign for the only ground of the subject's obligation, THE WILL OF GOD AS COLLECTED FROM EXPEDIENCY." W. PALEY, *supra* note 5, at 333.

21. Pufendorf's influence on Story was both direct and indirect. Pufendorf's direct influence is indicated by Story's familiarity with the works of Pufendorf. This familiarity probably dates from the time of Story's legal education and the preparation for his lectures on natural law at Harvard. For an account of this and other influences, see J. McCLELLAN, *supra* note 4, at 71-74; R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 41 (1985). Pufendorf's indirect influence on Story is probably due to the work of William Paley. Paley expressly mentions

Yet, whatever be the origins of the state, Story is nevertheless adamant in maintaining several sets of obligations that flow from being a member of the political community. These were briefly mentioned above as the duties of man as a member of political society.[22] Indeed, it appears that all legal obligations are among this class of duties. For instance, with respect to property rights (and those duties regarded as correlative thereto), Story remarks:

> But, whatever may be the origin of the right to property, it is very certain, that, as it is now recognized and enforced, it is a creature of civil government. Whatever right a man may have to property, it does not follow, that he has a right to transfer that right to another, or to transmit it, at his decease, to his children, or heirs. The nature and extent of his ownership; the modes in which he may dispose of it; the course of descent, and distribution of it upon his death; and the remedies for the redress of any violation of it, are, in a great measure, if not altogether, the result of the positive institutions of society.[23]

The moral force, and thus the obligatory characteristics of positive law, comes from its relation to the law of nature. Story illustrates this point by using the example of contracts:

> The obligation of contracts, or, in other words, the duty of performing them, may indeed, be deduced from the plainest elements of natural law, that is, if such contracts are just and moral, and founded upon mutuality of consideration. It is indispensable to the social intercourse of mankind. It is conformable to the will of God, which requires all men to deal with good faith, and truth, and sincerity in their intercourse with others. . . .
>
> But, in a state of nature, the obligation of contracts, however perfect in itself, cannot ordinarily be enforced upon the other contracting party to its just extent. The only remedy is positive force; and this, in many cases, is impracticable, and is generally inconvenient. The institution of political society brings the moral, as well as the physical power of the whole in aid of the natural obligation of contracts. . . .

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that he is improving on the work of Pufendorf:

> The writings of Grotius, and the larger work of Puffendorff [sic], are of too *forensic* a cast, too much mixed up with the civil law and with the jurisprudence of Germany to answer precisely the design of a system of ethics,—the direction of private consciences in the general conduct of human life. Perhaps, indeed, they are not to be regarded as institutes of morality calculated to instruct an individual in his duty, so much as a species of law books and law authorities, suited to the practice of those courts of justice, whose decisions are regulated by general principles of natural equity, in conjunction with the maxims of the Roman code; of which kind, I understand, there are many upon the Continent.

W. PALEY, *supra* note 5, at xi.

22. *See supra* text accompanying note 7.

23. Story, *Natural Law, reprinted in* J. MCCLELLAN, *supra* note 4, at 320.

> But it may be naturally asked, what contracts are really obligatory? The true answer, in civil societies, is, all such contracts as the law of the land declares to be obligatory or of which it permits the obligation to be enforced. The true answer, independent of the positive recognitions of civil society, is, all such contracts as are moral, just, practicable, and have been extinguished in any lawful manner. Contracts which are immoral, or which have resulted from fraud or oppression; contracts which require impossible things, or are repugnant to natural justice; or which are founded in essential mistakes, as to persons, characters, or things; or which involve the breach of other paramount obligations, cannot, upon the principles of eternal justice, be obligatory.[24]

This illustration from the law of contracts clearly shows the influence that natural law thought had on Story's own thought. Yet, the influence of natural law does not stop at contracts.

When one turns to Story's views on conflict of laws, it is apparent that these views are derived from his natural law philosophy. It is important to realize that although Story posits a set of duties to God (which are apparently paramount to one's other duties) this set is quite limited.[25] The great majority of our duties stem from relations with other people (his so-called "relative duties"[26]) and our relationships originating from our membership in a political society. Accordingly, it will be no surprise that Story's views regarding the determinative elements of a conflicts matter will relate to the latter, larger, two sets of duties, rather than to any conception of natural or universal rights.

B. Conflict of Laws: Story's Thought

The core of Story's thought on conflict of laws can be found in his book *Commentaries on the Conflict of Laws*, a work that was first published in 1834.[27] The work, though written more than a century and a half ago, nevertheless exercises its influence today.[28]

Recognizing that the rules determining a given conflict of laws dispute are themselves part of the domestic law of any jurisdiction, Story attempts to determine what these rules are in Anglo-American jurisdictions. Prior to this enterprise, however, Story recognizes that

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24. *Id.* at 321.

25. *Id.* at 314. According to Story, "in the just performance of these duties consists piety or devotion." *Id.*

26. *Id.*

27. The popularity of this work among nineteenth century scholars is demonstrated by its many editions: 1st ed. 1834; 2d ed. 1841; 3d ed. 1846; 4th ed. (E. Bennett ed.) 1852; 5th ed. (E. Bennett ed.) 1857; 6th ed. (I. Redfield ed.) 1865; 7th ed. (E. Bennett ed.) 1872; 8th ed. (M. Bigelow ed.) 1883 [hereinafter COMMENTARIES, citing 5th ed. 1857].

28. *See, e.g.*, G. CHESHIRE & P. NORTH, PRIVATE INTERNATIONAL LAW 32-33, 484, 503, 522, 536 (10th ed. 1979).

although the rules themselves may differ among nations and states, there are nevertheless several interrelated principles that govern the content of the rules. Accordingly, Story remarks:

> Before entering upon any examination of the various heads, which a treatise upon the Conflict of Laws will naturally embrace, it seems necessary to advert to a few general maxims or axioms, which constitute the basis, upon which all reasonings on the subject must necessarily rest; and without the express or tacit admission of which, it will be found impossible to arrive at any principles, to govern the conduct of nations, or to regulate the due administration of justice.[29]

Scholars generally concede that there are four interrelated principles that govern Story's analysis.[30]

First, legal rules of a jurisdiction have effect only within that jurisdiction's territorial limits, or apply to citizens of that jurisdiction. Story writes:

> It is plain, that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only, while they remain therein.[31]

This principle follows from one's duties as a member of a political society. So long as one remains a member of any political society, there is an obligation to act in accord with the duties imposed by virtue of one's membership in the community. Once one leaves the jurisdiction of a society (and physical departure from the jurisdiction is obviously the only practicable way of "leaving" a political

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29. COMMENTARIES, *supra* note 27, § 17, at 26.

30. *See, e.g.*, W. COOK, THE LOGICAL AND LEGAL BASE OF THE CONFLICT OF LAWS 49-50 (1942); E. LORENZEN, CASES AND MATERIALS ON THE CONFLICT OF LAWS 5-7 (5th ed. 1946); Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 34-35 (1934). Cook's work is a collection of essays; the relevant discussion of Story's interrelated principles was originally published as *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931).

31. COMMENTARIES, *supra* note 27, § 7, at 10. Regarding a nation's alleged right to extra-territorial governance of its citizens, Story remarks:

> Every nation has hitherto assumed it as clear, that it possesses the right to regulate and govern its own native born subjects everywhere; and consequently, that its laws extend to, and bind such subjects at all times, and in all places. This is commonly adduced as a consequence of what is called natural allegiance, that is, of allegiance to the government of the territory of a man's birth.

Id. § 21, at 29. This view is consistent with Story's views of the duties of humans as members of political society. This passage demonstrates that Story accepted the premise that birth in a country confers citizenship, which in turn imposes a number of benefits and obligations—one of which is the duty to obey the extra-territorial legislation of the country of which one is a citizen.

society), any positive duties imposed by that society vanish. This generalization is subject, of course, to those extra-territorial duties that necessarily flow from one's citizenship.

The second principle underlies the first: all nations (and within the context of a federation, all federated units regulating within the scope of their jurisdiction are deemed "nations") are equal and independent. From this it follows that no nation has a superior. Accordingly, each nation is free exclusively to legislate within the subject matter of those affairs appertaining to its sovereignty.[32]

This principle is apparently independent of Story's view as to positive and natural law. Rather, it appears to be adopted from common law philosophizing regarding the nature of the sovereign. It is similar to John Austin's criteria by which he identifies whom can be called a sovereign in a political community.[33] Story, however, does not use these principles to identify a sovereign. Rather, he elicits his own principles by examining the elements of sovereignty in a society, and determines that if one is a sovereign, then the characteristics enumerated in the second principle naturally follow.

It is unclear to what extent Austin exercised an influence (whether positive or negative) on Story's thought.[34] Nevertheless, Austin's thought had its antecedents, especially in the writings of Locke[35] and Blackstone,[36] and these latter authors clearly influenced Story's own view. Accordingly, even if one cannot trace the Austinian origin of the notion of sovereignty in Story's thought, one can nevertheless trace back to some common ancestors.

Story's third proposition follows directly from the first: since each nation possesses exclusive jurisdiction over its own territory, its laws exclusively govern all conduct within that territory.[37] The conse-

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32. In section 8, Story writes:

> This is the natural principle flowing from the equality and independence of nations. For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. . . . And, accordingly, it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory.

COMMENTARIES, *supra* note 27, § 8, at 11.

33. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 193-94 (1954). In Lecture VI a sovereign is defined as that to which "1. the *bulk* of a given society are in a habit of obedience or submission to a *determinate* and *common* superior . . . [and] 2. That certain individual, or that certain body of individuals is *not* in a habit of obedience to a determinate human superior." *Id.*

34. Note that Austin's *Lectures on Jurisprudence* were not published until 1892, some forty-seven years after Story's death.

35. J. LOCKE, *supra* note 18, ¶¶ 132-33 & 142.

36. *See, e.g.*, J. MCCLELLAN, *supra* note 4, at 79.

37. In his *Commentaries*, Story observes that

> [t]he first and most general maxim or proposition is that, which has been already adverted to, that every nation possesses an exclusive sovereignty

quences of this proposition for conflict of laws issues relating to contracts follow immediately: the law governing the contract is that of the place in which the contract is made, unless the place of performance is different. If the place of performance is different, the law of the latter jurisdiction governs.[38] In tort, the *lex loci delecti* governs both the rights of the parties and the quantum of damages.[39]

The fourth proposition is an immediate corollary of the first and third propositions. This proposition declares that each state possesses exclusive jurisdiction over its own territory, and no state can bind persons or property located outside its territory. Thus Story writes:

> Another maxim, or proposition, is, that no State or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.[40]

From these enumerated propositions, it is clear that the only principle upon which private international law can be said to rest is the comity of nations.[41] Story remarks:

> and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every State affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens; and also all contracts made and acts done within it.

COMMENTARIES, *supra* note 27, § 18, at 26 (footnote omitted).

38. *Id.* §§ 242, 280, at 370-71 & 421-32. In section 280, Story cites as authority Andrews v. Pond, 38 U.S. (13 Peters) 64 (1839) (holding that when a contract was made without reference either to the law of the state where it was executed or the state where it was performed, the law that governs is unquestionably that of the state where the contract was entered into and the instrument taken to secure its performance).

39. Story's discussion of tort is intertwined with his discussion of contract:

> Analogous to the rule respecting interest would seem to be the rule of damages in cases of contract, where damages are to be recovered for a breach thereof *ex mora*, or where the right to damages arises *ex delicto*, from some wrong, or injury done to personal property. Thus, if a ship should be illegally or tortiously converted in the East Indies by a party, the interest there will be allowed by way of damages in a suit against him.

COMMENTARIES, *supra* note 27, § 307, at 491 (footnote omitted).

40. *Id.* § 20, at 28. This proposition is, of course, subject to the extra-territorial jurisdiction that a country may claim over its citizens. *See supra* note 31 and accompanying text. These two claims are not necessarily self-contradictory, for the binding force of an extra-territorial legal duty takes effect upon the return of the subject to the original jurisdiction. The duty may be extra-territorial, but its force is intra-territorial; and it is with the force or effect of a law that Story is concerned.

41. *Id.* §§ 32-36, at 40-44.

> The true foundation, on which the administration of international law must rest, is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, *and from a sort of moral necessity to do justice*, in order that justice may be done to us in return.[42]

Yet this mutual obligation is only prima facie. No nation is bound to make itself an instrument of injustice for another nation:

> [T]here can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interest of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust.[43]

Accordingly, any mutuality of extra-territorial force of law is tempered through discretion.[44]

The relationship of this notion of comity to Story's views of natural law is apparent. States, being composed of groups of people, necessarily have relationships with other groups of people. Part of the interpersonal duties between persons is an obligation to see that "natural justice" be done.[45] *Prima facie*, the insistence that a political society's legal duties and rights be enforced is a part of natural justice. This provides half of the moral component to comity.

The other moral aspect of comity is the non-enforcement of "oppressive or injurious" extra-territorial legal obligations. This aspect provides the opposite side of the coin. The interpersonal duty required within a nation is to do justice. As a result, this serves to limit domestic recognition of foreign relationships.[46]

Observe that it is legal rights and obligations that are enforced by

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42. *Id.* § 35, at 42 (footnote omitted) (emphasis added).

43. *Id.* § 33, at 41 (footnote omitted).

44. *Id.* § 36, at 43-44. In explaining how the discretion is to be applied, Story notes that

> [i]n the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests.

Id. § 38, at 45. Unfortunately, Story includes no discussion of the criteria by which the courts are to determine whether or not a foreign law is "repugnant to its [government's] policy or prejudicial to its interests." *Id.*

45. Story, *Natural Law, reprinted in* J. McCLELLAN, *supra* note 4, at 314-15.

46. This is precisely analogous to the contracts example that Story mentions in his article *Natural Law*. *See supra* text accompanying note 24. Analogous to contracts that are enforceable in civil societies are extra-territorial laws that the law of the land declares to be enforceable. Analogous to contracts that ought to be enforceable "independent of the positive recognitions of civil society" are extra-territorial obligations that are "moral, just, practicable, and have been extinguished in any lawful manner." Story, *Natural Law, reprinted in* J. McCLELLAN, *supra* note 4, at 321.

a foreign regime. Accordingly, this represents a rejection of the universality of personal rights. This difference separated Story from the first American author on conflict of laws, Samuel Livermore. While arguing the case of *Saul v. His Creditors*,[47] Livermore, a New Orleans lawyer, drew upon continental authors to argue that the Louisiana Supreme Court ought to adopt the principle that a person acquires a cloak of rights both at law and in equity through operation of a particular municipal law which he carries with him wherever he goes. This argument was dismissed by the court. In reply, Livermore published his own treatise on conflicts.[48] Story cites this work frequently in his *Commentaries*, but always to criticize. Perhaps the clearest instance of Story's rejection of personal rights theory can be found in a letter to Lord Stowell, commenting on the latter's judgment in *Slave Grace's Case*[49]:

> I have read with great attention your judgment in the Slave Case . . . . If I had been called upon to pronounce a judgment in a like case, I should certainly have arrived at the same result . . . .
>
> In my native state, (Massachusetts,) the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law would re-attach upon him, and that his servile character would be redintegrated.[50]

By contrast, Livermore's theory would have protected the returned slave by protecting (and preserving) his status once he entered a free state, and this protected status would remain with him for the rest of his life.[51]

It is not necessary to discuss further the relation of Story's theory of conflict of laws to slavery. That question is adequately dealt with by others.[52] Furthermore, this question is too far bound up with constitutional issues[53] raised by the fugitive slave[54] and supremacy clauses[55] of the U.S. Constitution to be germane to the present

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47. 5 Mart. (n.s.) 569 (La. 1827). The discussion of this case is based upon Leslie, *The Influence of Joseph Story's Theory of the Conflict of Laws on Constitutional Nationalism*, 35 MISS. VALLEY HIST. REV. 204, 206-207 (1948).

48. S. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (1828).

49. 166 Eng. Rep. 179 (1827).

50. Letter from J. Story to Lord Stowell (Sept. 22, 1828), *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY 558 (W. Story ed. 1851).

51. Leslie, *supra* note 47, at 215-16.

52. *See, e.g., id.*; J. MCCLELLAN, *supra* note 4, at 261-62.

53. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842) (Story, J.) (holding that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever state they may be found, is constitutionally recognized as an absolute positive duty and right, pervading the whole Union and uncontrolled by state sovereignty or legislation), *overruled sub silentio*, Testa v. Katt, 330 U.S. 386 (1947).

54. U.S. CONST. art. IV, § 2.

55. U.S. CONST. art. VI.

discussion.

III. Story's Successors

As influential as they were, Story's views on conflicts were not the only ones to elicit a reaction from those responsible for the revolution. Story was succeeded by other writers, primarily John Westlake and A.V. Dicey in England, who exercised considerable influence on conflicts writing until at least the 1930s. In fact, Dicey is still influential today. Accordingly, the writings of these two conflicts jurists will now be examined in order to determine the theoretical basis on which their theories rest. Following this, the effect that their theories had on American conflict of laws will be examined.

A. John Westlake

Westlake's *A Treatise on Private International Law*[56] was among the first British discussions of conflict of laws. This work had as its main influences not only the English conflict of laws decisions but also the work of Story[57] and (more interestingly) the continental jurists.[58] Unlike the continental jurists and Story, Westlake makes no attempt to give a theoretical "backbone" to his treatise. Rather, the issues are treated topically (e.g., immovables, international law of obligations, movables, etc.) and, with one exception, no attempt is made to relate the jurisprudence of one topic to that of another. The sole exception is marriage, which, following traditional treatment of the subject, is regarded as a species of contract. Thus, the treatment of marriage is incorporated into contracts doctrine.

Whenever Westlake discusses the theory of conflicts, he does so with a view towards outlining all the possible reasons that courts and jurists have considered in arriving at their various opinions. Critical exposition is rare, and when done it tends to contrast points that have been derived from differing theoretical positions, rather than to analyze the theories themselves.[59]

Merely because Westlake makes no explicit statement of his theory of conflicts does not imply that he has no such theory. Indeed, one can elicit the threads of such a theory if we examine his discus-

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56. J. Westlake, A Treatise on Private International Law (1858).

57. For a reference to Story's work, see note (n) to article 176. *Id.* art. 176, at 163.

58. Even a cursory reading reveals this continental flavor.

59. Article 144 is representative of his approach. In the discussion of the theories of reality and personality, Westlake criticises Huber:

> Thus, can one who is of age in the country of his domicile devise land situate where he would still be a minor? Huber answers, Yes: a decision which many in England and America would reject, as derogatory to the territorial authority of the sovereign of the land. Nay, more: by referring to the rights of the individual citizens of the forum, the doctrine opens the door to very un-juridical reasonings founded on their supposed interests.

Id. at 127 (footnote omitted).

sion of the "Material Contents of Obligations." His treatment is worth quoting in detail:

> Every lawful dealing between parties which gives rise to a legal tie or obligation is a contract, a term opposed to a tort or delict, which is the unlawful fact of one person binding him by a legal tie or obligation to another. . . . Now men contract by agreement, by consent, or by fact. The obligation of an agreement arises from promise, which may be oral, written, or inferred from acts, and, if express, need not distinctly enumerate every thing which it includes. . . . The obligation of a consensual contract is imposed by the law on the relation in which the parties have placed themselves by their consent. Thus the pecuniary rights of a husband and wife, who marry without settlement, do not flow from any mutual promises, but from the matrimonial relation in which the consent interchanged in the ceremony has placed them. . . . Lastly, when parties enter into a particular dealing without agreement, they institute a contract by fact, as in the loan of money when no terms are stipulated as to interest, or the time and mode of repayment. In contracts by fact, as in consensual contracts, the obligation is measured by the law; . . . .[60]

Accordingly, Westlake envisages a territorial theory of conflicts, in which the parties' rights are determined by the place in which they alter their legal status. Therefore, in the case of contracts, the *lex loci contractus* is the governing law.[61]

Hence, under Westlake's theory, all rights depend upon their being created by the laws of some nation. Westlake expressly mentions this notion:

> Now, in jurisprudence, the origin of rights naturally precedes the mode of enforcing them, or, in other words, the civil code is prior to the code of procedure. This order was indeed long inverted in our [English] law, for, from the absence in it of clear expositions of principle, as well as from the singular distribution of powers among various courts, there was hardly any other mode of ascertaining whether a right existed, than by enquiring exhaustively whether it could be prosecuted under any of the known forms of remedy. Will trover lie? . . . But the reproach in question is gradually being removed from us, as well by the improvement of the English law itself, as by that of the institutional treatises which contain its elements; and, similarly, writers on the conflict of laws now usually consider on what law the creation of a right depends, before treating of the appropriate jurisdiction for its enforcement. . . . The maxim by which the passage was made from rules of jurisdiction to rules of law was, that every jurisdiction decided according to its own law, or, as it was expressed, *paria sunt forum alicubi sortiri et statutis ligari: si ibi forum, ergo et jus.* Hence, if it could be deter-

60. *Id.* art. 185, at 171-72.
61. *See id.* chs. V-VII.

> mined to what jurisdiction any contention directly, or by the strict rule, belonged, the law of that jurisdiction was to be applied if the matter arose incidentally, or by a permitted derivation from the strict rule, in any other forum . . . .[62]

Thus, the existence and content of a legal right or relation depends upon the law of the jurisdiction in which the parties brought about that right or relationship. Furthermore, once that right has been created, it can be enforced in any jurisdiction.

Two points must immediately be made. First, Westlake provides no justification, theoretical or otherwise, as to why a legal right created in one jurisdiction ought to be enforceable in another. Unlike Story, Westlake has no theory of comity that would explain the reciprocal enforcement of rights by courts of various sovereigns.

Second, in spite of appearances to the contrary, a court will not act against the policy of its own jurisdiction while enforcing a foreign right. Thus, an English court will not enforce contracts involving transactions in slaves,[63] nor will it enforce a foreign judgment which "we [that is, English public policy] consider contrary to natural justice,"[64] nor will it recognize a foreign status that is contrary to English public policy.[65]

It is also important to note that aside from the phrase "condemned in principle by our legislation,"[66] Westlake gives no account of how a foreign status or right is to be pronounced contrary to public policy. This represents a tremendous lacuna in the theoretical backbone of his position.

Nevertheless, Westlake's recognition that a state may decide, on public policy or moral grounds, not to enforce a right that a litigant obtained in a foreign jurisdiction indicates some acceptance of a moral theory that mandates action in accord with a moral imperative whenever that imperative is contrary to a legal (albeit alien) right. Obviously, this moral duty is narrowly restricted so as to be inapplicable to a conflict between a moral duty and a domestic right. Unfortunately, little else regarding Westlake's legal philosophy can

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62. *Id.* art. 56, at 52-53.

63. In article 198, Westlake touches upon Story's discussion of this issue:

> It has been held in argument by Chief Justice Shaw [of the Supreme Judicial Court of Massachusetts] that, upon a note given in a slave-state for the price of a slave, a suit might be maintained in Massachusetts: but we may say with Story—and, in England, with a more confident doubt—that "this doctrine, as one of universal application, may admit of question in other countries, where slavery may be denounced as inhuman and unjust, and against public policy."

Id. art. 198, at 183 (quoting COMMENTARIES, *supra* note 27, § 259 n.4, at 388-89 (footnotes omitted)).

64. *Id.* art. 388, at 374.

65. *Id.* art. 403, at 386.

66. *Id.*

be teased out of his *Treatise on Private International Law.*

B. A.V. Dicey

Whatever influence Westlake's treatise had,[67] it was soon superseded by the influence of A.V. Dicey, who in 1896 published his *A Digest of the Law of England with Reference to the Conflict of Laws.*[68] This work, though in the tenth edition, still exhibits its influence today.[69]

Like Westlake, Dicey recognizes that a legal right is created by virtue of the operation of law in one jurisdiction. Unlike Story, who used the theory of comity to justify the reciprocal enforcement of foreign legal rights, Dicey justifies this reciprocal enforcement from the fact of the right's very existence. While discussing this theory of "vested rights," Dicey noted that "[a]ny right which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts."[70] In a subsequent discussion of rights, Dicey declares that "[a] Court enforces a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it."[71] Thus, according to Dicey, once a legal right accrues to a subject by virtue of the operation of a "civilized" sovereign's[72] law, that right is (and ought to be, from a theoretical framework) enforceable anywhere else in the "civilized" world.

There is, of course, one major—and obvious—exception to this view. A court of one jurisdiction is not to be used as an instrument of injustice by another jurisdiction. Accordingly, there is no obligation imposed upon an English court to recognize a foreign right, when to do so is (1) contrary to an English law having extra-territo-

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67. Perhaps the best testimony to the decline of Westlake's influence in the latter part of the twentieth century can be found in J. MORRIS, THE CONFLICT OF LAWS (3d ed. 1984), which—though mentioning Westlake in the Table of Authorities—remarks: "In the twentieth century the most influential writers have been Dicey, whose *Conflict of Laws* was first published in 1896, and Cheshire, whose *Private International Law* was first published in 1935. Each of these well-known books has passed through many editions . . . ." *Id.* at 8.

68. A. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (1896).

69. DICEY'S CONFLICT OF LAWS (J. Morris 10th ed. 1980).

70. A. DICEY, *supra* note 68, at xliii.

71. *Id.* at 30.

72. The notion that only certain countries are "civilized" is essential to Dicey's discussion. Dicey admits that the term "is of necessity a vague one," but narrows his definition to include "any of the Christian states of Europe, as well as any country colonised or governed by such European state, at least so far as it is governed on the principles recognised by the Christian states of Europe." A. DICEY, *supra* note 68, at 29.

rial effect,[73] (2) inconsistent with the policy of English law or English political institutions, or (3) inconsistent with the authority of a sovereign over the territory over which he is sovereign.[74]

Dicey's theory of vested rights soon had an immediate effect on American jurists. In his first casebook on conflicts published in 1902, Joseph Beale cites Dicey's discussion of vested rights in his own discussion of comity.[75] Furthermore, although Dicey is not explicitly mentioned in the opinion, the Massachusetts Supreme Judicial Court relied on the theory of vested rights in the 1900 case of *Howarth v. Lombard*.[76] In the opinion, Justice Knowlton remarked that "[t]he fundamental question is whether there is a substantive right originating in one state, and a corresponding liability which follows the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere."[77] The court, however, also raised considerations of comity as a ground for reciprocal enforcement of vested rights:

> Such a right, arising under a local statute, will be enforced ex comitate in another state unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him.[78]

This consideration of comity is independent of Dicey's theory, and seems to indicate Story's influence on the case. Yet, again reflecting Dicey, the court also raised considerations of morality and public policy as possible limits to the reciprocal enforcement of vested rights. Knowlton continued:

> If the statute creating the right is against the policy of the law of

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73. It is interesting to note that English extra-territorial jurisprudence may violate the sovereignty of another sovereign. If so, under the latter of the next-mentioned bars against English enforcement of foreign legal rights, Dicey's theory is either internally inconsistent or admits of an unjustified anglo-centricism. Given the historical context in which Dicey's work had its genesis, the latter is likely the case.

74. A. DICEY, *supra* note 68, at xliii. The third qualification has been dropped in the tenth edition. As to the scope of "public policy" see In the Estate of Fuld (No. 3), 3 All E.R. 776, 781 (1968). In *Fuld*, Lord Justice Scarman's opinion noted that "an English Court will refuse to apply a law which outrages its sense of justice or decency. But before it exercises such power it must consider the relevant foreign law as a whole." *Id.* This seems to come under the relevant foreign law limitations as set forth by Lord Atkin in Fender v. St. John-Mildmay, [1938] App. Cas. 1, 12, that public policy "should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." *Id. See also* Regazzoni v. K.C. Sethia Ltd., 2 Q.B. 490, 524 (Crim. App. 1956); Robinson v. Bland, 97 Eng. Rep. 717, 721 (K.B. 1760). *But cf.* Santos v. Illidge, 141 Eng. Rep. 1404 (Ex. Ch. 1860).

75. 1 J. BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS 144 (1902).

76. 175 Mass. 570, 56 N.E. 888 (1900).

77. *Id.* at 572-73, 56 N.E. at 889.

78. *Id.*

> the neighboring state, that is a sufficient reason for refusing to enforce the right there. In the neighboring state, in such a case, it will not be considered a right. If the enforcement of a statutory right in a neighboring state in the manner proposed will work injustice to its citizens, considerations of comity do not require the recognition of it by the courts of that state.[79]

A few lines later, the court concluded its discussion by noting that

> if there is a substantive right, of a kind which is generally recognized, courts, through comity, ought to regard it and enforce it as well when it arises under a statute of another state as when it arises at common law, unless there is some good reason for disregarding it. These seem to be the reasons and principles which govern the action of the courts in cases of this kind.[80]

In summary, *Howarth v. Lombard* demonstrates the influence both of Story's comity theory of reciprocal enforcement of foreign law, and the theory of vested rights in Dicey's sense.

It might be argued that *Howarth v. Lombard* does not provide evidence of any direct connection between Dicey and American conflict of laws jurisprudence, inasmuch as theories of vested rights were quite common in the nineteenth century. Indeed, Westlake's thought demonstrates this common thread. This objection does not, however, seriously undermine the argument. Evidence of Dicey's direct influence can be found elsewhere. As previously noted, Joseph Beale's conflicts casebook cited Dicey's discussion of vested rights in the section dealing with comity.[81] Furthermore, for the purposes of this brief discussion of the jurisprudential and theoretical underpinnings of American conflict of laws, it is necessary only to show the influence that a vested rights theory had upon these writers. Although Dicey's views may be the exemplar of such a vested rights theory, it is necessary only to show the influence of the general theory and not necessarily the influence of its exemplar.

IV. The Traditional View of Legal Reasoning

Simultaneous with the development of vested rights and comity theories in the conflict of laws, jurists were beginning to look at the nature of law in a different manner. They began to view law as a science, analogous to mathematics or the science of chemistry, rather than as an amorphous collection of frequently contradictory principles that lawyers and judges could apply on an ad hoc basis.

The origins of such a "scientific" view of law have been traced by M.H. Hoeflich.[82] Though his work is too extensive to duplicate in

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79. *Id.*

80. *Id.*

81. J. Beale, *supra* note 75, at 144.

82. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 Am. J. Legal Hist. 95 (1986).

this short account, it is, however, desirable to trace independently the origins of the scientific view of law. As Hoeflich indicates, this view of law arose with a correlative view that geometric reasoning should serve as a paradigm for legal reasoning. These views can be traced to the discovery of manuscript editions of the Byzantine *Corpus Iuris Civilis*, a compilation of Roman customary law:

> The *Corpus* as a whole is plagued by *homonymiae*, tautologies, and *antinomiae*, inconsistencies. Nevertheless, what impressed a number of the early modern jurists was the method of argumentation adopted by the classical jurists and contained in those fragments preserved in the *Digest*. Roman juristic argument tends to be internally orderly and logical. More importantly, juristic discourse also often tends to proceed in a deductive fashion, and lends itself to an analysis starting from general analysis of facts leading to the derivation of first principles and moving thence again to a consideration of the application of those specific principles to another particular set of facts.[83]

Coincident with the discovery of the Roman legal fragments (and the reasoning contained in them), continental scientists—influenced by the philosophical methodology of Descartes, Leibniz and Wolff—were beginning to view geometry and its deductive methodology as the paradigm of scientific reasoning. Indeed, this position is succinctly stated by Descartes:

> Science in its entirety is true and evident cognition. . . .
>
> . . . .
>
> But now let us proceed to explain more carefully our reasons for saying, as we did a while ago, that of all the sciences known as yet, Arithmetic and Geometry alone are free from any taint of falsity or uncertainty. We must note then that there are two ways by which we arrive at the knowledge of facts, viz. by experience and by deduction. We must further observe that while our inferences from experience are frequently fallacious, deduction, or the pure illation of one thing from another, though it may be passed over, if it is not seen through, cannot be erroneous when performed by an understanding that is in the least degree rational. . . .
>
> This furnishes us with an evident explanation of the great superiority in certitude of Arithmetic and Geometry to other sciences.[84]

This geometric paradigm was applied to law by the philosopher G.W.F. Leibniz. Hoeflich traces Leibniz's treatment of law, and summarizes it as follows:

> Both in his major Romanist treatise, the *Nova Methodus Discendae Docendaeque Iuris*, and in his letters, Leibniz extensively

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83. *Id.* at 97.

84. Descartes, *Rules for the Direction of the Mind, reprinted in* 1 THE PHILOSOPHICAL WORKS OF DESCARTES 3-5 (E. Haldane & G. Ross trans. 1911) (footnotes omitted).

> developed the notion that law, indeed, must be understood as a principled deductive science on the model of classical geometry and that legal reasoning must follow the deductive, demonstrative model used in geometric proofs. For Leibniz, Roman law, as an illustration of such reason in practice, was no less principled and subject to deductive process than was geometry. In several of his letters and academic works Leibniz compared the work of the classical Roman jurists to that of the ancient mathematicians and geometers.[85]

Leibniz also devoted much attention to two other related ideas that influenced his way of viewing law. The first was the notion that there is a fundamental unity among the sciences.[86] Most of Leibniz's work on this topic was devoted to an examination of the interrelationships between mathematics and physics. Nevertheless, because he viewed the nature of law as essentially scientific, Leibniz recognized that its content was related to other disciplines.

Second, and related to the notion of the unity of sciences, was the idea that a logically perfect language (*ars combinatoria*) could be developed that would mirror the structure of true scientific propositions. Such a language would also have the virtue of unambiguous expression and would allow for the derivation of other propositions from initial propositions.[87] The geometric method served as the paradigm for the process of derivation. Thus, legal reasoning in its ideal form would be identical to the sorts of reasoning found in other branches of the sciences.

The idea of viewing legal reasoning as analogous to geometrical reasoning continued to be an important influence after Leibniz. We find this view strongly expressed in the juristic works of Leibniz's student, Christian Wolff. Indeed, in the preface to his work *Institutiones Iuris Naturae et Gentium*, Wolff writes:

> Therefore, these things may not be brought out into the light [of clarity], unless, setting oneself in the footsteps of Euclid, of the truer, stricter logic of the law; individual terms are defined by exact definitions, and, no less, definitions are thus properly arranged, so that not only may consequences be entirely understood through their prior propositions, but also that the truth of these results be demonstrated through [the truth] of these preceding statements.[88]

Wolff is no longer regarded as a philosopher of major importance. This does not negate the fact, however, that he had a significant

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85. Hoeflich, *supra* note 82, at 100 (footnotes omitted).

86. *See* McCrae, *The Unity of the Sciences: Bacon, Descartes, and Leibniz*, 18 J. HIST. IDEAS 27 (1957).

87. *See* H. ISHIGURO, LEIBNIZ'S PHILOSOPHY OF LOGIC AND LANGUAGE 35-51 (1972).

88. C. WOLFF, INSTITUTIONES JURIS NATURAE ET GENTIUM (1749), *quoted in* Hoeflich, *supra* note 82, at 103-104.

impact on subsequent philosophers and students of philosophy.[89] In his time, Wolff was an important figure in the *Aufklarung* (German enlightenment) and was one of the first German philosopher-educators. More important for present purposes, he produced works that were broadly influential on the next several generations of scholars.[90] Although Kant and his successors were later to criticize Wolff's metaphysical and epistemological doctrines, such criticism did not directly reach Wolff's doctrines regarding the nature of legal reasoning.[91]

Accordingly, when one considers Wolff's influence on later thought and the relative lack of criticism directed against his views regarding the nature of legal reasoning (in comparison with his other philosophical views), it is not suprising that Wolff influenced later jurists.[92] Wolff, however, was but one representative of the so-called "geometric paradigm" in continental jurisprudence. This continental tradition subsequently made its way into Anglo-American jurisprudence. There are four significant reasons why and how this form of civilian legal reasoning affected Anglo-American jurisprudence.

First, during the late eighteenth and early nineteenth centuries, common lawyers began to pay more attention to the civil law.[93] Indeed, this was particularly true in the case of conflicts jurisprudence. For example, in writing his treatise on conflicts, Joseph Story drew extensively upon the works of Huber, Grotius, Pufendorf and other

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89. It should be noted that Kant's philosophy is in part directed against the "dogmatic philosophy" of Wolff. I. KANT, KRITIK DER REINEN VERNUNFT at xxxvi (2d ed. 1787).

90. Regarding Wolff, Copleston noted that

> [a]part from Leibniz, Germany had produced little in the way of philosophy: the great period of German philosophy lay in the future. But meanwhile Wolff acted as a kind of philosophical educator of his nation. He is often accused, no doubt with justice, of aridity, dogmatism and formalism. But because of its comprehensiveness and its format and orderly arrangement his system was able to provide a school-philosophy for the German universities. His influence spread throughout Germany and beyond, and his ideas may be said to have dominated in the German universities until the rise of the Kantian criticism.

6 F. COPLESTON, A HISTORY OF PHILOSOPHY 114 (1985).

91. Obviously, if it could be shown that the validity of Wolff's position regarding legal reasoning was dependent upon, for instance, an untenable epistemological theory, then his position regarding legal reasoning would be affected. The present author knows of no such attempts, however.

92. As Hoeflich traces Wolff's broader influence, it is not necessary to duplicate his effort. *See* Hoeflich, *supra* note 82, at 104-105.

93. *See* J. MCCLELLAN, *supra* note 4, at 80-98; Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, U. ILL. L. REV. 719 (1984); Schwartz, *John Austin and the German Jurisprudence of His Time*, 5 POL. Q. 178 (1934); Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966).

civilian jurists.[94] Inasmuch as the ideas of these latter authors neither developed nor were discussed in a vacuum, it is not surprising to discover the impact of their views (as well as the views of their later followers) regarding legal reasoning on Anglo-American readers.

The second reason for the geometric paradigm's influence upon Anglo-American law is the notable work of John Austin. Austin studied in Bonn during 1827-1828, and he later incorporated the geometrical reasoning that he had learned in Germany into his own views regarding legal reasoning.[95] According to Austin's normative framework for law, the first principles of legislation were to be worked out from the general principle of utility. From these first principles other legislative principles were then to be deduced. The geometrical model served as a paradigm for this deductive process. In the third lecture of *The Province of Jurisprudence Determined*, Austin describes this form of reasoning:

> This general demand for truth . . . and this general contempt of falsehood and nonsense . . . would improve the method and the style of inquiries into ethics, and into the various sciences which are nearly related to ethics. The writers would attend to the suggestions of Hobbes and of Locke, and would imitate the method so successfully pursued by geometers: Though such is the variety of the premises which some of their inquiries involve, and such are the complexity and ambiguity of some of the terms, that they would often fall short of the perfect exactness and coherency, which the fewness of his premises, and the simplicity and definiteness of his expressions, enable the geometer to reach. But, though they would often fall short of geometrical exactness and coherency, they might always approach, and would often attain to them.[96]

Although Hoeflich traces the geometric paradigm so as to include other jurists lesser known than Austin,[97] later English legal thought would demonstrate that Austin's views provided the most important influence of any jurist.

The third reason for the incorporation of the geometric method into Anglo-American legal reasoning is the change in the method by which law was studied. In the nineteenth century, both in England and the United States, law began to be taught as a university subject. The notion that law should be studied through an apprenticeship was challenged as universities accepted law as a proper subject to be taught in a university curriculum. Legal scholars, in order to justify their place in the universities and

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94. *See supra* note 21 and accompanying text.

95. *See* Schwartz, *supra* note 93.

96. 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 140 (Campbell ed. 1885), *quoted in* Hoeflich, *supra* note 82, at 111-12.

97. Hoeflich, *supra* note 82, at 109-16.

> convince potential students to attend university law schools, [began] to develop some notion which would set university law studies apart from apprenticeship and would convince everyone that university law studies bestowed special expertise and status. The notion of legal science achieved these ends. First, by establishing law as a science, law *ipso facto* became a legitimate university subject. . . . The notion of law as a deductive science on the model of mathematics also served as a special selling point for attracting law students to the universities, for the apprenticeship system inculcated the traditional, writ-based, practice-oriented notions. It was only in the university law schools that students would be taught broad principles and the scientific mode of reasoning necessary to apply them.[98]

The incorporation of law as a university subject required both a standard that guaranteed its academic legitimacy and a marketing feature that could be used to attract students to university legal studies. The scientific nature of law, and the geometric form of legal reasoning would fulfill both essentials.

The fourth reason why the geometric-scientific method came to be influential in nineteenth century Anglo-American legal thought rests in the common desire during this period to codify the common law. Although the codification movement was felt in England (in particular with respect to the criminal law[99]), the movement was much more influential in America. There were three primary reasons behind this.

First, legal materials, especially law reports, were scarce during the nineteenth century. Accordingly, if the common law was distilled into a code containing fundamental principles, the appropriate answers to any particular situation could be educed without reference to scarce case reports.[100]

Second, due to the federal nature of the American republic, state courts were given parallel jurisdiction to decide many legal issues without necessarily having a common appellate court.[101] Such decisions did not always coincide with one another. As a result, there was well-founded confusion as to what exactly was the common law with respect to a particular point.[102] Thus, a code embodying common law principles (of contract law or conflict of laws, for instance) adopted by state legislatures would resolve the confusion as to what was appropriate law.

Third, and related to the former point, was the growing hostility

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98. *Id.* at 118.

99. *See* M. FRIEDLAND, A CENTURY OF CRIMINAL JUSTICE 1-46 (1984).

100. *See* J. MCCLELLAN, *supra* note 4, at 90.

101. Regarding the Supreme Court's powers to hear appeals on state law, see Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825), and Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

102. *See* J. MCCLELLAN, *supra* note 4, at 85-86.

to the common law as it was perceived by the public. The common law was viewed as a varying and contradictory fund of principles drawn upon by lawyers and judges alike when framing arguments and reaching decisions. Accordingly, the public felt that these common law principles were nothing more than sophistic grounds that could be used ad hoc to justify any desired result.[103] This feeling was exacerbated by the fact that very few state judges in the early nineteenth century were trained as lawyers.[104] Therefore, if the common law could be incorporated into a code, and a method found (preferably based on scientific principles) by which the codified principles could be applied in a coherent manner to specific cases, the ad hoc nature of legal reasoning would supposedly disappear.

Codification and the use of geometric reasoning to apply general principles to specific fact situations was thought to provide a solution to the complex problems facing nineteenth century lawyers and legal theorists in England and, more particularly, in America. Such ideas provided an attractive theoretical foundation for much work in law. There is, however, another possible reason why this legal viewpoint became popular.

The fourth possible reason why the geometric paradigm in law (or legal formalism, as it is sometimes known) came to be accepted is offered by Morton Horwitz. According to Horwitz, legal formalism arose in America due to a significantly changed postrevolutionary society in which the mercantile classes began to consolidate their power. Horwitz observes that

> [b]y the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society. Not only had the law come to establish legal doctrines that maintained the new distribution of economic and political power, but, wherever it could, it actively promoted a legal redistribution of wealth against the weakest groups in the society.
>
> The rise of legal formalism can be fully correlated with the attainment of these substantive legal changes. If a flexible, instrumental conception of law was necessary to promote the transformation of the postrevolutionary American legal system, it was no longer needed once the major beneficiaries of that transformation had obtained the bulk of their objectives. Indeed, once successful, those groups could only benefit if both the recent origins and the foundations in policy and group self-interest of all newly established legal doctrines could be disguised. There were, in short, major advantages in creating an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making "legal reasoning seem like

103. *Id.* at 90.
104. *Id.* at 87-88.

> mathematics," conveyed "an air . . . of . . . inevitability" about legal decisions.[105]

Although it is possible to read into Horwitz an ideological motivation, it is probably a mistake to reject him on that basis. Other scholars have come to substantially the same conclusion.[106]

Changing socioeconomic conditions and the resultant class bias might not themselves provide an adequate explanation for the rise of formalism. Indeed, some scholars also include the decline of equity[107] as one of the contributing factors. This may be the case in England. Nevertheless, for the purposes of this discussion, it suffices to indicate that changing socioeconomic conditions were a contributing factor to the rise of formalism.

Whatever social or intellectual conditions may have prompted this view of the law and legal reasoning, it is indisputable that formalism exercised a profound influence on American legal thought (and indeed, American legal education) during the sixty-year period approximately spanning 1860-1920. Unfortunately, the most influential formalists were more concerned with applying the doctrine to an area of substantive law than with articulating the details of formalism. In spite of this, formalism's proponents have nevertheless outlined the foundations of their approach to law.

Christopher Columbus Langdell, who is regarded as the leading American proponent of this doctrine,[108] stated that

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105. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 253-54 (1977) (quoting Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7 (1894)). *See also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38 (1960).

106. With regard to the rise of legal formalism, P.S. Atiyah has expressed a similar position:

> Plainly, the growth of formalism was closely related to the ideas of the political economists and to the rise of the market economy.
>
> The Courts began to take for granted a certain 'natural' background of law (which they did not conceive of as interference at all) and this background was virtually the same as that assumed by the political economists. It was the background in which property rights were secured, and contracts were enforced. Rules designed for these purposes were not thought of as policy-oriented rules, but as 'purely legal.' . . . The new formalism gave the impression that the laws of contract, like the laws of political economy, were inexorable deductions drawn from neutral principles, which in reality they were no doubt broadly in the interests of the new commercial and industrial classes. Nevertheless, it is too simplistic to see this whole process in class terms. English judges almost certainly believed their own dogmas. Moreover, they were never wholly successful in creating this new body of value-free law, for they were engaged upon an impossible exercise. Questions of justice and questions of policy would keep arising; and when they did so, the actual decisions of the Courts by no means betrayed a uniform class bias.

P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 389-90 (1979).

107. *Id.* at 392.

108. Langdell was so regarded by such later legal realists as Holmes. *See* J. FRANK,

> [l]aw, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.[109]

There are three essential elements to Langdell's formalism. First, law is a science, the content of which is doctrines or principles. Therefore, the study of law is the study of these doctrines. Second, the growth of these doctrines is a slow evolutionary process with courts being the prime movers in this process. Thus, the proper method of studying the process is to study the empirical phenomena in which this process is contained, or in other words, the judicial decisions in which the evolution of law is "embodied." Finally, as a science, the doctrines of law can be arranged in a logically consistent manner.

Langdell's colleague Joseph Beale also adopted the formalistic approach to law.[110] He remarked that

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COURTS ON TRIAL ch. xvi (1963); Holmes, *Book Review*, 14 AM. L. REV. 223 (1880) (reviewing C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS). *See also* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 1-25 (1973); Hoeflich, *supra* note 82, at 119-21.

109. 1 C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACT at viii-ix (2d ed. 1879).

110. While discussing this era, William Twining remarked that

> [t]o learn [law] the process seems to be as follows: First, many decisions are examined, before a provisional opinion is formed, followed by discussion on the basis of ethical, economic, and social considerations as well as the historical course of the law. Error having been found in the first opinion, a new opinion is formed, which in absence of being shown false is accepted as true. This process of trial and error, which is the true scientific process, as the author understands it, is the method which appears to be that of every lawyer desiring to argue a case or make a brief.[111]

The court-centered approach of Beale's formalism is apparent in the passage quoted above, for it is judicial decisions that are to be the subject of inquiry, notwithstanding any "ethical, economic, and social considerations." Although Beale does in fact pay lip service to such considerations, in both his *Treatise* and his earlier three-volume work entitled *A Selection of Cases on the Conflict of Laws*,[112] he ignores entirely these extra-judicial considerations.

The consistency of a particular body of legal doctrines, which is implicitly the subject of conflicts of laws, is expressed concisely by Beale:

> When (as sometimes happens) two courts of equal authority and without a common superior have the duty of declaring the same law, there is no possibility of compelling them to adopt the same view of the law. If they differ, this cannot mean that there are two laws, but merely that one court or both is mistaken in its statement of the law; as also may happen for a time where courts of co-ordinate jurisdiction have a common superior . . . .[113]

Consistency is, of course, a necessary condition for any subject if it

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> [i]n the sphere of legal research the contribution of Harvard was of particular significance. Between 1886 and 1920 Harvard scholars, notably Williston, Beale, Gray and Thayer, took the lead in writing a series of monumental legal treatises which won immediate recognition among practitioners as well as among legal scholars at home and abroad. These were truly scholarly works, more substantial than many students' textbooks and more systematic and more rigorously analytical than ordinary practitioners' reference works. The assumptions and attitudes underlying these treatises bore a close affinity to Langdell's conception of law. The approach adopted by their authors was well suited to the systematization and simplification of law in a relatively stable society. They conceived of their task as that of extracting principles from the morass of decided cases; on the surface this involved neutral analysis and exposition of the existing law, but the variety of their sources allowed for an element of choice and hence of quiet, interstitial creation.

W. TWINING, *supra* note 108, at 14-15.

111. J. BEALE, A TREATISE ON THE CONFLICT OF LAWS at xii (1935) [hereinafter TREATISE].

112. J. BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS (1902) [hereinafter CASES]. Volume III (at 501-45) contains a "Summary of the Conflict of Laws" which is a concise statement of Beale's views on this topic [hereinafter *Summary*].

113. *Summary*, *supra* note 112, § 13, at 503.

is to be regarded as a science. If the subject is not consistent, and if the subject is to incorporate any form of logical reasoning, contradictory results would be generated. These results would undermine much of the *raison d'être* of the claim that law is a science.

It is interesting to note that in contrast to the continental jurists who were inspired by the rationalist philosophers, the American formalists did not explicitly incorporate the paradigm of geometric reasoning into their theory of legal science. Nevertheless, although the paradigm may have shifted from mathematics, the deductive element was still present. *Cases* were to be studied in order to determine inductively the first principles of law, and these were to be applied, deductively, to individual situations.[114]

To conclude this discussion of the traditional view of legal reasoning, it is necessary to examine briefly how this type of reasoning was applied to conflict of laws. Beale serves as the best illustration. Both Beale's *Summary* and *Treatise* articulate a theory of conflicts based on territoriality and vested rights. These concepts serve as the basic principles from which all other applications are derived.

The territoriality thesis is briefly stated: "[t]he jurisdiction of a country is primarily over its territory. Within that territory there is complete jurisdiction over every person and thing."[115] Jurisdiction is exercised by creating rights,[116] and a right can only come into existence through the operation of law.[117]

The theory of vested rights can be stated with equal brevity: once the right has come into being, it vests with the bearer and must be recognized as existing.[118] Nevertheless, recognition is different from enforcement.[119] The former is a consequence of the domestic law of

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114. *See* Hoeflich, *supra* note 82, at 120-21.

115. *Summary*, *supra* note 112, § 18, at 505. There is recognition that a nation may have extra-territorial jurisdiction over its subjects and vessels, *id.* § 24, and that nation's legislature functions as an "imperial" legislature for its colonies, *id.* § 21. TREATISE, *supra* note 111, § 42.1.

116. In discussing this subject, Beale writes:

> **Exercise of Jurisdiction by Creating Rights.**—The ultimate end of the law is the creation of rights; for though the law has to do with the protection of rights, it is only indirectly and in a general way that it protects rights, and its method of doing so is by creating other rights. If, for instance, a contract is broken or a tort is committed, the law operates by creating in the injured party another right of equal value with the right which the wrongful act destroyed.

TREATISE, *supra* note 111, § 46.1.

117. *Summary*, *supra* note 112, § 2 at 501. Accordingly, with respect to contracts, two parties cannot determine which law shall govern the contract (rather, the *lex loci contractus* shall govern), otherwise this delegates a legislative function to them. *See* COMMENTARIES, *supra* note 27, §§ 242-248, at 369-76.

118. With regard to the recognition of rights, Beale writes: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere." *Summary*, *supra* note 112, § 47, at 517 (citation omitted).

119. In the next section, Beale continues his analysis:

one state, and the latter is the consequence of the domestic law of another state. Thus, a state will not *enforce* a foreign right when to do so is contradictory to that state's public policy.[120]

It is not difficult to determine how the traditional *lex loci contractus* and *lex loci delecti* rules (in contracts and torts, respectively) follow from Beale's principles. In the case of contracts, two parties make an arrangement in one jurisdiction and by operation of the laws of that jurisdiction, legal rights (and correlative duties) vest in the parties. Accordingly, it is those rights that are to be recognized by the courts of other jurisdictions, unless the rights are somehow contradictory to the public policy of the jurisdiction that is asked to enforce the rights.

In the case of torts, a delict gives rise—through the operation of law in the territory in which it occurred—to certain other legal rights of equal value to the loss caused by the delict.[121] Thus, these rights will be recognized and enforced in other jurisdictions, subject to the public policy exception.

The deductive model thus purports, albeit somewhat naively,[122] to provide an apparently unique answer to any legal dispute involving issues of differing jurisdictions. Such an answer will appear to stem from first principles of territoriality and a comity-like principle of reciprocal enforcement. The deductive-like chain of reasoning cloaks the judgment with an aura of scientific status, neutrality, and certainty. By so justifying their conflicts decisions, jurists would satisfy all of the four deserada outlined previously.[123]

V. Legal Reasoning and the Realist Challenge

During the first two decades of the twentieth century, the foundations of the formalist approach to legal science were beginning to be

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> Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force. Since a right can have no legal force unless it is given force by law (§ 2), and since nothing can have the force of law in a State except the law of that State (§ 11), it follows that no foreign right can be enforced unless the law of the state so provides.

Id. § 48, at 517-18.

120. Beale concludes this strand of analysis by noting:

> But since the enforcement comes through the domestic law, that law may refuse to give any effect to the right . . . . The law will not cause its own harm. Thus enforcement will be denied where the right was created abroad in evasion or fraud of the domestic law, or where it is injurious or of bad example, or against public policy, or against morality.

Id. § 49, at 518 (citations omitted).

121. *See supra* note 116 and accompanying text.

122. For example, consider the difficulties when elements of a tort occur in different jurisdictions. This deductive model would not provide a unique answer to the situation of a car accident occurring in New York but causing damages in Quebec. Where is the right to compensation for the damages created?

123. *See supra* notes 93-107 and accompanying text.

undermined. The principle source of this attack on formalism was the rising "realist movement" in American jurisprudence.[124]

Other possible influences on the realist movement which have been ignored until recent years were certain developments in the philosophy of mathematics and science. As is noted in a later discussion, one of the core tenets of legal realism was to deny the certainty (at least, in terms of possible application) of almost any given legal rule. This is paralleled, in mathematics, by the discovery of the very uncertainty of that subject. During the last two decades of the nineteenth century, mathematicians had proven the relative consistency[125] of both non-Euclidian geometries with Euclidian geometry.[126] Further, it was also demonstrated that Euclidian geometry was consistent with number theory.[127] Nevertheless, given the existence of (relatively) consistent non-Euclidian geometries, mathematicians had prima facie grounds to seek proof of the absolute consistency of number theory. Gödel's theorem[128] later demonstrated that such a proof could not exist.

Thus, with this discovery in mathematics, the foundations of what was regarded as the most certain of sciences was shaken. Indeed, if mathematics *was* uncertain, it was hardly conceivable that any other discipline would be able to display certainty. Furthermore, if legal reasoning was to incorporate or model itself on mathematical (or "scientific") reasoning and the latter was proved uncertain or indeterminate, then the former must also be so. It is well beyond the scope of this present study to trace further the influence of mathematical philosophy on realist jurisprudence. In any case, its effect cannot be discounted.[129]

Like any intellectual movement, it is rather difficult to define pre-

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124. This discussion makes no attempt to trace in detail the intellectual antecedents of legal realism. The influence of Austin's positivism on realism has already been thoroughly traced by other scholars. *See, e.g.*, Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence* 66 CORNELL L. REV. 986 (1981).

125. Systems A and B are relatively consistent if it is the case that if either one is consistent, so is the other; or both are inconsistent.

126. *See* I. BOCHEŃSKI, A HISTORY OF FORMAL LOGIC 290-95 (1961).

127. *Id.*

128. *See* Gödel, *Über formal unentscheidbar Sätze der Principia Mathematica und verwandter Systeme*, in 38 MONATSHEFTE FÜR MATHEMATIK UND PHUSIK 349 (1931); *On Formally Undecidable Propositions of Principia Mathematica and Related Systems, reprinted in* FROM FREGE TO GÖDEL: A SOURCEBOOK IN MATHEMATICAL LOGIC, 1879-1931 596 (J. van Heijnoort ed. 1967). The proof establishes that number theory is consistent if and only if it is incomplete. That is, there are some mathematical truths that cannot be proven true by a consistent system. For an accessible account of this proof, see E. NAGEL & J. NEWMAN, GÖDEL'S PROOF (1958).

129. It is evident that at least some of the realists were aware of the problems in the foundations of mathematics. *See, e.g.*, Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927).

cisely what constituted the legal realist movement. Indeed, defining legal realism may be more difficult than defining most other intellectual movements, for the legal realist movement had no stable core of members, no well-articulated program, and very few—if any—views shared by all adherents.[130] Nevertheless, the work of two undisputed members of this movement—Arthur L. Corbin and Walter W. Cook—was to have a profound effect on the way many jurists would come to view the law, and would ultimately affect the way in which conflicts problems would be treated. Accordingly, Corbin's realism is briefly examined to provide a paradigmatic background for the discussions that follow. Section VI then exhibits Cook's (and others') criticism of "traditional" conflict of laws doctrine.

Arthur Corbin

Corbin's initial attack on formalism, a semi-popular essay entitled *The Law and the Judges*,[131] contained the core of his philosophy. In certain respects Corbin's views agree with Beale's and Langdell's, in particular with their adamant acceptance of the view that law is in a state of evolution.[132] Yet, beyond this initial similarity lies a world of difference.

The most fundamental difference rests in the way the nature of law is to be viewed. Corbin viewed laws as social rules that, unlike most rules, had to be obeyed:

> For our present purpose, however, we may assume that a law is an expressed rule or principle of human action. Anyone may express or *declare* such a rule, but the declarations of some have more influence on human conduct than the declarations of others. . . . Do our statutes control us? Only in case the judges permit them, and only with the meaning the judges give them. As for all the rest, their expressions are only "academic." Over all the others the judge has this advantage: the rule which he declares must be obeyed by at least one person. No one is directly compelled to obey a constitution or a statute or a law-book or a sermon. . . . The Sherman anti-trust laws prescribed fine and imprisonment for the doing of certain acts. For a decade it influenced nobody's action, and now it is commanding and prohibiting action only to the extent permitted by a majority of the Supreme Court judges.[133]

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130. *See* W. TWINING, *supra* note 108, at 26-55. This fact was also recognized by the realists themselves. *See* Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

131. Corbin, *The Law and the Judges*, 3 YALE REV. 234 (1914).

132. Corbin observed that "[t]here will always be two large fields of legal uncertainty—the field of the obsolete and dying, and the field of the new born and the growing." *Id.* at 243. *See also id.* at 249. Additionally, Corbin (and the "realists" in general) assume with Beale and the rest that law was capable of being an object of study. *See id.* at 239-40, and W. TWINING, *supra* note 108, at 26-55.

133. Corbin, *supra* note 131, at 236.

Given this conception of law as judge-made rules that apply to individual cases, Corbin mounts a two-pronged attack on the formalist vision of the common law.

First, Corbin argues that inasmuch as the law is what a judge says it is with respect to the matter in dispute between two litigating parties, there are no doctrines to be distilled from the vast number of reported cases. Corbin remarks:

> When a dispute arises, either a third party must decide or the parties must fight it out. We appoint a judge as such third party. We compel the litigants to abide by his decision, however bad the rules by which he arrived at it. But we do not have to abide by the rules that he lays down. We are bound only by the rule that the judge who is to decide our future dispute is going to lay down in the future. Justice Holmes has written: "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law."[134]

The second prong of his attack is framed in the following terms: even if there are certain well-established doctrines of law, it is the court's own decision to apply them. A court, if it feels so inclined, can determine whether or not to apply a rule, and need not do so if so inclined. Corbin argues:

> If it be said that the court merely applies a rule already created by other authority, the answer is that it lies within the will of the court whether such previously created rule shall or shall not be applied. Even though there be a well-settled rule that has been applied for centuries, still the court may limit or disregard it, either ignorantly or corruptly or for benevolent reasons. In any case, the parties to the suit must obey the judgment. To them it will bring no conviction to say that the judge merely obeyed a rule laid down by other and higher authority.[135]

Corbin may be criticized for failing adequately to document his claims. But this criticism is unfair, for such documentation is out of place in the semi-popular forum in which this article appeared. In any event, his more "academic" writings provide sufficient documentation.[136]

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134. *Id.* at 237-38.

135. *Id.* at 238. Corbin also remarks: "But precedents have been forgotten, have been disregarded and evaded, have been flatly disapproved and overruled. We must not forget this fact, even though at times the judges did not move as fast as other people." *Id.* at 242.

136. *See, e.g.*, Corbin, *Contracts for the Benefit of Third Parties*, 46 L. Q. REV. 12 (1930), in which he argues that although the common law doctrine indicates that courts will not enforce such contracts, they will finesse the "doctrines" of trust, agency and assignment to do what they said they would not do. For a possible negative reaction to Corbin's argument, see Vandepitte v. Preferred Accident Ins. Corp., [1933] App. Cas. 70 (holding that under the British Columbia Insurance Act only the party insured under a contract at law is entitled to benefit under the contract). *See*

Underlying Corbin's two-pronged attack is the view that whenever a judge sets down his rule with respect to two parties, he does so to advance some sort of purpose. According to Corbin, "[t]he judge, if honest, lays down either a rule that has been approved or acquiesced in by the community in the past, or a rule to which he believes the community will in the future give approval and acquiescence."[137] The rule laid down by the judge, however, may not be so accepted. Corbin notes that

> [t]he rule he [the judge] declares and applies, may be, and not infrequently is, opposed to the former decisions of the highest court of that very jurisdiction. It may be opposed to constitutions and statutes. It may be opposed to the moral canons of the community. It may be a rule that will be flouted and disregarded by the mass of the people, one that does not give satisfaction, one that does not do what we call "justice," one that will not be agreed to and followed by other judges.
>
> Suppose the rule declared and applied by a judge is all of these things. What shall the general community do about it? It must in some way alter the forces that produced the rule.[138]

Legal change, then, comes about through a change in the forces producing the rule, that is, by persuading judges that a certain decision in a particular case will be approved by the community.

Accordingly, Corbin (and indeed, the legal realists in general) challenged the formalist conception of legal reasoning. Rather than being geometric-like deductions from general principles, legal arguments and judicial decisions were viewed as the declaration by officials of rules (or predictions thereof) which bind specific litigating parties. The rules, if laid down properly, are those which the community does or will approve.

VI. Realism and the Revolution

This realist view of law underlies the legal theory of those who began the revolution in conflicts. Adopting the view of legal reasoning discussed above, those involved in the revolution then attacked the general principles from which the formalists "derived" their subsidiary propositions. This attack consisted of a refutation of the territorial basis of the formalist doctrine, and the undermining of the theory of vested rights upon which much of the orthodoxy rested. The former attack was initially the work of Ernest G. Lorenzen, the latter of Walter W. Cook.

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also his discussion of reliance in section 90 of the Restatement of Contracts (1932).

137. Corbin, *supra* note 131, at 240.

138. *Id.* at 241.

A. Walter Wheeler Cook

Cook's work rests clearly upon realist foundations. Beginning from the position that in the field of law there is a wealth of available data, he determines that the job of the legal scientist is to explain this data.[139] To this point, he admits[140] he agrees with the orthodox position represented by Dicey and Story. Cook, however, departs from Dicey and Story inasmuch as the latter two writers argue that their explanations of the data lead to some underlying principles (and in particular the theory of vested rights) against which the correctness of actual decisions can be tested.[141] Rather, Cook accepts the position that inasmuch as the law is what courts say it is, the value of any statement of what the law is rests in the accuracy with which it describes the past and predicts the future decisions of judges.[142]

From this point of view, Cook examines the adequacy of orthodox conflicts doctrine. The vested rights theory (as expounded by Dicey[143]) is subject to devastating criticism. Cook argues that vested rights are a fiction, for a court does not enforce a right created by a foreign sovereign, rather it enforces a right which it creates itself. This view is illustrated by a consideration of Learned Hand's opinion in *Guinness v. Miller*.[144] In that case, the plaintiff sought to collect a debt payable in German marks. The sole issue was whether the damages were the American equivalent when the account was stated (1917) or the American equivalent at time of judgment (1923). Judge Hand's remarks are worth quoting in detail:

> In the case of tort committed in a foreign jurisdiction it is pretty clear that the judgment should be based on the exchange at the time of the loss inflicted. In such cases we are familiar with the idea that his wrong imposes on the tort-feasor an obligation to indemnify his victim in money. A court of the sovereign where the

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139. W. Cook, *supra* note 30, at 4-8.

140. *Id.* at 4-6.

141. *Id.* at 6-7.

142. This proposition is well captured by Cook's remark, "If I am right in my interpretation of this passage [from Beale's *Treatise*], the territorial theory set forth in it seems to be a thoroughly sound one, by which I mean merely that it is an accurate and useful general description of what courts have done and are doing in dealing with cases in the conflict of laws." *Id.* at 22. Cook further remarks that "[e]ven in making this statement [about foreign rights] we must as always guard ourselves against thinking of our assertion that 'rights' and other legal relations 'exist' or have been 'enforced' as more than a conventional way of describing past and predicting future behavior of human beings—judges and other officials." *Id.* at 33. And again Cook remarks: "The present writer does not believe that the conclusion he [Judge Hand in Guiness v. Miller, 291 F. 769 (S.D.N.Y. 1923)] reached follows by some inevitable logic from the premise that the forum is enforcing a right created by its own law, and not a foreign right." *Id.* at 28. *See supra* text accompanying notes 59-61.

143. A. Dicey, *supra* note 68, at xlvii.

144. 291 F. 769 (S.D.N.Y. 1923).

tort occurs enforces this obligation in the money of that sovereign, regardless of its change in value, merely because those are the terms in which it is cast. When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And, if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment.

However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But since, apart from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose; that is, when the loss occurred. Hence a foreign court is as little concerned with the changes in the value of money in the territory where the tort arose as are the courts of that territory itself. Each court is enforcing a different obligation, imposed by different sovereigns, necessarily defined in the terms of its own money.

. . . .

There is, in my judgment, no sound basis for distinction between torts and contracts to pay fixed sums of money. . . . When the promisor defaults, he fails to perform the only promise he has made, and his liability is as much a new creation of the law as though he had failed to deliver a chattel. . . . That liability is, as it seems to me, quite analogous to the obligation to indemnify raised upon a tort, and the same reasoning should apply to it. A foreign sovereign will raise an equivalent obligation, but couched in terms of its own money, because that alone it has the power to secure.

A different rule it is true might be applicable if specific performance were possible in such cases. No doubt a sovereign might insist upon the delivery of foreign money, if the occasion were proper. On obligations to pay money, this remedy does not, however, lie. All that can be done is to seize the promisor's property, and sell it, a procedure which can result only in domestic money. To take the exchange as of the period of the judgment or decree is, therefore, to adopt a rule applicable only to specific performance, in a case where specific performance is not exacted. Since the loss is to be indemnified in the money of the sovereign where the court sits, it has no alternative but to calculate it in terms of that money when the loss occurred, and to enforce its judgment, regardless of varia-

tions in its value between that time and the date of collection.[145]

Hand's remarks indicate that the domestic court will award the domestic equivalent of the damages at breach. Nevertheless, were the domestic court actually enforcing a foreign vested right, the amount that ought to be awarded must at all times correspond with the amount that would be awarded by the foreign court. As there is no necessity that the domestic amount and that amount which would be awarded by the foreign court coincide, the domestic court is not enforcing foreign rights, rather it is creating domestic rights and enforcing them.[146] In his book entitled *The Logical and Legal Base of the Conflict of Laws*,[147] Walter Wheeler Cook states the issue thus:

> It is conceivable that the forum might on grounds of policy so mold its right that it would contract or expand as the rate of exchange varied. That would, perhaps, be a less natural view. But if the forum is thought of as literally enforcing a foreign right, it is believed that this means that the amount of judgment in dollars *must* at all times correspond to the amount of marks which at the moment of entering judgment would be recovered in the courts of the foreign country whose 'right' is being 'enforced.' Otherwise, the so-called 'foreign right' enforced by the forum differs in scope from the 'right' enforced by the foreign court—and so could not be a 'foreign right' in a literal meaning of that term.
>
> In the conclusion that a court never enforces foreign rights, but only rights created by its own law, I see nothing extraordinary. Indeed, if we examine into the meaning of the terms 'law' and 'right' as they are commonly used by judges and lawyers, I think we shall conclude that this way of stating the matter is the only satisfactory way.[148]

As the excerpt from *Guiness* demonstrates, the orthodox doctrine of vested rights will not fit the observed phenomena.

B. Ernest G. Lorenzen

The attack on the territorialist nature of orthodoxy was initially

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145. *Id.* at 770-71.

146. An easy example can be found in prejudgment interest. The foreign rate might be 16% simultaneous with a domestic rate of 8%. Accordingly, the value of the award (irrespective of which currency is used to measure it) would differ. Therefore, the domestic court is not enforcing a foreign right, otherwise the award would be identical.

147. W. COOK, *supra* note 30.

148. *Id.* at 28-29. *See also* Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 315 (1953). Yntema states that "[t]he explanation of [Cook's] proposition is that, since the principle of renvoi is not usually followed, a court confronting a case involving foreign elements typically treats the case as if it were for the foreign court a purely domestic group of facts involving no foreign element. Hence, the rule of law to be applied is not identical with that which the foreign court would enforce." *Id.*

led by Ernest G. Lorenzen. A primary objective of his 1924 essay entitled *Territoriality, Public Policy and the Conflict of Laws*[140] was to show that a court's choice of law was in fact made on policy grounds, rather than on some principled adherence to views of territoriality. There are two branches to Lorenzen's argument.

After describing Story's maxims with respect to territoriality (and the public policy exception pertaining thereto), Lorenzen first disputes the empirical adequacy and logical coherence of the maxims. Story's first maxim (that every "nation" has exclusive sovereignty within its own territory)[150] is shown to be inapplicable to chattel transactions:

> The transfer of chattels was governed at the time Story wrote by the law of the *situs* neither as regards "capacity," "formalities," or "essential validity." Rights therein were governed as a rule by the law of the domicile of the owner. During the latter half of the last century a more controlling influence has been given by Anglo-American law to the law of the *situs* with respect to chattels than theretofore, but only where the transfer was *inter vivos*, and did not result from the operation of law. The sovereign of the *situs* has declined also, on grounds of policy, to apply its local law in instances which cannot be explained on any theory of territoriality.[151]

Story's second maxim (that no "nation" can directly bind persons or property outside its borders)[152] is shown to be false on two grounds. First, in the absence of some superstate authority imposing this rule on a state, it is merely a matter of self-limitation. Indeed, a state may legislate extra-territorially, and *as far as its own courts are concerned* determine legal relationships outside its borders.[153] As Cook was later to show, nations actually do this and since there is no international consensus with respect to extra-territorial jurisdiction, limits to such jurisdiction do not form part of international law.[154] Second, Lorenzen notes that when a state exercises jurisdic-

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149. 33 YALE L.J. 736 (1924), *reprinted in* E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1931).

150. *See supra* text accompanying note 37.

151. Lorenzen, *supra* note 149, at 738-39. Lorenzen cites Ennis v. Smith, 55 U.S. (14 How.) 400 (1852); Saul v. His Creditors, 5 Mart. (n.s.) 569 (La. 1827); De Nicols v. Cartier, [1900] App. Cas. 21; Cammell v. Sewell, 157 Eng. Rep. 1371 (Ex. D. 1860), as instances where transfer of title by operation of law was governed by the *lex domicilli*, and Wray Bros. v. White Auto Co., 155 Ark. 153, 224 S.W. 18 (1922), as an instance where policy prevailed over territoriality. *Id.* at 739.

152. *See supra* text accompanying note 40. Lorenzen, *supra* note 149, at 740.

153. Lorenzen, *supra* note 149, at 740.

154. W. COOK, *supra* note 30, at 72. Cook cites as evidence the Case of the S.S. Lotus (Fr. v. Turk.), 1926 P.C.I.J. (ser. A) No. 10. In this international arbitration case, the majority opinion noted that "international law [does not prohibit] a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law." *Id.* at 18, *quoted in* W. COOK, *supra* note 30, at 74. The

tion on account of domicile or citizenship, that power is exercised in virtue of a personal relationship existing between the person and the state, and not through any principle of territoriality.[155]

The logical incoherence of Story's theory is next illustrated by the following hypothetical:

> Suppose that the question relates to the validity of a deed to land situated in state A, the deed being executed and delivered in state B by X, a citizen of state C. According to Story's first maxim state A has exclusive power over the property; state B has exclusive power over the execution of the deed, the act being done in state B; and state C, exclusive power over X. How are we to get out of the embarrassment? By applying the law of state A where the property is situated? But why should the laws of state B and of state C relinquish their power? . . .
>
> The only conclusion that can be reached from the foregoing discussion is that the rules of the Conflict of Laws are not based upon, nor are they derivable from, any uniform theory of territoriality.[156]

As the theory leads to three results when, if adequate, it should lead to only one, its adequacy is immediately suspect.

The second branch of Lorenzen's argument arouses further suspicion regarding the adequacy of Story's views. This argument concerns the public policy qualification in the enforcement of foreign rights.[157] Lorenzen points out the incoherence of a doctrine that permits state A exclusive power to create a legal relationship that must be recognized by all other states (for failure to do so violates the territorial sovereignty of state A), yet allows state B to set aside this relationship in a particular case on the grounds that its enforcement violates state B's public policy.[158]

Lorenzen then proposes an alternate explanation to these legal phenomena.[159] In each case, courts apply their own notion of justice to achieve the desired result. In the modern world, one element of the administration of justice is to take into account "foreign" views of this concept. Whether such foreign views are to be applied will depend both on the facts of the particular case and the court's sense of justice.[160] What the courts do, Lorenzen believed, can be explained as follows:

> If the situation is one admitting of the application of "foreign" law, the choice of the rule to be applied will be determined again in

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chapter was first published in 1942.

155. Lorenzen, *supra* note 149, at 741-42.

156. *Id.* at 743.

157. *See* COMMENTARIES, *supra* note 27, §§ 33, 36.

158. Lorenzen, *supra* note 149, at 747-49.

159. *Id.* at 748-51.

160. Lorenzen remarks: "The general problem is, therefore, always the same: What are the demands of justice in the particular situation; what is the controlling policy?" *Id.* at 748.

> many instances by general social or economic considerations. For example, if the question relates to capacity, a state may conclude that the principal interest involved is the protection of its citizens or of persons domiciled within its territory, wherever they may be. If this be so, it will probably say that the *lex patriae* or the *lex domicilii* governs "capacity." On the other hand, it may conclude that its principal interest in the matter is the security of local transactions. In this event it will say that the *lex loci contractus* governs capacity.[161]

After discussing a hypothetical based on the validity of a foreign marriage, Lorenzen concludes:

> Whatever the point or points of contact chosen by the *lex fori*, special situations may require the application of the local rule. Suppose, for example, that two citizens of the forum go into another state for the purpose of contracting a marriage which they could not enter into under the local law of the forum. In such a case the courts might reach the conclusion that the local interests of the state demand that its law should not be allowed to be evaded by its own citizens and that its local rule should therefore prevail. In the customary phraseology, it would be said that the general rule would not be enforced on grounds of public policy.[162]

According to Lorenzen, therefore, it is actually public policy which dictates what law will be applied in a certain case. "Public policy" will manifest itself in a court's determination of what interests are at stake in a given fact situation, and what the just resolution to that situation ought to be. "Territoriality" is only *one* consideration used by courts to determine actually what the just result really is.

Unfortunately, Cook's and Lorenzen's work is primarily destructive. That is to say, they are content to attack the orthodox view, without proposing a suitable alternative.[163] The initial steps in constructing such an alternative would come later.[164]

C. The Restatement of the Conflict of Laws

In 1934, the American Institute published the first *Restatement of the Conflict of Laws*. This work was the culmination of many years of discussion and work by members of the Institute. Yet, this work fails to take into account the criticisms offered by Cook and Lorenzen.

Indeed, the *Restatement* adopted the orthodox doctrines of territoriality (in the sense that each state has exclusive jurisdiction to determine the legal effect of acts or events done within its terri-

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161. *Id.* at 748-49.

162. *Id.* at 749 (footnote omitted).

163. Yntema, *supra* note 148, at 351, raises this as a criticism of Cook's work.

164. These first steps would come with the works of Cavers and Currie. *See infra* text accompanying notes 171-202.

tory)[165] and vested rights.[166] Accordingly, the law that governs is the law of the jurisdiction in which the last event necessary to bring a right into existence occurred.[167] In tort, the law that governs is the law of the place of injury (on the ground that the tort is incomplete until the plaintiff has sustained legal injury).[168] In contract, it is the law of the place of contracting.[169]

Why did those in charge of drafting the *Restatement of the Conflict of Laws* choose to ignore Cook's and Lorenzen's work? The answer to this question is found in the formalistic editorial influence of Joseph Beale, who served as reporter for this project. The *Restatement* was one of many similar projects begun in the 1920s: similar treatments were accorded to contracts, property, torts and the like. Yet all these areas of law shared one thing in common: the alleged unity and coherence of their constituent doctrines had come under attack from those who were identified as "realists."

In contract law, the leader of the attack was none other than Arthur Corbin.[170] In conflicts, Cook and Lorenzen led the attack. The response of the positivists was to attempt a doctrinal codification of the various legal subjects, in an attempt to demonstrate their coherence. The adoption of vested rights and territoriality, the two essential foundations of doctrinal orthodoxy in conflicts, was therefore mandated by the formalist nature of the *Restatement* project.

D. David Cavers

David Cavers' 1933 essay entitled *A Critique of the Choice-of-Law Problem*[171] articulates the first constructive alternative to the orthodox position by proposing a set of criteria[172] that courts ought to take into account in arriving at their decision in conflicts cases.

In his essay, Cavers briefly summarizes the orthodox position,[173] Cook's and Lorenzen's criticisms thereof,[174] and those avenues of escape that courts have used to reach a satisfactory decision when a strict application of vested rights and territoriality would have otherwise resulted.[175] Cavers then sets forth the normative framework

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165. RESTATEMENT OF THE CONFLICT OF LAWS § 64 (1934).
166. *Id.* § 65.
167. *Id.* §§ 332, 377.
168. *Id.* § 377.
169. *Id.* § 332.
170. Corbin's attack is nicely outlined in G. GILMORE, THE DEATH OF CONTRACT (1974). *See also* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).
171. 47 HARV. L. REV. 173 (1933). His views are set forth in greater detail in D. CAVERS, THE CHOICE OF LAW PROCESS (1965).
172. *See infra* text accompanying note 179.
173. Cavers, *supra* note 171, at 173-76.
174. *Id.* at 176-87.
175. *Id.* at 182-87.

that he believes courts should use in their analyses of conflicts cases.[176]

Cavers begins with the premise that courts should attempt to reach a just result in each case that comes before them. Therefore, the first stage of analysis is to determine the controlling policy of the situation.[177] Once the court articulates these controlling policies, it should apply them to a complete description of the facts in order to make manifest the effects of the proffered laws.[178] Cavers' summary of his approach is worth quoting in detail:

> When a court is faced with a question whether to reject, as inapplicable, the law of the forum and to admit in evidence, as determinative of an issue in a case before it, a rule of law of a foreign jurisdiction, it should
>
> (1) scrutinize the event or transaction giving rise to the issue before it;
>
> (2) compare carefully the proffered rule of law and the result which its application might work in the case at bar with the rule of the forum (or other competing jurisdiction) and its effect therein;
>
> (3) appraise these results in the light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other; recognizing
>
> (a) in the use of precedent, that those cases which are distinguishable only in the patterns of domestic laws they present, may for that very reason suggest materially different considerations than the case at bar, and
>
> (b) in the evaluation of contacts, that the contact achieves significance in proportion to the significance of the action or circumstance constituting it when related to the controversy and the solutions thereto which the competing laws propound.

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176. *Id.* at 187-97.

177. Cavers states that "it seems more profitable to commence not with the definition of an issue but with the suggestion of a way of attack to a problem no less general than that posed by Professor Lorenzen: 'What are the demands of justice in the particular situation; what is the controlling policy?' " *Id.* at 187 (quoting Lorenzen, *supra* note 149, at 748).

178. Cavers posits that "the alternative approach suggested would require an equally complete depiction of these facts, but to determine what their effect upon the choice of the competing laws should be, would necessitate their careful appraisal with this end in view." *Id.* at 188. Note that this process is identical to that which is done in any "leading case." Such a case achieves its importance because reasoned choice has been made between two competing lines of precedent and their corresponding (and competing) policies.

> The end-product of this process of analysis and evaluation would, of course, be the application to the case at bar of a rule of law, derived either from the municipal law of the forum or that of some foreign state if proof of the latter law were duly made. The choice of that law would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case.[179]

Cavers notes that the use of this process will ultimately result in the development of criteria by which the significance of the facts can be appraised.[180]

Although this alternative procedure might lose the apparent uniformity possessed by the mechanical application of territory-based rules, Cavers notes that this objection can be mitigated in two ways. First, this alternative process will expose those factors that lead to the decision in a particular case, thereby exhibiting them for criticism.[181] Second, to demand certainty in the application of a rule confuses the application with the content of the rule (and thus, the substantive outcome of litigation). For Cavers, the goal is to develop criteria that allow for the isolation of the competing social values advanced by competing laws and procedures that enable courts to reach just outcomes in such cases. Once accomplished, the case for mechanical application of rules (with little or no thought as to the results) diminishes. So Cavers argues.[182]

Throughout his article, Cavers' realist position is evident. Clearly, he rejects the formalist position that the common law is constituted out of a coherent collection of doctrines, with the principal task of the commentator (or student) being to order those doctrines.[183]

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179. *Id.* at 192-93 (footnote omitted).

180. Cavers criticizes the paucity of evaluative criteria in previous conflicts analyses:

> Furthermore, the creation and fruitful employment of rules of this sort must be attended by the development of standards for the evaluation of the facts which they render significant. . . . In the conflict of laws it presents a peculiar difficulty since the operative facts in choice-of-law cases have heretofore called for no such appraisal. We have looked for the *situs* of the property, the *locus* of the tort, or the place of performance of the contract with an austere unconcern for the consequences of the discovery.

Id. at 196-97.

181. *Id.* at 198. *See* Corbin, *supra* note 131, at 241.

182. Cavers, *supra* note 171, at 200.

183. His rejection of formalism is satirically stated in the following passage:

> Instead of making a searching inquiry into what has happened in cases of conflicting laws, the commentator's chief concern heretofore has been to ascertain what rules for choice of law the courts have adopted. On each question in this field, a poll of the several states has been taken, their votes for the various rules recorded, and numerous instances of plural voting duly noted. The canvasser, after reporting the customary confusion of authority, takes advantage of the license which this situation confers upon him to become the advocate of the rule he finds most appealing. To support it he

Rather, he maintains that a statement of the law is a prediction of future judicial actions.[184] Like Corbin, Cavers recognizes that, notwithstanding any orthodox doctrine existing in a field of law, the judiciary has developed a sufficient number of "escape devices" so that it can reach the desired result.[185] Accordingly, whenever a court reaches an unjust result, one should ignore excuses such as "precedent dictated that outcome." Instead, those rules or processes that cause the outcome should be the proper subject of criticism.[186]

E. Brainerd Currie

Cavers' attack was recommenced by Brainerd Currie.[187] According to Currie, the law of a state (whether it be with respect to contractual capacity, limitation periods, strict liability, etc.) represents a policy that, given a sufficient nexus between an event and the state, the state has an interest in advancing. Currie terms this "government interest."

In his article entitled *Married Women's Contracts: A Study in the Conflict of Laws Method*[188] he applies this analysis to the fact situation (and possible variants thereof) in *Milliken v. Pratt*.[189] Mrs. Pratt, a resident of Massachusetts, was sued by Milliken, a resident of Maine, on her guaranty. The court found that her guaranty, though executed in Massachusetts, became a valid contract when it was received by the plaintiffs in Maine. Therefore, the court held that the contract "must . . . be treated as made and to be performed in the State of Maine."[190] The suit was commenced in a Massachusetts court. Under then-existing Massachusetts law (unlike Maine), a married woman was incompetent to bind herself by contract. Nevertheless, finding the contract to have been completed in Maine, the court, applying the *lex loci contractus* rule, held her lia-

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> spins, if this be his bent, theories of the nature of law and of the state, discovers, in any event, pressing considerations of policy which dictate its recognition, points with dismay to the harsh results worked by competing rules, and extenuates as inevitable and occasional those produced by the one he champions. Of course arguments of the same sort can be and are constructed for other rules. The process has grown stale.

Id. at 205 (footnote omitted).

184. *Id.* at 207.

185. *Id.* at 205 n.57.

186. *See supra* note 181 and accompanying text.

187. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) [hereinafter *Married Women's Contracts*]; Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958) [hereinafter *Survival of Actions*]. Both articles are reprinted in B. CURRIE, SELECTED ESSAYS IN THE CONFLICT OF LAWS 77 & 128 (1963).

188. *Married Women's Contracts*, *supra* note 187, at 227.

189. 125 Mass. 374 (1878).

190. *Id.* at 376.

ble under Maine law.[191]

Finding four significant elements in the nexus between the act (contract) and the two states concerned,[192] Currie noted that sixteen possible factual permutations could arise (as with each element one or more other elements could be either foreign or domestic).[193] One permutation contained all domestic facts, and one contained all foreign facts. This left fourteen relevant conflicts permutations to analyze on the basis of the governmental interests that Currie observed to be at stake.[194]

In the vast majority of these cases, Currie found "no real conflicts problem."[195] That is, they do not involve any conflict between the interests of the two states, so one state's interest could be advanced without hindering the interests of the other. In the remaining four cases, the advancement of one state's interest "results in subordination or impairment of the interest of the other."[196] In such cases, the court ought to advance its own policy, since this policy is represented by its own law.[197] Currie reached similar results with his analysis of the conflict of laws in tort.[198] These analyses of tort and contract problems were to have a profound influence on conflict of laws discussions, both academic[199] and in the courts.[200]

Although Currie's criticisms of the choice-of-law process developed from Cavers' initial work, Currie's motivation did not stem from any deep adherence to realist doctrines.[201] Currie's main concern was with the structure of then-existing legal rules, and how that structure frustrates sensible advancement of public policy.[202]

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191. *Id.* at 383.

192. *Married Women's Contracts*, *supra* note 187, at 231-32. The four factors are (1) guarantor's residence, (2) creditor's residence, (3) place of making of contract, and (4) forum. *Id.*

193. *Id.* at 232-33.

194. *Id.* at 232-46. The interests were Massachusetts' interest in protecting its married women, and Maine's interest in emancipating its women (neither interest was intended to have an effect outside the state).

195. *Id.* at 251.

196. *Id.* at 252.

197. *Id.* at 252-63. This would, of course, be subject to (1) constitutional limitations and (2) multi-lateral agreements among states. *Id.* at 254-55 & 263-68, respectively.

198. *Survival of Actions*, *supra* note 187. The case analyzed by Currie was Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), which dealt with the conflicts question in the context of an automobile collision occurring outside the forum state.

199. *See supra* note 2 and accompanying text.

200. *See infra* notes 203-19 and accompanying text.

201. Of course, this is not to deny that Currie's works do not contain any traces of realism.

202. This comes across quite clearly in Currie, *Method and Objectives in the Conflict of Laws*, [1959] DUKE L.J. 171, *reprinted in* B. CURRIE, SELECTED ESSAYS IN THE CONFLICT OF LAWS (1963).

F. Cavers, Currie, and the Courts

Cavers' and Currie's arguments were to have a significant impact on the way in which courts would decide conflicts cases. The majority of jurisdictions in the United States have since accepted Cavers' and Currie's position,[203] and it is therefore instructive to examine the New York Court of Appeals' acceptance of their work. The Court of Appeals was among the first courts to adopt their position and certainly the most influential one to do so.

The court took the initial step in the case of *Auten v. Auten*.[204] At issue was the law governing a separation agreement executed in New York. The parties had married in England; fourteen years after the marriage the husband moved to New York, obtained a Mexican divorce and remarried. The ex-wife then came to New York to settle her differences with her former husband. A separation agreement was executed that obliged the husband to pay £50 monthly support, mandated that the parties would live apart, and provided that neither would sue the other "in any action relating to their separation."[205] The husband defaulted on the agreement and the wife brought suit in England. The English court entered an order requiring the husband to pay alimony *pendente lite*. The English action never proceeded to trial, and the wife "realized nothing as a result of the English action."[206] She subsequently brought a suit in a New York court for enforcement of the agreement.[207]

In defense, the husband claimed that commencement of an English action operated *under New York law* as a repudiation of the agreement. The wife had therefore waived her rights under the agreement. The defense was successful; the lower courts held that New York law was applicable.

The Court of Appeals disagreed. Judge Fuld's unanimous opinion recognized that New York courts had applied different rules in previous contract cases.[208] Henceforth, courts should determine the place that has the most "significant contacts with the matter in dispute" and apply the law thereof.[209] The court stated that the merit of this approach "is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the

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203. *See* Weintraub, *The Future of Choice of Law for Torts: What Principles Should be Preferred?*, 41 LAW & CONTEMP. PROBS. 146, 146-47 (1977).

204. 124 N.E.2d 99 (1954).

205. *Id.* at 100.

206. *Id.*

207. *Id.*

208. *Id.* at 101.

209. *Id.* at 102.

outcome of [the] particular litigation.' "[210] This separation agreement involved English nationals who were originally married in England. One spouse still resided there with the children of the marriage. Under a "contacts" analysis, it was not difficult for the court to hold that English law must apply.[211]

Judge Fuld applied similar reasoning when he again wrote for the majority in *Haag v. Barnes*,[212] a case involving a child support agreement. The most significant of Judge Fuld's decisions, however, was the 1963 holding in *Babcock v. Jackson*.[213] In that case, three New York residents took a weekend vacation to Ontario. A car accident occurred. Upon return to New York, the plaintiff sued the driver. Under New York law a driver owed his passengers "reasonable care," but under then-existing Ontario law[214] a guest passenger's suit was barred by statute. Theretofore, the "place of injury" rule was almost universally recognized[215] as the choice-of-law rule in tort. Applying the "center of gravity" analysis developed in *Auten* and *Haag*, Judge Fuld used reasoning that is suggestive of Currie:

> Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law. The object of Ontario's guest statute, it has been said, is 'to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against [Ontario] insurance companies . . . .' Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario, simply because the accident occurred there . . . .[216]

In other words, the application of Ontario law in this situation would frustrate New York's interest (requiring a tortfeasor to compensate for the injuries which he negligently caused) without advancing Ontario's interest (prevention of fraud on its insurance com-

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210. *Id.* (quoting Note, *Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV. 490, 498-99 (1952)).

211. *Id.* The court held that the contract's execution in New York was merely fortuitous, for the wife's visit to New York was "the only way she could see her husband to discuss their differences." *Id.*

212. 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

213. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

214. Highway Traffic Act, ONT. REV. STAT. ch. 172, § 105(2) (1960).

215. *But see* Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Currie, *Married Women's Contracts* and *Survival of Actions*, *supra* note 187; Lorenzen, *supra* note 149; Morris, *The Proper Law of Tort*, 64 HARV. L. REV. 881 (1951).

216. Bacock v. Jackson, 12 N.Y.2d at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750 (citation omitted) (quoting Note, *Survey of Canadian Legislation*, 1 U. TORONTO L.J. 358, 366 (1935)). For other explanations of the object of Ontario's guest passenger statute, see Baade, *The Case of the Disinterested Two States*: Neumeier v. Kuehner, 1 HOFSTRA L. REV. 150 (1973).

panies). As the center of gravity pointed to New York, New York law was applied. After *Babcock*, the court used similar reasoning to decide several other tort conflicts cases.[217]

After he became chief judge, Fuld articulated in *Tooker v. Lopez*[218] three rules respecting guest passenger statutes that courts ought to develop in future conflicts cases:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
>
> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
>
> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.[219]

Fuld's concurring opinion marked the death, at least in New York, of doctrines that in any way resembled territoriality, and the birth of those policy-centered criteria initially advocated by Lorenzen, Cavers and Currie.

G. The Restatement (Second) of the Conflict of Laws

The very existence of these New York cases and others like them decided elsewhere[220] required the proponents of orthodox doctrine to rethink their position. The fruits of this endeavor are found in the *Restatement (Second) of the Conflict of Laws*. The second edition, adopted in 1969,[221] is a "fresh treatment of the subject."[222]

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217. *See* Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Dym v. Gordon 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965). *Compare* Arbuthnot v. Allbright, 35 A.D.2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970) (facts converse to those in *Babcock*: Ontario drivers injured in New York—Ontario law held to apply).

218. 249 N.E.2d 394.

219. *Id.* at 404 (Fuld, C.J., concurring) (citation omitted).

220. *See supra* notes 203-19 and accompanying text.

221. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS (1971) [hereinafter RE-

This "fresh treatment" manifests itself both in the work's content and in the form in which its discussion is presented.

The *Restatement (Second)* avoids "black letter" statements of the law. In place of these rules, the work presents more flexible considerations. The Introduction states:

> [The present] treatment . . . takes full account of the enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favour of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty, posing a special problem in the process of restatement. Its solution lies in candid recognition that black-letter formulations often must consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application given there or in the notes of the Reporter.[223]

Although this statement of what is an adequate formulation of the law may not coincide with those views held by the early realists,[224] it is nevertheless a clear rejection of the formalist view of law.[225] No longer is the law regarded as a coherent set of doctrines that can be distilled from judicial opinions and then mechanically applied to future cases. Rather, whatever doctrines may exist are only to be regarded as tentative, taking their content from further elaboration and sources both judicial and extra-judicial.

In terms of its content, the *Restatement (Second) on the Conflict of Laws* begins afresh. Scrapping former notions of vested rights and territoriality, its new centerpiece is section 6:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to

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STATEMENT (SECOND)] was the result of tentative drafts published between 1953-1965 and of a proposed initial draft published 1967-1969.

222. *Id.* at vii.

223. *Id.*

224. Compare this view with Corbin's. *See supra* text accompanying note 134.

225. *See supra* text accompanying note 109.

be applied.[226]

These general principles are to be applied to the subject of the issue in dispute.

Thus, the choice of law in tort is to be determined as follows:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.[227]

In contracts where the parties have made no effective stipulation[228] of the choice of law, the *Restatement (Second)* comes to much the same result.[229]

Of course, the views taken by the authors of the *Restatement (Second)* are not above criticism.[230] For present purposes, however, it is not necessary to investigate the legitimacy and efficacy of proffered criticism, as this discussion is concerned with the philosophical

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226. RESTATEMENT (SECOND), *supra* note 221, § 6. *See also* Cheatham & Reese, *Choice of Applicable Law*, 52 COLUM. L. REV. 959 (1952).

227. RESTATEMENT (SECOND), *supra* note 221, § 145.

228. An effective choice of law is that of the state which the parties chose, unless the chosen state has no substantial connection to the parties or transaction, or the application of the chosen state's law defeats a policy of a state which has a materially greater interest in the transaction than the chosen state. *Id.* § 187.

229. Section 188(2) of the *Restatement (Second)* states:

> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188(2).

230. *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 307 (1975); Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 211 (1969); Korn, *supra* note 2, at 816-20.

influences behind the choice of law revolution.

If the *Restatement (Second)* is, as it should be, taken as an authoritative, albeit open-ended, guide to the state of American law, then the impact of the revolution is clear. No longer are conflicts cases to be analyzed in terms of vested rights or territoriality;[231] rather, the controlling policy is to be sought and its demands advanced.[232]

VII. Criticism of the Revolution

The revolution in conflicts has been criticized.[233] It must be stressed that this criticism is primarily directed against what the critics believe to be the *results* of the revolution, rather than against the theoretical basis that permitted the results in the first place. To be fair, however, this does not per se invalidate such criticism; for if it can be shown that the results of a theory are unacceptable, this would act as a *reductio ad absurdum* of the theory itself. Nevertheless, the fact that this criticism is result-oriented indicates that it lacks theoretical foundation. Admittedly, this is a difficult proposition to prove conclusively. It is far easier to prove the existence of a theoretical foundation than the non-existence of such a foundation—there may always be an unconsidered *alteriam quid* which represents the foundation. Though space does not permit a separate critical discussion of every objection to the revolution, it is necessary, however, to respond to three main points raised by those critical of the revolution.

First, it has been suggested that the revolution is responsible for "the current chaos in choice of law"[234] inasmuch as its policy-oriented analysis is incapable of (or provides a tremendous obstacle to) generating rules which are certain in their application. In response to this, one might ask whether any legal rule is capable of certain application. Indeed, as previously noted, this was the very point made by Corbin in his 1912 article.[235] Accordingly, this objection begs much of the question.

Furthermore, even if rules (the application of which were certain) could be generated, one might inquire whether certainty per se is the *sole* normative criterion by which the law is to be evaluated. It is of course conceded that certainty is *one* of the normative criteria by which the law *ought* to be evaluated. There are also, however, other criteria that must also be considered in any such evaluation such as

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231. This fact alone would indicate that Cook's and Lorenzen's arguments have utility.

232. Thus, Lorenzen's, Cavers' and Currie's arguments have been accepted by courts.

233. *See* Korn, *supra* note 2; Hill, *supra* note 2.

234. *See* Hill, *supra* note 2, at 1646.

235. *See supra* text accompanying notes 131-38.

doing justice to the individual parties before the court. Indeed, this writer suggests (though he will not—at present, at least—argue) that the latter criterion ought to weigh more heavily than the former in any normative analysis of the adequacy of a legal system.

The second proffered criticism has been succinctly stated by Harold L. Korn:

> Dr. Gerhard Kegel—a giant among European conflicts scholars—explained to an audience at The Hague the fallacy of the proposition upon which Currie's entire system is grounded—i.e. that the basic problem in conflict of laws is to reconcile or resolve the conflicting interests of different states. "The state," Dr. Kegel pointed out, "uses private law rules not in order to serve its own goals, but rather in search of justice in the relations of individuals." Accordingly, the "interests at stake" in conflicts cases are not "governmental" but "private."[236]

This objection raises a false dichotomy between private and public-governmental interests. A government may choose a particular private law regime (tort or no-fault in the case of automobile accident compensation, for instance) in order to promote justice among individuals. Having chosen a particular regime in accord with its particular conception of justice (compensation for injury without the necessity of proof of fault, for instance), the state has an interest in seeing justice being done. Accordingly, there is a public or governmental interest (e.g., compensation, rather than welfare) in maintaining the chosen ordering of private interests. Once the apparent dichotomy is exploded, this objection loses its force.

Third, the work of those critical of the revolution is destructive: it indicates difficulties with the results of the revolution. No concrete alternatives are proposed.[237] It is almost axiomatic that any human-developed system will contain imperfections. Nevertheless, a more considered criticism of the system should point out its latent defects and suggest viable alternatives.

VIII. CONCLUSION

The history of conflict of laws over the last hundred or so years clearly demonstrates a change in the way law is viewed not only by academics but also by practitioners and judges. As previously noted, the traditional natural law approach of Story, in combination with the rationalist-based ideas regarding legal reasoning, determined solutions to conflict of laws problems in the mid to late nineteenth century.

Only with the rise of legal realism, and its attack upon the traditional view of the nature of legal reasoning, would a new approach to

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236. Korn, *supra* note 2, at 965 (footnote omitted).

237. *See, e.g.*, Hill, *supra* note 2, at 1646.

viewing conflicts problems arise. Legal realists in the conflicts field first rejected the traditional analysis of law's internal logic and then subsequently turned to an examination of the traditional conflicts "axioms" then used to justify particular conclusions in the area. This was the so-called "revolution" in conflict of laws. Accordingly, by examining the theoretical foundations of this revolution, one sees a strong correlation with legal realism and the legal realist movement. Indeed, this movement was the foundation, if not the *raison d'être*, of this revolution.

More important, the analysis in this article provides empirical evidence that tends to lend support to legal realism itself. As Corbin argued, there are very few, if any, legal doctrines which are binding (in the sense that a unique outcome is mandated) in any particular dispute.[238] The revolution has shown this to be the case. Indeed, Judge Fuld in *Auten* uses this very point to begin afresh and forge his "center of gravity" analysis that would become tremendously influential to later jurisprudence.[239]

As Corbin also suggests, this new starting point could only come about if the traditional rules were exhibited and subjected to criticism. This was the result of the work of Cook, Lorenzen, Cavers and Currie.[240] Once this criticism was published, the forces which produce the law—the judges—could examine the criticisms of the previous rules, and declare new rules and law that would better accord with the community's sense of justice.

Yet, no human institution is perfect. As the reaction to it demonstrates, there may be some difficulty with the policies advanced by the revolution. Those criticizing the revolution certainly have had difficulties with some of the policies involved.

Here is where the Heraclitean epigraph to this article becomes relevant. Heraclitus' "continual strife" is represented by discussion of the proper policies and approaches to use in solving concrete problems. Through this "strife" the various possible conceptions of justice will emerge. At least, it is to be hoped that this will be the case. It is also to be hoped, in this continual strife, that justice itself will necessarily emerge as well.[241]

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238. *See supra* text accompanying notes 131-38.

239. *See supra* notes 204-211 and accompanying text.

240. *See supra* notes 139-64 & 171-202 and accompanying text.

241. I wish to thank Professor John Swan of the Faculty of Law, University of Toronto, for his insightful comments both in conversation and on earlier drafts of this paper. Of course, the opinions expressed and any errors contained in this paper are mine alone.