

Legal Realism, Lex Fori, and the Choice-of-Law Revolution

Michael S. Green

The choice-of-law revolution rejected the previously dominant view that a state has the sole power to determine how events occurring within its territory should be adjudicated by other states. The revolution is widely recognized to have been a product of legal realism. Nevertheless, an adequate understanding of this relationship has been hampered by a common misunderstanding. The prevailing view is that the revolutionaries' legal realism led them to accept a consequentialist¹ jurisprudence, in particular, a jurisprudence under which advancement of the policies of the forum state guides adjudication. Commentators then cite the revolutionaries' acceptance of this jurisprudence as the reason that the revolutionaries advocated the application of the *lex fori* or law of the forum (a choice-of-law principle we can call *lexforism*²) whenever the forum is interested in the application of its law. This account of the relationship between legal realism and the revolutionaries' *lexforism* is often presented by those, such as Lea Brilmayer and Perry Dane,³ who offer as an alternative certain rights-based or deontological⁴ theories of adjudication. Such rights-based theories of adjudication, they claim, are incompatible with the revolutionaries' *lexforism*.

Brilmayer's and Dane's account of the revolution is logically and historically in error. It is logically in error because, far from being essentially consequentialist, legal realism is compatible with *any* normative theory of adjudication, including those in which the policies of the forum are subordinated to the rights of the litigants. Clarifying this logical error helps to explain an important historical error in the account: One of the foremost revolutionaries, Walter Wheeler Cook, did not accept that *lexforism* follows

1. Consequentialism assesses actions according to whether they maximize the good. For a more sophisticated definition, see Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 75, 82-93 (1973). Utilitarianism is that form of consequentialism that assesses actions according to whether they maximize happiness or the satisfaction of preferences. See, e.g., J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST, *supra*, at 1, 9-12.

2. Cf. ELGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.6 n.3 (2d ed. 1992) (using "lexforism" to describe Alfred A. Ehrenzweig's *lex fori* approach).

3. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1289-91 (1989); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

4. Rights-based or deontological ethics set limits upon what one may do in the pursuit of good consequences. E.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-30 (1974).

from the showing of an interested forum. Indeed, Cook, despite his legal realism, often looked to the rights of the litigants to determine choice of law.

The account contains a second logical error: Acceptance of rights-based jurisprudence need not lead to outright rejection of lexforism. Even if one accepts such jurisprudence, rights of the sort that are incompatible with lexforism often can be absent. In such cases, consequentialist considerations, such as those of state policy advancement, can still play a role in choice of law. Clarifying this second logical error is crucial to making sense of the work of another important revolutionary, Brainerd Currie. Currie's advocacy of lexforism in what are known as *true conflicts* has led critics to attribute to him a consequentialist jurisprudence of state policy advancement. Contrary to such interpretations, Currie's approach to choice of law owes much to rights-based jurisprudence. Currie advocated lexforism in true conflicts solely because he thought that in such cases rights incompatible with lexforism did not exist.

While Currie's lexforism is not the only possible resolution to true conflicts, any response to such conflicts must go beyond those forms of rights-based jurisprudence advocated by Brilmayer and Dane. Dane's attempt to use such rights-based jurisprudence to resolve true conflicts fails because it depends upon an implausible account of the nature of legal norms. Although consequentialist responses to true conflicts may be dissatisfying, such responses are one of the few options left to a court.

I. LEGAL REALISM IS COMPATIBLE WITH RIGHTS-BASED JURISPRUDENCE—COOK

A. *Rights-Based Critiques of the Choice-of-Law Revolution*

From around 1900 to 1950, vested rights theory guided choice of law in the United States.⁵ The theory had two main elements. First, a state had the sole power to create legal norms governing actions within its territory.⁶

5. SCOLES & HAY, *supra* note 2, § 2.4. The main proponent of the theory in the United States was Joseph H. Beale, the reporter of the first *Restatement*.

6. Beale assumed a sovereign had exclusive legislative jurisdiction over events occurring within its territory. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 2.1, 5.2. (1935). Thus the first *Restatement* approach to choice of law in tort cases was to determine liability according to the law of the place of the wrong, RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 378 (1934), "the place of the wrong" to be understood as the place of the last event necessary to establish liability, *id.* § 377. Analogously, the validity of a contract was to be determined by the law of the place of contracting. *Id.* § 332.

The rigid territorialism of vested rights theory often led to counterintuitive results. In response, courts would frequently attempt to circumvent choice-of-law rules through certain escape devices. For example, a court could recharacterize the cause of action. *See, e.g., Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928) (tort recharacterized as contract). Alternatively, a substantive issue could be recharacterized as procedural, allowing for the application of forum law. A court could also employ *renvoi*, that is, it could apply the totality of foreign law to the case, including foreign choice-of-law rules that themselves suggest the application of the internal law of the forum or of a third state. *See, e.g., University of Chicago v. Dater*, 270 N.W. 175 (Mich. 1936). Or it could appeal to the public policy exception, under

Second, if it exercised this power, violations of those norms created vested rights, which every other state taking jurisdiction of the case was bound to enforce.⁷ This second element is sometimes known as the *obligatio* theory.⁸

The choice-of-law revolution, which overthrew vested rights theory, rejected the vested rights theorists' rigid territorialism.⁹ But the revolutionaries also rejected the *obligatio* theory. They argued that when a court employs foreign law, it does not do so because it is bound to recognize a foreign legal right, but rather because the application of foreign law is suggested by domestic policies.¹⁰ Indeed, the most prominent critic of the *obligatio* theory, Walter Wheeler Cook, insisted that because any employment of foreign law has fully local motivations, a forum cannot enforce a foreign legal right at all.¹¹ The employment of foreign law is really the creation of a domestic legal right similar to the legal right created by foreign courts.¹²

Cook's "local law theory" follows from his acceptance of the legal realist view that claims about law and legal rights are descriptions and predictions of the behavior of judicial authorities.¹³ Because such claims are merely

which a forum may refuse to enforce foreign law that violates "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.). An example of such an employment of the public policy exception is *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (rejecting interspousal tort claim arising out of Connecticut auto accident because of New York interspousal immunity rule).

For a general account of vested rights theory and its difficulties, see LEA BRILMAYER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* 218–29 (1986).

7. BEALE, *supra* note 6, § 1.1.

8. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 34–39 (1942). The term is taken from Justice Holmes' opinion in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904).

9. See, e.g., COOK, *supra* note 8, at 311–46 (criticizing vested rights theorists' approach to torts); Walter Wheeler Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931) [hereinafter Cook, *Jurisdiction*] (undertaking critical analysis of territorialism); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924) (same).

Given the extent to which the courts relied upon escape devices to circumvent the vested rights theorists' territorial rules, it comes as no surprise that this element of the choice-of-law revolution has been largely successful.

10. E.g., COOK, *supra* note 8, at 35–36; Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 478 (1928).

11. COOK, *supra* note 8, at 36.

12. *Id.* at 20–21, 222; see also *Guinness v. Miller*, 291 F. 769, 770 (S.D.N.Y. 1923) ("[N]o 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."), *aff'd*, 299 F. 538 (2d Cir. 1924), *aff'd in part and rev'd in part sub nom.* *Hicks v. Guinness*, 269 U.S. 71 (1925); Ernest G. Lorenzen, *Tort Liability and the Conflict of Laws*, 47 LAW Q. REV. 483, 487 (1931).

13. COOK, *supra* note 8, at 33 ("[W]e must . . . 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."); Walter Wheeler Cook, *Essay* [hereinafter Cook, *Essay*], in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 49, 57–58 (Julius Rosenthal Found., Northwestern Univ. ed., photo. reprint 1987) (1941) [hereinafter *MY PHILOSOPHY OF LAW*].

Although Cook objected to being labeled a realist, Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 423 (1943), the descriptive or functional approach to the law that he employed is a cornerstone of realist jurisprudence, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 3–44 (1986). Cook has been included among the legal realists for just this reason. See, e.g., *id.* at 7.

descriptive, no normative conclusions follow. In particular, such claims cannot tell a judge how she ought to adjudicate. Thus, Cook denied that the recognition of a foreign right—a merely descriptive claim—could ever normatively compel a judge to employ foreign law.¹⁴

Brilmayer and Dane have interpreted the revolutionaries' rejection of the *obligatio* theory as the expression of an underlying consequentialist jurisprudence, in particular, a jurisprudence that recommends adjudication that advances the policies of the adjudicator's state.¹⁵ These critics argue that because the revolutionaries accepted such a jurisprudence, they advocated lexforism in cases of true conflicts, that is, cases in which both the forum and another state have an interest in furthering the policies behind their competing laws and no choice of law will satisfy both states' policies.¹⁶ A court may apply foreign law only when the forum lacks an interest in the application of its own law.

Brilmayer and Dane arrive at this reading of the revolution in part through the example of the revolution's most influential proponent, Brainerd Currie.¹⁷ Currie appears to be an example of someone who accepted legal realism and the local law theory,¹⁸ subscribed to a consequentialist jurisprudence of state policy advancement, and advocated lexforism in true conflicts. Currie's approach to choice of law involves examining potentially conflicting laws in order to determine the policies that stand behind each.¹⁹ If such an examination reveals that only one state has a legitimate interest in the application of its policy, there is a false conflict and a court should apply the

14. COOK, *supra* note 8, at 35–36.

15. See Brilmayer, *supra* note 3, at 1289–91; Dane, *supra* note 3, at 1196–99, 1236–39.

16. For a discussion of true conflicts, see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107–08, 117–18 (1963) [hereinafter CURRIE, *ESSAYS*]. Currie himself never employed the term “false conflicts” or “true conflicts,” but rather spoke of “false problems.” *E.g.*, *id.* at 109.

17. Brilmayer, *supra* note 3, at 1284–85; Dane, *supra* note 3, at 1201–03.

18. CURRIE, *ESSAYS*, *supra* note 16, at 49. Aside from Currie's acceptance of Cook's local law theory, there is little evidence of strong tendencies toward legal realism in Currie's work. See Brainerd Currie, *The Materials of Law Study* (pt. 3), 8 J. LEGAL EDUC. 1, 64–78 (1955) (offering sympathetic but critical examination of effects of legal realism on legal education); see also Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1588 n.6 (1985) (distinguishing Currie from legal realists). But see CURRIE, *ESSAYS*, *supra* note 16, at 183 (praising admission of “sociological jurisprudence into the conceptualistic precincts of conflict of laws”). Nevertheless, because Currie's legal realism plays a role in Brilmayer's and Dane's arguments, this Note will assume that Currie was indeed a legal realist.

19. Although such examination has often been criticized as assuming the implausible view that there is always legislative intent concerning the extraterritorial application of laws, see, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 430–31 (1980), the relevant policies can be understood rather as the underlying purposes of laws, Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 606–10 (1983). Although explicit legislative direction on the extraterritorial application of law (in effect, promulgation of statutory conflict-of-law rules) is possible, interest analysis can involve judicial interpretation that goes far beyond anything that a legislature ever explicitly contemplated.

Some defenders of interest analysis are Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics"*, 36 AM. J. COMP. L. 681 (1988); Sedler, *supra*; Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985).

law of the interested state.²⁰ On the other hand, if both states have a legitimate interest, a court should apply the law of the forum.²¹ To weigh legitimate interests would be to assume inappropriately a "political function of a very high order."²²

In opposition to the revolutionaries' ostensibly consequentialist jurisprudence, these recent critics have offered rights-based theories of adjudication, which restrict a court's freedom to employ forum law. For example, Lea Brilmayer has argued that adjudication is limited by negative rights of the litigants against unjust coercion by the state.²³ Unlike vested rights, such negative rights do not determine but merely constrain choice of law; although certain laws may not be applied, a number of options can

20. *E.g.*, CURRIE, ESSAYS, *supra* note 16, at 184, 189. The discovery that only one state is interested is a "classic 'false conflicts' situation." *Williams v. Rawlings Truck Line*, 357 F.2d 581, 586 (D.C. Cir. 1965). Some commentators, however, have spoken of cases in which both states remain interested as "false conflicts" as well, such as those cases (1) in which the conflicting laws, whatever the policies standing behind them, are the same, or (2) in which the conflicting laws, although different, come to the same result given the facts of the case. *See, e.g.*, DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 89-90 (1965). For an outline of seven uses of the term "false conflict," see Note, *False Conflicts*, 55 CAL. L. REV. 74, 76-78 (1967).

21. *E.g.*, CURRIE, ESSAYS, *supra* note 16, at 119, 184, 189. Currie also argues that if a *disinterested* forum encounters a true conflict between two other states' laws, the forum should either refuse jurisdiction on the grounds of *forum non conveniens* or apply forum law if it corresponds to the law of one of the interested states. *See generally* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP PROBS 754 (1963). Finally, if *no* state is interested, the so-called "unprovided case," Currie suggests the application of forum law. CURRIE, ESSAYS, *supra* note 16, at 152-56, since this is a "rational and convenient way to try a lawsuit when no good purpose is to be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law," *id.* at 156.

Currie's approach to true conflicts has not been generally accepted. Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 815-16 (1983). (Kentucky may be the only state that has accepted Currie's approach. Hill, *supra* note 18, at 1593 n.39.) Other methods that have been introduced for dealing with true conflicts are the application of the better rule of law, Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 279-304 (1966), and a weighing of interests on the basis of the extent to which each is impaired, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

22. CURRIE, ESSAYS, *supra* note 16, at 182. Later in his career, however, Currie suggested that in cases of true conflicts, the application of the law of the forum should be preceded by an attempt at a moderate or restrained interpretation of the policy or interests of a state in order to avoid the conflict. Brainerd Currie, *Comment on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242 (1963).

23. Brilmayer, *supra* note 3, at 1279-80; *see also* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 297-98 (1987). For related critiques, *see* Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987); Earl M. Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-law*, 30 ARIZ. L. REV. 751 (1988).

Brilmayer argues that fairness in the application of a state's law requires the existence of an adequate connection between the state and the party protesting the application of the state's law. An adequate connection can occur when "the party is a local domiciliary, has consented to application of local law, or has voluntarily affiliated with the state by engaging in local activities or conduct with foreseeable legal consequences." Brilmayer, *supra* note 3, at 1318. Brilmayer argues that Currie's interest analysis does not ensure that these conditions are satisfied. *Id.* at 1317. Furthermore, Brilmayer argues that fairness requires that choice of law be non-discriminatory, in the sense that the choice-of-law rule employed be one that would allow the person burdened to have benefited from the employment of the rule in other circumstances. *Id.* at 1308-13.

remain.²⁴ Nevertheless, these negative rights sometimes will override *lexforism*.

Perry Dane has argued for the stronger thesis that adjudication should recognize and enforce the norms to which the litigants were expected to conform their behavior at the time of the events being adjudicated.²⁵ These norms give rise to legal rights of the litigants against each other rather than merely against the state, and these rights do not just constrain choice of law but, ideally, provide a unique answer to every choice-of-law problem. This theory of adjudication is similar to vested rights theory denuded of its objectionable territorialism.

Dane does not flesh out what choice-of-law principles follow from his theory. He does argue, however, that because adjudication must recognize and enforce forum-independent rights, any choice-of-law principle should be nonrelativist, that is, any forum applying the same principle to the same set of facts should come to the same choice of law. In particular, choice of law must completely reject *lexforism*.²⁶

Dane finds his theory of adjudication, which he calls norm-based jurisprudence,²⁷ superior to that of the revolutionaries because it reflects the fundamental jurisprudential notion that a right can exist independently of its enforcement. According to Dane, because the revolutionaries' legal realism led them to see rights as existing only when and as enforced, they erroneously tied rights to fora. Norm-based jurisprudence rejects this idea:

[I]f the defining function of courts is to enforce legal rights that exist, in some sense, apart from their enforcement, any court committed to that view cannot hold that the analysis of substantive legal rights depends on the manner in which they are sought to be enforced or, more specifically, on the forum in which an adjudication happens to be brought.²⁸

Dane argues further that because the revolutionaries tied rights to fora, they believed adjudication should advance the policies of the forum. This, too, norm-based jurisprudence rejects:

[I]f the (direct) function of any particular adjudication is not to further policies of one kind or another, but rather to judge human beings on the basis of norms to which they were expected to adhere, then a court's primary responsibility cannot be to represent its own sovereign's interests, or anybody else's.²⁹

24. Brilmayer, *supra* note 3, at 1279.

25. Dane, *supra* note 3, at 1218–23.

26. *Id.* at 1245.

27. *Id.* at 1216.

28. *Id.* at 1245.

29. *Id.*

Thus, Dane argues, norm-based jurisprudence must reject lexforism. Asserting that different laws may apply as one moves from forum to forum demonstrates insensitivity to the norms that originally bound the litigants' behavior.³⁰

B. *The Legal Realist Account of Adjudication*

Dane and Brilmayer fundamentally misconceive the legal realists' account of adjudication. Principally, they ignore the legal realists' insistence that *ethical* considerations, particularly the ethical considerations *of the judge herself*, are central to adjudication. Nothing about the realist view of legal rights dictates *what* ethics the judge should use in adjudication. Legal realism is compatible with forms of consequentialist jurisprudence that aim to maximize some good other than state policy advancement. More important, legal realism is also compatible with a jurisprudence that looks to ethical (as opposed to legal) rights. Such ethical rights-based jurisprudence can offer protections to litigants similar to those offered by Dane's and Brilmayer's theories. Thus, although the realist believes that all law is local law in the sense that the adjudicator's ethical perspective always animates choice of law, the realist need not hold submission to state policy to be of the highest ethical significance.³¹ He can embrace a choice-of-law theory that rejects lexforism and advances foreign interests to the detriment of the forum.

1. *The Centrality of the Judge's Own Ethics*

The legal realists insisted that claims about the law and legal rights are nothing more than descriptions of past, and predictions of future, judicial behavior.³² As a result, such claims do not determine what anyone *ought* to

30. Cf. Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 943–44 (1975) (arguing that Cook and Currie are unprincipled in their approach to choice of law in the sense that they do not advocate that all fora should treat similar situations similarly).

31. See Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. LAW 297, 316–17 (1953) (arguing that local law theory may reject vested rights but it does not answer substantive questions about which law applies in a choice-of-law situation).

32. See, e.g., COOK, *supra* note 8, at 8; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 828–29 (1935) [hereinafter Cohen, *Transcendental Nonsense*]. COOK, *Essay*, *supra* note 13, at 57–58; Underhill Moore, *Essay*, in *MY PHILOSOPHY OF LAW*, *supra* note 13, at 203.

The legal realists often pointed to Holmes' famous statement in O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), as anticipating this approach: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." See, e.g., COOK, *supra* note 8, at 15 (quoting Holmes). But they also found justification for this "functional" approach to the law in those philosophical positions that identify the meaning of terms with their methods of empirical verification. See, e.g., COOK, *supra* note 8, at 4–5, 46–47; Cohen, *Transcendental Nonsense*, *supra*, at 822. There is no way to verify empirically what the law is except by reference to concrete judicial decisions. (This emphasis on judicial decisions as opposed to the activities of other authorities has been criticized as excessively narrow. See Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1246–47 (1934).)

do. In particular, they do not tell a judge how she ought to adjudicate a set of facts.

Accordingly, adjudication cannot merely involve a determination of what the law is, but must also involve an assessment of what the law ought to be.³³ As Felix Cohen put it:

Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment . . . Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge is not whether a legal rule or concept actually exists but whether it *ought* to exist.³⁴

The realists further insisted that any assessment of what the law ought to be must be *ethical* in motivation.³⁵ Thus legal realism had two programs, one

33. See Cohen, *Transcendental Nonsense*, *supra* note 32, at 840; Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 308 (1927) [hereinafter Cook, *Scientific Method*].

34. Cohen, *Transcendental Nonsense*, *supra* note 32, at 841. Cohen's work is important to the understanding of legal realism, despite the fact that he was one of the youngest of the legal realists, because he was more interested than most in the philosophical underpinnings of the movement and had the philosophical training to address this topic rigorously. Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032, 1032-33 (1981). He is particularly important to discussing the legal realists' views on the relationship between law and ethics, because no other realist dealt with this question as clearly and thoroughly. *Id.* at 1033. For these reasons this Note relies to a great extent on Cohen's work.

35. See Cook, *Scientific Method*, *supra* note 33, at 308; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-37 (1931). On the legal realist view that legal decisions are ethical and political decisions, see Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 474 (1988) (book review).

The legal realists rejected the significance of the normative legal concepts that judges often claimed guided their adjudication. An example of the realists' rejection of conceptualism is Cohen's *Transcendental Nonsense and the Functional Approach*. Cohen, *Transcendental Nonsense*, *supra* note 32. Cohen begins with an examination of the New York Court of Appeals' decision in *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917). The question the court addressed in that opinion was whether a corporation chartered in Pennsylvania could be sued in New York, the summons and complaint having been served upon an officer of the corporation in New York. Cohen outlined two approaches that one could take to this question. On the one hand, a competent legislature would look at, *inter alia*, the practice of modern corporations of choosing their sovereigns, the actual significance of the relationship between a corporation and the state of its incorporation, difficulties injured plaintiffs would have in suing in the state of incorporation, and possible hardship to corporations sued outside of their state of incorporation. "On the basis of *facts* revealed by such an inquiry, and on the basis of certain political or ethical *value judgments* . . . , a competent legislature would have attempted to formulate some rule as to when a foreign corporation should be subject to suit." Cohen, *Transcendental Nonsense*, *supra* note 32, at 810. In contrast to this reasonable approach, in *Tauza* the Court of Appeals asked whether the corporation was present within the State of New York. This, according to Cohen, was "transcendental nonsense":

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.

Id. at 812.

Such an appeal to normative legal concepts is inadequate because it is circular. *Id.* at 820. For a judge to claim that a corporation is located in New York is for her to express in shorthand a substantive conclusion that, given certain social facts and given certain ethical values, it is correct to hold a corporation

descriptive and one normative. On the one hand, the realists sought to enhance description of the law through greater sensitivity to the actual motivations, especially ethical motivations, of judges' decisions. Once the law was explained as a psychological and sociological fact, the realists hoped to assess and to reform it from their ethical perspectives.³⁶

Although the legal realists believed that a judge must ethically assess the law, they did *not* reject the idea that a judicial decision can be consistent or inconsistent with past judicial decisions or statutes. While most legal realists did believe that judges have a great deal of liberty in extrapolating from past decisions³⁷ and that ethical considerations fundamentally determine the direction of such extrapolation,³⁸ they were, in general, not complete rule skeptics.³⁹ They merely insisted that accepting the descriptive claim that judicial decisions were x-like in the past does not recommend to a judge, *without the introduction of ethical considerations*, that she make an x-like

subject to New York jurisdiction. The normative legal concept (the place of a corporation) is the confused representation of an important ethical judgment. *Id.* at 825 Thus one cannot appeal to the concept itself to arrive at the ethical judgment. Such concepts are the epiphenomena of, rather than the reasons for, the decisions of judges. *See also* Llewellyn, *supra*, at 1237, Yntema, *supra* note 10, at 479-81 On the legal realists' rejection of conceptualism generally, see KALMAN, *supra* note 13, at 25-27

Claims about the "recognition" of "vested rights" were prime examples of the invocation of normative legal concepts in a way that obscured the fundamental ethical decision involved in adjudication For a recognition of a vested right was really an autonomous ethical decision to provide the same or similar relief that a foreign court would. *See* COOK, *supra* note 8, at 36 Indeed, Beale was a primary target of the realist attack on conceptualism. *See* KALMAN, *supra* note 13, at 25-26

36. Admittedly, to the extent that some legal realists did not examine judges' moral reasoning, but rather looked to the idiosyncrasies of depth psychology, *see, e.g.*, JEROME FRANK, *LAW AND THE MODERN MIND* 106 (1935), or employed behaviorist explanations, *see, e.g.*, Moore, *supra* note 32, at 204, Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 609-10 (1923), they tended to put into doubt the place of moral reasoning in their own assessments of the law, leading to legal nonreformism or quietism. *See* KALMAN, *supra* note 13, at 42-43. On the relationship between empiricism and nonreformism in the legal realists, *see id.* at 32-33.

In addition, the functionalism and empiricism of the legal realists threatened the very objectivity of ethics. If the meaning of a word is its method of empirical verification, what is to be made of ethical terms, which arguably lack such verification? *See, e.g.*, FRANK, *supra*, at 27-31, 100-06 (expressing skepticism about objectivity of value); Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 12-13, 23 (1932) (arguing that ethical ideals in whose terms law is understood are without anything but emotive meaning and are not subject to rational discussion or defense)

Nevertheless, most legal realists believed in the importance of legal reform, even though they pursued "[t]he temporary divorce of Is and Ought . . ." Llewellyn, *supra* note 35, at 1236, to avoid confusion between descriptions of what the law is and claims about what it ought to be Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 874-75 (1981)

37. COOK, *supra* note 8, at 42-46; Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 215-16 (1931) [hereinafter Cohen, *Ethical Basis*], Cook, *Scientific Method*, *supra* note 33, at 308

38. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 260 (1950)

39. *See* FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* 238 (1933); COOK, *supra* note 8, at 44-45 Similarly, Karl Llewellyn noted [The realists] return from their excursion into the purest description they can manage with a demonstration that the field of free play for Ought in appellate courts is vastly wider than traditional Ought-bound thinking ever had made clear. This, *within* the confines of precedent as we have it, *within* the limits and on the basis of our present order.

Llewellyn, *supra* note 35, at 1252. Cohen worried, however, that some legal realists might have overemphasized the elasticity of traditional legal rules to the point of denying the existence of any uniformity to the law. COHEN, *supra*, at 238.

(rather than a not-x-like) decision in the present. If the judge determines consistency to be unethical, for example, the very same descriptive claim will suggest a not-x-like response. Of course, judicial consistency is usually of value, but this is an ethical claim.⁴⁰

Thus the realists denied the supposed distinction between adjudication according to the law and adjudication according to ethics. Consider a judge who thinks that decision A would be the most ethical resolution of a matter, *absent considerations of judicial consistency or deference to statute*, but chooses decision B because she, naturally, does consider these factors. A realist would reject the argument that A is demanded by ethics and B is demanded by law. Rather, B is what is demanded by ethics, *all things considered*, and A is what is demanded by ethics, *institutional facts not considered*. When people say that questions of ethics are not relevant to law, they really mean that a decision that is ethically wrong from an institutional-facts-not-considered perspective (the perspective of "ethics") can be ethically right from an all-things-considered perspective (the perspective of "law").

The view that the law is an extramoral normative force binding judges in their decisions merely confuses the purely descriptive and the ethical perspectives.⁴¹ On the one hand, the ethical perspective infects descriptions of what the law is. If they find a judicial decision ethically incorrect in the sense that, all things considered, they would adjudicate otherwise, adherents to the normativity of the law often claim not that the law created is unethical, but rather that the judicial decision was not the law at all. This distortion interferes with adequate description of the law as a social fact.⁴²

On the other hand, when adherents to the normativity of the law encounter criticisms that a judicial decision is morally wrong, they will often respond that

40. As Cohen put it:

[T]he ethical value of certainty and predictability in law may outweigh more immediate ethical values, but this is no denial of the ethical nature of the problem. *Consistency*, like *truth*, is relevant to such a problem only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical. The proposition that courts ought always to decide "in accordance with precedent or statute" is an ethical proposition the truth of which can be demonstrated only by showing that in every case the following of precedent or statute does less harm than any possible alternative.

Cohen, *Ethical Basis*, *supra* note 37, at 215; see also John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24-26 (1924) (arguing that judge must enable people to foresee the legal import of their acts, which requires consideration of precedent).

The utilitarian values of judicial consistency and deference to statute are obvious: fulfillment of others' expectations, maintenance of the public order and the stability of legal institutions, even the futility, given the possibility of appeal, of deciding in an inconsistent fashion. However, Cohen admits that a judge can value consistency for non-utilitarian reasons. He notes that many judges have feelings of institutional obligation to abide by precedent. COHEN, *supra* note 39, at 242. These feelings of obligation are presumably not utilitarian in motivation.

41. Cohen, *Transcendental Nonsense*, *supra* note 32, at 838.

42. See *id.*; Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 945 (1931) ("The 'normative' conception of legal science . . . precludes the objective narration of conventional legal principles by confusing law and ethics . . .").

questions of law and ethics are distinct. Of course one could interpret this response as the mere assertion that the ethical perspective, institutional facts not considered, differs from the ethical perspective, all things considered, and that adjudication must proceed from the latter perspective. Such a response would still leave a place for judges to weigh the ethical value of consistency against other ethical considerations. But, in claiming that law and ethics are distinct, adherents to the normativity of the law are actually claiming that the law is a normative force that gives one a reason, independent of all ethical considerations, to judge in a manner consistent with precedent. Such a view provides no place for weighing consistency against other ethical considerations. It amounts to the claim that the value of consistency trumps all other ethical considerations. But nothing about the mere existence of law as a descriptive fact could entail such a controversial ethical view. Such apologism for all forms of state coercion interferes with adequate ethical assessment of the law.⁴³

The legal realist view of the relationship between law and ethics does not mandate judicial activism. Yet, by showing that respect for consistency is an ethical choice, not a choice compelled by recognition of the law, it can release latent dissatisfaction with precedents to bring about reversals. When the law is revealed as the behavior of judicial authorities, “[t]he ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or worse and is therefore subject to moral criticism.”⁴⁴

The realists therefore made two distinct but closely related claims about freedom in adjudication. First, they claimed that decisions are often consistent with the law and thus, even if a judge did assume that consistency was of overriding importance, she would still have little constraint on how she could decide a case.⁴⁵ Let us call this freedom *in* law. Second, realists claimed that, even if only one decision is consistent with the law, recognition of this fact without the introduction of ethical considerations will not motivate a judge to make the consistent decision. Let us call this freedom *from* law.

Many critics have claimed that legal realism underestimates the role of legal rules in adjudication.⁴⁶ Such critics often erroneously believe that by showing the limits of freedom in law, they also show the limits of freedom from law.⁴⁷ The fact that judges employ rules, giving criteria or reasons for

43. See Cohen, *Transcendental Nonsense*, *supra* note 32, at 838.

44. *Id.* at 828–29.

45. See *supra* notes 37–39.

46. Golding, for example, criticizes Cohen for concentrating on ethical to the exclusion of legal norms. Golding, *supra* note 34, at 1048.

47. For example, in *Some Rationalism About Realism*, Hermann Kantorowicz argues that any account of adjudication that ignores judges' employment of rules is inadequate. Kantorowicz, *supra* note 32, at 1242–47. He goes on to claim that by understanding adjudication as involving rules, he has shown that the

their decisions that will render future decisions either consistent or inconsistent, does not give extramoral normative force to legal rules. No matter how obvious the legal rule, the normative question remains: whether consistency itself matters. Thus, no matter how little freedom in law a judge has, she always retains her freedom from law. Legal rules must be brought to life by ethics; without ethics they are dead.

2. *The Compatibility of Legal Realism with Rights-Based Ethics*

Many legal realists were, in fact, consequentialist—in particular, utilitarian—in ethical outlook.⁴⁸ But, contrary to Dane's assertion,⁴⁹ consequentialism need not result from the realist view that legal rights exist only when enforced by a particular forum. No ethical or jurisprudential conclusions can follow from this purely descriptive claim.⁵⁰ Despite the

law is normative in the sense of being more than a set of facts. *Id.* at 1243–44. Nevertheless, he claims, the law is also distinct from ethics. *Id.* at 1249.

48. On Cohen's utilitarianism, see Golding, *supra* note 34, at 1056–57. On the general utilitarianism of the legal realists, see Summers, *supra* note 36, at 875–80. But it is altogether unclear whether Cook himself was a utilitarian. Summers, *id.* at 877 & n.48, suggests that Cook's comments on ethics in Cook, *Essay*, *supra* note 13, at 62–64, might be an expression of utilitarianism. This is not very likely the case. Cook is interested in the extent to which science can be relevant to normative or evaluative inquiry, including such inquiry as it concerns the law. He argues that adequate scientific clarification of the *means* to our normative ends can go a long way toward creating agreement over ends. For example, some ends will be shown to be pragmatically incompatible with other ends to which we are attached. "This we may regard as too high a price to pay, and so may be led to reconsider our original decision to seek the end in question, at least until other means can be found." *Id.* at 61. But the ends he speaks of are not necessarily consequentialist ends. They could include the fulfillment of one's duties or adjudication according to rights-based jurisprudence. Indeed, Cook speaks of *justice* and *honor* as examples of ends. *Id.* at 63. These are usually understood as deontological goals. Cook's citation of John Dewey also supports this reading. *Id.* at 64 (citing JOHN DEWEY, *THEORY OF VALUATION* (1939)). In that work, Dewey is concerned not with the conflict between consequentialism and deontology, but with the conflict between fact and value.

Indeed, as this Note will argue below, Cook's approach to conflicts often reveals an attachment to rights-based jurisprudence.

49. See Dane, *supra* note 3, at 1245; see also text accompanying notes 25–30.

50. Furthermore, to the extent that one holds a normative jurisprudence of *any* sort, even a consequentialist jurisprudence of state policy advancement, one *must* hold that there are rights that exist independently of their enforcement. If one believes a judge ought to adjudicate in a manner that advances the policies of the forum, one must also believe that litigants have a *right* to have their cases so adjudicated, whether or not the right is enforced. Dane's claim that the legal realist cannot recognize rights until they are enforced only applies to *legal* rights. The realist belief in the descriptive nature of law does not prevent recognition of ethical rights central to jurisprudence. The same erroneous conclusion, that because the legal realists believed in a lack of legal normativity they had no account of normativity in adjudication, occurs in Brilmayer, *supra* note 3, at 1283.

This is not to say, of course, that a consequentialist jurisprudence will recognize every type of right. A utilitarian will not recognize Brilmayer-style rights of litigants against coercion by the state unless the coercion does not maximize utility. Furthermore, a utilitarian will ignore the rights of Dane's norm-based jurisprudence; utilitarianism does not consider whether the litigants conformed their behavior to norms binding them at the time of the events being adjudicated, but rather evaluates the future consequences of adjudication on people's behavior.

Cohen appeared to hold such a utilitarian view of adjudication: "The meaning of a legal rule is not action commanded but action caused." FELIX S. COHEN, *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 94 (Lucy K. Cohen ed., 1960). "The function of science is . . . to throw light upon the real meaning of legal rules by tracing their effects throughout the social order. To appraise or value these effects is the task of ethics." *Id.* at 27 (emphasis omitted). He argued that the lack of normativity to the law

tendency of realists to be utilitarians, nothing about the legal realist account of the relationship between law and ethics requires adjudicators to assess the law according to a utilitarian ethical view.⁵¹ A legal realist could easily hold that the litigants' Brilmayer-style rights limit a judge in her pursuit of good consequences. Furthermore, a legal realist could favor a norm-based jurisprudence, in which adjudication would be based upon the recognition and enforcement of common norms governing the litigants at the time of the events being adjudicated. But if the law and legal rights are purely descriptive, what would constitute these common norms? After all, just as the law gives a judge no reason to adjudicate in a particular way, so the law gives an individual no reason to follow it.

Although the legal realist sees the law as non-normative, he can accept that one might have a duty to obey the law. He can see such a duty as ethical, as

would lead to a utilitarian theory of adjudication. Since claims about the law are descriptions of judicial coercions, he thought it followed that one should assess such coercions according to whether they maximize the good. *Id.* at 93-94.

Nevertheless, it should be noted that a utilitarian might advocate that adjudication proceed according to deontological rules, on the ground that a system of justice proceeding according to such rules will tend to maximize utility more than one in which adjudicators act according to explicitly utilitarian reasoning. As Rawls puts it:

Try to imagine, then, an institution . . . which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interests of society. . . . Once one realizes that one is involved in setting up an *institution*, one sees that the hazards are very great. For example, what check is there on the officials? How is one to tell whether or not their actions are authorized? How is one to limit the risks involved in allowing such systematic deception?

If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose. A utilitarian justification for this institution is most unlikely.

John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 11-12 (1955) Thus one can argue that for utilitarian reasons a judge should not take straightforwardly utilitarian considerations into account when determining whether someone should be punished. Merely because legal realists were generally utilitarian in outlook does not mean that they had to advocate the employment of utilitarian reasoning in adjudication

51. See COHEN, *supra* note 39, at 231-32. As Karl Llewellyn noted

When the matter of *program in the normative aspect* [of legal realism] is raised, the answer is *there is none*. A likeness of method in approaching the Ought-questions is apparent. If there be, beyond that, general lines of fairly wide agreement, they are hardly specific enough to mean anything on any given issue.

Llewellyn, *supra* note 35, at 1254. In addition, even assuming that the revolutionaries were utilitarians, it still does not follow that they would advocate lexforism. The maximization of utility and the advancement of state policies are very different goals. (Dane appears to equate a jurisprudence of state policy advancement with utilitarianism. See Dane, *supra* note 3, at 1237-38.) The pursuit of these goals will lead to very different choice-of-law rules. A utilitarian would recommend the application of the law that maximizes utility. If the utilitarian had a global rather than regional perspective, that is, if he took into account everyone's utility and not merely the utility of the actor's own state, see Brilmayer, *supra* note 3, at 1288 (citing Smart, *supra* note 1, at 63), he clearly would reject lexforism. More important, even if he were a regional utilitarian, and so varied his recommendation of what law to apply depending upon the forum, he *still* would not think that a judge should be concerned solely with advancing the policies of her state. If a judge could successfully override a state policy that did not maximize state utility, he would recommend that she do so. Thus lexforism would not necessarily result even from regional utilitarianism. And since the whole point of the legal realists' view of adjudication is that the *judge's own policies* are critical to adjudication, the realist who was a regional utilitarian would clearly advocate this rejection of state policy in the name of state utility.

are duties to adjudicate in a certain way.⁵² He only insists that intrinsically *legal* reasons to follow the law do not exist. For example, a utilitarian legal realist could argue that one has a duty to obey the law when obedience would maximize utility. He would look to the negative consequences of punishment, the harm to those who rely upon one's abiding by the law, and the possible destruction of the social order due to defiance of the law.⁵³ If the law of more than one state might apply, he would argue that one should act in accordance with the law that maximizes utility.

But, once again, nothing about legal realism entails utilitarianism. Once one adequately has described the law as a social fact, any form of ethical reasoning can be used to determine one's obligations to obey it. For example, one who believed that domiciliaries have implicitly contracted with a state to obey its commands might consider obedience to be the domiciliaries' ethical duty, even if the law compelled actions that one would not find ethical absent the contract. The choice-of-law principle following from this view would be one that looked to the law of the domicile.

Given that the legal realist can accept the existence of a duty to obey the law, he can also argue that adjudication involves the recognition and enforcement of these duties. The legal realist can accept norm-based jurisprudence. Indeed, to the extent that the legal realist accepts norm-based jurisprudence, he can accept Dane's claim that choice of law cannot be lexforist, at least when the litigants had an ethical duty to conform their behavior to a particular state's law. Notice that, whatever principle one uses to determine which law one ought to obey, the principle should not assign such duties in a manner that will vary depending upon who employs the principle.⁵⁴ Although duties can vary according to one's situation, the fundamental ethical principles determining such duties must be the same in

52. See COHEN, *supra* note 39, at 4–5, 30.

53. As Cohen puts it:

The possibility of being punished and of causing consequent harm to friends and dependents, the possibility of harming those who rely upon the law, the possibility of destroying social order, which in some degree is a necessary condition of the good life, all these are pertinent facts in a moral judgment, which may appear only after law is created.

Cohen, *Ethical Basis*, *supra* note 37, at 213.

54. Consider an analogy to etiquette. To assert the principle "When in Rome (or x), do as the Romans (or x-ers) do" is to assign duties concerning etiquette that do not depend upon where such an assignment takes place. It says, whether in Rome, or Greece, or Persia, it is the case that when in Rome (or x), do as the Romans (or x-ers) do.

every location.⁵⁵ Thus norm-based jurisprudence will see choice of law, which recognizes and enforces these duties, to be equally invariant across fora.

C. *Understanding Cook's Local Law Theory*

If legal realism is compatible with norm-based jurisprudence, why is it so often said that legal realism led the choice-of-law revolutionaries to a jurisprudence of state policy advancement? The reason is a remarkably pervasive misunderstanding of the nature of the "local law theory" that Cook derived from legal realism.

Cook certainly accepted the legal realist view that claims about law and legal rights are the description and prediction of judicial decisions⁵⁶ and that all such decisions are fundamentally ethical in motivation.⁵⁷ Because he accepted that the law amounts to what the courts decide, he concluded that the application of laws has no *intrinsically legal* limitations of the sort that the vested rights theorists hoped to discover.⁵⁸ A state's law will apply to a situation whenever the state's courts can so adjudicate.

Cook gives an example of choice of criminal law.⁵⁹ In contrast to the view that a state's laws can apply only to acts that occur within that state,⁶⁰ Cook points out that the criminal law is often extended beyond a state's borders:⁶¹

55. Such nonrelativism should be distinguished from views that ethical qualities in the world are objective in the sense that they exist independently of anyone's ethical views. No claim about the objectivity of ethics is being asserted here.

Consider the following example. We take *tabooness* to be something that is not objective in the sense that a member of a culture applies the term "taboo" to x, not because of a recognition of the tabooness of x, but only because his culture, by and large, has an appropriate attitude (something like strong disapproval) toward x. But imagine that a culture had an attitude of strong disapproval toward x wherever it imagines x to be. When the culture imagines x to exist in a possible world where no human beings are present, it still strongly disapproves of x. When the culture imagines x to exist in a possible world where all cultures strongly approve of x, it still strongly disapproves of x. And when the culture imagines x to exist in a possible world where *the culture itself* strongly approves of x, it *still* strongly disapproves of x. This attitude of the culture will lead its participants to say that something is taboo and that people have taboo-duties independent of culture or attitude. Thus, the culture's claims about the taboo and taboo-duties will be nonrelativist. We, in denying that tabooness is objective, do not claim that the culture should not have such nonrelativist attitudes. Thus the question of relativity or nonrelativity is independent of questions of objectivity or subjectivity.

Such nonrelativist judgments have been termed "quasi-realist" by Simon Blackburn. Simon Blackburn, *Errors and the Phenomenology of Value*, in *MORALITY AND OBJECTIVITY: A TRIBUTE TO J.L. MACKIE* 1, 4 (Ted Honderich ed., 1985). Like Blackburn, those who reject the objectivity of value often argue that their opponents mistakenly assume that they are rejecting quasi-realist ethical judgments when they are actually making claims about ethical objectivity. See, e.g., CHARLES L. STEVENSON, *Relativism and Nonrelativism in the Theory of Value*, in *FACTS AND VALUES* 71, 90-93 (1963).

56. COOK, *supra* note 8, at 29.

57. See Cook, *Scientific Method*, *supra* note 33, at 308.

58. See COOK, *supra* note 8, at 391-92.

59. *Id.* at 9-16.

60. See, e.g., *State v. Carter*, 27 N.J.L. 499 (1859) (holding that New Jersey could not exercise jurisdiction over and apply its law to defendant because no act by defendant occurred in New Jersey), cited in COOK, *supra* note 8, at 9.

61. Cook cites *Commonwealth v. Macloon*, 101 Mass. 1 (1869), which applied Massachusetts law to an act on the high seas that resulted in a death in Massachusetts. COOK, *supra* note 8, at 10.

If then, we base our generalizations as to the "jurisdiction"—the power of a state or country to attach valid legal consequences to groups of fact—upon observations of what has been and is being done, we may, I think, conclude that a state or country, if it deems wise to do so, can punish people on whom it can lay its hands for "acts" done in other states or countries, at least where some "result" of the act takes place within the state or country in which the prosecution is had.⁶²

Of course, this descriptive fact that the criminal law of a state has been and can be applied to events outside its borders does not inform a court about whether it *ought* to do so.⁶³ But Cook claims that to answer this normative question is to engage in the same sort of reasoning that a judge undertakes in any adjudication: "[I]f the answer to conflict of laws cases cannot be deduced from certain preëxisting principles relating to 'jurisdiction,' how are they to be decided? The only answer that can be given is, by the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc."⁶⁴ Choice of law is domestic adjudication no different from any other sort.

The equivalence between choice of law and any other form of adjudication is Cook's local law theory.⁶⁵ One argument in favor of the theory approaches a tautology: The law, according to legal realism, is the coercions of a court, and since the coercing court is a local court, the law is local law. For this reason, foreign legal rights can never, by definition, be enforced by domestic courts. The right is a foreign one only if it arises from the coercions of foreign courts.

62. COOK, *supra* note 8, at 10 (footnote omitted).

63. *See id.* at 71. Brilmayer mistakenly takes Cook's descriptive claim about the possible application of the criminal law to be a normative claim about how the criminal law should be applied. *See Brilmayer, supra* note 3, at 1289-90.

64. COOK, *supra* note 8, at 42-43.

65. The substance of the local law theory is somewhat obscured by Cook's tendency to emphasize cases in which *renvoi* is rejected. Cook never tires of showing that in those cases where foreign legal rights are said to be enforced, the domestic court is not deciding the case exactly as the foreign court would, because the foreign court would apply choice-of-law rules that refer to a law other than its own. *See, e.g., id.* at 31-33, 239-51, 263-64, 331. The supposed enforcement of a foreign legal right is actually the creation of an entirely new domestic legal right that bears similarity to the rights created by foreign courts when addressing purely domestic cases:

[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in many groups of cases . . . the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element* The forum thus enforces not a foreign right but a right created by its own law.

Id. at 20-21. But the dissimilarity between the domestic and foreign adjudication is not the only reason to subscribe to the local law theory. For even when the domestic court behaves *exactly* as the foreign court would, the law employed is *still* local law. *See id.*

But the claim that choice of law is local law no different from purely domestic adjudication gains more substance if we keep in mind Cook's account of domestic adjudication. Cook, like any good legal realist, argues that all adjudicatory responses to domestic law proceed according to the adjudicator's own ethical lights. Domestic legal rules cannot themselves determine a decision. When we take adjudication to follow deductively from rules, "the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into consideration all the relevant facts of life required for a wise decision."⁶⁶ According to Cook, a judge "must legislate, whether he will or no."⁶⁷

By saying that choice of law is like domestic adjudication, Cook is saying that any recognition of a foreign right is no different from recognition of a domestic right: It is entirely non-normative until brought to life by the judge's own ethical views. The local law theory is simply another way of expressing the view that *all* legal rights are non-normative. Cook could just as easily have extended the local law theory to the recognition of domestic rights, claiming that any supposed recognition of a forum-wide right is really the creation of a judge-specific right.⁶⁸ All law is judge-specific law.

Dane understands Cook's local law theory—the view that "a forum's choice of law decisions could be nothing but expressions of its own policy"⁶⁹—to be a claim about judicial submission to the policies behind domestic legislation and precedent. According to Dane, since Cook did not believe that "a court might apply a set of rules that did not take the forum's vision regarding the outcome of a case to be dispositive, but rather inquired, on the basis of some set of second-order criteria, whether that vision or some other should govern the case at hand,"⁷⁰ Cook must have thought that lexforumism should apply in the case of true conflicts.

But Dane's account suffers from a critical equivocation concerning the terms "policy" and "forum." Cook thought that all use of foreign law is grounded in the policies of a forum, but that does not mean that he thought it must be grounded in the policies behind domestic legislation and precedent. Rather, he believed that all law, foreign and domestic, has its source in the policies of the adjudicator, which will often, but not always, be equivalent to the policies behind domestic legislation and precedent. The gap between state

66. *Id.* at 45.

67. Cook, *Scientific Method*, *supra* note 33, at 308.

68. See Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND L. REV. 827, 841–42 (1991) (reviewing LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* (1991)).

69. Dane, *supra* note 3, at 1199

70. *Id.* at 1201.

policy and court policy allows for a critical space in which state policy may be weighed—and perhaps rejected—in cases of true conflicts.

To say that legal realism prohibits judges from employing second-order criteria that assess the policies of the forum is either false or incoherent. If by “the policies of the forum” one means the policies of the legislature or precedent, the claim is false. The ethical principles of the judge stand above and assess such policies. (Thus, paradoxically, in claiming that all adjudication is the expression of the judge’s ethical principles, the local law theory explains how a judge can *avoid* applying local law.) On the other hand, if by “the policies of the forum” one means the judge’s own policies, the claim is incoherent. A judge cannot transcend herself.

But what should one make of Cook’s occasional claims that a court should defer to explicit legislative direction concerning choice of law?⁷¹ Doesn’t this mean that Cook thought a court must be lexforist if the state has an interest in the application of its law?

In fact, we can learn nothing about Cook’s theory of adjudication from his conclusions about what should be done when there is explicit legislative direction concerning choice of law. Consider, once again, the distinction between freedom in law and freedom from law.⁷² Freedom in law is the existence of indeterminacy in the law, while freedom from law is an adjudicator’s freedom to assess and reject from an ethical perspective even that which precedent or statute suggests. Although these two forms of judicial freedom are logically distinct, freedom from law, although always present, means little without some freedom in law. What good is it that a judge may always have ethical views largely contrary to those standing behind the law when any divergence from the law will be immediately recognized as such and met with institutional resistance? The prospect of such resistance usually means that, by the judge’s own ethical lights, conformity with the law is the proper choice. After all, being overturned will not advance her ethical ideals; indeed, it very likely will inhibit her ability to advance such ideals in the future. Only with some measure of freedom in law can a judge meaningfully exercise freedom from law. Whenever choice of law is a matter of explicit positive law, a judge has insufficient freedom in law to exercise meaningfully her freedom

71. When speaking of the claim that jurisdiction in criminal law should be limited by considerations of territoriality, Cook says:

If all that is meant by such statements is that according to existing rules of positive law the *courts* of the state in which the actor’s bodily movements take place are not authorized to deal with the situation, well and good. But if, as is sometimes the case, this rule of positive law is interpreted as expressing some inherent or immutable principle limiting the “jurisdiction,” i.e., the power of the *state* concerned to authorize its courts to deal with the situation and apply its law to the offender, so that any attempt of the *state* to do so is necessarily void, I for one cannot follow the argument. The reason why I cannot is that I find states actually doing the supposedly impossible thing, and doing it without successful challenge by anyone.

COOK, *supra* note 8, at 11–12.

72. See *supra* notes 45–47 and accompanying text.

from law. *Whatever* her theory of adjudication, she will come to one conclusion in such a situation—follow the command of the legislature or man the barricades.

Indeed, even Dane admits that a court should abide by lexforism when unequivocally ordered to do so, and that only when the legislature is silent can a court advance its jurisprudential vision of enforcing the rights of the litigants to the detriment of the policies of the forum.⁷³ He should allow Cook the same defense.

D. *Cook's Rejection of Lexforism*

The compatibility of the local law theory with rights-based ethics helps answer an embarrassing problem in Dane's interpretation of Cook: Cook never advocated lexforism. Indeed, he seemed perfectly willing to seek forum-independent answers to choice-of-law questions, answers that apparently appeal to the rights of the litigants.⁷⁴ Rather than accepting lexforism, Cook instead sought merely to tidy up choice of law after rejecting the crude territorialism of the vested rights theorists.⁷⁵

Consider Cook's discussion of *Milliken v. Pratt*,⁷⁶ which Currie used as an example of a true conflict.⁷⁷ Mrs. Pratt executed in Massachusetts a guarantee of her husband's credit in favor of a partnership doing business in Portland, Maine. She delivered it to her husband in Massachusetts, who then mailed the guarantee from Massachusetts to the partnership in Maine. The partnership delivered goods to Mr. Pratt in response to his orders. Upon default, the partners sued Mrs. Pratt in Massachusetts on the guarantee. Under a Maine statute, a married woman was competent to bind herself by contract. Under a Massachusetts law applicable at the time of the transaction, a married woman could not bind herself by contract as surety or for the accommodation of her husband or any third party. Maine's interest was to ensure the security

73. Dane, *supra* note 3, at 1258–59. One should be careful not to conflate a state interest in a choice-of-law context with explicit positive law on choice of law. If the two are conflated, then one would be forced back to the view that choice of law can never override state interests: The judicial discretion to override state interests would only exist when there is an absence of explicit positive law, but such an absence would mean there is no state interest to override. Cf. Courtland H. Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQ. L. REV. 436, 440–41 (1971) (distinguishing overruling of forum interests in connection with (1) explicit choice-of-law directives from legislature, (2) policies standing behind legislation that are not couched in choice-of-law terms but that clearly apply to multistate cases; and (3) policies standing behind legislation that are not couched in choice-of-law terms and do not clearly apply to multistate cases).

74. Dane admits that lexforism "was not always clear in Cook's writing." Dane, *supra* note 3, at 1200. This is an understatement.

75. See, e.g., Cook, *Jurisdiction*, *supra* note 9. Some dissatisfaction with Cook's ad hoc and untheoretical approach to specific conflicts problems is expressed in DAVID F. CAVERS, *Review of Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws*, in *THE CHOICE OF LAW. SELECTED ESSAYS*, 1933–1983, at 39, 42–43 (1985) [hereinafter CAVERS, *ESSAYS*].

76. 125 Mass. 374 (1878).

77. CURRIE, *ESSAYS*, *supra* note 16, at 117–20.

of transactions.⁷⁸ The interest appears legitimate in connection with the contract at issue, since Maine was the residence of one of the contracting parties. Massachusetts' interest was to protect married women from being coerced into contracts for the benefit of their spouses.⁷⁹ This interest also appears legitimate with respect to the contract at issue, because one of the contracting parties was a married woman who resided in Massachusetts.

But contrary to Currie's approach to the case, Cook did not argue for lexforism, but claimed that the law of *Massachusetts* should be applied. The reasons he offered suggest that both parties were bound to conform their behavior to the law of Massachusetts:

[The wife] did no acts in [Maine]; all her acts were done in [Massachusetts]. If one rather than the other state has "jurisdiction," it would seem to be [Massachusetts], not [Maine]. . . . It is pertinent to inquire: (1) Why should the offeree[s] expect her to be bound by the "law" of [their] own state rather than by that in force where she is living *and acting*? (2) Why should her own state be expected to recognize that she can escape the limitations of its law merely by sending a communication ("offer") to [the partners] in another state? [The partners] must know that if [they] ever have to sue her, it will in all probability be in the state where she lives. Why ought the offeree[s], [the partners], to expect the courts there to apply [their] law rather than hers to her acts done in her own state?⁸⁰

These facts are reasons for the litigants to have conformed their behavior to Massachusetts law at the time of the events being adjudicated. Cook nowhere suggested that a Maine court could have used Maine law to foster its own interests. Nor did he suggest using consequentialist considerations to decide the matter. He squarely emphasized the norms binding the litigants at the time of the events being adjudicated. Not only did Cook not accept lexforism, he appears to have employed norm-based jurisprudence to answer choice-of-law questions.⁸¹

Admittedly, Cook occasionally suggested choice-of-law solutions that are not compatible with norm-based jurisprudence. For example, he suggested that in certain torts cases an adjudicator should choose the law most favorable to the plaintiff.⁸² Even in these cases, however, the choice-of-law principles he offered are not lexforist.⁸³

78. *Id.* at 86.

79. *Id.* at 85.

80. COOK, *supra* note 8, at 435-36.

81. I am not suggesting that Cook's solution to *Milliken* is convincing.

82. COOK, *supra* note 8, at 345. Cook also claims that "in some cases it makes little difference which rule is adopted, so long as it is reasonably clear and definite and after its adoption is not departed from in cases clearly falling within it." *Id.* at 45-46.

83. Indeed, the only time Cook suggested that the *lex fori* ought to be applied is precisely when adherents to norm-based jurisprudence would so suggest, namely in connection with issues of procedure

II. RIGHTS-BASED JURISPRUDENCE IS COMPATIBLE WITH LEXFORISM IN TRUE CONFLICTS—CURRIE

Cook is an example of a legal realist who rejected lexforism. But in Currie we find a realist who was explicitly lexforist in his approach to true conflicts and who accepted lexforism because he thought courts are obligated to advance the interests of their states in such cases. Although, as we have seen, one cannot demonstrate that Currie was a consequentialist merely by pointing to his legal realism, it certainly seems plausible to say he was a consequentialist. Indeed, any other conclusion seems incompatible with his advocacy of lexforism in true conflicts.

Despite such appearances, Currie's approach to choice of law is, in fact, influenced by rights-based jurisprudence. Currie advocated lexforism in true conflicts not because he thought the rights of the litigants are irrelevant to choice of law, but simply because he thought that rights incompatible with lexforism do not exist in true conflicts. Rights-based jurisprudence and lexforism in true conflicts are compatible.

A. *The Inapplicability of Rights-Based Jurisprudence to True Conflicts*

To Currie, true conflicts are not merely cases in which both states are interested in the application of their policies; both states' interests must be *legitimate*.⁸⁴ An interest is legitimate if it is reasonable for the state to apply its policy.⁸⁵ Although Currie sometimes suggested that legitimacy merely requires showing an appropriate relationship between the state and a party,⁸⁶ as if the rights of other parties are not of concern, his requirement of legitimacy, to be intelligible, must take into account the relationship between the state and the entire matter being litigated.⁸⁷ Indeed, Currie spoke of interests as requiring an appropriate relationship between the state and "the transaction, the parties, or the litigation."⁸⁸ Therefore, through the requirement of legitimacy, the Brilmayer-style rights of all the litigants against unjust coercion can be addressed.⁸⁹

rather than substance. *Id.* at 179. He does argue, however, that the distinction between substance and procedure is more elastic than the vested rights theorists believed. *See id.* at 154–93.

84. CURRIE, ESSAYS, *supra* note 16, at 189–90.

85. *Id.* at 736–37.

86. *Id.* at 108.

87. *See infra* notes 102–08 and accompanying text.

88. CURRIE, ESSAYS, *supra* note 16, at 621; *see also id.* at 737.

89. *See Sedler, supra* note 19, at 610–17, 637–43 (arguing that interest analysis is already limited by considerations of fairness to all parties, such that application of forum law in true conflicts is not unfair); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 229–31 (1977) (arguing interest analysis subsumes questions of fairness to the parties; one cannot apply law if litigants could not foresee being held liable under standard set under it).

Consider again the case of *Milliken v. Pratt*.⁹⁰ Although Currie claimed that Maine's and Massachusetts' interests were legitimate because domiciliaries of each state were involved,⁹¹ one need not conclude that he thought that having a domiciliary as a litigant is sufficient to show the legitimacy of a state's interest in spite of any unfairness of the application of the state's law to the non-domiciliary. For the situation in *Milliken* is one in which the application of *either* state's law would have been fair to both parties, in the sense that neither Mrs. Pratt nor the Maine partners would have been unfairly surprised by the application of either state's law. After all, both parties willingly engaged in a transaction that crossed state borders.

Furthermore, in true conflicts, the litigants have no rights against one another of the sort that underlie Dane's norm-based jurisprudence. Since it is reasonable for either states' laws to apply, the litigants could not have had an ethical duty to follow a particular state's law. *Milliken v. Pratt* suggests this proposition as well. Can one really say the parties had an ethical obligation to act in accordance with Massachusetts law? With Maine law? If we cannot easily decide which law to apply in adjudication, how can we claim that a particular state's law supplied the norm to which the litigants ought to have conformed their behavior?

The requirement of legitimacy of interest can assure that in true conflicts, rights of the litigants will not be violated no matter which law is applied. To claim that judges should serve the interests of their states in cases of true conflicts would not, therefore, violate the litigants' rights. Lexforism in true conflicts is compatible with rights-based jurisprudence.

But couldn't one argue that norm-based jurisprudence is really the view that there should be no adjudication *unless* there is a norm to be enforced? If so, then in cases of true conflicts a court should abstain from adjudication rather than apply the law of the forum. But to abstain from adjudication in such a case would mean the parties will not have a forum for resolving their dispute, and providing such a forum has positive ethical values irrespective of the importance of enforcing norms that might have governed the litigants'

Brilmayer argues that the application of forum law in true conflicts does not satisfy some of her negative rights. Brilmayer, *supra* note 3, at 1317. She ignores, however, the requirement of legitimacy of interest. Nevertheless, it is not the purpose of this Note to argue that all of Brilmayer's rights, exactly as she conceives them, are taken into account in Currie's interest analysis. The point is merely that interest analysis is constrained by rights of the sort with which Brilmayer was concerned.

If Brilmayer-style rights are very strict, lexforism in true conflicts would certainly violate them. For example, if it is unjust for a state's law to be applied to anyone but a domiciliary, then lexforism in true conflicts would be unjust, since true conflicts often involve parties with different domiciles. But to the extent that her rights are construed this strictly, all true conflicts become situations in which the choice of either law will violate one of the litigants' rights. In such a case, considerations beyond Brilmayer-style rights will have to be used to break the tie in any event.

90. 125 Mass. 374 (1878).

91. CURRIE, ESSAYS, *supra* note 16, at 117.

behavior.⁹² These ethical values are primarily of the consequentialist sort—for example, the value of forestalling potentially violent private resolutions. Since the court has good reasons to adjudicate, but choice of law is not determined by the rights of the parties, there seems to be no jurisprudential reason why the court cannot, at the same time, employ its own law in the resolution of the dispute as a means of concurrently satisfying the consequentialist goal of advancing the interests of its state.

Claiming that lexforism does not violate rights-based jurisprudence is not the same as *advocating* lexforism in true conflicts. The risk of forum shopping that it creates is merely the most obvious of its difficulties.⁹³ One might also argue that even if traditional rights-based jurisprudence does not limit lexforism, other ethical considerations should be of greater importance to a court when confronting true conflicts than that of advocating the policies of the forum.⁹⁴

B. *Dane's Rejection of Lexforism in True Conflicts*

Why didn't Dane recognize that ethical obligations to abide by a particular state's law could fail to exist in true conflicts and thus that lexforism could be permissible in such cases? The reason appears to be that he did not think of the normative force of legal rules as ethical at all; rather, he thought of such rules as having extramoral normative force upon those to whom they apply, in the sense that people ought to act according to them in a manner independent of ethical (or self-interested) considerations.⁹⁵ From this view, a rejection of lexforism in cases of true conflicts is justified, according to the following reasoning: In cases of true conflicts, laws legitimately apply. Thus the litigants ought to have acted according to the law. But since conflicting laws apply,

92. *Cf. id.* at 64–65 (justifying use of New York law to adjudicate tort between two Americans in Saudi Arabia instead of dismissal of case for want of pleading of foreign law).

93. On the problem of forum shopping, see Baxter, *supra* note 21, at 9–10; Harvey Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 TUL. L. REV. 1, 4 (1974).

94. One obvious example is equity between the litigants. This may be what David F. Cavers meant by "conflicts justice." See, e.g., DAVID F. CAVERS, *Cipolla and Conflicts Justice*, in CAVERS, *ESSAYS*, *supra* note 75, at 191. Another example is the promotion of multistate values. For the view that lexforism in true conflicts ignores multistate values, see Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 313 (1990); Willis L.M. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 722 (1980); Donald T. Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1614 (1981).

The ethical considerations on the basis of which one might decide true conflicts need not be consequentialist. For example, Leflar's better-rule-of-law approach, see Leflar, *supra* note 21, might choose between laws on the basis of considerations independent of the consequences of the laws' application. Although rights-based jurisprudence of the sort advocated by Brilmayer and Dane cannot solve true conflicts, solutions to true conflicts need not be consequentialist in form. Nevertheless, consequentialism will provide some of the most plausible solutions to true conflicts.

95. Thus Dane suggests that law is not reducible to general moral philosophy, Dane, *supra* note 3, at 1221, and that "the Norm-Based view upholds the importance of the norm as a goal in and of itself, and finds a fundamental purpose, and a special nobility, in its vindication." *Id.* at 1219.

there must be an answer to the question of *which* law they ought to have followed and what rights the litigants have against one another. But to adopt lexforism in true conflicts would mean ignoring the litigants' rights against one another and so violating norm-based jurisprudence. Thus whatever choice-of-law principles one uses in adjudication, they must at the very least not be lexforist.

But seen in the light of legal realism, Dane's argument appears implausible. Norm-based jurisprudence, according to Dane, is the view that adjudication is "to judge human beings on the basis of a previously defined conception of the good to which they were expected to adhere."⁹⁶ One wants to ask, "What is this *expectation*?" *Not* the mere fact that a state wanted its policy to apply to the case, or each state's expectation would justify the application of its own law and lexforism would result. *Not* an expectation from the perspective of ethics, or no expectation would exist in cases of true conflicts. It must be a special *extramoral* form of expectation that, like ethics, transcends the policies of the states, but, unlike ethics, is able to provide an answer in true conflicts. What reason do we have to expect that such expectations exist? Dane's understanding of norm-based jurisprudence is a reversion to the implausible jurisprudence of the vested rights era, in which an intrinsically legal inquiry can answer the question of which state's law governed the litigants' actions. Such legal inquiry cannot exist.

C. Currie's Advocacy of Lexforism in True Conflicts

Currie advocated lexforism in true conflicts because, as he put it, "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy."⁹⁷

Dane argues that Currie ignores the fact that *jurisprudential* considerations might stand behind choice-of-law rules. Courts commonly override state policies that conflict with jurisprudentially significant rights of the litigants. If choice-of-law rules are seen as jurisprudential, courts should be able to override state interests in the choice-of-law context as well. According to Dane, Currie saw choice-of-law rules as unable to override state interests because he had an impoverished jurisprudence, in which adjudication involved

96. *Id.* at 1221.

97. CURRIE, ESSAYS, *supra* note 16, at 182. In addition, Currie pointed to the local law theory as a reason to accept lexforism in cases of true conflicts. *Id.* at 52. One will probably have to accept this as a misunderstanding on his part. Nevertheless, Currie's feeling that weighing competing state interests was inappropriate for a court, and not the local law theory, appears to be what played the crucial role in his advocacy of lexforism in true conflicts. *See id.*

merely advancing such interests.⁹⁸ Dane's criticism resembles claims that weighing governmental interests against other interests, far from being illegitimate, "seems to strike at the heart of the judicial process."⁹⁹

Instead of embracing a jurisprudence of state policy advancement, however, Currie actually saw choice of law as limited by the litigants' rights. He advocated lexforism in true conflicts only because he believed that rights incompatible with lexforism were absent.¹⁰⁰ It is for this reason that Currie believed that the choice between interests in true conflicts is a political rather than a judicial decision. It is political because it stands outside of the only circumstances under which a court may properly override state interests, that is, when the rights of the litigants are at stake. As Currie put it, "I shall not admit that I am unwilling to consider the claims of human beings to justice unless I can fit them into the conception of state interests. I am just a little less sure what constitutes justice in a conflict-of-laws case"¹⁰¹

Since choice of foreign law in true conflicts is not demanded by justice, a court should not pursue it absent express authorization from the state. Thus, paradoxically, Currie was a lexforist *because* of his attachment to rights-based jurisprudence. Once such jurisprudence failed to provide an answer, Currie saw no role for the court absent what was expressly authorized by the state.

Reading Currie as accepting rights-based jurisprudence makes sense of his demand that true conflicts exist only when both states have a legitimate interest in the matter being adjudicated. This notion of legitimacy is normative in screening out some state interests. Thus, it *must* be false that Currie saw judges as simple handmaidens for their state's policies. The possibility of screening out illegitimate interests means that a judge has to inhabit a space critically distant from the interests of her state. Furthermore, examining this criterion of legitimacy of state interest reveals that it includes considerations of rights-based jurisprudence.

The best evidence of this is Currie's discussion of *John Hancock Mutual Life Insurance Co. v. Yates*.¹⁰² In this case an insurance contract for a New

98. Dane, *supra* note 3, at 1243-44.

99. Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CAL. L. REV. 845, 853 (1961).

100. Currie's argument that forum law should be employed in true conflicts should be distinguished from his argument that there should be a presumption in favor of forum law absent the pleading of foreign law. CURRIE, ESSAYS, *supra* note 16, at 3-77. The presumption of forum law is a procedural issue independent of interest analysis. Interest analysis does not arise if no foreign law has been pleaded. Cf. Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1305 (1989) (arguing that presumption of forum law can be justified by well-established procedural principle, applicable even in domestic cases, that plaintiff's complaint is sufficient unless defendant challenges it). Currie thought that the policies behind choice-of-law rules were not sufficiently strong to override this procedural presumption in favor of forum law. CURRIE, ESSAYS, *supra* note 16, at 52-53. But that does not mean that he thought that, when foreign law had been pleaded, the policies behind choice-of-law rules were not strong enough to override forum interests when the application of forum law would violate a litigant's rights.

101. Letter from Brainerd Currie to David F. Cavers (Jan. 10, 1958), in David F. Cavers, *A Correspondence with Brainerd Currie, 1957-1958*, 34 MERCER L. REV. 471, 488 (1983).

102. 299 U.S. 178 (1936). Currie's discussion occurs at CURRIE, ESSAYS, *supra* note 16, at 620-21

York resident was made in New York. The policyholder died, and his beneficiary, also a New York resident, moved to Georgia subsequent to the death and filed an action against the insurance company in a Georgia court. The question in the case was whether Georgia law may be applied to allow a recovery that New York law would deny. Currie believed that this was a case of a false conflict: Only New York had a legitimate interest in the case.¹⁰³ In response to the claim that Georgia clearly had an interest in having its residents benefit financially and in avoiding their becoming public charges, Currie argued that this interest is not legitimate because "the determination of state interests is to be made at the time of the action or event whose legal consequences are at issue, not at the time of litigation, except with respect to laws which might reasonably be given retroactive application in a domestic context."¹⁰⁴ Indeed, he went so far as to say that "rights ha[d] become 'vested.'"¹⁰⁵

Three conclusions can be drawn from Currie's discussion of this case. First of all, he clearly cannot have believed that judges must foster any interest of their states. He must have believed in a gap between the policies of judge and state within which state interests may be evaluated in choice-of-law contexts.¹⁰⁶ For he did not consider the weighing of interests in *Yates* to be merely "political." Second, Currie's notion of legitimacy of interest must take into account the appropriateness of the application of the policy to the entire issue in dispute; it is not enough to show some connection with one of the litigants. Despite its connection with the plaintiff beneficiary, Georgia's interest was illegitimate in part because of the vested rights of the nondomiciliary insurance company. Since the requirement of legitimacy looks to the reasonableness of the application of the policy to the case as a whole, it is plausible to argue that Currie meant the requirement to ensure fairness to all of the parties and thus to satisfy their Brilmayer-style rights. Third, Currie must have believed that a domestic interest is illegitimate when satisfying the interest means violating a right of one of the litigants brought about by a norm applying to him at the time of the events being adjudicated.¹⁰⁷ Currie in

103. CURRIE, ESSAYS, *supra* note 16, at 620-21.

104. *Id.* at 621 (quoting David F. Cavers, *The Conditional Seller's Remedies and the Choice-of-law Process—Some Notes on Shanahan*, 35 N.Y.U. L. REV. 1126, 1137 n.27 (1960)).

105. *Id.*

106. *See id.* at 182 (recognizing that courts make law and thus weigh conflicting interests). That the issue at hand was whether the use of Georgia law was in violation of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, does not limit the applicability of this conclusion to choice of law between U.S. states. Insofar as Currie spells out what is meant by legitimacy of interest, this criterion is applicable in any choice-of-law context.

107. *Cf.* CURRIE, ESSAYS, *supra* note 16, at 426 n.166, 626, 737. To be sure, Currie claimed that sufficiently important state interests can override the litigants' vested rights. *See id.* at 621. But insofar as Currie spoke of *weighing* state interests against vested rights, *see id.* at 738, he still treated such rights as a restriction upon choice of law. Even the vested rights theorists recognized that state interests could override vested rights through the public policy exception. *See* sources cited *supra* note 6.

effect argued that the litigants in *Yates* had an unambiguous duty to conform their behavior to the law of New York and that this duty gave rise to vested rights on the part of the insurance company.¹⁰⁸ Despite his talk of submission to state interest, Currie must have had a latent belief in norm-based jurisprudence.

As a result of his discussion of *Yates*, Currie has been criticized for slipping back into vested rights theory.¹⁰⁹ But such a claim is very misleading. Currie never suggested that the norms binding the litigants' behavior are extramoral norms, recognizable independently of the ethical views of the person adjudicating, as the vested rights theorists believed. Currie could easily argue, as a legal realist, that his claim about "vested" rights was a claim about ethical rights. His discussion of *Yates* is incompatible only with the view that adjudication is about fostering the interest of the state without concern for the ethical rights of the litigants.

Currie's work is a substantial improvement over Cook's in recognizing that traditional rights-based theories of adjudication cannot provide definitive solutions to choice-of-law questions in many contexts. Despite his rejection of vested rights theory, Cook sometimes appears to have seen choice of law as bound by the requirement of finding the particular law binding the litigants' actions at the time of the events being adjudicated. Currie recognized that in many cases no such law exists. Furthermore, in many cases the application of either state's law will not be fundamentally unfair to the parties. Even if one rejects the lexforist conclusions that Currie drew from the absence of rights controlling choice of law, the recognition that choice of law must go beyond

Currie also suggested the possibility that Georgia did not in fact have a policy of upsetting vested rights to avoid being burdened by indigents and thus that there was no Georgian interest to consider CURRIE, ESSAYS, *supra* note 16, at 621. But Currie cannot have believed that a state's interest can never violate an individual's vested rights; otherwise, the requirement of legitimacy of interest would be superfluous. Even if Georgia had no policy in favor of the application of its law, Currie clearly suggested that if Georgia did have such a policy and was interested in applying it, a court should override the interest.

108. Larry Kramer argues that Currie's interest analysis is really a method of discovering which states have established positive law concerning the matter being adjudicated and thus whether the litigants have rights to be vindicated in court. Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA L. REV. 1045 (1989). Therefore, he argues, there is nothing mysterious about an unprovided-for case, in which no governmental interest exists on either side: It is merely a case in which no relevant positive law exists and thus no rights exist to be vindicated. The plaintiff simply has no cause of action. Because Kramer sees governmental interests as creating litigants' rights, he argues that Brilmayer and Dane are in error in treating interest analysis as incompatible with rights. *Id.* at 1064 n.60.

The rights of which Kramer speaks are not the rights with which Brilmayer and Dane were primarily concerned. Brilmayer discussed litigants' rights against laws being unjustly applied to them. If the application of the forum's law to a defendant is fundamentally unjust, it will not do to say that the plaintiff has a right to be vindicated because the forum established positive law concerning the matter. The defendant's rights are intended to override such establishment. Likewise, under Dane's norm-based jurisprudence, a litigant has a right to be vindicated not merely because a state has established positive law concerning the matter; rather, its positive law must have governed the litigants' behavior at the time of the events being adjudicated. Kramer is correct in saying that Currie subscribed to rights-based jurisprudence, but the rights Currie accepted as governing choice of law were not merely the rights that arise from positive law applying to one's actions. They include rights limiting the applicability of positive law.

109. See Brilmayer, *supra* note 3, at 1286 n.41.

rights-based jurisprudence in dealing with true conflicts is an important contribution toward clear thinking on the subject.

It is a commonplace that greater ease of movement between states has forced a reassessment of choice of law. But the reassessment has not been merely one of questioning the importance of territoriality. With ease of movement, the ethical certainty of what law the litigants had a duty to obey has, in many cases, disappeared. Without this certainty, the rights that norm-based jurisprudence claims the courts must recognize and enforce also disappear. This leaves the courts with literally *nothing to do* in such cases, unless they are willing to experiment with innovative reasons for applying law. The confusion in and dissatisfaction with choice of law is largely a result of such experimentation. Thus the situation is not that traditional rights-based jurisprudence has been rejected in favor of other forms of reasoning, but that traditional rights-based jurisprudence has become irrelevant and other forms of reasoning are all that is left to fill the gap.

III. CONCLUSION

Is choice of law the judicial equivalent of all-out war, in which judges act as officers for their states: advancing whenever they can, retreating only on command from above, looking at both the enemy (foreign litigants) and their own foot soldiers (domestic litigants) from the narrow perspective of military success? Or is choice of law, like purely domestic adjudication, a largely peaceable realm, in which judges are heavily bound by respect for the rights of the litigants against the state and against each other? The answer—a bit of both—is not surprising. But that this answer can be found in works of choice-of-law revolutionaries, the supposed advocates of unrestrained lexforism and state policy advancement, might be.

Dane and Brilmayer put the choice-of-law revolutionaries in the all-out war camp because they thought that the revolutionaries' local law theory led to unyielding loyalty to the state. As a result, they ignored the extent to which the revolutionaries' rights-based jurisprudence constrained their choice-of-law theories. Nevertheless, as Currie recognized, rights-based jurisprudence can only take one so far. Where rights exist, they must be respected. But when dealing with the lawless realm of true conflicts, politics and pragmatism are the tools that everyone, including the courts, must use.