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CONFLICTS ON AN UNRULY HORSE:* RECIPROCAL CLAIMS AND TOLERANCES IN INTERSTATE AND INTERNATIONAL LAW

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THE widespread impact of philosophies of positivism coupled with the growth of legislation regulating previously unrestrained human conduct has greatly affected both the substance of the common law and the methodology of the judiciary. Verbal consistency and doctrinal purity have given way to a process that emphasizes purpose and social function—the "public policy"[1] —underlying statutory language or common law principles, a process that seeks, within the proper limits of judicial discretion, results consistent with that policy. Decisions which rely on the autonomy of symbols—"mechanical jurisprudence" to use Dean Pound's famous phrase[2]—are ever rarer.

This philosophical and legislative trend has had a particularly devastating, albeit salutary, impact upon the conflict of laws. The conceptual castles in the air so laboriously constructed by Professor Beale and embodied in the Restatement[3] were based on common law precedent (as fitted into Beale's theory) and fundamentalist thinking. Much of the precedent has been legislatively and judicially modified;[4] the theory of "vested rights" has been brutally

*"[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you." Burrough, J., in Richardson v. Mellish, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824). This Article does not, however, confine itself to the public policy "doctrine." Apologies are probably due to a famous legal equestrian who rode a different mount. See Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939).

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1. "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." HOLMES, THE COMMON LAW 35-36 (1881). The jurisprudential trend of contemporary scholarship has, of course, been to make articulate what has been "unconscious" and "instinctive."

2. 8 COLUM. L. REV. 605 (1908).

3. RESTATEMENT, CONFLICT OF LAWS (1934) (hereinafter cited as RESTATEMENT). The RESTATEMENT does not explicitly adopt the "vested rights" theory associated with the names of its Reporter (Beale) and Advisor (Goodrich), but it is implicit throughout.

4. The RESTATEMENT is currently being "continued." See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW CONTINUED 33 (Tentative Draft No. 1, 1953); *id.* at 37 (Tentative Draft No. 2, 1954). But not without opposition. See Ehrenzweig, *American Con-*

murdered by Cook,[5] Lorenzen[6] and others,[7] though it still flits ghostlike through many decisions. We are left, therefore, without a sound and satisfactory theoretical framework as a basis for solving new problems, and with much precedent founded, consciously or unconsciously, upon assumptions no longer valid.[8]

Systematic formulations of conflicts theory have consistently abjured questions of public policy, or *ordre public*,[9] either as outside the proper scope of conflicts[10] or as exceptions to normal choice of law rules.[11] In fact, much

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flicts Law in Its Historical Perspective: Should The Restatement Be "Continued"?, 103 U. PA. L. REV. 133 (1954). While certain rules will be modified, there is no evidence of a substantial change in the general approach of the RESTATEMENT.

5. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) (a collection of articles, with revisions by the author, which began with the famous title article appearing in 33 YALE L.J. 457 (1924)).

6. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947). See especially his *Territoriality, Public Policy and the Conflict of Laws*, reprinted from 33 YALE L.J. 736 (1924). The RESTATEMENT was preceded and followed by vigorous debate in the law reviews between the adherents of "local law" (Cook, Lorenzen) and "vested rights" (Beale, Goodrich), the latter group capturing, so to speak, the American Law Institute. But not without a struggle. See, for example, 3 ALI PROCEEDINGS 225, 260 (1925).

7. The literature is vast. See, especially, Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Harper, *Policy Bases of the Conflict of Laws*, 56 YALE L.J. 1155 (1947); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928). For a general discussion see Cheatham, *American Theories of the Conflict of Laws*, 58 HARV. L. REV. 361 (1945).

8. Public policy has, for this reason, been increasingly resorted to as a doctrinal ground for decision. See, *e.g.*, Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 747 (1924). For an excellent general discussion see Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940).

9. "Public Policy" and *"Ordre Public"* overlap but do not equate. For comparative studies see LLOYD, PUBLIC POLICY: A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW (1953), especially c. V; Husserl, *Public Policy and Ordre Public*, 25 VA. L. REV. 37 (1938). In part the difficulties are terminological, civil law conceding a wider ambit to the "personal law," and then cutting it down by application of the *ordre public* exception. LLOYD, *op. cit. supra* at 96. In addition, matters that civil law would classify as *ordre public* are at common law within other exceptions to "normal" choice of law rules; for example: procedural, penal, political and revenue laws. See WOLFF, PRIVATE INTERNATIONAL LAW 176-79 (2d ed. 1950) (hereinafter cited as WOLFF).

10. This is the civilian approach, traceable at least to Savigny in its modern formulation. While he does not use the term *ordre public*, he excludes "statutes of a strictly positive and absolute (coercive, imperative) nature" and "legal institutions of a foreign state, of which the existence is not at all recognized in ours, and which, therefore, have no claim to the protection of our courts." SAVIGNY, PRIVATE INTERNATIONAL LAW 34-38 (Guthrie transl. 1869) (hereinafter cited as SAVIGNY). Within the first category Savigny distinguished between rules enacted for the protection of possessors of rights (capacity, formalities) and those resting on moral grounds or the "public interest." *Id.* at 35-36. Savigny's categories have been misleadingly labeled by others as "ordre public interne" (applicable where promulgated by the state whose rules govern according to private international law) and "ordre public international" (applicable only where internal rules of forum apply). WOLFF 168-69.

Anglo-American public policy doctrine is not similarly qualified—at least not explicit-

of the rationale behind keeping "public" and "private" international law in separate compartments has been founded on the philosophical assumption that private rights are unrelated to public policy—an assumption incorporating the dominant economic and political viewpoint of the last century. Excluded from private international law were all questions of public law. Courts of the forum did not enforce the penal, revenue or political[12] laws of other

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ly—and therefore has potentially broader scope unless limited domestically by full faith and credit doctrine. A court cannot intelligently use the substantive provisions of the *lex fori* as the measure of the limits of what it will recognize; there is an obvious difference between incompatible local and foreign provisions where both claim to govern the particular facts, and the mere absence of a similar local provision where the forum has no contact with the parties and events save as a convenient forum. There is too the danger that outmoded precedent of the forum will be used by its courts to exclude foreign regulation offensive to nineteenth century liberalism but not necessarily to contemporary economics or morality. *Cf.* Kahn-Freund, *Reflections on Public Policy in the English Conflict of Laws*, in THE GROTIUS SOCIETY, PROBLEMS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 39 (1954).

11. It would seem to make little practical difference whether one calls decisions resting on the forum's public policy an exception to normal rules or outside the scope of private international law. A theory of vested rights resting on jurisdictional premises tends to regard it as an exception because it represents a right not enforceable in the forum. RESTATEMENT § 612; GOODRICH, CONFLICT OF LAWS 21 (3d ed. 1949) (hereinafter cited as GOODRICH). But throughout, the RESTATEMENT leaves room for statutory or common law modification of the rules it restates, at least within constitutional limits. RESTATEMENT § 5. Thus public policy may be used in a "positive" sense, *i.e.*, extending the forum's rules beyond what would be allocated by conflicts doctrine. See, *e.g.*, Straus & Co. v. Canadian Pac. Ry., 254 N.Y. 407, 173 N.E. 564 (1930); *cf.* Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928). Most such extensions have been statutory regulation of local business, *e.g.*, insurance, where state law seeks to protect local residents from unfair contracts of adhesion. See, generally, CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS (1942). For a recent extension of protective policy see Watson v. Employers Liab. Corp., 348 U.S. 66 (1954) and Note, 64 YALE L.J. 940 (1955). If the forum state seeks to impose a liability not contracted for, or explicitly excluded from the contract, there are constitutional due process limits. See, *e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

12. Since a foreign state cannot sue in its "sovereign" capacity (to enforce its public laws) the cases invoking these oft-repeated maxims do so in a variety of private law contexts. American authority derives from The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825), where Marshall used the principle ("The Courts of no country execute the penal laws of another . . . .") to justify a claim of the Spanish government to property in slaves seized from a Spanish ship by a pirate of uncertain flag. The slave trade was illegal under United States, but not under Spanish law, and had the slaves been carried by an American flag, presumably no claim to title would have been recognized. Earlier English cases had refused to allow a defense to a debt owing an Englishman based on the confiscatory decree of a country at war with England. Folliott v. Ogden, 1 H. Bl. 123, 126 Eng. Rep. 75 (C.P. 1789), *aff'd*, Ogden v. Folliott, 3 T.R. 726, 100 Eng. Rep. 825 (K.B. 1790), 4 Bro. P.C. 111, 2 Eng. Rep. 75 (H.L. 1792) (attainder and confiscation of loyalist property by American states in revolt). Cases have also raised the questions whether a contract which contemplated an act criminal by foreign law was unenforceable in the forum and whether the "penal" exception could be used to make the contract enforceable. See, *e.g.*, Simeon v. Bazett, 2 M. & S. 94, 105 Eng. Rep. 317 (K.B. 1813) (ship engaged in smuggling to

states. Even the "public policy" exception was in effect a refusal to hear a controversy that departed from local policy embodied in local precedent.

An important element in this hands-off view stemmed from the dominant legal thinking which foreswore "policy" as inappropriate to the judicial function. Courts, at least in international cases, were concerned about "political" involvement where matters of public policy or public law were concerned.[13] The problem is, of course, a real one, but one may be skeptical of such an ostrich-like solution. How far the attempted dichotomy between "law" and "policy" was carried is perhaps best illustrated by the courts' refusal to recognize the policy of the state whose law was in question, even though the policy was apparent from that state's disposition of the same facts.[14] Viewing the juridical question as one of renvoi, the Restatement regards as largely irrelevant[15] the question whether the state with "legislative jurisdiction" would apply its own internal law to the same controversy. The criterion of decision was not regarded as one of self-restraint or deference

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Prussia seized, insurer liable despite foreign "illegality"; smuggling abroad in Napoleonic era encouraged by British government). Compare the modern English attitude as evidenced by Foster v. Driscoll, [1929] 1 K.B. 470 (C.A. 1928) (contract among English joint venturers to smuggle whiskey into United States held unenforceable as "immoral"), and Ralli Bros. v. Compania Naviera, [1920] 2 K.B. 287 (C.A.) (Spanish price regulation enforced). The RESTATEMENT § 610 overgeneralizes that "no action can be maintained on a right created by a foreign state as a method of furthering its own governmental interests," but, except for criminal prosecution, allows the forum to determine whether or not a "particular claim falls within this section." Cases are collected and policies discussed in Leflar, *Extra-state Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932). The modern domestic trend has been to confine "penal" to its "international sense" (penalties imposed by state action) as exampled in Huntington v. Attrill, 146 U.S. 657, 673-74 (1892), though much earlier precedent remains for a broader reading of "penal." Leflar, *supra* at 205. And the Supreme Court has knocked a good deal, if not all, the force out of the interstate "revenue" exception by its decision in Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935) (sister state tax judgment entitled to full faith and credit). See Daum, *Interstate Comity and Governmental Claims*, 33 ILL. L. REV. 249 (1938). Obviously the penal, revenue and political categories can be subsumed under the more generic public policy head. See, for example, CHESHIRE, PRIVATE INTERNATIONAL LAW (4th ed. 1952) (hereinafter cited as CHESHIRE); NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW (1943) (hereinafter cited as NUSSBAUM).

13. NUSSBAUM 115; *cf.* Kronstein, *Crisis of "Conflict of Laws,"* 37 GEO. L.J. 483 (1949) (arguing that choice of law rules are a political football in the hands of private parties).

14. So long as the "laws" of the several nations are simply different refinements of the same general principles or policies, and the facts are localized, the problem is unlikely to arise; that is, a court can safely generalize on the basis of domestic policy and doctrine and formulate a conflicts rule. Savigny attempted this on a broader scale for countries sharing a Romanic code (though like Story, he identified the principles with civilized (*i.e.*, Christian) countries), and Beale for common law precepts. This process—perfectly intelligent in itself—creates the illusion of "superlaw" which soon outstrips the assumptions on which it was built: *i.e.*, similar principles and policies of substantive law.

15. The RESTATEMENT rejects renvoi generally. RESTATEMENT § 7. Title to land and the validity of a divorce are excepted. *Id.* § 8.

among states to policies prescribed by each, but as a strictly legal question to be resolved by a super-law of reference.

One premise of contemporary positivism (a cloak, to be sure, of many colors) is that all law rests, in the final analysis, upon public policy—upon "considerations of what is expedient for the community concerned,"[16] and conflicts doctrine is no exception. Lorenzen, for example, puts it this way: "The general problem is, therefore, always the same: What are the demands of justice in the particular situation; what is the controlling policy?"[17] And he saw the exceptional status of public policy as it exists in the various conflicts theories and decisions as evidence that the rules themselves are based on faulty premises.[18]

Now, "public policy" in the all-inclusive sense of much contemporary usage, and "public policy" as a narrowly conceived exception to rules which on principle should apply, are quite different ideas. Yet they are difficult to segregate.[19] Judge Burrough's horse has long been an unruly beast, and there is no evidence that another century has made him less frisky. The exception, originally dominated by notions of morality,[20] has always had a propensity to swallow up the rule itself. Sometimes public policy has been a synonym for provincialism, as in the refusal to apply foreign wrongful death statutes.[21] Sometimes it is merely a round-about device for avoiding the impact of unhappy full faith and credit precedent, as, for example, when the California court soberly pronounced the Massachusetts Compensation act "obnoxious" and then applied its own act, which, except for a more liberal recovery provision, was very similar.[22] In the international cases it is particularly difficult to saddle, for its reference may be to foreign rules offensive to domestic notions of morality,[23] due process [24] or foreign policy,[25] or to the promotion of domestic political or economic interests at the expense

16. HOLMES, *op. cit. supra* note 1, at 35.

17. Lorenzen, *supra* note 8, at 748.

18. *Id.* at 747.

19. See WOLFF 179.

20. The great bulk of substantive applications were in contract, invalidating contracts against public morals, *e.g.*, contracts that involved committing a crime, gambling, working on Sunday, restraint of trade or illicit cohabitation or other sexual immorality. See LLOYD, *op. cit. supra* note 9; Knight, *Public Policy in English Law*, 38 L.Q. REV. 207 (1922).

21. *E.g.*, Cristilly v. Warner, 87 Conn. 461, 466, 88 Atl. 711, 713 (1913).

22. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 504 (1939). The only way of distinguishing Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), was to seize on dictum pointing out that the New Hampshire court had not determined the Vermont compensation statute to be against its public policy. *Id.* at 161.

23. *E.g.*, Oscanyon v. Arms Co., 103 U.S. 261 (1880); Roth v. Patino, 185 Misc. 235, 56 N.Y.S.2d 853 (Sup. Ct. 1945), *aff'd*, 270 App. Div. 927, 62 N.Y.S.2d 820 (1st Dep't 1946). The flexibility of contracts conflicts rules often makes it unnecessary to invoke "public policy" specifically; most cases, including those cited, could be explained by traditional doctrinal references. In Anglo-American law the public policy concept in its conflicts usage is traceable at least to Mr. Justice Wilmot's much quoted hypothetical to the effect that an English court would not permit a suit by a courtesan for the wages of sin even if the contract

of antagonistic foreign ones.[26] In many instances private and public international law—never really far apart—have become inextricably intertwined.[27]

Current conflicts problems, both domestic and foreign, are reflections of the increasing and complex interdependency of human activities that know no state boundaries. Public regulation, legislative and judicial, has affected the presuppositions of much doctrine. In other respects social and cultural values have been modified, thereby requiring modification and clarification of conflicts doctrine. Much of the Restatement, and the precedent which (to a degree)

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was valid where made. Robinson v. Bland, 2 Burr. 1077, 1084, 97 Eng. Rep. 717, 721 (K.B. 1760).

24. The bulk of litigated cases here and abroad involve confiscatory laws and decrees violative of domestic notions of substantive due process. They could equally well be characterized as "penal" or "political." Cases involving the Russian revolutionary decrees and the German anti-Jewish laws are particularly prolific sources. For some of the cases dealing with the former, see Dougherty v. Equitable Life Assur. Soc., 266 N.Y. 71, 193 N.E. 897 (1934); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Princess Paley Olga v. Weisz, [1929] 1 K.B. 718 (C.A.). On the Nazi laws, see, *e.g.*, Bernstein v. Van Heyghen Frères S.A., 163 F.2d 246 (2d Cir. 1947); David v. Veitscher M.A.G., 348 Pa. 335, 35 A.2d 346 (1944); Novello & Co. v. Hinrichsen Edition, Ltd., [1951] 1 All E.R. 779 (Ch.).

Doctrine is not confined to seizure of property; foreign judicial procedure may be equally offensive, though it is perhaps easier to find a lack of "jurisdiction" in the foreign court. That the due process-public policy exception exists, see Hilton v. Guyot, 159 U.S. 113 (1895) ("a full and fair trial abroad . . . under a system of jurisprudence likely to secure an impartial administration of justice . . ."); DICEY, CONFLICT OF LAWS rule 79 (6th ed., Morris 1949) (invalid if contrary to "natural justice"). Public policy is a normal exception in treaties containing reciprocal enforcement provisions with regard to judgments. *E.g.*, Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 GEO. V, c. 13, extended by Convention to a number of European and Commonwealth countries.

25. The leading case is Pink v. United States, 315 U.S. 203 (1942) (executive agreement precludes contrary state public policy against confiscation; foreign policy becomes public policy). In general, see JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS (1933); Stevenson, *Effect of Recognition on the Application of Private International Law Norms*, 51 COLUM. L. REV. 710 (1951). For a discussion of this problem in relation to the International Monetary Fund Agreement, *compare* Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421 (1950), *with* Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953).

26. Instances would include such diverse examples as the seizure of enemy alien property, the administration of exchange and export-import controls, and the "extra-territorial" enforcement of the Sherman Act. *Compare, e.g.*, Direction der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22 (1925), *with* Braun v. The Custodian, [1944] 3 D.L.R. 412 (Can. Ex. Ct.) (both involving governmental claims to intangibles). A comprehensive discussion of alien property problems is contained in 11 LAW AND CONTEMP. PROB. 1-199 (1945). See also HOLLANDER, CONFISCATION, AGGRESSION, AND FOREIGN-FUNDS CONTROL IN AMERICAN LAW (1942).

27. For recent observation on the interrelationship of public and private international law see, McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 214-15 (1953); *cf.* Stevenson, *Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952).

it reflects,[28] presupposed a body of law within each state which was largely the product of custom and agreement, unrelated to conscious policies. Matters once viewed as of serious public concern—marital relations, for example—are less intensely felt today. Relationships founded conceptually in freedom of contract are now vitally related to notions of the public weal. In a sense, what was regulated status has moved toward unregulated private agreement, and what was within the area of unrestricted bargain has become regulated status.

The assignments of "legislative jurisdiction" incorporated into the Restatement are quite useless to a rational solution of many of these problems. Yet theories of territoriality are deeply rooted in common law precedent and are only gradually breaking down. What goes on in State X may have a serious impact in State Y. How far can Y reach out, legislatively and judicially, to protect its interests as it conceives them? And what is, or should be, the reaction of the courts of X? What are the limits of power, and what are the criteria for the respective "public policies" of states involved?

Among the United States these are problems ultimately subject to Constitutional prescriptions. But it is no easy task for the Supreme Court to set limits without a sensible framework for analysis. To what extent and how intelligently can due process and full faith and credit be measured in territorial terms? When conflicting state policies (how measured?) must be balanced,[29] is the public policy here involved to be determined by jurisdictional concepts [30] or by the national interest?[31]

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28. See, *e.g.*, Nussbaum, *Conflict Theories of Contract: Cases versus Restatement*, 51 YALE L.J. 893 (1942); Lorenzen & Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555 (1935).

29. A contest arising out of conflicting statutes can be determined under the full faith and credit clause only "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935). Stone's "balance of interest" test is still good tender, despite doubt in high judicial quarters. Watson v. Employers Liab. Corp., 348 U.S. 66, 73 (1954). But see Mr. Justice Frankfurter's concurring opinion querying how "principles of equal relevance" are balanced. *Id.* at 75-76. See further Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 9 (1945), where the late Justice finds no standards for weighing and opines that the balance of interest test will not long be the last word.

It is unlikely today that the Supreme Court will permit a state court to refuse effect to a sister state statute unless the forum also has a substantial interest. See Hughes v. Fetter, 341 U.S. 609, 612 (1951); Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952). But given a substantial interest, "a state is not required to enforce a law obnoxious to its public policy." Griffin v. McCoach, 313 U.S. 498, 507 (1941).

30. The interrelationship between jurisdiction and the due process and full faith and credit clauses is complex. In part this complexity is simply the product of history. See Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955) (relating the constitutional bases to the Law of Nations). In essence, the operative scope of due process is to protect the individual from arbitrary exercise of state power; it requires,

In international conflicts our public policy has the habit of getting tangled up with our foreign policy.[32] What is the effect to be given foreign legislation which violates domestic notions of due process?[33] What is the scope of international full faith and credit—the "Act of State" doctrine—when it lacks the correlative protection of the Fourteenth Amendment? Should domestic, political or economic interests be judicially conceived as exceptions to foreign law public policy, or are these issues wholly for determination by diplomats? And again, what is the relation of territoriality to acts of state, or of traditional choice of law principles to explicit mandates of a foreign government?

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therefore, some reasonable connection between the individual and the prescription asserted and some notice that he is subject to the prescription. Traditionally these have been measured in "territorial" language. The full faith and credit clause, as it has evolved, is a tool for national regulation of state conflict. To date it has been almost wholly judicially administered. See Jackson, *supra* note 29. What could be legislatively accomplished, and how, is uncertain. Broad implementation possibilities are suggested by Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919). But its legislative history scarcely supports a heavy legislative hand. See Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944); *but see* 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, 550-57 (1953).

While states customarily gave effect to sister state judgments, not every such judgment was recognized, and the full faith and credit clause was restrictively interpreted as late as 1850 by the Supreme Court. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850). Even Pennoyer v. Neff, 95 U.S. 714 (1877) could be regarded as restrictive. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 306-08 (1956). But *Pennoyer* marked the beginning of increased judicial control by the Court of interstate conflicts, and the test it established—jurisdiction in accordance with due process criteria—became the measure of mandatory full faith and credit to judgments. Even local public policy was knocked out as an exception. Fauntleroy v. Lum, 210 U.S. 230 (1908).

Due process was essentially a defendant's argument, vested rights to the contrary notwithstanding. It was difficult to argue that a state was depriving a plaintiff of property merely because it refused to enforce his claim locally. Yet vested rights was important, for if it could be said that a foreign judgment gave rise to an *obligato* within the protection of full faith and credit, it could equally well be said that a statute, or "public act," did the same. The commentators thought so, at least. See Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656 (1918); Dodd, *The Power of the Supreme Court to Review State Decisions in The Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926) (an extremely influential article pointing out the procedural advantages of full faith and credit over due process in regulating choice of law). By the nineteen-thirties the Supreme Court apparently was following Professor Dodd's lead, invoking full faith and credit more often than due process to strike down a state choice of law involving a foreign statute. Due process remained where the forum applied its own law and no foreign statute was involved. One important result has been to move somewhat away from the territorial concepts employed in older due process precedent to the measurement of governmental interests. See note 29 *supra*.

31. Hughes v. Fetter, 341 U.S. 609, 612 (1951) (the "strong unifying principle . . . in the Full Faith and Credit Clause"). See Cheatham, *A Federal Nation and Conflict of Laws*, 22 ROCKY MT. L. REV. 109 (1950).

32. See note 25 *supra*.

33. See authorities cited note 24 *supra*.

Some Theory About Theories

Multiple Sovereigns, Multiple Laws and Multiple Rights

Within the world community, methods of policy prescription and application are territorially organized within a framework of separate sovereignties. But the values that states seek to achieve jointly and severally as well as the means of achievement are not so easily related to geography. Policy is conceived in functional terms, and the bases of power—persons and wealth—move across state lines with relative ease.

Much of the difficulty, and fascination, of the conflict of laws stems from peculiarly difficult conceptual problems. A vocabulary and doctrine geared to a single legal system are strained beyond their capacity, or utility, when employed in a context of multiple sovereignties. In common parlance "law" refers to a body of principles which will be applied by public officials on given occasions. People may and often do differ as to the ultimate source of these principles, within reasonably narrow limits as to what they are, and within somewhat broader limits as to how they may be applied to assumed facts. We can express this uncertainty by claiming that the law itself is certain but that people may differ about what it is and how it applies to certain facts; or we can equally say, with Holmes, that "for legal purposes a right is only the hypostasis of a prophecy."[34] As a practical matter it makes little difference as long as we accept the institution and have sufficient confidence in the hypostasis. Over the great bulk of human relations prediction is accurate, and this leads us to express law as a constant. Actually, in doing so we telescope the element of time verbally because we think of it as irrelevant. We use the present tense to describe the predicted future behavior of judges; and courts, indulging in the same license, use the past tense to describe their present behavior. In both cases it is the law which attaches consequences to events, and we speak as though these consequences attach at the time of occurrence rather than when they are judicially pronounced and administratively enforced.

What is at worst a mild and not too misleading fiction creates conceptual problems as soon as we introduce multiple sovereigns. We now have as many "laws" as there are sovereigns, and, if "rights" are derived from "laws," then as many rights as well. Semantic difficulties abound, the more so because similar judicial behavior can be equally well described in language derived from different premises. When a court applies the rules and principles found in the statutes or judicial decisions of another sovereign, it can be said that the court is either enforcing foreign law,[35] enforcing a right created by foreign law,[36]

34. Holmes, Collected Legal Papers 313 (1920). See also *id.* at 173 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law").

35. See Story, Conflict of Laws 47 (3d ed. 1846) (the "comity" theory) (hereinafter cited as Story).

36. Dicey, Conflict of Laws 11 (6th ed., Morris 1949); 1 Beale, Conflict of Laws 64-75 (1935) (hereinafter cited as Beale).

or enforcing a right created by its own law which is "as nearly homologous as possible to that arising" under the foreign law.[37] All we are doing is using different symbols to describe similar judicial behavior. Unhappily, however, the symbols come freighted with a host of philosophical assumptions, supplementing the inherent "tyranny of words."

There are conceptual difficulties with any formulation. From the point of view of the forum, only its law can operate within its territory; that is, be applied by its judges. The Dicey-Beale verbalization, local enforcement of rights created by foreign law, avoids this pitfall, but, as Cook and others have exhaustively demonstrated, it is not an accurate statement of what courts do in fact: in many cases the right is not one which would be recognized and enforced by the courts of the state whose laws are said to have "vested" it. Descriptively more accurate, therefore, is the statement that rights are purely the creation of the forum's law, but it offends our preconceptions about the stability of legal relations and our way of talking about law. This statement, rests, of course, on the Holmes prophecy theory, and was recently characterized by Yntema—a little unfairly—as a "truism which contains neither truth nor virtue."[38] His objection is based on its failure as a theory to explain why foreign law (principles found in the statutes and decisions of another state) is used by the forum as the measure of adjudication, and its tendency to mislead by exaggerating the creative role of the forum.

Concepts of territorial sovereignty breed theories of territorial laws—jejune notions of an "omnipresence" which cannot "brood" more than three miles from home.[39] For Beale and his followers, the territoriality of law explains why the forum applies its own law and, equally, why it applies foreign law. It is simply a question of where you get on the merry-go-round and where you get off; which "sovereign" you are talking about and what you mean by "law." European thinking has traditionally been oriented from the viewpoint of the sovereign whose law ought (in someone's opinion) to govern; conceptually, therefore, it claims for this law an extra-territorial effect, an approach consistent with the methodology of codified law.[40] The Anglo-American practice, on the other hand, has always started at the other end of the spectrum—in terms of courts rather than codes, jurisdiction rather than

37. Guiness v. Miller, 291 Fed. 769, 770 (S.D.N.Y. 1923). This quotation from Judge Hand's opinion is customarily regarded as epitomizing the "local law" theory. See, *e.g.*, Cook, *The Logical and Legal Bases of the Conflict of Laws*, 23 YALE L.J. 457, 474-75 (1924); *cf.* Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950) (distinguishing Hand's views from those of Cook).

38. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 316 (1953) (hereinafter cited as *Yntema*).

39. "[N]ot only must the law extend over the whole territory subject to it and apply to every act done there, but only one law can so apply." 1 BEALE 46.

40. "Extra-territorial" in the sense that it will be honored abroad; *i.e.*, applied by states other than the one which enacts it, not that it applies to events taking place outside territorial limits, though it may. See Niboyet, *Territoriality and Universal Recognition of Rules of Conflict of Laws*, 65 HARV. L. REV. 582, 585-87 (1952).

choice of law. Certainly this was the orientation of the common lawyers before and after Joseph Story. It is, too, the orientation of Dicey, although positivism via Bentham and a skepticism of judicial innovation moved him away from broad-gauged "comity" to the more confining concept of "vested rights." Even more clearly is this true of Beale who, by a curious inversion, gets close to the continental position despite—almost because of—his rejection of its ideas of extra-territorial laws.[41] Borrowing from Story's maxim that every state has sovereignty within its own territory and, as a consequence, its laws bind persons, property and acts which take place therein,[42] he re-created territoriality in terms of "legislative jurisdiction"—the power to create rights entitled to extra-territorial effect. Law remains territorial; rights are endowed with extra-territoriality—unless, of course, opposed by the forum's public policy. We start with the forum's law because of its territoriality, and we end up with it in the form of an expansible savings clause; from local law to foreign rights to local policy. Why bother, says Cook; it is really local law, local rights, local policy. But how questions Yntema, is it "possible to derive from X what is not X"[43]—to find in the forum's law principles which were not there before you looked. And, I feel sure, Cook would answer with Holmes, "because the court speaking for the Sovereign damn chose to. . . ."[44]

Uniformity as a Policy in Conflict of Laws

If the warp of conflict theory is "sovereignty" then its woof is "universality." Virtually all commentators today agree that conflicts doctrine has its source in the positive prescriptions of the forum—that there are as many systems of conflicts as there are sovereigns to give them birth.[45] Yet there is considerable doctrinal agreement among the several laws, and the collective objective is almost invariably posited as uniformity. The dilemma is not unlike that of Henry Adams living in the diversity and turmoil of modern civilization and gazing longingly at a unity symbolized for him by the Virgin of Chartres. "Justice," it is said, "requires that the decision be the same wherever the claim is brought";[46] or results should not vary with the "fortuitous choice" of a forum.[47] Hence the effort to create a super-law of reference, to give each

41. The RESTATEMENT has attracted praise on the Continent, particularly among French scholars who follow Pillet's universalism. Professor Niboyet, in his introduction to the French translation, hailed it as "our true, traditional law returning from over the Atlantic." See *Yntema* 313 n.46.

42. STORY 28.

43. *Yntema* 316.

44. 2 HOLMES-POLLOCK LETTERS 137 (Howe ed. 1944). The quote continues, significantly, ". . . however excellent the reasons." Holmes was referring to a criticism by Pillet of Dicey, and the inference Holmes drew that Pillet believed in a "droit international privé which means something more than what the tribunal having to deal with a case will apply. . . ." For Holmes such an idea was "humbug."

45. *E.g.*, RESTATEMENT § 5; NUSSBAUM 42; WOLFF 11.

46. WOLFF 4.

47. GOODRICH 7.

legal relation a geographical "seat,"[48] to pinpoint rights upon a globe—and thus to reestablish law as a comfortable constant. Theory vacillates from the heterogeneity of several laws to the unity of a super-law; from pluralism to monism; from sovereignty to a "general system of international jurisprudence,"[49] a "world law,"[50] a universal recognition of vested rights.

Uniformity as an objective has been more often stated than explained.[51] While there has been much discussion at the theoretical level of devices for its achievement (for example, the interminable renvoi argument)[52] and the practical and conceptual difficulties involved (for example, characterization and the need for a super-super-law to resolve conflicts of conflicts doctrine),[53] there has been surprisingly little critical analysis of it as a policy.

One must, of course, distinguish between the wisdom of using foreign law as the measure of rights and the need for uniform laws for prescribing whose law should obtain. Courts and commentators would agree that not all cases should be adjudicated by purely local rules; that is, in complete disregard of foreign law. As obvious as this point is, it has been frequently overlooked or transformed, by a curious sleight of hand, into an argument for uniform conflicts doctrine. The need for choice of law generally (as opposed to automatic invocation of the forum's purely domestic standards) is not an argument for any particular law under any particular circumstances, nor for the need of universal agreement as to what law should apply. And conversely, the fact that we have failed to achieve universal agreement is not an argument for the application of local substantive rules.

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48. SAVIGNY 27, 70, 133.

49. STORY 1042.

50. The reference is to the system of Joseph Jitta, a follower of Savigny, who carries Savigny's principles to their conclusion in a new *jus gentium*. See 3 BEALE 1957.

51. See Harper, *Policy Bases of the Conflict of Laws*, 56 YALE L.J. 1155, 1159 (1947), observing that it is not apparent why it should be regarded as "intolerable" that rights may vary with *fori*. But he then suggests that courts should consider whether or not uniformity is attainable, and if this seems unlikely, accommodate their decisions to other policy considerations. *Id.* at 1161. Where the problem concerns the distribution of an estate there is, perhaps, a good deal to be said for one administration. The English accomplish this by a discriminatory use of renvoi. *Compare In re* Annesley, [1926] 1 Ch. Div. 692, *with In re* Ross, [1930] 1 Ch. Div. 377 (1929).

52. The literature is endless and, one is tempted to say, pointless as well. The doctrine is said to be accepted in some degree by most European countries, rejected by most American jurisdictions. See I RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 70-83 (1945) (hereinafter cited as RABEL). Most of the literature considers the doctrine as an abstract device for achieving uniformity. For an intelligent and refreshing appraisal see Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938); *cf.* Briggs, *The Jurisdictional-Choice-of-Law Relationship in Conflicts Rules*, 61 HARV. L. REV. 1165 (1948).

53. Characterization literature is also formidable. The most exhaustive study is ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940), reviewed by Cheatham in 55 HARV. L. REV. 164 (1941), and commented on extensively in Lorenzen, *The Qualification, Classification, or Characterization Problem in The Conflict of Laws*, 50 YALE L.J. 743 (1941). For a critical "realist" view see Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

Nor is equating uniformity with justice very helpful. If we hypothesize on any given facts one "just" result, then, as a matter of polar definition, any other result is "unjust." If we are willing to hypothesize that reasonable men can differ as to how and by what law a controversy should be determined, then uniformity ceases to be equated with justice and must find another support. Within one polity it is the daily task of courts to choose between conflicting claims, each with doctrinal support; that is, to characterize a group of facts as being within or without one or more legal concepts. In the sense that one principle must be rejected in its application to the particular controversy, this process always involves a choice of law. Different courts applying identical principles to the same facts come to different results. We may differ as to which result seems preferable, but we seldom do so in the extreme language of "justice." A few decisions may go beyond the bounds of tolerance, but more often than not we can accept a measure of difference in result. As Judge Goodrich, recanting the categorical imperative of vested rights, remarked in connection with conflicting choice of law doctrine, "the reference can be justified by convenience, fairness or what not. But it is hard to defend as the inevitable and only reasonably possible kind of way to settle the question."[54]

Results may, then, vary with the "accident" of jurisdiction. It seems to me that the statement that they should not is merely an alternative way of saying that jurisdiction may involve different principles and policies than choice of law and should not, therefore, of itself change the result. It is not, of course, because a court has jurisdiction that it comes to a different result from other potential forums, but because it has different choice of law rules. Different choice of law rules may lead to different results, but this does not make any given choice necessarily unreasonable, unfair or unjust.

Obviously what Judge Goodrich, along with others who go much further in their rejection of absolutes, is saying reflects an attitude, an outlook, a philosophy of law and of the judicial function. Within one polity, or among the several states, one objective of law is to stabilize human relations, to prescribe for future contingencies in a manner calculated to effectuate underlying social values. In determining what these values are and how they are best implemented the judiciary plays a limited creative role. It exercises its discretion within prescribed limits and in accordance with accepted standards. As to both limits and standards judges and commentators display within one polity, or more markedly among the several nations, differences of outlook. The traditional mythology of both the civil and common law overstates judicial passivity—the automatic equation of principle and facts. That this process requires the exercise of discretion is somewhat more readily admitted today than fifty or one hundred years ago. But only somewhat. Discretion involves choice, and choice is difficult to square with the objectivity and impartiality that adjudication requires. The whole structure of law and legal philosophy

54. GOODRICH v.

argues for certainty and predictability to the maximum extent possible. In large measure its function is to limit, for political reasons, judicial discretion. But we go further than that in our thinking. There are constitutional provisions against the impairment of contracts and ex post facto criminal laws, and a strong presumption against applying any new legislation to events already past. Whatever their political origin and function, these ideas are deeply ingrained in our thought.

The theories of vested rights, all arguments for uniformity, really take their nourishment from this predisposition to regard the law as fixed. We project domestic concepts and philosophy into international, or multi-law, situations. It offends our preconceptions about law to state that even the principles according to which our rights will be adjudicated cannot be known in advance, and that these principles may vary, even though all the relevant facts have already occurred, simply because the forum may vary. Absent uniform choice of law rules, there can be no certainty, no predictability until we know the forum.

It would be dangerous to underestimate the appeal of this argument. Certainty and predictability are old friends. Nobody—least of all a lawyer—would contend for uncertainty and unpredictability, except, perhaps, as arguments of despair. But certainty and predictability can only be bought at the price of other objectives. And even in purely domestic affairs, within one legal system, we can live comfortably with a good deal of doubt at the edges, in a cold war between doctrinal pairs of opposites,[55] without the ordering of "unruly facts."[56]

To say that, absent uniform conflicts doctrine, certainty and predictability are impossible because we cannot know the law until we know the forum, is to exaggerate the difficulty. Actually there is considerable similarity among the several substantive laws and considerable agreement on many conflicts principles. As against the extreme of automatic operation of the forum's substantive rules (to tilt again at windmills), an argument for stability obtained through the application of foreign law in appropriate cases can be persuasively made. But, to repeat, this objective does not require that we agree in advance on the one substantive system which should govern in all possible cases. Particularly is this true where the foreign legal system is selected on the basis of an arbitrary territorial connection. The classic example is the significance of the "place of contracting"—once related to policy at the time of

55. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40 (1932); CARDOZO, THE PARADOXES OF LEGAL SCIENCE 4-9 (1928).

56. See FRANK, COURTS ON TRIAL (1949); *cf.* Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law* (to be published, 104 U. PA. L. REV. (1956)). Judge Frank would classify himself as a "left-wing realist" because unlike the "right-wingers" (Cook, Lorenzen, Llewellyn) he does not stop with exposing doctrinal ambiguities in tilting with the fetish of certainty and predictability, but calls attention to the difficulties of fact-finding as well, and the impossibility of knowing what actually occurred, let alone predicting judicial and jury response to evidence.

medieval fairs and traveling merchants, but since made irrelevant by modern artifacts.[57]

One cannot argue intelligently for or against uniformity or certainty or predictability as such. Universality is always an objective so long as it is universality on the terms of the particular observer. Certainty and predictability are constant—and unattainable—objectives of all law. But they are themselves the reflections of other policies which may and do yield to more pressing demands. To stabilize human relations and to fulfill felt expectations is a purpose of conflicts as well as internal law. But to imply that uniform doctrine is necessary to that modicum of certainty and stability at the base of social and commercial intercourse is to overstate the case.[58] To attain uniformity through universal acceptance of much existing doctrine, based on ideas of territoriality, would be self-defeating. For if stability of human relations is an objective, then it may in many instances be easier to achieve through flexible principles adjusted to particular facts in the light of policy and function.[59] But the policy and the function cannot be assumed on the basis of domestic experience alone. The provisions of foreign law are relevant considerations in every case.[60]

57. Beale's occasional predisposition to dogma was never carried further than his classic marriage of vested rights to territory in the field of contracts. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 79 (1909). The "place of contracting" rule was carried over, with minor qualifications, into the RESTATEMENT § 332.

58. "International trade could not be carried on as has now become necessary unless the trader could be assured that he would not be placed absolutely at the mercy of the vagaries or unknown requirements of the local law, but would find a well-established body of law to protect his rights."

1 BEALE 4. But the real difficulty is making a choice between plaintiff and defendant who have differently understood their obligations. The law merchant, old and new, intelligently aims at substantive resolution, through uniform legislation or codified custom.

59. Particularly is this approach necessary in the field of contracts where the operative facts are especially difficult to tie down to geographical borders. Hence the English doctrine of "proper law," permitting the English judge wide latitude of choice. DICEY, CONFLICT OF LAWS rules 136-43 (6th ed., Morris 1949). Arguably, New York and other American jurisdictions have the same doctrine functionally, especially where courts resort to intent to determine applicable law. See, for example, the discussion by Judge Shientag in Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (Sup. Ct. 1936). See also Bernhard, *A Rationalization of the Illinois Conflict of Laws Rules Applicable to Contracts*, 40 ILL. L. REV. 165 (1945).

60. The spurious nature of the formal territorial references in vogue as a result of the RESTATEMENT has been brought out particularly lucidly and convincingly by Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). Cavers simply points out that in determining a conflicts case the court always in fact examines foreign law claimed relevant and the result it would lead to before invoking or rejecting it. Griswold adds that one important consideration giving dimension to the foreign rule is whether the foreign court would apply it to the particular facts in controversy, thus introducing renvoi considerations. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938). But Griswold suggests this course not because he believes in the utility of the renvoi doctrine as a device to achieve uniformity, but because it aids in determining the whys and wherefores of the foreign "law."

Story's Comity—A Balance of Policies

Story, together with the great Dutch jurists from whom he derived much, was aware that a state court invoking state power to settle private disputes is playing a political role in the world community. He expressed this in his ideas of "comity"—ideas which, owing to increasing consciousness of the public stake in private law, have perhaps even more validity today than when he wrote. No state can ignore the interests or the views of other states as reflected in their substantive prescriptions without encouraging similar conduct, *mutatis mutandis*, on the part of other sovereigns. From the point of view of each, the objective is reciprocity—the protection of domestic values, institutions and policies viewed not simply in terms of the immediate controversy, but within the larger context of divided power as well. In coming to its decision a court should, therefore, seek to formulate its judgment in accordance with principles which will insure the international integrity of the particular decision and which, if employed in similar situations by foreign jurisdictions, will give results in accord with the domestic policy. And it is equally the task of judicial statesmanship to avoid formulations that, when applied to recurring fact situations, lead to excessive provincialism from which the citizens of the world community have nothing to gain.

In this sense, at least, conflicts doctrine is "international law." Principles must be formulated in terms that argue for universal validity. There should be no double-standard for the forum and for other states whereby claims exceed concessions.[61] The principles proposed may be changed from time to time because of new circumstances or insights; they may be rejected by other courts in favor of other formulations. To the extent, however, that similar principles are applied to recurring patterns of events by more than one state, thus gaining "meaning," a measure of uniformity exists. Accordingly, foreign precedent is always relevant, whether or not persuasive, in the task of building up rules of international significance and application. So long as we conceive of international law as rules binding upon states the violation of which is likely to induce diplomatic representations, then conflicts doctrine is unlikely, save in extreme cases, to fit the definition.[62] But this distinction is simply one of intensity. Put differently, it amounts to no more than a statement that sovereign *laissez faire* tends to prevail as long as the several states can so indulge themselves.

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61. Where "there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves." Travers v. Holley, [1953] P. 246, 257 (C.A.). The case involved recognition of a foreign *ex parte* divorce. The word "reciprocity" is perhaps inept, for as used by the court it means no more than balancing claims and concessions. The case has been extensively noted.

62. Nussbaum reports no case where the violation of a rule of private international law has led to sanctions of public international law. NUSSBAUM 25. He concludes therefore that conflicts cannot be international law. But *quaere*. *Cf.* STORY 13.

One aspect of, or approach to, conflicts theory, therefore, remains Story's comity—deference to the laws of another state. From this orientation conflicts principles, like rules of international law, are rules governing the exercise of sovereign power, rules of sovereign self-restraint. They have as their objective the inducement of a reciprocal self-restraint by others. Insofar as they accomplish this objective they give the benefits both of a particular determination and a precedent with international validity, and thus serve as an important stabilizing force in world affairs. Insofar as they fail, differences will continue to exist until recurring fact situations or public sensibilities create sufficient political pressure for consonance through diplomatic resolution.

Now there is nothing in the very general notion of comity from which one can conjure specific doctrine. One cannot deduce from it, any more than from sovereignty itself, what the principles of conflict of laws ought to be in any given case. Story was well aware of this. He wrote:

> "It is not comity of the courts, but the comity of the nation, *which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided.*"[63]

The reference to foreign law—conflicts principles—was discoverable in a general jurisprudence. This was the method of the common law that Story knew, and he saw no reason to question its validity in an international context.

At the time Story published his famous treatise, law, particularly in the United States, was still a creative process in theory as well as practice. Legislatures and courts vied with each other in adapting principles of common law and equity to the problems of a new continent.[64] John Marshall, with the help of Story's scholarship, was expounding a strong constitutional philosophy: the supremacy of living judges reading a living law. Hardening of the judicial arteries—the conception of law as a static body of rigid rules[65]—was a later development. More conservative than many of his brethren, Story could nonetheless speak, without blushing, of principles judicially derived from general jurisprudence—a jurisprudence transcending national boundaries and local precedent.

In point of fact his comity theory was simple enough, yet flexible and imaginative:

> "The true foundation on which the administration of international law must rest, is, that the rules, which are to govern, are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return."[66]

63. STORY 48. (Emphasis added.)
64. See Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403-04 (1908).
65. McDougal, Book Review, 49 AM. J. INT'L L. 376 (1955).
66. STORY 45.

Story had no illusions that the task was easy or that the principles or their application "to the infinite variety of cases, arising from the complicated concerns of human society in modern times"[67] could be formulated on a priori theories. As a common lawyer he believed that rules were made in relation to facts; he queried whether the work of European jurists, despite their "uncommon skill and acuteness," had resulted in "success at all proportionate to their labor."[68] He was particularly concerned, as had been the Dutch writers before him whose ideas he found compatible with his own, about claims for the extraterritorial application of "personal laws" as a "universal obligation in all other countries." In a passage that today equates with notions of public policy in many fact contexts, he wrote:

> "No nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty."[69]

Given a world community in which formal power is distributed among many separate sovereignties, any conception of law must take account of both the common and the independent. Story attempted to express this idea in the word "comity"—a symbol designed to convey something more than the parochialism of a Podsnap, something less than obligation. On the one hand he recognizes "mutual interest and utility," the need for law, the inadequacy of a concept which confined law to power and control based merely on force; on the other hand he realizes that there exist many decision-makers of equal status and authority whose views might differ. The most that one could ask was that the governing rules be formulated by each with consciousness of interdependence, with knowledge that whatever is said is precedent for like statements, and with deference to what has already been said by others. Clearly Story envisioned international law—and he included conflicts—as aimed at the creation of international precedent—albeit conflicting—which could be molded, after the fashion of the common law from which he drew inspiration and experience, into an open-ended *corpus juris* to which all nations could look for guidance and to which all nations could contribute insights.[70]

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67. *Id.* at 35.

68. *Id.* at 37.

69. *Id.* at 35.

70. *Cf.* SAVIGNY 27 ("an international common law of nations having intercourse with one another"). But "common law" to a common lawyer and to a continental scholar could not carry quite the same meaning. Story was far more imbued with a natural law outlook in terms of substantive universals, Savigny with a nationalistic outlook. Story took his sovereignty at the decisional level, Savigny at the legislative. See Bodenheimer, *The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy*, 12 SEMINAR 51, 53-57 (1954).

Formalism and Conflicts

Positivism as a Limitation on Judicial Creativity

Treated imaginatively, comity is sufficiently adaptable and alive to the fundamental role of law in a context of mutual interest and divided power to be useful even in our infinitely more complex modern society. But unhappily, despite its auspicious birth with Story, Anglo-American conflicts spent its formative years in a less tolerant and less sophisticated intellectual environment. For one thing it continued to get caught up in the theoretical debates which Story, by training and conviction, had rejected as unproductive. Worse yet, it was subjected to the late nineteenth and early twentieth century cult of formalism. Judicial creativity, always limited by the demands of impartiality, was submerged further in the sterile analytics of Austinian positivism. Legal scholarship put great emphasis on the judicial function, the role of precedent, law in its setting of common law principles. Far too little attention was paid to law in its larger sense of a total decision-making process and the difficulty of relating (not merely limiting) the use of official (not merely judicial) power to the achievement of goals consistent with a value system and a community transnational in many aspects.[71] Perhaps it was inevitable that a society which ideologically was committed to a negative role for government would adopt a positive philosophy of law, better to focus, as it were, upon limitations on the power of government generally, and judges in particular. Certain it is that the more complicated and interrelated our complex society became, the more scholarship avoided the problems raised, retreating to the false security of precedent, mesmerized, it often seemed, by law at the level of words.

In jurisprudence, if not in decisions, there was a notable tendency to regard law as a fixed and static body of principles which only the legislature could change, and to reduce the art of decision to a spurious science of language.[72] Many proclaimed the common law complete, an inventory of principles for every case. Doctrine with regard to the separation of powers became rigid;[73] policy formulation was to be left wholly to the legislature, or occasionally to the executive, but never to the judiciary. Precedent was regarded as capable of analytical treatment whereby precise holdings could be discovered. Hermeneutics became fashionable. Even the legislature—"which had only words with which to drive the courts"[74]— had its enactments subjected to a science of

71. See McDougal, *supra* note 65.

72. See, *e.g.*, AUSTIN, JURISPRUDENCE (1832); LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3d ed. 1880). That it is spurious because of language limitations, see Williams, *Language and the Law*, 61 L.Q. REV. 71, 179, 293, 384 (1945).

73. *Compare* the relaxed view of STORY, COMMENTARIES ON THE CONSTITUTION § 525 (3d ed. 1858), *with* Kilbourne v. Thompson, 103 U.S. 168 (1880). There has been considerable retreat from the watertight philosophy of *Kilbourne*, even by such conservative jurists as Taft. See J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

74. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

interpretation whereby, it was sometimes proclaimed, the exact meaning of legislative language could be discovered.

The Impact of Positivism on Conflicts

It is easy to exaggerate the importance of this emphasis upon formal logic, to confuse form and substance. But it doubtless had some impact upon the legal process and upon theory about the conflict of laws. On the one hand it argued for a positive source of law, and hence the origin of conflicts in the laws of the various sovereigns. On the other, it sought to project passivity and scientific method into conflicts, a methodology leading directly—almost inevitably—to vested rights and territoriality. Understandably, neither Dicey nor Beale was ever able to square the two ideas satisfactorily. Only if one focuses exclusively on the judicial function—on the mythology of passivity and certainty (for judges if not for litigants)—on a conception of law as determinate rules changeable only by legislature—can one understand the Restatement.

Story's is an approach which could live at the time he wrote and which could breathe new life when used by thoughtful men. Adjusted to modern problems and new judicial techniques, it is perfectly valid today. It ran into difficulty because courts abused it [75] and because it was too free-wheeling for a philosophy of fully developed common law—a positivism which left little room for conscious and evolved creativity. Dicey could not accept the view that foreign law was applied out of courtesy:

> "The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign . . . to show courtesy to other States. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenienece and injustice to litigants, whether natives or foreigners."[76]

Apart from correcting the misunderstanding of his views, and differing with Dicey as to the scope of the judicial function, Story would have agreed. He, too, talked of justice, convenience and vested rights.[77]

To the extent that comity left room for parochialism of the type Dicey deplored, then the emphasis he gave to the other side of the coin was useful. The notion of vested rights was and is a buffer against extreme preferences for local substantive doctrine whose application would destroy reasonable expectations. Yet even Dicey gave considerable scope to the selective power

75. Illustrative of this abuse are many of the public policy cases. See Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938); Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935).

76. DICEY, CONFLICT OF LAWS 10-11 (3d ed. 1922).

77. STORY 8, 9, 34-35, 40, 45. While he does not use "vested rights" explicitly he quotes approvingly from Huberus the axiom that "the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens." *Id.* at 40.

of the forum—more, for example, than Holmes thought desirable [78] or Beale's dogmatic statement would allow. The temptation of a judge to identify local substantive rules with justice is not easy to override, the more so when one considers the difficulties of knowing and intelligently using foreign sources. Hence the need and utility of a strong verbalization—one with constitutional overtones—to drive him on. Having located law in space to his own satisfaction, Beale was not about to let it slip across the border.

The Realists' Attack on Doctrine

Enter now the proponents of legal realism—or as Yntema calls them, the "eclectic positivists"[79]—archangels of doctrinal destruction. In the conflict of laws, as elsewhere, they proved with passion that courts were not doing what they were saying or saying what they were doing. If you want to know the "law," look at what judges do in fact; pierce the deceptive outer shell of doctrine to the hard reality of results. Widows, orphans and the tax collector win; insurance companies lose.[80]

But still the problem presses. It is helpful to expose the pitfalls of doctrine and to appraise decisional trends in terms of results. But it is no help to say that judges select results and manipulate their doctrinal ways to undisclosed ends formulated by other criteria. One may always approve or disapprove results by one criterion or another. Result-selection [81] describes all "law" in action. The task of courts and commentators is to formulate the "why" of particular results in terms that, however tentative, can serve as a guide to the regulation of future controversy.

Existing theory offers some help. Vested rights implies an objective of protecting reasonable expectations from attrition due to the hazards of different or multiple forums. Comity implies a similar objective measured in public terms: reciprocal self-restraint rather than mutual policy frustration. One urges the importance of stabilizing private relations, the other sovereign relations. Both reflect consistent and valid policies.

Thanks to legal realism (admittedly another Joseph's coat),[82] we have all become more sophisticated about the nature of the judicial process, more aware of the importance of clarifying objectives. Rules of law, statutory or judge-made, have a social purpose and should be construed and applied to particular

78. 2 HOLMES-POLLOCK LETTERS 138 (Howe ed. 1941).

79. *Yntema* 311.

80. Morse, *supra* note 53, at 1029.

81. Morse, Hoff, and others have given the name "result selective" to the approach described by Cavers in *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). Morse describes it as judicial selection of the principle among competing claims to legislative jurisdiction which advances the "social or economic interest" preferred by the adjudicating court. Morse, *supra* note 53, at 1029; Hoff, *Intensity Principle in the Conflict of Laws*, 39 VA. L. REV. 437 (1953).

82. See, *e.g.*, Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

facts in the light of their function. To do so judges need become neither uninhibited legislators nor unfettered glossators. They should simply avoid a pretension to automation. Abstract principles cannot intelligently, fairly, responsibly or predictably be applied to concrete facts unless we add the dimension of purpose. There will, of course, always be marginal cases where the decision tends toward being arbitrary. That cannot be avoided wherever lines must be drawn. But we can insure that the line itself is located intelligently with relation to the thrust and purpose of the doctrine.

The difficulties of conflicts have often been the product of a semantic confusion derived from the complications in fitting together several laws. The objective of uniformity and consequent efforts to create a super-law fitted into traditional philosophies of law and the judicial process. There are perfectly understandable historical explanations of this phenomenon. One can sympathize with the serious conceptual problems of early writers trying, in an age that emphasized sovereignty, to justify and explain why the forum applied foreign law.

I do not understand the position of Cook and his followers to have been one of eclecticism. It is true that Cook may have overemphasized the creative capacity of the forum in his eagerness to prove the fallacies of then current theories of legislative jurisdiction. And it is true that his critique could be naively read to assert the omnipotence of the forum's judges—forgetting that there are other forums and other cases to come, ignoring the long term interest and the wisdom of self-restraint. But I take it that his "eclecticism" consists only of his refusal to accept popular dogma and his failure to substitute more valid criteria—the latter a task that he concededly left mostly to others.

Law as an Instrument of Public Policy

The realists concentrated their attention—like their philosophical predecessors and adversaries—on the judicial function; they exposed the tautologies of legal logic and attacked existing theory at the level of description. At the same time, increasing industrialism, with its specialization, interdependence, and concentration of power and wealth through organization, has made the public more aware of its stake in hitherto "private" activities. As legislatures have ground out new statutes aimed at new problems we have inevitably arrived at a view which contemplates an active role for government, and hence for law. In fact and in theory we have come to regard law as a creative instrument for using public power to fulfill community expectations with regard to all values, and not merely the preservation of order.[83] The "policeman" of

83. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 169-70 (1953); see also McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915, 931-32 (1952). The reader familiar with Professor McDougal's writing does not need to be told how much the analysis here presented is derived from his conception and philosophy of law.

classic liberalism has evolved into the "social engineer" of the welfare state. Law is not, and can no longer be intelligently conceived as, merely a bundle of directionless rules—the conception which dominated the age of formalism but which, even with the safety valve of legislative change, was overstated in fact. And particularly is this true with regard to law in the international community, where there is no safety valve, where political processes and institutions are less highly developed, and where a formal basis for law, apart from treaty or agreement and the process here described, simply does not exist.

I do not mean to suggest that the judicial function has been radically altered, or that the discretion of judges to formulate the public policy is not a limited one. But the methodology and approach of judges has greatly changed. Perhaps the most obvious example is in the interpretation of statutes where purpose and policy, as gleaned from a variety of sources, dominates literalism in its application to facts. We have not, perhaps, quite reached the point where courts feel free to derive a policy from the explicit coverage of a statute and apply that policy to analogous cases,[84] but we are not so far off. Conscious reappraisal of older doctrine in the light of social and legislative change and community objectives is, if not yet commonplace, ever more frequent.

Because conflicts has been a favorite outlet for philosophers it has been infused with domestic conceptions of law and the judicial function which have greatly confused and obscured underlying problems and policies. International law, including conflicts, is like all law simply a process of decision [85] in which many authoritative decision-makers, including judges, respond in various ways to events, claims and counterclaims. It is the task of all these decision-makers within the limits of their domestic authority, to seek to synthesize the flow of decisions in terms of new doctrine, oriented to new problems—to discover and to formulate, as Story put it, principles of "general jurisprudence" to govern "multi-law" events.

Conflicts and the International "Constitution"

What we commonly refer to as "law" is, then, the sum total of considerations, drawn from a variety of sources—statutes, prior judicial or administrative rules or practices, custom, prevailing ethical and moral beliefs, and so forth —which both limit and guide the exercise of governmental power by designated officials. It has as its objective the realization of community expectations with regard to many values. Any meaningful concept must assume that power is so exercised,[86] else the distinction between "law" and power based on mere force is obliterated.

Within one polity sovereign power is distributed among various public officials who act in prescribed ways to effectuate generally prescribed or

84. See Pound, *supra* note 64, at 385-86.

85. The process is described at some length in McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 180-88 (1953).

86. *Id.* at 183.

assumed value changes. Fundamental distributions of, and limitations upon, the exercise of public power are often designated "constitutional." Institutions for the resolution of differences, the formulation of objectives, and the administration of policies are highly developed. The behavior of public officials, especially those concerned with administration, is in general predictable because we can know in advance the considerations that officials will weigh and the criteria they will employ in making their decisions.

Within the world community political processes are less highly developed and political institutions are in the formative stages. We are still in the process of attempting to formulate the principles of an unwritten "constitution." The fact that formal power is distributed geographically, rather than functionally, makes necessary mutual assistance and reciprocal self-restraint in its exercise. Wherever interdependency exists there is pressure for consonance. Resolution may be in terms of substantive policy itself, or it may be in terms of allocating competence, within substantive limits, to prescribe that policy. What we are wont to refer to as "international law" are those fundamental distributions of, and limitations upon, the power of the various sovereigns which roughly correspond to typical provisions of domestic constitutions. The conflict of laws operates within these constitutional principles, at a lower level of intensity. Prediction in the international community is somewhat more hazardous than in the domestic one until the decision-maker is identified. Each sovereign is, presumably, using its power to effectuate its policies in the international community. To the extent those policies differ, or are differently prescribed, the forum must be ascertained before prediction can be brought within domestic standards of accuracy.

The general predisposition of sovereigns to be cautious in promulgating "constitutional" limitations which may later operate upon their own sovereignty, combined with absence of an institution for definitively resolving differences, has left to all a wide area of discretion to act without protest or reprisal. Formalistic positivism, when it did not deny totally the existence of international law, distorted intelligent restraint into a definition of international law as rules governing the relationships of sovereigns. A typical product of nineteenth century thought,[87] this view of international law overemphasizes limitations upon power and even here fails to relate limitations to intelligent substantive policies. To fit the definition it confuses substance and procedure, for even as traditionally formulated, much of the doctrine is concerned with the protection of individual, not sovereign, rights.

I do not wish to revive the debates of the last century as to whether or not conflicts *is* international law. That is a matter of definition. I prefer to conceive all authoritative decisions which affect the international community as international "law," and the various decision-makers as participants in the process of creating valid principles grounded, like domestic law, on expressed

87. McDougal and Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60, 82-83 (1949).

policies. Those principles and policies that are considered fundamental I would label "constitutional," the better to draw a domestic parallel. "Due process," substantive and procedural, has its international equivalent in that loose collection of fundamental notions of decency or natural justice the violation of which is claimed to be a "denial of justice." The provisions of Article IV of our Federal Constitution which are aimed at the protection of the interests of sister states are similarly present in the international constitution. What we domestically refer to as "full faith and credit" passes internationally as "acts of state." There are differences, of course. The greater interdependency of the states, the national interest of consonance, the similar policies and doctrine of the several laws combine with the existence of an authoritative political institution to produce precise domestic prescriptions and to refine constitutional mandates.

Therefore, it seems to me that the argument as to whether or not conflicts *is* international law is very much like the argument as to whether or not, domestically, all conflicts questions are ones of constitutional law.[88] The only intelligent answer is a descriptive one. Given sufficient intensity and sufficient pressure for consonance a question will be claimed to have that fundamental importance we reserve for constitutional issues. The difference is one of degree and not of kind.

SOME HISTORICAL PERSPECTIVES

The Universal Law

During the early and formative period of conflicts doctrine [89] both civil and common law jurisprudence were heavily imbued with the spirit of a *jus gentium.* On the continent the *jus gentium* was identified with principles of Roman law, which in turn were proclaimed the law of civilized people everywhere. Conflicts problems grew up on margins of common doctrine and partook of similar universalism. The first experience was with local ordinances sufficiently similar in content to urge similar classification—the medieval "statutes"[90] which supplemented the broader fundamentals of the common Roman heritage. Later, in the same vein, came codified local customs. Absent such written documentation a civil court would have drawn upon less formal sources to reduce principle to case. Given a local enactment the problem was approached as one of interpretation—to what events, persons and property

88. I can conceive no question that could not be picked up by the elastic provisions of full faith and credit. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1 (1945).

89. On the history of the conflict of laws see, generally, 3 BEALE 1880; WOLFF 19; *Yntema.*

90. The most famous commentary is that of Bartolus (1313-1357). See BEALE, BARTOLUS ON THE CONFLICT OF LAWS (1914). The statutory interpretation technique dominated conflicts for some five centuries, in the course of which a highly developed complex of semantic analysis was built up.

did it apply? Scholars, working with similar local provisions within a common framework, sought to work out a common mode of interpretation as well.

Because it aspired to universality in substantive terms, Roman law did not deal explicitly with choice of law. But the substantive provisions were sufficiently general and the gaps sufficiently broad, as Savigny brilliantly demonstrated, to take account of local custom. One could even argue, as indeed Savigny did, that a conflicts system was inherent within and could be derived from the general principles of Roman law and that these principles were in fact to be found in the law of all civilized nations. Thus, even after the impact of nationalism and the growth of national polities, with their doctrinal superstructure of territorial sovereignty, the earlier vision of universality did not die easily.[91] Nor should it necessarily. There was and still is much in common among nations in terms of the policy and rationale of particular rules, and much that can be derived therefrom for choice of law purposes. The intestate distribution of personal property, for example, differs among jurisdictions as to proportions awarded to various individuals, but all rules revolve around a common conception of familial distribution; a fact that argues —so long as this policy is common—for a law with which the decedent was closely associated. Ease of unitary administration, the interest of the state in the provision for dependents and a more or less fictional "intent" point to the personal law, although in an age of mobility further refinements may be necessary in identifying this law.[92]

Though the methodology of Anglo-American law, without a complete inventory of written principles, was different, it too had its *jus gentium* flavor. But the historical development of English law, with its unique court structure, gave the whole a procedural twist. The nature of the cause of action—the writ which would lie—dominated the internal division of administrative responsibilities and the relief which courts were locally empowered to give. Thus, from the outset, jurisdiction and the substantive law got intertwined and oriented inwardly to the quite irrelevant (for conflicts purposes) practice and pleading that characterized the legal system. Remedies remained, in important respects, matters of local law because, at the very least, the kind of relief that could be granted was a function of the court that heard the dispute. It would scarcely be an exaggeration to say that the emphasis given to pleading made it virtually impossible to start with anything save an English cause of action, or to put it differently, one which was sufficiently akin to a familiar cause to

91. See, generally, Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189 (1942).

92. The controversy is generally between a conception of domicil and nationality as governing the "personal" law. But even domicil can, within the same or similar definitions, be difficult to determine on mobile facts. For general comparative discussions see CHESHIRE 150-95; RABEL c. 4.

One of Cook's major points of issue with the Restaters was the unitary concept of domicil adopted by the ALI. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 194-99 (1942). He suggests that the approach be made more flexible and adapted to the particular facts and particular laws.

make it pleadable within known forms. Foreign law was almost invariably a matter of defense—the injustice of applying local rules derived from local facts to the case at hand.[93]

Had a different view of law prevailed during the eighteenth and early nineteenth centuries perhaps these internal administrative arrangements would have taken a less jugular hold on Anglo-American conflicts. But the rules which courts applied in private disputes were not in conception the edicts of a particular sovereign until reduced to judgment. A *jus gentium* jurisprudence, often based on natural law, envisioned rights as derived from customary norms of conduct and universal concepts of morality, and the law itself a process of discovery rather than fiat. Therefore, the way a foreign court might treat the same or similar controversies had no particularly persuasive force. It did not preclude the relevancy of provisions of foreign positive law, but the applicability of particular rules to interstate facts was to be worked out, as with the civilians, within the larger framework of substantive universals. For the English judge or chancellor foreign law was simply a fact to be proved, weighed and assessed against, in Story's phrase, "principles of general jurisprudence." To repeat the same example, if personal property located in England was distributed according to the law of the domicil it was not because that sovereign claimed competency or because English positive law insisted upon it, but simply because an English chancellor believed this was the proper way to distribute it. His belief was based on the assumptions that disposal of such property should be in accordance with the probable intent of the intestate, and, in the absence of explicit provision by will, that his intent was most probably in accordance with those rules with which he was most familiar. And the court's power thus to "discover" and pronounce what it viewed as the *jus gentium*—that personal property shall be disposed of in accordance with the intent of the intestate—gained comfortable support from theories of sovereignty upon which English judges generally, and Story in particular, drew so heavily.

Putting aside theoretical arguments as to the source of law and the extent to which positive enactments may within one polity influence or abrogate deeply rooted custom or conceptions of morality (the problem of "constitutional" limits on state power), it is no great task to establish on empirical evidence large areas of common conception between the English and continental systems. Particularly was this true before the problems of modern industrialism gave birth to a spate of statutory reforms consciously aimed at collective goals. A shared culture based on Christian ethics joined with a common faith in classical capitalism and individualism to universalize many ideas. Like the political and economic philosophy it reflected, virtually all substantive doctrine was heavily weighted toward individual morality: the sanctity of prop-

93. See, generally, Sack, *Conflicts of Law in the History of the English Law*, in 3 LAW: A CENTURY OF PROGRESS 1835-1935, at 342 (1937), tracing the jurisdictional problems of the common law in considerable detail.

erty and contract; the duties of matrimonial status; the *mens rea* element to crime; even, perhaps, the idea of reasonable conduct that characterized much of tort law. At a sufficiently abstract level it is easy enough to relate doctrine to both ideology and value system, and to state, again on empirical evidence, that before and even at the time of Story's writings the ideology and value system, as well as much derivative doctrine, was widely shared by "civilized" nations.[94] There was room within general rules for differences based on different customs. And there were of course other differences of administrative detail, method and terminology. Similar policies might be differently implemented, and those arbitrary lines essential to law administration might be differently drawn. The derivative nature of legal doctrine—the joining of policy to abstract fact patterns through the intermediary stage of composite doctrine—prevents a hard and fast line between the policy and the implementing doctrine.

Even at the risk of considerable oversimplification one is tempted to explain the different approaches to conflicts between the continental and English systems largely as reflections of different judicial method. Although it contained an element rooted in *jus gentium*, English private law was by and large a matter of remedies; historically its whole development had been in terms of expanding writs not rights. Statutes were few, loosely worded and drafted largely in terms of command to judges, hence in procedural language. Rights did not have their theoretical origin in the positive law, but rather in custom and morality—principles not formally tied down to political boundaries. The civilian, on the other hand, was greatly concerned with the other side of the coin. He, too, universalized his rights, but the limits of judicial authority were defined in terms of these rights (not writs) with their source in the written provisions of codes, statutes and ordinances. Experiencing conflicts problems long before the English and in far greater quantity, the European courts quite naturally attempted to work out differences through techniques of interpretation, and began to speak, therefore, of laws entitled to extra-territorial effect, or what we might call faith and credit. Similar local statutes could, in theory at least, be similarly interpreted as to operative scope and effect, thus preserving the unity of the larger whole.[95]

The result of a particular case might be the same under either approach, and for essentially the same reasons however expressed, but the Anglo-American judge did not hesitate to view law as judgment. "Jurisdiction" for the civilian became predominantly connected with the applicable written law; for the common lawyer, with the competency of the court to decide.[96] Civilians continued the effort to establish a logical system of selecting applicable "law"

94. Both Story and Savigny depend on this common quality to justify their internationalism, explaining it in terms of the influence of Christianity and commerce. See STORY 7; SAVIGNY 17.

95. This was the technique which dominated conflicts on the continent for five centuries. See note 90 *supra*.

96. See Sack, *supra* note 93. He points out that while there were no conflicts of laws there were conflicts of jurisdictions (*i.e.*, whether triable at common law or admiralty),

(*i.e.*, written rules). Story, admitting that foreign rules were important and often decisive factors in the judgment of a court, could not square such an approach with either wisdom or common sense—not to mention sovereignty. He was wary of the overgeneralization, the "lump concept" analysis which sought to allocate competence among states without regard to the purpose or policy of particular prescriptions and the variant facts of a particular case.

The Anglo-American Shift to Positive Law

Anglo-American law in the nineteenth century underwent progressively important changes in policy, in form and in theory. Despite the ingenious efforts of Mansfield to reform common law anachronisms, the task proved too overwhelming for the techniques of interstitial policy-making and the intellectual capacity of his certainly less gifted and probably less motivated brethren. Reform initiative shifted to the legislature; statutory law became increasingly important from the Reform Act of 1832 to the present. The shift to a legislative base forced a corresponding shift in legal theory, and John Austin provided it in the same year with the notion that all law emanated from sovereign command. Thus it was possible to justify changes in the common law by giving legitimacy to the voice of Parliament as an expression of the will of the popular sovereign not merely as to remedies but as to rights as well. Bentham, of course, had already pointed out that judges were, in fact, legislating; by and large he did not like their legislation and placed his confidence in the elected representatives. So did Austin. Influenced strongly by Bentham he sought with remarkable skill to introduce a necessary and important logical symmetry into English legal method. His extraordinary powers of case analysis brought a hitherto unruly body of doctrine into an orderly pattern. In doing so, of course, he intentionally removed the element of conscious policy formulation by judges. What he did not and could not remove were the inherent limits of both logic and language to the adjudicative process. But, once the impact of his jurisprudence was felt, judicial policy formulation was disclaimed in practice as well as theory, and was reduced to an unconscious factor in decision making by judges.

The impact of Bentham and Austin on Dicey and Beale is apparent. The view that law has its source in sovereign command led to the statement that courts always applied their own law. The same essential idea, that rights were the creature of sovereign command, led to the theory of vested rights—rights created by a foreign sovereign but recognized and enforced by local law. The prohibition against judicial policy-making gradually made itself felt by freezing choice of law precedent and, eventually, forcing courts to the spurious use of decided cases and to a methodology which depended too heavily on *stare decisis*. Dicey, with only English law to concern him, stopped there.

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and that "jurisdiction" was a mixture of judicial and legislative jurisdiction. *Id.* at 356-57. The common law and civilian approach are contrasted in Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 283 (1913).

His was the relatively simple problem of stating what foreign rights an English court would recognize.[97] But Beale had the infinitely more complicated job of restating not a single law of conflicts, but forty-eight different laws of the conflict of laws, all of which he sought to bring into an orderly pattern and theory. Because he was working within a single legal heritage and similar legislative enactments, he took an approach not unlike the early civilians whose objective of logical universalism was close to his own. The universalist quality of the Restatement, so seemingly inconsistent with its adherence to the sovereignty of the forum, was an implied concession to a felt need of avoiding judicial legislation by imposing rigid choice of law rules.

Yet, particularly in its American context of vested rights, positivism was substantively a liberalizing influence. American judges were dealing with a number of statutory modifications of harsh common law doctrine. Early decisions rejected sister state enactments, for example, wrongful death statutes, on the grounds that such laws were "penal,"[98] or involved "procedure,"[99] or were opposed to the forum's "public policy."[100] The result was to deny the widow a remedy except when the defendant was foolish enough to wander back to the state of his tort within the period of limitations. Such decisions are annoying. It is, I think, no surprise that the *obligatio* theory of Justice Holmes was voiced in a similar fact context,[101] and echoed later by Cardozo when he rejected the lower court's finding that the Massachusetts wrongful death statute was against New York's public policy.[102] The peculiar combination of a *jus gentium* with regard to rights and local provincialism with regard to remedies that characterized the common law did not make fertile soil for foreign statutes expanding traditional remedies or, for that matter, creating new rights. The older attitude that the foreign plaintiff takes the forum's law as he finds it[103]

97. DICEY, CONFLICT OF LAWS lxv (5th ed. 1932).

98. McCarthy v. Chicago, Rock I. & Pac. R.R., 18 Kan. 46 (1877); Richardson v. New York Cent. R.R., 98 Mass. 85 (1867).

99. MacKay v. Central R.R., 4 Fed. 617 (C.C.S.D.N.Y. 1876); Woodard v. Michigan So. & No. Ind. R.R., 10 Ohio St. 121 (1859).

100. Unless "similar" to the forum's substantive statute. The similarity doctrine was in wide vogue after its formulation by the Court of Appeals in Leonard v. Columbia Steam Nav. Co., 84 N.Y. 48 (1881), but was emphatically rejected by the same court some years later in Cardozo's famous opinion in Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918). In the interval even the Supreme Court had approved it. Texas & Pac. Ry. v. Cox, 145 U.S. 593, 604-05 (1892).

101. Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). Here the circuit court applied the *lex fori*, which would have given a different, perhaps even greater, recovery; accordingly the case on its facts is perhaps more concerned with fairness to defendant than plaintiff. That Justice Holmes was not always averse to curtailing the *obligatio* by curtailing the remedy, see The Titanic, 233 U.S. 718 (1914) (British law governs, but owners entitled to benefit of American statute limiting recovery).

102. Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

103. See, for example, the dicta of Mr. Justice Wilmot in Robinson v. Bland, 2 Burr. 1077, 1084, 97 Eng. Rep. 717, 721 (K.B. 1760): "But if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress."

tended to persist, even after the merger of law and equity and the introduction of code pleading had removed local procedural bars to pleading a cause of action that depended upon the provisions of a foreign statute unknown to the forum.

Vested rights, therefore, had the impact of forcing awareness of the statutory provisions of sister states whose laws were claimed applicable. Particularly did this result occur when the full faith and credit clause was rediscovered, applied to judgments and interpreted as a constitutional mandate reenforcing foreign statutes and even foreign case law.[104] The difficulty, of course, was the ever-present one of deciding whose "law" determined whose "law" vested what "rights."

Policy Rather Than Formula

Despite the opposition of Story and, though to a lesser extent, Dicey,[105] there has always been a tendency to sell conflicts doctrine at wholesale. Broad references have been its bane even before Beale entered with "legislative jurisdiction," thus purporting to give rules a validity and force quite independent of any reason for the reference. The method of phrasing conflicts doctrine in terms of the "law governing" a wide category of events has created whole areas of false problems, or, at least, real problems falsely stated. "Characterization" and "renvoi" are prize instances.[106]

Characterization

There is no inherent reason why one body of doctrine, determinable in advance without consideration of its content, should govern multi-state transactions. But even achievement of uniform doctrinal reference leaves the problem of determining the operative scope of the symbols used; that is, by whose "law" are they characterized? For example, it is almost universally agreed that torts are governed by the *lex loci delicti* and procedure by the *lex fori*. The problem of characterization is whose law does one use to determine what facts constitute a tort; or which state, if the events are multi-state, is the *locus*; or what rules are procedural if the forum and the *lex loci* differently regard a similar rule or rules. Renvoi occurs when the conflicts rule of the *lex loci* would characterize the same facts differently and would not apply its domestic rules.

Seeking to merge two or more legal systems is a task more intricate than any formulaic, or "hornbook," method contemplates. Granted, many conceptions are to some degree universal; the notions of a delict, of property, of marriage and of contract appear in all legal systems, and a wide area of similar events would be grouped under the same general classification. But even within one system the lines of demarcation are fuzzy; the conceptual pattern

104. See note 30 *supra*.
105. Dicey, Conflict of Laws 8-9 (6th ed., Morris 1949).
106. See notes 52 and 53 *supra*.

is intricately interwoven with doctrine to effectuate results and to meet the social, political and economic pressures—the value preferences—of time and place. In the common law, tort has sometimes been the device for expanding contract, and vice versa. Procedure continues to play its important, sometimes dominant, substantive role. Real property, once the focal point of the English social, political and economic system (hence zealously protected against foreign "law" for obvious though inarticulate reasons of policy), gives way to contract doctrine as economic change in the means of production accelerates. Statute interacts with case law as the law shifts, adjusts and readjusts. We read into the past the conceptions of the present; with the clarity of hindsight we substitute function for purpose.

Legal doctrine always requires reinterpretation in the light of new facts or contrasting doctrine or policies. In good measure this process is all that is involved in characterization. It is complicated, as are all conflicts problems, because states may disagree on conflicts doctrine itself (often a reflection of different internal policies) and on the interpretation of verbally similar rules. Whether or not another state would apply its internal rules to a given fact situation is always a potentially relevant, though not necessarily decisive, consideration, for it adds an important dimension to the foreign internal rules whereby one may determine their purpose. Renvoi in its "sitting and judging" meaning (how a potentially interested state would treat the same controversy) may, as Dean Griswold has pointed out,[107] be a measure of the scope and intensity of the foreign domestic rule. If, for example, the domiciliary state would not incapacitate its domiciliary in a particular interstate transaction, there seems little reason for others to do so.[108] Or if the *lex loci* (as determined by the forum) would not claim to govern a particular "tort" because it would characterize the facts differently, or if it would regard another state as the *lex loci* because, perhaps, all the acts of defendant took place there, it may be that the forum should itself look to this third state.[109] If, on the other hand, the *lex loci* has previously characterized one of its rules as procedural for conflicts purposes, that decision may merely reflect the importance it attaches to the policy involved, since, for reasons of history, "procedure" developed into a capacious grab-bag for local rules. The difficulty lies in the emphasis given at the level of syntax to uniformity and in the previously discussed philosophical preconceptions about "law."

We introduce an unnecessary and misleading dimension to the resolution of multi-law problems if we phrase conflicts questions as abstract determinations of what "law" governs contracts, torts, real property, and so forth—and then argue about the classification. The question as to what "law" governs can be intelligently answered in terms of abstract categories of doctrine only if the facts fit the pattern and policy which led to the reference and rule in the

107. See Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

108. *But see* RESTATEMENT § 333 (law of place of making governs capacity).

109. *Cf.* Briggs, *The Jurisdictional-Choice-of-Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165, 1196-97 (1948).

first place. Comprehensive rules of thumb such as the *lex loci delicti* rule are helpful only as long as they work in the concrete, and only as long as everyone uses the same legal shorthand. As soon as we move from familiar and recurring fact situations which everyone characterizes as "torts" and which all take place within one state, it becomes necessary to rethink the rule in a comparative context with regard to the *particular* events and the *particular* rules of interested states. This is a task which, of necessity, falls to the court of the forum. If it is to be done intelligently the judge will have to go back of customary conflicts doctrine to its purpose, and back of the invoked internal rules to their purpose, evaluating insofar as he is able the interests of the various states, not in geographical terms, but in terms of having their prescriptions applied to these particular facts—not to similar facts occurring locally. It is not necessary that similar facts occurring elsewhere, involving different states and different prescriptions, be decided by the same hypothetical internal law, and it was an unhappy day for conflicts when this fallacy became popular.

The approach suggested is that which, I believe, the realists with their "local law" theory were urging. I cannot see any essential difference between it and the traditional methodology of the common law which Story advocated. Differences lie only in the increased public concern about "private" law and our resultant expanded sense of relevancy as to the factors to be weighed in arriving at a proper result.

Capacity

Take, for example, the old chestnut, "capacity." It seems to me too clear for intelligent argument that the only state with interest in capacity as such is the domicil of the person involved. The usual purpose of the various rules centering around capacity is to preserve the family relationship, or to protect the (presumably) weak from their own follies. But there may well be limits to the fairness of extending such protection to transactions entered into in another state with citizens of that state where the customs, and consequently "laws," are markedly different, and where it is possible to engage in business transactions with persons of an age or sex elsewhere prohibited. Thus, the forum might reject a claim based on the practice of the domiciliary state and put the integrity of transactions innocently entered into ahead of the protection otherwise sought to be cast around the person of the defendant.[110] There are often many substantially similar qualifications of capacity in local law.[111]

110. Even countries which view the personal law as governing capacity may make an exception in favor of the *lex loci contractus* to protect an innocent party unaware of the incapacity under the personal law. See, for example, article 29 of the French *Draft Law on Private International Law* as adopted by the Commission for the Reform of the Civil Code, April 5, 1951, translated by Nadelmann and von Mehren, and reprinted in 1 AM. J. COMP. L. 416, 421 (1952); 1 RABEL 186-90.

111. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 188-92 (1933). Obvious examples are the gradual expansion of such exceptions as "necessaries" and remedies in "quasi-contract" for restitution or unjust enrichment.

Or the court might go even further. Since many states have emancipated women, to put the contracting party under a burden of inquiry as to the law of the domicil in transactions negotiated elsewhere might be felt to place an undue and undesirable restraint on commerce. Even knowledge by the plaintiff of defendant's domiciliary incapacity might be held irrelevant in the light of a general policy of encouraging commercial activity.[112] Finally, if the prescribed incapacity does not fit the normal pattern in concept—if it is in the nature of a punishment rather than a protection, perhaps a denial of civil rights—a foreign state might refuse altogether to enforce it on grounds that it was penal or against local public policy; that is, that the quality of the foreign law was beyond the competence of the judiciary to recognize or was offensive to its strongly held ideas of proper punishment.[113]

The first two examples above of refusals to give effect to a domiciliary restriction on capacity have sometimes been expressed as though constituting a contrasting rule on capacity; that is, "the law of the place of contracting determines the capacity to enter into a contract."[114] It seems to me that this is an unhappy formulation, for it conveys none of the reasons that underlie the protection of at least certain categories of transactions and thus gives no intelligent guidance for future cases. Where the personal law would emancipate, for example, there is unlikely to be any reason for setting aside a transaction merely on the ground that had all the facts been local the agreement would have been voidable. And there equally may be little reason in generally extending the *lex loci*, or any emancipatory rule other than that of the domicil, to noncommercial transactions.[115]

Torts

In situations normally characterized as delicts there is widespread agreement that the rules of the *lex loci delicti* ought to apply.[116] As in the case of

112. See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 748 (1924).

113. For example, foreign civil death statutes, whatever the reason or the similarity of local laws, are usually disregarded in the forum. Cases are collected in Note, 6 U. CHI. L. REV. 288 (1939).

114. RESTATEMENT § 333.

115. A recurring problem — though seldom denominated as such — is "evasion" or "fraude à la loi." Such problems occur with frequency in domestic relations, but are complicated by the possibility of injury to an innocent party. For this reason the *lex loci celebrationis* is commonly used even by the prohibiting state to determine (and preserve) the validity of a marriage. RESTATEMENT § 121. Similarly, prohibitions on remarriage after divorce are honored more in the breach than observance. See Kingsley, *Remarriage After Divorce*, 26 So. CALIF. L. REV. 280 (1953), where the American cases are collected and analyzed. In contract cases the problem is usually discussed in connection with the problem of "autonomy" to select applicable law. See, *e.g.*, 2 RABEL 400 (relating the French "fraude" doctrine to public policy, but criticizing its application in particular cases); *cf.* Union Trust Co. v. Grosman, 245 U.S. 412, 416 (1918) (holding that federal district court should follow Texas public policy in refusing to enforce contract of guaranty made in Illinois with Illinois bank which knew it might have to sue in Texas).

116. RESTATEMENT §§ 378, 379; 2 RABEL 235.

crimes, the reason given is often predicated on the "territorial sovereignty" of the state where the events take place.[117] The most difficult problems occur when the events are not localized; when, for example, the acts are in one state and the injury in another;[118] or when there is a prior relationship between the tortfeasor and the injured party or property;[119] or when questions of vicarious liability are interposed.[120]

Internally, theories of tort liability vacillate between concepts of negligence, or "wrongful" conduct, and absolute liability, allocating the economic risk, for certain kinds of activity. The general trend has been in the direction of increased liability, particularly in an insurable or commercial context. So, too, has the trend of conflicts doctrine. Take for example the wandering dog who bites abroad. Assume the law of the dog's residence requires proof of owner's negligence, the place of the bite makes the owner absolutely liable, and suit, probably of necessity, is brought in the former jurisdiction. In 1937, despite its local rule, the Pennsylvania court applying New Jersey law held for the plaintiff.[121] Conceptually an opposite result could have been reached by saying

117. See, *e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-59 (1909). The relation between interfering with the sovereignty of another state and the law vesting the right is obvious. Savigny tended to view torts within his "imperative" (hence non-exportable) category, at least where the same acts were not tortious at the forum. SAVIGNY 205-07; *cf.* Phillips v. Eyre, L.R. 6 Q.B. 1 (Ex. 1870) (the English rule). For a persuasive argument in favor of a more discriminating approach see Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951) (urging the same flexibility of approach to tort as to contract).

118. The American view favors the place of injury. RESTATEMENT § 377. It has been criticized, however, for its rigidity and lack of social policy orientation. STUMBERG, CONFLICT OF LAWS 201-12 (2d ed. 1951). It may be an inaccurate reflection of case law as it exists, and the result of historical accident. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 165 (1944). The civil law is commonly said to adopt the place of acting. See 2 RABEL 303. The Germans have the best of both worlds by giving plaintiff his choice. *Id.* at 304. On multiple contact cases generally, see HANCOCK, TORTS IN THE CONFLICT OF LAWS 171-256 (1942).

119. Often such problems (*e.g.*, workmen's compensation, breach of warranty) may sound in either contract or tort. Frequently they involve the capacity of one spouse to sue another, thus adding to the classification potpourri the further potential ingredients of personal law and procedure, or perhaps even public policy. See, *e.g.*, Reed & Barton Corp. v. Maas, 73 F.2d 359 (1st Cir. 1934) (breach of warranty, *lex loci delicti* applied); Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934) (*lex loci* rather than personal law applied to prevent suit by wife against husband); Dyke v. Erie Ry., 45 N.Y. 113 (1871) (suit in contract for injury to train passengers); Dupont v. Quebec S.S. Co., 11 Queb. S. Ct. 188, 201-06 (1896) (injury on British ship, employment in Quebec; if British law applied, it did not include fellow-servant defense, which was called contractual in origin, hence governed by place of contract).

120. The English rule which requires the conduct to be tortious by English standards stems from such a fact situation. The Halley, [1868] L.R. 2 P.C. 193, discussed in HANCOCK, *op. cit. supra* note 118, at 11-13. The most familiar contemporary fact situations are the result of statutes imposing liability on the owners of motor vehicles. Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934); *cf.* Young v. Masci, 289 U.S. 253 (1933), discussed in Beale, *Two Cases on Jurisdiction*, 48 HARV. L. REV. 620 (1935).

121. Fischl v. Chubb, 30 Pa. D. & C. 40 (C.P. 1937).

that the owner had done nothing to "subject himself to New Jersey law"—the notion of the territorial omnipresence—particularly since the dog had wandered some thirty miles.[122] The actual holding can be said to stem from the fact that there is no "tort" until there is a bite, and hence the "place" of the tort is the place of the bite—a view which favors an impact theory, or what in criminal law is euphemistically called "objective territoriality." The honest answer, however, lies in a changed "general jurisprudence" of tort liability. An even stronger case can be made in a commercial context of injury from commodities, where today there is very little doubt that the law of the place of impact, if it imposes strict liability, will be applied even if the goods in question were not shipped into or sold within the territory.[123] The general trend of tort liability is sufficient to put the manufacturer or dealer on notice of his potential liability even if the law at his place of business is less strict. Very much the same result is likely in cases of vicarious liability even when there is no proof that the principal has specifically "subjected" himself to the particular foreign law in question, though limits may be reached. The owner of a motor vehicle (in a context of familiar insurance provisions) is probably liable for the acts of another driving with his consent even if the acts occur in a place not included within the consent.[124] But the situation is substantially different when the state of impact seeks to impose common law liability on a husband for the tortious conduct of a wife—at least when the couple is separated—than it might have been a century or less ago.[125]

Conflicts doctrine, unlike public law, looks to an "exclusive" jurisdiction; uniformity presses for finding *the* applicable "law" in universal terms without

122. See Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934), where Judge Hand refused to apply Ontario statute making automobile owner liable for driver's tort without some proof that owner had "subjected himself" to Ontario law; *cf.* Cherwien v. Geiter, 244 App. Div. 814, 279 N.Y. Supp. 553 (2d Dep't 1935) (refusing to apply local statute to New Jersey bailment, even though New Jersey would have done so). *But cf.* Young v. Masci, 289 U.S. 253 (1933) (New Jersey court application of New York statute making owner liable held no violation of due process even though bailment took place in New Jersey).

123. *Cf.* Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940) (sale in New York but goods shipped to Ohio; court applied Ohio wrongful death statute and used Ohio criminal statute to establish negligence per se). See Rheinstein, *supra* note 118, at 30-31. I agree with Rheinstein that one can push the place of injury beyond forseeability only at risk of considerable injustice to defendant, but I would push forseeability very far where commercial or insurable conduct is involved.

124. See cases cited note 122 *supra.* The text goes beyond the decided cases, which still talk consent, express or implied, to drive the car within the state where the injury occurs. But once we imply consent we are at the threshold of forgetting it entirely. It seems to me the risk of negligent driving by one financially irresponsible is better placed upon the owner who places the car in his hands, then upon the victim of his carelessness. And I believe today a court would so hold, whatever the doubts in 1935.

125. Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938). Judge Hand, who also wrote the *Scheer* decision, see note 122 *supra,* does not need to regard these situations as substantially different, for he finds a "consent" absent in both cases. To repeat, I believe not consent but some sort of forseeable event within the place of injury, and perhaps some control over its occurrence, are the important ingredients of Hand's "consent."

taking into account variations in local doctrine at either the substantive or conflicts level. Willingness to impose liability when the place of impact or injury would do so should not exclude the possibility of imposing liability if the rules of another state, the place of the acts or the agency, would do so on the same multi-state facts.[126] Admittedly, such liability is in the nature of a windfall to plaintiff, but it is scarcely unfair to defendant and is consistent with the thrust of tort doctrine towards increased liability. One might doctrinally justify reference to that law either because the place of impact would do so under its conflicts rule, or independently because the place of the acts would apply its substantive law to these facts. Uniformity in terms of prescribing one applicable "law" is not important in itself in a typical tort context; there is little reason today for the forum not to pay deference to the policy of any state with an interest in plaintiff's injury or defendant's conduct if there is evidence that the policy of that state would extend to these facts and if doing so would not violate due process as conceived by the forum. Here, as elsewhere in conflicts doctrine, the emphasis given to the law of the "place of tort" was an effort to persuade a foreign forum, normally the domicil of defendant, to apply the law of the place of the events out of fairness to plaintiff and in deference to the interest of that state in both local conduct and protection of persons locally resident. It was an attempt to give an objective standard to recovery in terms of the wrong rather than the actor. Few states would be willing to accept as a principle that liability should invariably depend on the internal rules of the defendant's domicil. But few states would object to more stringent rules of liability being imposed by the domicil if it desires to do so.

The important distinction—obscured by insistence upon uniformity in the abstract—is between "territoriality" as a sufficient contact to put plaintiff or defendant on notice of potentially applicable foreign rules, and "territoriality" as a system of allocating competence to prescribe policy. Both depend, but for different reasons, on the nature of the rules as read in the light of their purpose. There are limits, domestically measured by due process, to which a state can in fairness seek to prescribe as to persons, property and acts unconnected physically with its territory, and these limits depend upon the general familiarity of the rule coupled with the extent and quality of the contact. Given the competency to prescribe—"legislative jurisdiction" if you will—there are further questions for the court of the forum to consider: (1) whether the rules apply to these particular facts, and (2) what are the prescriptions and policies of the forum and of other states with contacts with regard to the same events. Traditional conflicts theory and doctrine attempt to make choices of law on the basis of the events alone. I would add the additional variable of the provisions and policies of the potentially applicable laws—considerations now present but hidden in ideas of "characterization," "renvoi" and "public policy."

126. See Morris, *supra* note 117, at 885; STUMBERG, CONFLICT OF LAWS 201-12 (2d ed. 1951).

Private Agreements

A goodly portion of conflicts cases have come up in situations where, within broad limits, the dominant policy of all states has been to enforce private arrangements that are concerned with the disposition of property, or with contracts for sale of goods or for personal services. Much of the doctrine revolves around the catch-all of "intent"—if the relevant intent is not reasonably clear from admissible evidence, it is derived from rules that are the result of a mixture of past experience, custom and policy. Positive prescriptions have often dealt with "formalities," presumptions with regard to the meaning of words and phrases, and remedies available in specific instances. Even among states with a common legal heritage and common customs it is not unusual to find the same policy refined through precedent into slightly different rules that produce somewhat varying results. "Close cases" go opposite ways in neighboring states, creating prospectively different dispositions of future controversy. Many such differences are not intensely felt; judges may, in fact, prefer the foreign rule but feel bound in local matters, by their predecessors in office.

Lorenzen in his intensive study of contracts [127] observed and approved a marked tendency of courts to uphold contractual obligations if any "law" with which there was a substantial contact would do so. Cavers [128] has pointed out a similar phenomenon in the case of inter vivos trusts, where the dominant policy is clearly in favor of fulfilling the intent of the settlor, the consequences of frustration comparatively drastic, and differences in rules often minor. The same is true of disposition by gift or will.[129] Marriages, too, have generally been upheld as valid despite prohibitions expressed in the rules of the state of nationality or domicil at the time of marriage,[130] and there are many cases where doctrine has been manipulated to favor rights stemming from legitimation or adoption[131]—at least once these concepts were

127. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565, 655, 673 (1920), 31 YALE L.J. 53 (1921).

128. Cavers, *Trusts* Inter Vivos *and the Conflict of Laws*, 44 HARV. L. REV. 161, 167-68 (1930). New York, a particularly important center of administration, has gone to great lengths to uphold a trust. Dammert v. Osborn, 140 N.Y. 30, 35 N.E. 407 (1893); Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892).

129. While the law of domicil governs personal property and the law of situs controls real property in Anglo-American law, the reference in both cases includes statutory provisions of those states aimed at preserving the disposition. See Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Forum in the Conflict of Laws*, 20 YALE L.J. 427 (1911); CHESHIRE 519-43. Cases and statutes are collected in Annots., 2 L.R.A. (n.s.) 408 (1906); 169 A.L.R. 554 (1947).

130. See note 115 *supra*. *E.g.*, Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941) (youthful marriage; parties intended to avoid prohibition of domicil). The Uniform Marriage Evasion Act has been withdrawn from the active list. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 64 (1943).

131. *E.g.*, *In re* Lund's Estate, 26 Cal. 2d 472, 159 P.2d 643 (1945); Moretti's Estate, 16 Pa. D. & C. 715 (Orphans Ct. 1932).

firmly embedded in the public mind and conscience and, therefore, in the "general jurisprudence." Widows and children have generally had the best of all possible laws when, for example, the issue was their share of an estate.[132] And, significantly, uniform statutes and treaties have generally aimed directly at substantive problems rather than seeking solutions through appropriate choice of law rules.[133]

There is much wisdom in decisions which voice the dominant policy of all states involved and decline to frustrate expectations because of non-compliance with a particular technicality. The argument for firm choice of law rules to give certainty assumes compliance, rather than noncompliance, with a particular rule. The need for protecting expectations is, however, better effectuated by selecting any law reasonably complied with than by insisting upon one particular law. It would be a strange jurisprudence which would preserve a mechanical rule at the expense of legitimate expectations.

As in the field of torts, these decisions have followed the thrust of substantive policy. The trend internally has been toward carving out exceptions to rules requiring formalities and away from mechanical application of such intent-frustrating devices as the rule against perpetuities applied in the "unborn widow" context. The operative impact of the Statute of Frauds has been diminished by the expansion of the "fraud" exception and the action in reliance doctrine; the parole evidence rule has had many of its teeth removed; even the Statute of Wills, by judicial and legislative modifications, is far less exacting than the older jurisprudence had it; flexible doctrine with regard to laches and estoppel is always at hand to preserve a voidable marriage or divorce.

A general drift of legislative and judicial response to social change is often discernible, even if lag exists within several polities. If choice of law can be used to select the "better" rule, the temptation to do so may be irresistible, and may even pave the way for local change. Legislative backwardness with regard

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132. *E.g.*, the much debated case of Rosa Anton v. Bartholo, Cour d'appel d'Alger, Dec. 24, 1889, [1891] Clunet Journal du Droit Int. Privé 1171, discussed in ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 158-63 (1940), and Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027, 1031 (1949).

133. Among the United States the approach of the uniform laws has been either to create common substantive rules (*e.g.*, the Negotiable Instruments Law, the Uniform Sales Act) or to effectuate a prescribed result (*e.g.*, Uniform Marriage Evasion Act, Uniform Wills Act), and not to allocate jurisdiction to prescribe. Internationally the difficulties of marrying civil and common law concepts make anything save substantive resolution very difficult. The Hague Conventions of 1902 and 1905 on aspects of family law have not been successful because of substantive policy differences. The Convention on Bills of Exchange and Cheques of 1930 and 1931, as well as those dealing with Arbitration clauses (1923) and Foreign Arbitral Awards (1927), have been more worthwhile owing to the absence of significant variations in the substantive laws and policies. One could conclude that where the facts are not localized, as in commercial transactions, it would be very nearly as easy, and far more productive, to work at common codification of substantive rules and policies. The Latin Americans have had somewhat more success with the Montevideo treaties (1889, revised 1940) and the Codigo Bustamante (1928). For a general discussion see 1 RABEL 29-41; WOLFF 46-51.

to adoption or legitimation, for example, should not be construed as a "public policy" in opposition to a status generally recognized and favored by the public. Anachronistic precedent with regard to commercial practice ought to be modified in many instances, and if choice of law is a convenient interim step to judicial or legislative repeal, it should be used as such.[134] And, finally, where two doctrinally different devices are used to fulfill a common policy—a property settlement by marriage contract vs. a statutory share—a choice which gives the widow the benefit of the more favorable distribution may well be the best fulfillment of the social policy of both states and the human expectations which underlie both rules.[135]

But policies change, and choice of law precedent too can be out of date. Freedom of contract has been more and more circumscribed in the name of "public policy," and for a variety of reasons. Where bargaining inequality exists, regulation by statute and decision has moved "bargain" away from intent in the direction of obligation. Precedent founded on the assumption of unsupervised negotiation is often inappropriate. Usury laws, for example, were not particularly popular with courts at the height of economic liberalism, and while a judge might not close his eyes to explicit and crude evasion, winking was not unknown; the lender could likely get the benefit of the higher of two percentages in an interstate contract.[136] Contemporary small loan legislation is a horse of a different color,[137] to be scrutinized far more rigorously for compliance which protects the borrower and prevents evasion of local policy. The growth of retail credit and expansion of commercial lending institutions have changed the nature of the problem and the attitude with which choice of law in this area is approached. Obviously where the lender is doing business locally he ought not and will not be permitted to transfer a loan negotiated locally to another "law" by the terms of the basic contract.

There are many areas where, in some degree, bargain has given way to status, freedom to regulation: sale of securities, insurance, employment, public utilities, to mention only a few. How far one state may extend its protective policy ought not to depend on choice of law rules previously invoked in different factual contexts and expressing different policies. "Intent" as to governing law is clearly irrelevant where evasion is the issue; places of contracting

134. Apparently this is the view of the proposers of the Uniform Commercial Code. See § 1-105 (applying the Code to controversies that have any contact with the forum). A less dogmatic technique is sometimes employed by courts that invoke a choice of foreign law to avoid their own outmoded precedent, but the cases are difficult to tie down because of the flexibility of conflicts doctrine. See, *e.g.*, Consolidated Flour Mills Co. v. File Bros. Wholesale Co., 110 F.2d 926 (10th Cir. 1940) (applying foreign law but suggesting that the *lex fori* is also moving to the same "modern rule" of liquidated damages).

135. See Neuner, *Policy Considerations in the Conflict of Laws*, 20 CAN. B. REV. 479, 485 (1942).

136. See GOODRICH 334, and cases cited therein.

137. NUSSBAUM, MONEY IN THE LAW, NATIONAL AND INTERNATIONAL 169-71 (rev. ed. 1950); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1077-78 (1953).

or performance may or may not be indicative, because they are themselves subject to bargain. Attempts to evade local prohibitions are likely to fail if the enacting state has a voice in the disposition of the case. If, on the other hand, a transaction is on the margin of those regulated, a court may still ignore even a doctrinally substantial contact to preserve a good faith transaction.[138] The problem is not—and, indeed, never has been—one of finding the greatest number of contacts, or the "center of gravity" of the transaction, or the "proper law" by crude addition of contacts,[139] but one of measuring the policies of the several states against the facts of the particular controversy, the rules against their origin and purpose. These formulae are useful only in that they are flexible. Whether a foreign rule can in fairness or does in policy touch a particular transaction is dependent upon an evaluation of the policy, the parties, the events and the contact. Recurring commercial transactions are likely to be subjected to a higher degree of regulation than non-recurring ones, and interstate or international business enterprises to more exacting knowledge of local and foreign regulations than individuals doing business on a smaller or more incidental scale. And the probability that a state will be able to effectuate its regulation in the former cases without running the rapids of choice of law has been enhanced by expanding concepts that may give that state "jurisdiction" to make a final judicial determination.

Sovereign Power and Policy

Under a rational view of conflicts, each sovereign should use its bases of power to secure maximum effect for its policy in and with regard to the international or interstate community. To do so requires invoking principles that are at least potentially persuasive as international precedent, and which, therefore, take cognizance of the policies and power of other states. If they are to fulfill their function as a stabilizing force in the world community conflicts rules should urge and imply reciprocity on like terms. The objective of each state should be to effectuate the compatible policies of all. This objective does not require uniform choice of law rules. In fact, except where internal laws are similar and facts localized, the contrary may be true, because what the various laws provide, and with what purpose, should be conscious factors in choice. It does, however, require a far more discriminating clarification of underlying goals and the identification of facts, or "contacts," with the various policies. That we are slowly progressing toward such an approach is reasonably clear.[140] But a tremendous amount of doctrinal pruning remains to be done.

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138. *E.g., In re* Motor Products Mfg. Corp., 90 F.2d 8 (9th Cir. 1936), *cert. denied*, 302 U.S. 695 (1937) (California "blue sky law" not applied to void transaction valid by Missouri law despite substantial California contract).

139. The problem of "proper law" is qualitative and not quantitative. It is, therefore, misleading to talk about an "accumulation of contact points as paramount." See, *e.g.*, Harper, Taintor, Carnahan & Brown, Conflict of Laws 7 (1950).

140. As evidenced by such juristic formulae as "proper law," "minimum contacts," "balancing of governmental interest," "convenience" and, of course, "public policy"—all

Disagreement in the international arena is often resolved at a relatively low level of intensity by the fortuitous distribution of power to enforce a given prescription within territorial limits; at a higher level of intensity by diplomatic techniques ranging from minimum compromise and negotiation to maximum coercion. In interstate matters the Supreme Court is available to play an arbitral role; uniform state laws and national legislation equate with treaties as means for resolving problems through substantive principles. There is clearly a national interest, recognized by the Constitution, in compatibility. National controls over monetary problems and interstate commerce, in particular, remove many of the more intense areas of dispute from the competence of the states.

In the final analysis what rules will be applied to what persons and events in the international community with what consequences depends upon what decision-maker possesses and exercises effective power. This simple truism has always distressed those with a rigid conception of "law," the more so because possession of power in its narrow sense of coercion over persons and property within territorial limits may be completely fortuitous. Hence the desire to move back a step in time and speak of enforcing vested rights—to make power effective in terms of legislative prescription rather than enforcement. Nevertheless, descriptively at least, power seems to be the determinant of policy and, therefore, of law—a formulation that puts cart before horse in a quite unsatisfactory way and is, in addition, quite misleading.

Jurisdiction and the Significance of Power

"Jurisdiction" is in wide vogue to describe the competency of the various decision-makers in the international community to prescribe value changes. It has a solid sound, well suited to the dignity of the judicial process despite the fact that it is used indiscriminately to refer to a wide variety of claims and concessions, actual and potential, variously phrased, interpreted, administered and qualified with regard to persons, events and wealth, both for descriptive and preferential purposes.

It has been frequently observed that it is in terms of "jurisdiction," as contrasted to "choice of law," that public and private international law share common ground.[141] Certainly "jurisdiction" is the semantic focal point of interstate regulation under both the due process and full faith and credit clauses of the Constitution, and, as already stated, similar ideas underlie less refined international equivalents.

Jurisdictional theory is customarily phrased in terms of the broad claims made by the "personal" and "territorial" sovereigns. There has been little

of which require some evaluation of policy vis-a-vis particular facts. There remains the institutional difficulty of overruling or avoiding precedent based on different assumptions in a field of law relatively untouched by legislation.

141. See, *e.g.*, 1 BEALE § 1.10. The various views are collected and reported in Stevenson, *Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 564-65 (1952).

effort to relate specific claims to either particular prescriptions or policies, largely, it would seem, for fear of creating limiting precedent on state power to act in future contingencies. Story expressed what is still the usual Anglo-American or "territorial" view by bottoming his theory on the exclusive competency of a state to regulate persons resident and property situate within its borders.[142] Principally he used a concept of territorial sovereignty—the monopoly of formal law enforcement within geographic boundaries—to justify the international integrity of judicial "acts of state";[143] that is, judgments rendered and enforced through local process. The use of the word "exclusive" reflected both sovereignty and international res judicata. He assumed comity —deference by the deciding court to the views of other interested sovereigns. But his concern for what he regarded as excessive claims of civilians for the "personal" law led him to speak of jurisdiction over "contracts made and acts done" within a state, clearly a choice of law idea.[144] He acknowledged the jurisdiction of a sovereign over its nationals anywhere, but viewed it as subsidiary to the competency of the territorial state,[145] once again indicating his concern lest the national sovereign seek on the one hand to immunize its citizens from local sanctions or, on the other, to claim their extradition as a matter of international obligation.

Beale emphasized the choice of law aspect of Story's maxims by hardening comity into vested rights, though he too, somewhat inconsistently, insisted on the finality of judgment by a court with jurisdiction irrespective of the law chosen. Elevating judgments, at least where locally executed, to constitutional status inevitably reduces choice of law doctrine to local rather than international standing save, perhaps, at its extremes. When forced to elect between doctrinal uniformity and territorial power, Beale could not help but cast his lot with the latter. But while Story and the later realists did so with gusto, Beale was a reluctant partner in diversity. To repeat, underlying the different attitudes were different philosophies of law and judicial function. Modern iconoclasts have shared with Story a view according judges a discretion which the more conservative Austinians reserved for legislatures. To Dicey and Beale "legislative jurisdiction" for legislatures and "legislative jurisdiction" for courts are different things: the former goes the limits of international due process; the latter is simply quick-frozen choice of law precedent of the forum viewed *as though* it were positive law of a foreign sovereign capable of vesting rights.[146]

142. STORY 28. For its significance, see *id.* at 33-34.

143. In its judicial usage "act of state" has been confined to executive acts, while judgments have depended on the "jurisdiction" of the rendering court. There seems little reason to make the distinction, and some commentators do not. See, *e.g.*, Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. REV. 42, 53 (1943).

144. STORY 28.

145. *Id.* at 31-33.

146. *Compare* RESTATEMENT §§ 5 and 7 *with* §§ 62, 63 and 64. Hence problems of "preliminary question," "classification" and "renvoi."

In all theories the Gordian knot has been cut, "law" has been distilled from "laws" by insisting on the freedom of a sovereign with jurisdiction, at least where fortified by local power, to effectuate its choice of law. Territorial sovereignty in terms of enforcement got linked with traditional Anglo-American emphasis on local service at the time of bringing suit. Holmes, for example, in a burst of realism, concluded that the "foundation of jurisdiction is physical power,"[147] a half-truth which, though immediately qualified, has misled others to overstate the importance and function of the forum and to understate claims of other sovereigns to both judicial and legislative competency which the forum may be prepared, at least on a reciprocal basis,[148] to recognize. Resting in part upon the truism that the effectiveness of any prescription ultimately depends upon power to coerce compliance and in part upon the importance of preserving self-determination in the exercise of local power (sovereignty again), it has obscured rather than clarified other relevant policies.

To the decision-maker, possession of power does not determine appropriate policy, the wisdom and propriety of its exercise or the substantive rules chosen as the guide to adjudication. The policy so formulated is, of course, one related to problems of the larger community: the fact that there exist only state courts to determine disputes involving interstate facts, the fact that policy prescription and administration are geographically organized, the fact that power is shared.

It would be footless to ignore local power or the valid policy of self-determination it encompasses; Holmes' aphorism is scarcely as "factually unsupported and functionally unsupportable" as Ehrenzweig would have it.[149] To ignore it would be to ignore the final determinant of whose policy, and therefore what policy, prevails. To that extent Holmes, in company with Story,

147. McDonald v. Mabee, 243 U.S. 90, 91 (1917). *Cf.* Direction Der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22, 28 (1925) (reaffirming power but further qualifying its impact by observing that a state "prefers to consider itself civilized and to act accordingly").

148. Reciprocal recognition of foreign judgments has been implemented by treaty. *E.g.*, Denmark, Finland, Iceland, Norway and Sweden, Convention regarding the Recognition and Enforcement of Judgments, Copenhagen, 1932, 139 LEAGUE OF NATIONS TREATY SERIES 165, 181 (1933-34); Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 & 24 GEO. V, c. 13, extended by Convention to reciprocating countries. The Supreme Court has suggested a doctrine of reciprocity as a condition to enforcement of foreign judgments, Hilton v. Guyot, 159 U.S. 113, 227 (1895), but this doctrine is difficult to apply because someone has to move first without the assurance. Many countries, however, apply the rule. See Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188, 194-99 (1919). Neither the full faith and credit clause nor *Hilton* are binding on state or (since *Erie*) federal courts, but state courts are inclined to give broad recognition to foreign judgments without requiring reciprocity. See Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 784-87 (1950). There is early authority for full faith and credit as part of the law of nations. Kennedy v. Cassillis, 2 Swans. 313, 326, 36 Eng. Rep. 635, 640 (Ch. 1818); see Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 791-96 (1955).

149. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296 (1956).

was on solid, if self-evident, ground. But equating jurisdiction and power in this sense neither refutes nor even takes issue with those who insist that law is cast in more purposeful terms. Of course it is, and rightly so; each sovereign uses its power to effectuate what it conceives to be appropriate policy, and over a wide area there is agreement or, at least, tolerance. So long as formal authority is organized and administered territorially, there is a mutual and reciprocal interest—a "sense of the inconveniences which would otherwise result"—in extending areas of tolerance. The strongest case, of course, is presented by the executed judgment or decree—the exercise of territorial power-in-fact by a foreign official. Whether courts concede the "jurisdiction" of the foreign sovereign or refer directly to the Act of State doctrine, plaintiffs are normally relegated to diplomatic channels for redress. Thus where a sovereign possesses and exercises physical power, his competency to do so will rarely be questioned in courts abroad.

Judicial equation of jurisdiction with power to enforce a prescription within territorial limits is, then, less an endorsement of principle than an acceptance of fact. It merely recognizes the power realities; the deficiencies of a legal system involving multiple decision-makers, limited power and differing doctrine; and the circumspect role of judges in resolving political problems. It need not be sanctified as principle and, in fact, a different result may well obtain for prescriptions unreduced to *faits accomplis*. There are degrees of policy cross-reference—res judicata, deference to the views of other sovereigns, and the possibility of political complications.[150] But these considerations are less strongly felt where the complication of territorial sovereignty is removed. Legislative or judicial acts of state unaccompanied by an exercise of local power stand on a lesser footing in the international community.

It scarcely requires argument that physical power over the defendant, or his property, is indefensible as the exclusive criterion of either legislative or judicial jurisdiction. No one seriously asserts otherwise. Venue in all countries is linked with fairness and convenience, most often measured by domicil or residence, the place of relevant acts or events or property, or prior agreement.[151] The application of legislation to persons or events is, like all rules, a function

150. "But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality' . . . a *casus belli*." Scrutton, L.J., in Luther v. Sagor, [1921] 3 K.B. 532, 558-59 (C.A.). While undoubtedly an overstatement, Scrutton's point is nonetheless valid. In effect the justification of the Court's decision in United States v. Pink, 315 U.S. 203 (1942), rests on the same premise, for the Russian confiscations did not improve in due process by the political settlement made by the United States as a step to recognition.

151. What in intra-state controversies is "venue" becomes "jurisdiction" when a state line is crossed. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296-303 (1956); Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930); Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 43-47 (1930).

of its purpose, limited only by the due process principle that the defendant should have had fair opportunity to apprise himself of its potential application, and the legislative claims of other sovereigns to regulate differently the same events. Ultimately, of course, enforcement depends upon the views of a sovereign with physical power to enforce. But there is no reason to invert a political limitation into a legal principle.

The Constitutional Framework

Rather than resting solely on concepts of power conflicts rules operate within and reflect a constitutional triad common to both the interstate and international community: equal protection of the laws, or nondiscrimination against aliens; due process, or denial of justice; and, more tentatively, what we term full faith and credit, variously expressed as comity, jurisdiction and respect for foreign acts of state. Equal protection and due process have considerable seniority. Except in the context of executed judgments or other "territorial acts," full faith and credit is as yet less developed. As soon as a foreign prescription involves a departure from customary and widely shared standards it likely presents a political question, and courts have traditionally sought techniques and doctrine that reduce the possibilities of political involvement.[152] The more activities are regulated in the public interest, however, the more difficult it becomes for the judiciary to abnegate decision.

Equal protection and due process are both aimed at protecting individual expectations and insuring even-handed treatment of nationals and foreigners in national courts. From relatively early times foreigners have been entitled to access to courts and to impartial justice in the prosecution of their cause.[153] As defendant, too, a foreigner was entitled to all the protection that would be accorded a national. In addition, as a requirement of due process, he must in some way have subjected himself to the legal process, or law, of the sovereign that seeks to prescribe with regard to his obligations or status. As the doctrinal equation works out, it is perhaps no offense to the concept of equal protection to limit claims to those set by the forum's substantive standards, provided that a citizen would be treated in the same way; this was the approach of the common law with its emphasis upon local law, local rights and local procedure. But in order to subject him to liability as defendant, due process requires some

152. A general rule that courts will not enforce foreign penal, revenue or political laws, or foreign laws involving *ordre public externe* (*international*) has the effect of avoiding political questions by requiring positive local legislation based on treaties. Absent local positive law, courts abjure competence to discriminate among polities or to pass on the substantive merits of the legislation.

153. See Beale, *The Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 193, 196-97 (1913). The alien has progressed from the status of outlaw or enemy to something approaching equality with nationals. Both humanism and the growth of commerce have been factors in his improved status; the modern growth of nationalism has limited certain substantive privileges. Access to courts was necessary to the growth of trade and commerce. A brief history is contained in BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 33-36 (1922). See also *id.* at 82, 333-40.

reasonable connection between him and the substantive law applied, and, in addition, the court's competence to hear the cause.

The due process problem is not particularly acute if the substantive rules are viewed in universal terms, are in fact widely shared, and are derived from custom and voluntary acts. Courts of admiralty, administering a common law of the sea and the law merchant, were not consciously concerned with more than variations of custom; the same was true of civil courts administering a common law derived from Rome. But as we move away from substantive universals and obligations voluntarily assumed or conceded to those imposed by community fiat for the realization of group values, the due process problem takes on added dimension and difficulty. Positive law as the origin of rights poses immediately the question of whose positive law is to be used, and leads to a jurisdictional approach. Then, too, as rules are conceived as expressions of sovereign policies rather than individual rights derived from nature or reason, a political element enters the conscious appraisal of doctrine. It is one thing to argue that a court should adopt a foreign rule of decision as its own because fairness or justice demands it; it is quite another to do so simply because another state has prescribed a particular result. The two may often equate, but not necessarily. Problems as to the scope of judicial discretion arise.

To some extent the theory of "vested rights," although precluding a natural law basis, actually made easier a "law of nations" approach.[154] It gave courts a verbalization and theory that permitted the use of foreign law even when it was substantially different from that of the forum. But its adherents spoiled its practical utility by their rigid insistence on the forum's choice of law precedent as the measure of foreign legislative jurisdiction.[155] Thus it became necessary to think directly in terms of foreign claims to regulate the consequences of particular events, and to refuse recognition only if the claims ran counter to the forum's conception of due process and public policy or the co-equal claims of another state with regard to the same events. There is general agreement that a state is primarily interested in events that affect its own safety, public order, and the integrity of its social system; that is, the distribution of values among those who, by virtue of citizenship or residence, identify themselves with a particular community and seek the protection of its laws. Therefore all claims to prescribe value changes are cast, explicitly or inferentially, in terms of events that directly concern the welfare of that community. As the impact upon values of this national community becomes more remote the public interest is less and the area of tolerance correspondingly increases.

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154. See Nussbaum, *The Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189, 198 (1942) (calling "vested rights" a "tenet somewhat analogous to the Law-of-Nations approach" of continental scholars).

155. The RESTATEMENT'S position as to characterization by the forum's law (§ 7), as well as the whole of the "Local Law" theory, constantly confuses the court's power to decide with the relevant criteria of decision. The view here taken is that the limit of legislative jurisdiction is due process by the forum's criteria, and within those limits it is a court's task to arbitrate differences.

A claim for the application of personal or territorial law is merely a general statement of sovereign concern. Relationships among its own nationals or residents, particularly continuing ones like marriage and employment, may be of importance to the sovereign wherever the relevant events occur. Similarly, the conduct of others that affects local values may be sought to be subjected to its standards. A state may or may not be concerned with acts of its citizens abroad. In terms of its impact upon local values the place of occurrence of relevant events may or may not have significance. In the absence of a specific prescription embodying a definable policy it is not possible to determine abstractly the scope of statutory or customary law with regard to either persons or events.

The claims of a sovereign to control the conduct of its citizens are, in due process terms, somewhat broader than the claims it can fairly make with regard to others. There are obligations imposed upon nationals and residents that can only be imposed on foreigners in more limited fact circumstances. An obligation to pay taxes, for example, cannot fairly be found against non-residents except with regard to local transactions. The same is true of an obligation to defend in local courts. And a general familiarity with legal standards of one's personal law may permit that sovereign to extend its prescriptions to foreign acts, when its policy is served by doing so, more freely than would be reasonably possible in the case of those whose contact with the sanctions invoked is insubstantial.

Problems of Fair Notice and Venue: Power v. Convenience

Where a sovereign possesses physical power to enforce its judgments its jurisdiction is unlikely to be questioned elsewhere. But the fact of physical power does not legitimize its exercise, particularly if the claim is based on foreign rules and the venue is an inconvenient one. But if the forum refuses effect to foreign judgments unless executed abroad, there is a pressure to sue only where power in fact is present. This practice may protect citizens against foreign law and foreign judicial procedures, but it does so at the price of sacrificing local claims against foreigners. Furthermore, as the movement of people, the conduct of business and the dispersal of wealth become increasingly interstate, power over these elements is more widely shared. It is therefore to the interest of all states to formulate reasonable criteria of proper place of trial without regard to the existence of physical power to enforce.

If one could hypothesize uniform principles and standards of judicial administration, the policy issues with regard to both claims and concessions to render effective judgments would be drawn exclusively in terms of fair notice and reasonable venue. Indeed, even with the possibility of different rules and methods of fact-finding and trial, these policies would seem more important than achieving doctrinal uniformity. When called upon to enforce a foreign judgment, a state with power can always cast out decisions that offend its sense of justice. The standards of what constitutes fair notice are relatively

easy to formulate and are, in fact, widely shared.[156] Venue is more difficult, unless states were to agree that defendant has an obligation to appear wherever venue is prima facie reasonable: for example, any state where connection with the events is sufficiently evident to make possible the application of its law. Such a principle, spurred by the ease of modern travel, has been slowly evolving, but it requires a counter-principle or practice which will cause dismissal if venue is in fact unfair. While we have virtually arrived at this result in the United States,[157] the counter-principle has not expressly appeared in other countries.

Despite the difficulties inherent in different choice of law precedent and different modes of trial there is widespread effect given to foreign judgments where the issues have been actively litigated, and wherever there is general agreement that defendant has consented to foreign trial.[158] The actively litigated judgment rests on a clear and common res judicata policy; the fairness of the forum and the adequacy of the notice of trial is no longer in issue. The default judgment, however, must rest merely on the obligation of defendant to have responded to a summons. Notice alone is probably not enough (though the development of an inconvenience doctrine may make it so), and, absent consent, the fairness of the forum is not always easy to determine *ex parte*.

In early times competency to adjudicate tended to be confined in both theory

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156. See note 148 *supra*. There is no disagreement that all reasonable steps to secure actual notice should be required. In most cases there is no problem in securing actual notice by personal service or service by registered mail. There may be some reluctance to enforce a foreign judgment, whatever the reasonableness of the notice procedure, if no actual notice was acquired. See Great Britain and Northern Ireland and France, *Convention Providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, January 18, 1934*, art. 3 § 1(b), in 171 LEAGUE OF NATIONS TREATY SERIES 183, 188 (1936).

157. As to having "jurisdiction," at least where there is no domicil, consent or presence, a court must make "an estimate of the inconveniences" to defendant. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). Where there is local service, a court may dismiss on the same grounds. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). A federal court may in the interest of justice and for the convenience of the parties transfer the suit to another district "where it might have been brought." 28 U.S.C. § 1404(a) (1952). The relationship between the inconvenient forum doctrine and § 1404(a) is extensively analyzed in Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955).

158. See note 151 *supra*. Consent in advance is good common law and will be recognized by common law courts. Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931); Feyerick v. Hubbard, [1902] 71 L.J.K.B. 509. A discussion of contractual consent is contained in Childs, *An Evaluation of the Techniques of Acquiring Personal Jurisdiction over Non-Residents not Engaged in Business When a Simple Commercial Transaction has been Breached*, 38 KY. L.J. 207 (1950). But where the consent is the result of unequal bargaining power a default judgment may be refused enforcement. Jones v. Turner, 249 Mich. 403, 228 N.W. 796 (1930) (holding consent in cognovit note invalid by *lex loci contractus* not operative to give Illinois jurisdiction). On the American practice generally see Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153 (1949); Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950). On foreign practice see Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188 (1919).

and fact to the domicil of defendant and only exceptionally elsewhere. At civil law domicil was an important principle of venue, though not necessarily an exclusive one.[159] At common law venue originally was confined, by virtue of the jury function, to the place of the occurrence of the relevant events. Only after fact-finding no longer depended on the jury's knowledge as to what had happened was it possible, by the use of a fiction, to lay venue in transitory actions wherever the defendant could be found.[160] Absent a voluntary submission or an accident, defendant was normally found where he lived. In both systems the presence of the defendant in court as a necessary condition of a fair trial underlay local service of process. Only as the *capias* writ ceased to be the norm did the default judgment come into being. Notice replaced the strong arm of the sheriff as the measure of procedural due process where suit was brought at the domicil or residence of defendant. Something more was needed, however, to impose an obligation to defend over nonresidents.

The norm of suit at defendant's domicil put a considerable burden upon plaintiffs not always justified by the reciprocal difficulty of defending abroad. A preferable venue in terms of ease of trial often remained the place where events occurred, at least where this place could be localized. Furthermore, states desirous of protecting local citizens began expanding their claims to competence in cases where the foreign defendant could be said to have subjected himself to local law at the time of the relevant acts. In cases generally involving business done locally, torts committed locally or maritime claims, there developed in England a justifiable pressure for litigation locally. In admiralty and mercantile courts a practice of issuing writs of attachment developed as a means of encouraging defendant's voluntary response to a summons served abroad, and as a fund for satisfaction of the claim. Writs served abroad were not unknown in eighteenth century England and, where the cause of action was governed by local law, were common on the continent as well.[161] The practice was codified in England in the middle of the nineteenth century,[162] and English judges have since (and probably before) been empowered to issue process abroad in cases where, broadly speaking, the cause of action is likely governed by English substantive law.

One can equally well describe these practices as claims exceeding local power or restrictions upon it. That is a question of fact. In theory they are not explicitly related to enforcement within the United Kingdom, although, since the issuance of foreign summons is discretionary, the likelihood of effective dis-

159. See Beale, *The Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 193, 195 (1913).

160. See HANCOCK, TORTS IN THE CONFLICT OF LAWS 1-5 (1942); Sack, *Conflicts of Law in the History of the English Law*, in 3 LAW: A CENTURY OF PROGRESS 342, 370 (1937).

161. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens*, 65 YALE L.J. 289, 299-300 (1956).

162. The Common Law Procedure Act, 1852, 15 & 16 VICT., c. 76 (now order XI of the Rules of the Supreme Court, 1 THE ANNUAL PRACTICE 93-117 (1956)).

position may be a factor influencing a judge. Obviously jurisdictional claims based on such process do not necessarily go the full length of local execution possibilities; equally they may go beyond. The latter possibility has caused some embarrassment to English courts and commentators,[163] since England is not quite willing to enforce a foreign default judgment arising from a similar process. In an effort to rationalize what appear to be double standards it has been said that England does not claim extra-territorial effect for such judgments. But this argument, while it may be recognizing a practical reality in that others might not recognize such a claim, is scarcely convincing as policy. There is no good reason why a judgment good in England by English standards should be marketed abroad at a discount. What is unfortunate is that there has not been more emphasis upon the facts presented *ex parte* and the factors influencing the claim, for the real justification of the practice is the evaluation made of factors within judicial discretion.[164] It would, too, seem far less exorbitant to Americans if we remembered not only how far we have recently gone in the same direction, but also that in neither English nor continental practice is attachment of itself a basis for jurisdiction.

The roughly comparable development within the United States was given a different emphasis by *Pennoyer v. Neff*.[165] While English extra-territorial service of process requires prima facie a local cause of action, *Pennoyer* put no such restriction on attachment—pure and simple power—as a basis of jurisdiction. "Personal judgments" required local service of process or consent; a local cause, presumably, was not necessary. Local property could be attached or a debt garnished by service on the debtor locally, and once again due process required no further justification of venue so long as the cause was "transitory." In both instances power, unrelated to any sensible policy, emerged triumphant, dressed strangely enough in the raiments of those "fundamental notions of decency" embodied in due process of law.

Pennoyer's mechanical clinging to the ritual of local service, historically traceable to the *capias* writ and the notion that power to compel appearance was the geographical limit of the sheriff's authority (as indeed it was and is), proved too confining a concept. Fortunately other doctrine was at hand to mitigate the strict side of personal jurisdiction. Most important was "doing business" as a fictional measure of consent or "presence," originated as a condition of corporate business but since expanded to other uses, at least where

163. *E.g.*, CHESHIRE 111.

164. Thus a writ would be refused where it appears that the forum is not convenient or would not justify the expense to a foreigner of defending in England. George Monro Ltd. v. American Cyanimid and Chemical Corp., [1944] I K.B. 432 (C.A.); *In re* Schintz, [1926] Ch. 710, 716 (C.A. 1925); cases are collected and analyzed in Note, 48 COLUM. L. REV. 605 (1948) (pointing out the many limitations in practice exercised for reasons of fairness and due process). Despite these qualifications an American court has refused to recognize such a judgment. Kerr v. Tagliavia, 101 Misc. 614, 168 N.Y. Supp. 697 (Sup. Ct. 1917), *aff'd*, 229 N.Y. 542, 129 N.E. 907 (1920).

165. 95 U.S. 714 (1877).

the cause of action arises from local acts.[166] The growth of "consent" through bargain and fiat—from *Hess*[167] through *Doherty*[168] to *International Shoe*[169] and beyond[170]—has piecemeal extended judicial jurisdiction very nearly to legislative jurisdiction for those states that wish to push protection of local plaintiffs on local causes of action to the limits of constitutional mandates. One may very nearly say that among the United States the process of a state runs to national borders where it can constitutionally claim legislative jurisdiction.

The restrictive holding of *Pennoyer* having been chopped away, a counter-principle was needed. The Supreme Court discovered in 1947,[171] with an assist from scholars[172] and the overworked New York judiciary,[173] that the old Roman doctrine of *forum non conveniens* had crept unnoticed into American common law via Scotland. It has proved a viable doctrine to bring venue back into conflicts principles.[174] Gradually, then, Holmes' physical power has been limited and extended until it begins to accord with shared values. Except for

166. "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as these obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). This language was relied on by the Maryland court in upholding a statute allowing local suit where the only basis was a contract made in Maryland. Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 260, 107 A.2d 357, 367 (1954). See Comment, 22 U. CHI. L. REV. 674 (1955). Judge Hand believed that even prior to *International Shoe* it was "settled that a state may subject a non-resident to the jurisdiction of its courts without personal service, if the action be based upon an act of the non-resident while personally within the state." Deutsch v. Hoge, 146 F.2d 201, 203 (2d Cir. 1944) (dissenting opinion).

167. Hess v. Pawloski, 274 U.S. 352 (1927).

168. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

169. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

170. *E.g.*, Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950). See Comment, 22 U. CHI. L. REV. 674 (1955).

171. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947). The inconvenient forum doctrine has been put in statutory form empowering federal courts in diversity cases to transfer cases to another district for reasons of convenience. 28 U.S.C. § 1404(a) (1952).

172. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935).

173. *E.g.*, Collard v. Beach, 81 App. Div. 582, 81 N.Y. Supp. 619 (1st Dep't 1903). Cases are discussed in Blair, *supra* note 172, at 30.

174. If the test of jurisdiction adopted by *International Shoe* is qualified by further considerations of convenience, there seems no persuasive reason not to extend (if we have not already done so) state process throughout the nation wherever there is a prima facie claim to legislative jurisdiction. See MD. ANN. CODE art. 23, § 88(d) (1951) (foreign corporations subjected to suit for contracts made, or liability for acts done, within state); Comment, 22 U. CHI. L. REV. 674 (1955). Ehrenzweig favors interstate venue in a convenient forum. See his recent article, *The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens*, 65 YALE L.J. 289, 312 (1956).

purposes of preserving assets, attachment and garnishment have virtually outlived their utility. They were never really important in notice terms (the *Pennoyer* rationale) and, in common with overstated corporate consent and presence, have been sometimes abused.[175]

Prior to the discovery of the inconvenient forum rationale American courts had usually abjured discretion; if jurisdiction existed, the case would be heard.[176] Some common law doctrine,[177] and occasional statute,[178] attempted to limit place of trial to the old common law concept of venue—the place of relevant events or applicable law. The interpretation of "transitory" to exclude foreign trespass, so often the procedure for determining title, is also an example. The oft-repeated statement that a court could exercise no jurisdiction over foreign land without offense to sovereignty is nonsense; equity did so all the time for no better reason than that equity acts *in personam*.[179] Of course such decrees do not affect title to foreign land if the situs refuses to recognize them.[180] But, assuming the adjudicating court has taken account of the policy of the situs and has been careful not to offend it, why should the courts of the situs refuse effect? Res judicata is as valid here as elsewhere. Even if one concedes that the situs is usually the most convenient forum, and the only one which can "bind the world," it is not invariably so. And rights in real estate may come up in non-title cases, as part of a property settlement, for example, in divorce. The fact of the matter is that it is almost impossible to set up rigid venue principles that will not occasionally work out badly. The Supreme Court has refused the sanction of full faith and credit to attempts to limit adjudication of statutory liability to the courts of the enacting state.[181] It has also struck down refusals to adjudicate causes arising out of foreign statutes even where

175. In a garnishment proceeding the exemption laws of the forum generally apply. Chicago, Rock I. & Pac. Ry. v. Sturm, 174 U.S. 710, 717 (1899); 3 BEALE § 600.2. The employee of a corporation thus may get the benefit of only the lowest state statute. See Moore & Olglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557, 587 (1943).

176. See Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1239-40 (1930).

177. *E.g.*, Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N.E. 4 (1920) (expanding the usual definition of "local," as opposed to "transitory," to avoid hearing litigation difficult to try except where facts occurred). *Cf.* Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933) (the "internal affairs" rule precluding stockholders' suits against foreign corporations).

178. *E.g.*, N.Y. GEN. CORP. LAW § 225; OHIO REV. CODE ANN. § 2307.37 (Page 1953); S.C. CODE § 826 (1952). *But see* First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396 (1952) (holding Illinois statute refusing to hear wrongful death actions that could be heard at the locus, without explicit consideration of convenience, unconstitutional).

179. Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810).

180. Fall v. Eastin, 215 U.S. 1 (1909). The constitutional problem is exhaustively analyzed and discussed in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

181. Tennessee Coal, Iron & R.R. v. George, 233 U.S. 354 (1914); Atchison, T. & S.F.R.R. v. Sowers, 213 U.S. 55 (1909).

limited carefully to situations where the forum prescribed had jurisdiction to decide effectively and was willing to do so.[182]

Efforts to expand effective judicial jurisdiction beyond local power even where local law is applicable are unlikely to be recognized and enforced abroad save among sister states. It is one thing to give effect to such judgments within a federal nation of limited size with a Court available to arbitrate excessive and conflicting claims in terms of due process, interstate relations and the national interest. It is quite another in the international community where substantive standards are more variant and conflicting national interests more difficult to submerge in a concept of common welfare. But even here the protection cast over local citizens as defendants has diminished as power has factually become more diverse. Particularly in the important area of business regulation it is virtually impossible to insulate local interests from foreign law. Even individuals, in an era of rapid transportation and dispersion of wealth, are likely to find themselves potentially subject to the physical power of several states. The underlying factual probabilities are very different today than even fifty years ago, when the common assumption of suit at defendant's domicil affected theories aimed at expanding recognition of foreign "rights." Now it is as least as likely that the shoe is on the other foot, and it is the defendant who seeks immunity by claiming a right based on foreign law.

The Technical Nature of Criminal Law

As issues cease to be framed in terms of private rights conceptually untouched by conscious social policy, differences of sovereign prescriptions become more sharply defined and tensions correspondingly mount. Where explicit mandates of a sovereign closely touching its public order are involved, the political element in the international decision-making process is correspondingly heightened and intensified. The same fundamental considerations are present, but courts, understandably concerned about political involvement and the proper limits of judicial discretion, have resorted to a "territorial" concept of law which obscures the underlying principles and policies.

Punishment for criminal acts has never been considered by either common or civil law as "transitory" or "extra-territorial."[183] Each state punishes only acts criminal by its own law; there is never any choice of law problem as such—though it is entirely possible for the same acts to constitute a crime by the law of more than a single state.[184] Territoriality enters the legislative picture be-

182. First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396 (1952); *cf.* Hughes v. Fetter, 341 U.S. 609 (1951) (Wisconsin exclusionary statute not limited to cases where service at place of tort was possible).

183. *E.g.*, 2 MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1906) ("no principle better settled than that the penal laws of a country have no extraterritorial force."); Research in International Law under the Auspices of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 436, 469 (Supp. 1935) (hereinafter cited as Harvard Research on Jurisdiction).

184. "[I]t is quite impracticable under present conditions to establish in all cases a simple jurisdiction. . . ." Harvard Research on Jurisdiction 603.

cause local statutes have generally been drafted, or interpreted, to cover only offenses occurring within territorial limits; that is, where at least some of the acts constituting the crime, or closely related to it, took place within the geographical boundaries of the sovereign.[185] At common law venue was laid at the "place" of the crime, and, as in private law matters, venue merged into jurisdiction and joined forces with sovereignty. In civilian nations laws relating to the *ordre public* were from the outset classified as "territorial," and thus not entitled to extra-territorial enforcement by other states. Since crimes in both systems were considered offenses against the sovereign, there was a conceptual barrier to considering a murder, for example, in State A an offense against State B. This idea was inverted and given positive expression by saying that because each state was sovereign within its territory, no other state could punish conduct occurring there without derogating from, and thereby offending, the sovereignty of the territorial state.[186] The time-honored exception, and transparent theoretical inconsistency, is the competency of a state to punish its own nationals for acts committed abroad. This latter "jurisdiction" is widely regarded as subsidiary to that of the *lex loci*,[187] though some consider it concurrent, and a few, if one may judge from their refusal to extradite nationals without any obligation to prosecute locally (though claiming nonetheless the right to try foreigners for crimes committed in their territory), still pursue a policy of catch-as-catch-can.[188]

Obviously, as in the case of conflicts doctrine, the key to territoriality lies in defining the connecting link. Since the purpose of criminal prosecution is principally protective, and since states have been almost unbelievably provincial and backward with regard to international assistance in criminal prosecution,[189] there has been a good deal of cheating around the edges in terms of extending one's own competency in order to meet the problems of rapid communication,

185. *Id.* at 480-84.

186. *E.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). See Leflar, *Extrastate Enforcement of Penal Claims*, 46 HARV. L. REV. 193, 198 (1932); Levitt, *Jurisdiction over Crimes II*, 16 J. CRIM. L. & CRIM. 495, 509-10 (1925). The classic discussion of territoriality is contained in the several views of the evenly divided court in The Case of the S.S. "Lotus," P.C.I.J. Ser. A, No. 10/9 (1927) (*e.g.*, at 56, Lord Finlay's oft-quoted, "A country is no more entitled to assume jurisdiction over foreigners than it would be to annex a bit of territory. . . .").

187. See Harvard Research on Jurisdiction 531. The conclusion there is based on the extent to which the nationality principle is circumscribed with safeguards; *e.g.*, also punishable by *lex loci delicti*. Some states assimilate domiciliaries to nationals. *Id.* at 533.

188. See Research in International Law under the Auspices of the Harvard Law School, *Extradition*, 29 AM. J. INT'L L. 15, 238 (Supp. 1935) (hereinafter cited as Harvard Research on Extradition). A greater number of states exhibit an unwillingness to extradite nationals but concede a duty to prosecute locally. *Id.* at 236.

189. It was not until the last half of the nineteenth century that extradition treaties became at all widespread. *Id.* at 41-42. No comprehensive steps were taken to secure investigation and judicial assistance until recently. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 530-31, 540-43 (1953).

transportation and resultant interdependency. The fetish for a territorial link, coupled with common law and constitutional venue and jury requirements, has led to attempts to maintain the fiction that each state punishes only crimes committed locally. Statutes have, however, provided for local punishment if any of the acts or omissions connected with the crime, although not in themselves doctrinally significant, have been committed locally.[190] This has been bolstered by other statutes redefining "crimes" and creating new ones to provide a geographical point of reference, however slight, within the boundaries.[191] Conspiracy and attempt doctrine and principal-accessory concepts have also been used to reach far abroad.[192] Only occasionally has ingenuity failed when there was pressure to find a territorial act, and in these cases, counterfeiting and offenses against state security, the protective principle has been frankly espoused.[193] Some maintain that a state has competency to try anyone for an offense against its nationals (or their property) under its own law, even though they were located outside the state at the time of the crime.[194] This view, however, has been severely criticized as too extreme.[195] The usual argument is premised on the assumption that the acts were not criminal where committed. It could also be argued that it may put too heavy a burden on the defendant in terms of producing witnesses.

The result of these expansions of jurisdiction through redefinition of both crime and its locus has been to make more than one law applicable to many offenses, a situation clearly in conflict with the theories of exclusive territorial sovereignty and equally at odds with the fallacy that one law must govern all legal relationships. Criminal statutes have not attempted to disguise the tenuous connection with territoriality. Virtually any act or omission within a state is sufficient if there is an intent to commit a crime somewhere;[196] the converse of this is "objective territoriality," which admits the competence of a state to

190. Authorities are collected and analyzed in Harvard Research on Jurisdiction 488-508; Berge, *Criminal, Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931). The Harvard Draft Convention adopts the "in whole or in part" terminology of many statutes, and expressly rejects the view that the territorial acts must in themselves be crimes or attempts. Harvard Research on Jurisdiction 480, 499.

191. *Id.* at 491, 494; Cook, *The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction*, 40 W. VA. L. REV. 303, 316-21 (1934).

192. See Harvard Research on Jurisdiction 503-08.

193. *Id.* at 543-63. It is suggested there that the justification lies in the failure of the territorial sovereign to enact laws protecting foreign states as well as itself. *Id.* at 552.

194. Known as the "passive personality" theory, asserted in some form by several states, but rejected by the Harvard Draft Convention. *Id.* at 445.

195. The only *causes célèbres* of modern times, the *Lotus* and *Cutting* cases, involved, respectively, Turkish and Mexican statutes drafted in "passive personality" language. In neither did prosecution or the particular facts require such broad language. Judge Moore was a particularly severe critic of the theory, dissenting from the court's opinion in *Lotus* and protesting Cutting's prosecution by Mexico, solely because of the language of the statute. See The Case of the S.S. "Lotus," P.C.I.J., Ser. A, No. 10/9, at 89-93 (1927); MOORE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE 34 (1887).

196. Called "subjective territoriality." See Harvard Research on Jurisdiction 484-94.

punish a person who, though all his acts are outside the territorial limits, "willfully puts in motion a force to take effect in it."[197] The latter is distinguishable from an unqualified protective approach and also from the so-called "passive personality" theory, which would by local criteria of crime and local trial protect nationals abroad, but it is nonetheless a formula capable of considerable expansion.[198] Lack of clarity, I would suggest, is inevitable so long as the theory is phrased in terms which, though strained, seek to give it a territorial flavor by using fictions that confuse physical acts within the state with the consequences of the proscribed conduct; and which indiscriminately merge considerations of venue, notice and legislative policy.

One may concede without argument that the limits of power are territorial, with only narrow exceptions, at the level of administration. Effective prevention of and punishment for crime depends upon being able to lay hands on the alleged culprit. There is, too, general agreement that a state is primarily interested in the punishment of acts or omissions which directly affect its own safety, that of persons and property within its boundaries, or that of its citizens, domiciliaries or residents. One could, however, reasonably maintain that there is a common interest in punishing "crime" irrespective of where it takes place, at least to the extent that there is agreement on what acts are "criminal," what is reasonable punishment and what constitutes fair procedure.[199] The policy that crimes committed in one state are of no concern to others is a short-sighted and self-defeating one that, absent treaty, results only in harboring and protecting criminals. Fortunately the pressure of mutual interest led to extradition provisions in the Constitution (significantly, in the same article which provides for full faith and credit) and to a rash of extradition treaties after 1850. Some provincialism remains with regard to extradition of nationals, but by and large states are now willing, on a reciprocal basis, to use their power in aid of a foreign state when the acts would be regarded as criminal by substantive domestic standards.[200]

Acts Generally Regarded as "Criminal"

A "universalist" view with regard to acts or omissions generally regarded as criminal would permit prosecution wherever the offender could be brought into custody. The failure to take this position can be rationally explained and

197. MOORE, *op. cit. supra* note 195, at 23. This principle was applied by the (evenly divided) court in the *Lotus* case. See note 195 *supra*. Nothing could make more clear the futility of a logical approach than a reading of the variant opinions in that case. See Cook, *The Application of the Criminal Law of a Country to Acts Committed by foreigners Outside the Jurisdiction*, 40 W. VA. L. REV. 303, 323-26 (1934).

198. It becomes virtually indistinguishable from the protective principle in its "extreme applications." Harvard Research on Jurisdiction 494.

199. Usually labeled the "universalist" or "cosmopolitan" theory. See Levitt, *Jurisdiction over Crimes*, 16 J. CRIM. L. & CRIM. 316, 495 (1925).

200. See Harvard Research on Extradition 80-86. The Draft Convention adopts the principle of "double criminality." *Id.* art. 2. Bilateral extradition treaties either adopt this

supported by the difficulties of procuring and presenting evidence at a distance from the place of the alleged acts, and by the consequent unfairness to the defendant. The refusal to extradite absent reciprocal treaty obligations is more difficult to justify, but can be explained partially by the protection customarily thrown around the use of public power in criminal cases and the judicial requirement for explicit authority to deprive an individual of freedom. The almost entirely accepted practice of not extraditing for acts not locally considered crimes is similarly explicable. In addition, it is probably desirable to reserve judgment with regard to alleged crimes which might conceivably offend one's sense of justice.

Insofar as extradition treaties and practices exhibit a general willingness to use local power in aid of prosecuting common crimes one could say with some accuracy that, given substantive limits, the problem is simply one of venue. The common interest in criminal prosecution has to this extent superseded jealousies founded on sovereignty and the irrational position that crimes committed in one state are of no concern to others. So viewed criminal prosecution shows similarity to conflicts doctrine with the difference that selecting a fair and convenient forum is particularly important. The failure to extend extradition the full length of a foreign state's claims is not unlike the sometime refusal to apply foreign law in private controversies, and is similarly based on the public policy of the forum. In criminal matters, however, the public policy is placed beyond the power of the judiciary to determine, and extradition treaties, consistently with customary principles of specificity, set quite narrow limits upon judicial discretion.

The continual reaching out, or "self-help," in criminal jurisdiction results partly from the failure to devise efficient methods of administrative assistance across international boundaries in terms of both prosecution and investigation, partly from the desire to extend one's policy as far as possible. To the extent that the conduct itself is commonly considered criminal, jurisdiction amounts to no more than broadened venue and is objectionable only insofar as it might, on particular facts, put an unfair burden on defendant in terms of securing evidence, or possibly, be a less efficient place to prosecute for the same reason. By thus allocating responsibility on a multi-state basis when the criminal conduct has more than local contacts, the general level of law enforcement is upgraded and, one might hope, the groundwork laid for future administrative cooperation. Since each state has by its own "law" an interest in prosecution, exchange of evidence and cooperative investigation is encouraged. The criminal, wherever prosecuted, is protected by the almost universal acceptance of double-jeopardy, or *non bis in idem*,[201] doctrine. It is worth noting that there is no insistence that one "law" govern criminal conduct, and, for extradition pur-

principle or list extraditable offenses, in which case they will be qualified by a double criminality approach. See examples contained in *id.* app. III and V.

201. See Harvard Research on Jurisdiction 602-16. The Roman doctrine is somewhat broader than that incorporated in the Fifth Amendment.

poses, variations in details of punishment prescribed or of conduct considered criminal are unimportant if substantial equivalency exists.[202]

Conduct Not Generally Regarded as "Criminal"

Where the conduct is not universally proscribed different policies are present. One policy involves the fairness of subjecting defendant to punishment in accordance with prescriptions not within his reasonable foresight at the time of acting. While *mens rea* is not a necessary ingredient of "crime," there is a widely shared belief that in its absence there ought to be quite clear notice that the activity in question is prohibited—the clarity of the notice varying directly with accepted ideas of individual morality and the harshness of the punishment. Here "territoriality" may serve a real and useful function since physical contact with a foreign state constitutes some notice of its laws and customs to the extent, at least, of putting one on inquiry. An individual traveling abroad is conscious of an obligation to obey local laws, and generally knows that they may differ somewhat from those to which he is accustomed. A business enterprise is perhaps even more aware of potential prescriptions with regard to "business done" in a foreign country, at least where it is more than incidental and isolated. Particularly is this true where the conduct proscribed is regulated not by a single state but by many, though perhaps not by all, thereby increasing general awareness of areas of potentially prohibited acts. It is, for example, common knowledge that the sale of securities or insurance, the practice of certain professions, compliance with pure food and drug laws, or the number of wives one may have at the same time, are often subject to criminal sanctions. How much territorial contact is necessary to put one on notice depends on the nature of the act and the notoriety of the proscription. Where the "impact" within a foreign state is reasonably foreseeable and the matter is one that is often subject to criminal sanction, even though not so regulated at the place of acting, it may be sufficient to subject the actor to the legal process of the place of impact if he can be there taken into custody, without objection by other states.[203] The case is, of course, even stronger where the particular actor intends to violate the law in question, for here the general interest in order and respect for law is put in issue. Some physical act within the territory has no

202. The crime may be differently denominated as long as the contact would be criminal by both laws, and punishment beyond a set minimum at approximately a felony level (one or two years) would be common to both laws. There is some precedent in England and the United States *contra* where the treaty contains named crimes. See Harvard Research on Extradition 81-86.

203. Distinguished jurists have attempted to limit "objective territoriality" by requiring some close connection between acts and effect, or impact. See, *e.g.*, MOORE, *op. cit. supra* note 195, at 34 (acts must be "brought, either by an immediate effect or by direct and continuous causal relationship, within the territorial jurisdiction of the court."); M. Loder in The Case of the S.S. "Lotus," P.C.I.J., Ser. A, No. 10/9, at 34 (1927) (dissenting opinion) (justifiable only "where the act and its effect are indistinguishable"). In addition to the semantic and practical difficulties of such a test, I believe it does not reflect the valid policy suggested in the text, while the cases themselves may have it in mind.

magic in itself. The real issue is due process—the fairness of subjecting the offender to rules that were unfamiliar to him, and the fairness, perhaps, of the foreign state as the place of trial.

The second major policy consideration where the crime is not one commonly recognized as such concerns the quality of the prohibition and punishment. Criminal behavior goes to the very roots of social organization, and, because individual freedom is often in issue, the limits of tolerance are narrower than in other fields of law. In many countries certain activities are highly favored and any public encroachment by way of limitation is viewed with jaundiced eye. Take, for example, freedom of speech and press. A foreign law with regard to criminal libel which attempts to touch newspapers and radio broadcasts "published" elsewhere is likely to be claimed a violation of "territorial sovereignty."[204] In these and similar cases where a conflict of policy exists, there is much more at stake than mere venue. Some effort to assign competence on a territorial basis may be useful, but only if it helps to prevent sharp conflicts. Resolution at a substantive level is preferable. It is, for the same basic reason, usually urged that one state should not punish for acts committed outside its territorial limits when the acts are, in some positive sense, required or, more doubtfully, privileged;[205] conversely, courts have been reluctant to order a defendant in a civil case to do some act abroad which is or may be in contravention of the law of the sovereign in whose territory he must perform.[206] In part this self-denial relates again to ideas of fairness (damned if you do and damned if you don't), but it also reflects a conscious self-restraint by the judiciary where other states have different views strongly held and potential power to enforce.

As the quality of the foreign prescription increases in its offensive aspects any ideas of "territoriality" are cast aside, and political protest goes directly to the nature of the prescription rather than its place of occurrence. This is so particularly if one's own nationals are involved, but today even with regard to foreign nationals, alleged "denials of justice" are likely to be subject to diplomatic protest.[207] There is a gradation of policy differences, and territorial com-

204. The fact that the *Cutting* case, MOORE, *op. cit. supra* note 195, was so vigorously protested by the United States is, I think partially if not wholly, explicable in terms of the freedom of press. Cutting was prosecuted and imprisoned for publishing in the United States (and in Mexico) a newspaper account libeling a Mexican.

205. See Harvard Research on Jurisdiction 616-17. The scope of privilege is hard to pin down; in a sense whatever is not required or forbidden can be said to be "privileged." It should be analogized to "required" in the context here used. See *id.* at 466-68.

206. RESTATEMENT § 94; DICEY, CONFLICT OF LAWS 637 (6th ed., Morris 1949). So strong is the idea of territorial jurisdiction that there is a general reluctance to order acts done in another state, although there is considerable precedent for such a decree. See GOODRICH 219-22.

207. The distinction between protesting treatment of nationals and treatment of others, particularly nationals of the offending state, is based on a policy of caution in setting precedent that may operate to limit one's own sovereignty and that may jeopardize other political objectives; a sense of one's limited power in the world community and a desire to hold one's fire for matters of more direct concern; and a theory of international law, reflecting these policies, which views it as governing only inter-sovereign relations and not indi-

petence serves as a sort of intermediate position. Given a sharp conflict not going to basic issues of human rights, territoriality is employed as a rationale for claiming and recognizing dominant interests on the part of one state. Differences are tolerated and resolution in fact depends upon the ability of the prosecuting state to enforce its prescriptions. Admittedly there is nothing very satisfying in thus leaving matters to chance, but surely we can accept the imperfections of political institutions in the world community without perpetuating confusion between the territorial organization of law enforcement and the policy aims of legal doctrine.

Territorial Power and Public Policy: Political Questions

Where the territorial interpretation of legislation goes beyond fairness in terms of notice and venue to an attempted allocation of sovereign competency to determine substantive policy, we move from judicial to predominantly political norms, with all the limitations on the judicial function that necessarily follow. Particularly perplexing are extensions of police power resulting in economic regulation of business and trade or the seizure of property. Domestically policies dictating such action are arrived at through legislation, and courts have retreated to a test of factual reasonableness that rarely leads to constitutional veto. If it can be shown that the regulation bears a factual relationship to health or welfare and is equitably administered, it likely will run judicial fire. Presumably the same constitutional tests and the same interpretative criteria govern business done internationally or owned or conducted by foreigners. But the national interest is here more obscure, for what benefits the citizens of one state may do so at the expense of others. Extra-territorial application of our antitrust laws, the administration of exchange controls and nationalization of industries are among the more important current problems. Where what is sauce for the goose is something else for the gander, power to enforce locally through unilateral determination of appropriate policy is unlikely to prove a mutually satisfactory solution.

Antitrust Prosecutions

There is little difficulty in fitting past antitrust prosecutions concerned with international trade into criteria of substantive and procedural due process. Foreign officials as well as foreign businessmen may have little sympathy with

vidual rights. Under this theory the sovereign must establish its "interest" in order to have, so to speak, procedural standing. The inadequacies of these policies and this theory have been demonstrated by many. See, especially, McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 YALE L.J. 60 (1949). The notion that sovereigns should not intervene in the "internal affairs" of other states is another facet of the idea of territorial sovereignty. But it scarcely requires documentation that in an interdependent world the scope of external affairs is ever smaller, and that deprivations of fundamental human rights, particularly where quantitatively significant, cannot—as the General Assembly has increasingly recognized—be ignored.

Sherman Act philosophy and even less understanding of its method and scope, but I cannot believe that those subject to prosecution have not been instructed by counsel as to the potential hazards they run.[208] Their complaint is not based on their own lack of knowledge, but rather on the lack of respect shown for the foreign laws or practices they raise in defense. Only where it is impossible for them to produce evidence in their behalf, or to comply with a decree, without being prosecuted elsewhere, do they present a convincing case.[209] For whatever relevance it may have, prosecutions to date, with the possible exception of *Alcoa*[210] and *ICI*,[211] have fitted comfortably enough within existing jurisdictional doctrine.[212] More important, the practices proscribed have had an actual or potential impact on the trade and commerce of the United States sufficient to legitimize some measure of governmental control. The difficulty is that they have had, too, an important impact on the economies of other nations, which understandably resented unilateral action by us. Oddly enough, *Alcoa*, the most difficult case to bring within jurisdictional doctrine, had the least substantive effect outside the United States. *ICI*, on the other hand, was widely regarded by the United Kingdom press as an attempt to foist American nylons on a hardpressed and dollar-poor economy.[213] And there is increasing evidence

208. *E.g.*, United States v. General Elec. Co., 82 F. Supp. 753, 891 (D.N.J. 1949). In its able opinion the court pointed out that the Dutch defendant, Phillips, had knowingly participated in a scheme enabling General Electric to dominate the United States markets with actual knowledge of the antitrust laws.

209. In the General Electric prosecution, see note 208 *supra*, Phillips was excused from producing records other than those located in the United States for fear of "international complications." United States v. General Elec. Co., 115 F. Supp. 835, 851-52, 878 (D.N.J. 1953). United States' attempts to investigate alleged conspiracies have been thwarted by direct prohibitions of foreign governments against their domestic corporations producing documents in response to United States subpoenas. See, for example, the prohibitions issued by the United Kingdom, Netherlands, France, India and Palestine in the 1952 oil investigation. Transcript of Record, pp. 509, 570, 595-667, 730-33, *In re* Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952).

210. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

211. United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951).

212. Even critics concede as much. See Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954) (claiming the objective territoriality, or impact, theory of *Alcoa* and *ICI* a violation of international law).

213. The district court decree required du Pont and ICI to grant for reasonable royalties nonexclusive immunity under foreign licenses to applicants to import into any foreign country any common chemical product lawfully manufactured in the United States. The effect was to destroy the exclusive territorial monoply of BNS in the United Kingdom and allow United States exports to compete with local British production. British patent law views the licensing required by the American decree as an abuse of the patent since it tends to allow imports to compete with domestic production. See Note, 66 HARV. L. REV. 925, 926 (1953). Great Britain could, of course, have set up effective exchange regulations or tariff barriers to American imports, which would have had an identical restraining effect on United States commerce. This consideration obviously influenced the Court of Appeal. British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd., [1953] 1 Ch. 19, 25 (C.A. 1952).

that our efforts at Sherman Act enforcement are regarded by others as an unwarranted interference in their internal affairs.[214] Market division and price fixing may be offensive to widely held (though less widely than before) ideas of economic liberalism, but so too are tariffs, subsidies, currency controls and quotas. Gross exploitation of domestic consumers and competitors by domestic or foreign businessmen may violate trade conspiracy doctrine in many countries, but such laws are not interpreted and enforced with anything approaching the vigor of the Sherman Act.[215] And exploitation of foreign markets has almost never been viewed as harmful to domestic interests. In an era of economic nationalism and struggle for foreign markets most states have attempted to carry water on both shoulders, seeking to promote national industry at home and abroad without regard to foreign interests or the needs of other countries.

Whether or not the United States could fairly be accused of extending its domestic policies beyond legitimate domestic interests, it appears to formulate its decisions without explicit consideration of the legitimate interests, and somewhat antagonistic views, of others. Extension of anti-cartel policy to world trade is clearly an objective of American foreign policy that is shared, if at all, with only moderate enthusiasm and considerable qualification by most foreign governments. The gap is sufficient to be called a genuine conflict of policy, in method and degree if not always in ultimate objectives. Against the presumed benefit to consumers of competitive pricing and quality, and the protection ostensibly offered economically weaker competitors from "unfair" practices, some nations weigh with skepticism the adjustments of their economies to the full force of competition in terms of the capacity to survive in the world market, the impact upon balance of payments, domestic price structure, and ultimately local employment and national self-sufficiency.[216] Even those who accept liberalism at home are less confident of its desirability where the competition is foreign. Then, too, there are political difficulties in imposing peculiarly American prac-

214. The *ICI* decree was colorfully labeled "judicial aggression" by a Canadian newspaper. See Timberg, *Extraterritorial Jurisdiction under the Sherman Act*, 11 THE RECORD OF ASS'N OF BAR OF N.Y. 101, 110 (1956); Whitney, *Anti-Trust Law and Foreign Commerce*, 11 *id.* 134, 135. Government comment has been somewhat more temperate. See, for example, the statement of the Conservative Government to the House of Commons with regard to the subpoena *duces tecum* served on Anglo-Iranian by the Justice Department, reported in *Comity and Oil Companies*, 165 THE ECONOMIST 556 (1952) (inconsistent with international comity).

215. Laws are collected and discussed in U.N. ECONOMIC AND SOCIAL COUNCIL OFF. REC. 16th Sess., Supp. No. 11 A, B (Doc. No. E/2379 and E/2379/Adds. 1 and 2) (1953); DEPARTMENT OF STATE, REPORT TO THE SUB-COMMITTEE ON MONOPOLY OF THE SELECT COMMITTEE ON SMALL BUSINESS OF THE UNITED STATES SENATE, FOREIGN LEGISLATION CONCERNING MONOPOLY AND CARTEL PRACTICES (1952); Wengler, *Laws Concerning Unfair Competition and the Conflict of Laws*, 4 AM. J. COMP. L. 167 (1955).

216. "Cartel controls are supplements or substitutes for the State's control of trade by tariffs, export and import licenses, trade agreements, anti-dumping laws, and the rationing of foreign exchange." Edwards, *Economic and Political Aspects of International Cartels, A Study made for the Subcommittee on War Mobilization of the Committee on Military Affairs*, S. Monograph No. 1, 78th Cong., 2d Sess. 44 (1944).

tice and standards—not because the standards are demonstrably unsound or inapplicable to foreign economies (though this is possible),[217] but because they are a departure from more common norms of law and administration and are new to foreign businessmen and officials.[218] Conduct we proscribe is elsewhere tolerated and even positively approved. Methods we employ to determine violations are elsewhere regarded as the grossest violations of privacy.[219] Inevitably a good measure of what anyone puts into "justice" consists of experience, familiarity and expectation.

It is self-evident that anything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States. Arguably the United States is most interested in those practices which, as in *Alcoa*,[220] affect domestic markets, and somewhat less concerned about the conduct of American firms engaged in export or production abroad, neo-mercantilists to the contrary notwithstanding. But even this proposition accepted—and its premise is highly dubious in view of the complex, worldwide industries commonplace today—it would amount to saying that those practices that most concern us are likely to be those most difficult to investigate and control. The physical power of the United States and common jurisdictional doctrine have no relationship to the international trusts most urgently, from our value perspective, in need of busting. Even as matters now stand there is little hope for an effective implementation of Sherman Act philosophy without foreign assistance in investigation and enforcement.[221]

In point of fact United States antitrust policy goes beyond any demonstrable impact on American markets. It is a policy that the government has vigorously recommended through political channels to the international community.[222] It is our contention that it is essential to achievement of the common objective of increased productivity on a worldwide scale. Thus our political target is an international antitrust agreement reasonably close to the Sherman Act in function and effect. Apparently it is the theory of the executive branch that prosecution to virtually the full extent of local power will create pressures for favorable compromise. To do so involves, of course, a risk to other foreign policy objectives. The theory may be unwise, but it is scarcely illegal. The question

217. See Wengler, *supra* note 215, at 188. A good deal of European opinion holds that the large population and area of the United States make possible a competition between American firms, whereas the problem for Europe would be urging competition at home between a domestic and foreign producer.

218. See Haight, *supra* note 212, at 644-51.

219. See, *e.g.*, Societe Internationale v. Brownell, 225 F.2d 532 (D.C. Cir. 1955) (Swiss federal attorney seized documents subpoenaed by district court on ground their production would constitute criminal economic espionage under Swiss law). *Cf.* note 209 *supra*.

220. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

221. See REPORT OF THE ATT'Y GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 98, 100 (1955) (hereinafter cited as ATT'Y GEN.'S REPORT).

222. See *id.* at 101-08 (summarizing our post-war efforts through United Nations channels); DEPARTMENT OF STATE, REPORT, *supra* note 215, at 178.

of whether or not it is politic is one that should be left to the political departments of government.[223]

If my analysis of precedent is correct, territoriality is a synonym for reasonable notice, venue and legitimate sovereign concern. There is no very useful purpose in cataloguing physical acts within the United States, or using verbal formulae such as the locus of the conspiracy, the requirement of a local act, and so forth, save as they have some factual relevance to the notice question. It is of far greater importance that defendant did in fact affect the "trade and commerce of the United States" directly and materially under circumstances that should create an awareness of American prescriptions.[224] Actually, in the antitrust context, the argument premised on lack of knowledge of American antitrust laws is virtually a caricature of reality. The problem more likely is that knowing of the Sherman Act offenders carefully stay beyond the limits of our effective process.[225]

How direct and material the impact must be on American trade and commerce is more difficult. There is precedent for a thin reading of that phrase in an analogous statute where there was an evident attempt to evade American law.[226] Presumably the impact should be sufficiently substantial to legitimize unilateral American conduct. Arguably it should have a somewhat more solid factual content where a predominantly foreign-owned corporation is involved than where local enterprises seek cover in foreign law. But, save possibly on the notice issue, it is difficult to see why. Once a business, domestic or foreign, has reason to know that its conduct is or may be reprehended by American law, the problem is simply one of apprehension.[227] The judicial function stops once it is established that standards of individual justice, or due process, have been met.

Absent clear political guidance courts might well essay a more moderate, hence diplomatic, approach. But in *Timken*[228] the majority wisely rejected a

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223. Prosecutions have State Department sanction. See ATT'Y GEN.'S REPORT 94.

224. See Carlston, *Antitrust Policy Abroad*, 49 NW. U.L. REV. 569, 582 (1954); *cf.* Haight, *supra* note 212, at 648-49.

225. *E.g.*, the diamond cartel. See Comment, 56 YALE L.J. 1404, 1411-14 (1947).

226. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

227. The Attorney General's Committee recommends a double standard. Where Americans are involved it would require "such substantial anticompetitive effects . . . as to constitute unreasonable restraints"; where foreigners alone are involved, restraints "only where they are intended to, and actually do, result in substantial anticompetitive effects." ATT'Y GEN.'S REPORT 76. This goes further in terms of "notice" than I think necessary. But the Committee makes this allocation not expressly for reasons of due process, but rather "international complications." *Ibid.*

228. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951). See also United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). The issue was not jurisdictional in the narrow sense of effective control over the domestic corporations and foreign subsidiaries involved, but did involve interpretation of the scope of the Sherman Act to foreign activities. Defendants in both cases raised a question as to the legitimacy of their acts in view of the difficult conditions of international trade in an era of governmental regulation of exchange, imports and exports, and analogous

"rule of reason" which, in the context of contemporary international business, might have encouraged resort to the protection of foreign legislation. Conceivably, despite the difficulties of formulating economic criteria translatable into legal norms, a balancing of sovereign interests would be sound American policy. Perhaps we should be circumspect in prosecuting restraints that, if removed, would open up a foreign market to American exports when it is already hard-pressed for dollar exchange.[229] Arguably, too, our standards are such as to make more difficult the carrying out of other equally important aspects of our foreign economic policy; for example, encouraging American investment abroad.[230] But such questions are not properly within the judicial function and are well beyond even the advanced fact-finding process of judicial administration of the antitrust laws. An approach that attempted to determine case by case what was "reasonable" conduct in view of foreign laws and the facts of cartelization in the world economy would seriously weaken our political hand without adding certainty or predictability to the Sherman Act's operative scope.[231]

Foreign Acts of State: More Political Questions

We have already noted that judicial self-restraint is most rigorously observed when courts are called upon to "reverse" an executed judgment or other official act of another state.[232] Several policies underlie this practice. In a legal system

restrictions, and sought a finding that the restraints were, as a consequence, "reasonable." See ATT'Y GEN.'s REPORT 77-83; Carlston, *Antitrust Policy Abroad*, 49 NW. U.L. REV. 569, 591, 713, 717-23 (1954); Carlston, *Foreign Economic Policy and the Antitrust Laws*, 40 MINN. L. REV. 125, 139-41 (1956).

229. See notes 213 and 214 *supra*. But these are political questions. The prosecution of foreign corporations and the recommendations of the government as to an appropriate decree are matters coordinated by Justice with State. See ATT'Y GEN.'s REPORT 94. If those charged with diplomacy are unconcerned about the political repercussions it is difficult to see any need for judicial caution.

230. *Timken* has caused real concern. See ATT'Y GEN.'s REPORT 92-98; Burns, *Report on Foreign Trade Conferences Abroad*, 1 ANTITRUST BULL. 303 (1955); Kalijarvi, *Relation of Antitrust Policies to Foreign Trade and Investment*, 33 DEP'T STATE BULL. 538, 540-41 (1955). On the other hand, cutting off the flow of direct investment dollars might encourage foreign countries to change their laws to permit United States participation on a competitive basis without resort to market division and other proscribed restraints.

231. I would concede that there may be circumstances where a company is so economically squeezed by conflicting national policies that there may be no practical alternative which does not violate the law of one of the countries involved. But to retract all the way to a "rule of reason" for territorial division of markets, price-fixing, and other of the more heinous "per se" offenses seems to open wide the gates.

232. The leading case with regard to foreign "Acts of State" is Underhill v. Hernandez, 168 U.S. 250, 254 (1897) ("[T]he acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."). The suit was in tort for acts of an army officer acting in his official capacity, and, on its facts, could be viewed as merely one familiar aspect of sovereign immunity. But Act of State is broader than sovereign immunity. First, it protects those

composed of multiple decision makers of equal formal authority tolerance is an essential ingredient. So long as litigants of all nationalities must depend on national courts to adjudicate controversies involving international facts and national policies there is a common interest in formulating acceptable standards of res judicata. These standards ought to and do extend beyond executed judgments or decrees, but they would rarely fall short of this minimum. The objective of stabilizing human relationships argues as persuasively internationally as locally for an end to controversy. Concern for the individual makes it imperative that the risk of conflicting prescriptions be minimized. Thus unfairness to litigants or to others relying on the international integrity of sovereign decisions and the doubt that would reciprocally be cast upon one's own territorial acts are convincing arguments for self-restraint.

In addition, and of equal stature, are the political questions raised. When sovereign power exercised within one's own territory is brought into question elsewhere, sensibilities are offended. The power value is at stake for the national community concerned, and, in terms of precedent, for those who question it as well. To undo what another state has officially done obviously involves inter-sovereign relationships, and can be justified—if at all—only where fundamental standards of substantive or procedural due process have been violated. Absent diplomatic guidance, there is a real question of judicial competency. In domestic cases the Constitution as read by the Court sets enforceable limits to state abuse of power and to political differences. Internationally, restraints, where not self-imposed, are the product of diplomatic pressure. Hence diplomats play a role for which there is no valid domestic analogy in determining the political wisdom of exercising jurisdiction to "reverse." Before a court may intelligently inquire into the merits of a claim it needs to consider the larger consequences of "reversal." For these political questions it urgently needs the informed views of the State Department.[233]

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whose title to property rests on the territorial exercise of sovereign power by government officials. *E.g.*, Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (both involving purchasers for value of property confiscated in Mexico by revolutionaries during successful Carranza revolt). In the second place, Act of State maintains that it cannot be wrongful under United States law to induce a foreign government to take executive or legislative action. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Frazier v. Foreign Bondholders Protective Council, Inc., 283 App. Div. 44, 125 N.Y.S.2d 900 (1st Dep't 1953).

English courts have approved *Underhill* and *Oetjen*. Paley Olga v. Weisz, [1929] 1 K.B. 718 (C.A.); Luther v. Sagor, [1921] 3 K.B. 532 (C.A.) (both cases involving confiscation of Russian-owned property in Russia). Dicey-Morris limits Act of State to sovereign immunity cases (the *Underhill* facts), classifies other cases under "political" laws. He is critical of the protection accorded territorial confiscation. See DICEY, CONFLICT OF LAWS 152, 156-57 (6th ed., Morris 1949).

European courts apparently do not follow the *Oetjen* view of Act of State, attributing less significance to the distinction between territorial and extra-territorial acts. See Wortley, *Problèmes Soulevés en Droit International Privé par la Législation sur L'Expropriation*, 67 RECUEIL DES COURS 343, 378-421, 423-25 (1939) (a comparative analysis by the editor of the relevant section of DICEY).

233. See note 232 *supra*. The view taken in the text is consistent with that of the

Unfortunately, a largely irrelevant separation of powers dogma has somewhat clogged channels of communication between courts and executive. When this is the case or when the executive is embarrassed to express publicly its view, the judiciary must seek, in the practices and known policies of the government, clues as to the political desirability of inquiry. It is through this door that diplomatic practices of "recognition" have infiltrated legal doctrine—doctrine supplemented by the views of the court, overstated in *Pink*,[234] that equate public policy with foreign policy as determined (*semble*) by the executive. The marriage of "law" to foreign policy is today clumsily consummated by recognition, de facto recognition and recognition of foreign acts of state.[235]

Court of Appeals for the Second Circuit. Bernstein v. N.V. Nederlandische-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). One aspect of Act of State is the political one of whether or not it is wise to seek to right a wrong done by a foreign government through judicial channels. Commentators who would ignore the political aspects cannot see the relevance of executive policy, and confuse the merits with the political question. *E.g.*, Olmstead, *International Law, 1954 Annual Survey of American Law*, 30 N.Y.U.L. REV. 1, 12 (1955) ("it is regrettable that the executive must lead the courts by the hand").

234. United States v. Pink, 315 U.S. 203 (1942). The issue was the effect to be given Russian decrees confiscating property situate in the United States. Under the Litvinov Settlement the United States government agreed to abandon pursuing the claims of its citizens as to property seized in Russia and to settle such claims from assets of Russians in this country. The New York courts refused to turn over such property to the United States, holding it for the original owners on the grounds that the Russian decrees violated New York "public policy." The Supreme Court reversed on the ground that the states could have no public policy which contravened the foreign policy of the federal government. But it was extremely difficult to support convincingly the view that another distribution of the assets would affect our foreign policy (*i.e.*, amicable relations with Russia), when the only effect would be to distribute the assets to foreign refugees rather than to use them as a fund for wronged Americans. See also Note, 48 COLUM. L. REV. 890 (1948).

235. The potential doctrinal significance of recognition lies in its conceptual connection with such familiar references as "sovereign," "state," "official" or "law." There is much debate as to whether it is "declaratory" or "constitutive"; *i.e.*, whether or not a foreign government exists in the forum if not recognized. See CHEN, THE INTERNATIONAL LAW OF RECOGNITION 13-15 (1951); LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW c. 4 (1947). Practices can be more profitably described in terms of access to arenas of formal authority. See McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 193-98 (1953).

An unrecognized sovereign has no standing to sue in American courts. Russian Soc. Fed. Sov. Rep. v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); and see Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938).

A *de facto* government is entitled to plead sovereign immunity. Wulfsohn v. Russian Soc. Fed. Sov. Rep., 234 N.Y. 372, 138 N.E. 24 (1923); The Arantzazu Mendi, [1939] A.C. 256. And in all the decided cases the territorial acts of a *de facto* government have been put into the Act of State category. *E.g.*, M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Luther v. Sagor, [1921] 3 K.B. 532 (C.A.).

While some inferences are normally permissible from nonrecognition, recognition should not automatically validate legislation or decrees of a foreign state. The diplomatic policies which lead to recognition may have little factual relevance to the foreign prescription involved, and are not indicative of executive approval or disapproval of the foreign legislation. The language of *Belmont* that the effect of recognition "was to validate, so

Problems of actual or potential diplomatic proportions will occur more frequently in domestic courts as the various sovereigns continue to take active roles in promoting national economic and social policies. These problems are by no means confined to territorial acts of foreign governments. What among the United States are problems of "law" tend to take on a strong "political" coloration when viewed in a context of divided power. For courts to seek political guidance in the resolution of political problems would be to act intelligently and rationally. But, understandably, they are inhibited by concepts and theory borrowed from a domestic setting. Objectivity of judgment and judicial independence are vital domestic principles that have a more limited scope in the jungle of international affairs: the seizure and sale of Iranian oil by Mossadegh's government is distinguishable from Roe's conversion of Doe's cow; it presents a different problem for the English judge at Aden[236] than for the Italian judge in Rome.[237] The English government had unequivocably expressed and widely circulated its views—what the court called its "public policy"—with regard to the "illegality" of the Iranian nationalization decree; as an incident of diplomatic pressure, it was clearly desirable from the government's point of view to limit the salability of Iranian oil in the world market. That the English court could have responsibly ignored this policy is inconceivable. All that really remained for judicial determination was the potential injustice to a good faith purchaser unaware of the English policy and of the possibility that English power, or that of other states sympathetic to the English contention, would be used to vindicate it. The Italian judge, on the other hand, had no such clear political guidance; the position of Italy, both with regard to the governments involved and the substantive issue, was too equivocal to warrant a similar decision.

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far as this country is concerned, all acts of the Soviet government here involved from the commencement of its existence" is certainly too broad. See United States v. Belmont, 301 U.S. 324, 330 (1937). It would, as Stone's concurrence pointed out, make recognition more conclusive than the domestic test of full faith and credit. *Id.* at 334-35; see also United States v. Pink, 315 U.S. 203, 248 (1942) (dissenting opinion). Recognition or nonrecognition of particular foreign acts of state by the political branch is a better solution and, since *Pink*, has occasionally been resorted to. Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951) (State Department did not recognize the legality of Soviet nationalization decree assuming power over Latvia; nonrecognition must be given effect by courts); Anderson v. N.V. Transandine Handelmattschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942) (expropriation of private Dutch assets abroad by Netherlands government in exile approved by State Department, given effect as to New York assets after characterization as "conservatory").

236. Anglo-Iranian Oil Co. v. Jaffrate, [1953] 1 Weekly L.R. 246 (Aden). The decision rested on the two grounds of a seizure which violated international law (because no compensation originally offered) and English public policy.

237. Anglo-Iranian Oil Co. v. Società Unione Petrolifera Orientale, 67 Il Gazzettino (Venezia), No. 61, p. 4 (March 12, 1953) (Civil Tribunal of Venice), digested in 47 AM. J. INT'L LAW 509 (1953). The Italian court denied an issue of public policy. In effect it applied Act of State, for the decision said that simply to accept effects consumated abroad was not against Italian public order.

The lines of internal authority are unclear throughout the conduct of inter-sovereign relations, and doubtless will remain so. Domestic techniques of judicial review and statutory interpretation are not easily transferred to multi-law situations. Judicial self-restraint is most rigorously exercised when the territorial conduct—the exercise of power-in-fact—of state officials is put in issue. In part this reflects an overall sovereign self-restraint required by the power structure of the international community and the consequent need for mutual tolerance; in part, the limited competency and expertise of the judiciary in policy matters and the wisdom of using political channels and political guidance for the resolution of political problems; in part, the protection of individual expectations and allocation of risk, the balancing of injustice done plaintiff abroad with the potential injustice to defendant relying on foreign process or innocently caught in the crossfire of conflicting national policies. Only the last encompasses a problem wholly within traditional judicial expertise.

Conclusion

Conflicts doctrine has always been a projection of the policies underlying substantive rules to events that in some aspect transcend state lines. As we adjust, adapt and change our substantive rules to effectuate values in a changing factual context, whether gradually by the judicial process or more dynamically through political channels, conflicts doctrine must adjust as well. Common policies and common concepts and rules may lead to a measure of doctrinal uniformity at any given time, but it is a passing phenomenon.

We have been shifting from a jurisprudence based largely on custom and universalized concepts of individual morality to one in which the collective welfare—the public policy—is a conscious factor in parliamentary and judicial legislation. The area of police power regulation has expanded at the expense of property and contract freedoms, altering doctrine once regarded as immutable principles of natural law. The techniques and extent of conscious social engineering may vary from polity to polity, but in all the distinction between public and private law is withering away save in the most formal procedural sense. National courts are, therefore, faced not merely with the task of adjusting individual rights but sovereign policies and sovereign relations as well. The older precepts about non-recognition of foreign penal, political or revenue laws, or laws which violate the public policy of the forum reflected the attitude of a society skeptical of all positive prescriptions. Today we are more sympathetic to regulation in the public interest, and our tolerance of foreign prescriptions has correspondingly expanded. Tolerance, domestically and internationally, is expressed as constitutional standards and is not limited to the principles of local legislation or precedent. We cannot sensibly measure the veto of conflicts public policy by domestic standards as applied to domestic events. Nor do we.

As the world community comes into being and grows *qua* community it becomes more difficult to allocate an exclusive competency to any one sovereign to prescribe with regard to acts or events which affect with varying intensity

values of the community as a whole. Hence the continuous effort to work toward substantive standards in constitutional terms and in matters of more than local interest. Often more than one state has a legitimate interest in prescribing with regard to the same interstate facts, and the task of arbitrating differences of "law," which may or may not be the formal embodiment of different policies, becomes more complex as it becomes intense. Refinements as to the particular facts in terms of their impact on values is one approach to resolution. A new and imaginative technique of bifocal statutory interpretation is needed. Perhaps we could improve the process of adjusting statutory policies by regarding the foreign and local prescriptions as simply relevant facts in formulating preferences for common standards—a "general jurisprudence" for the international community as a whole, reflecting what is shared and compromising what is not. But here there are limits to judicial competency and a need for new sources of political guidance. As matters stand, compromise will often rest with territorial power to enforce where issues of policy, and politics, are evident.

Of vital importance to both public and private international law is the avoidance of projecting domestic philosophies of law to decision making in the international arena. The judicial function must involve a greater measure of discretion, a less rigid adherence to formalism and local *stare decisis*, particularly as to local precedent based on different policy criteria and the compromise of different substantive rules. We must regard the making of international law as a vital, changing process of adjustment to new problems and ideas and facts in which the judges play an important legislative role. We must envision the process as a flow of decisions from which it is possible to synthesize valid principles to be utilized in the making of future decisions.

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