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# THE PROCESS OF ANALYZING CHOICE OF LAW PROBLEMS

By Charles D. Kelso†

Almost every case has conflict of laws potential.

Assume that a court takes jurisdiction and venue is proper. Assume further that the court will occasionally look for guidance to legal rules of other states. In this case, which is almost every case, neither counsel nor court have fulfilled their professional responsibilities until they have explored whether reference should be made to foreign law.

Lawyers have not always been alert to this responsibility. Witness the many cases where for the first time on appeal an argument is advanced that non-forum law should be applied and the argument is rejected as untimely. Recall also that even lawyer-drafted legislation usually fails to specify what factual connections with the forum call the statute into play. Indeed, only rarely is there clear indication of a policy which might be used as a premise to determine the statute's application to multi-state cases.

This professional ill may heal somewhat with a rise in the percentage of law students who have been unsuccessful in avoiding courses in Conflict of Laws and who are thus exposed to the influence of excellent treatises and coursebooks. But a booster shot is needed if this is to confer more than temporary protection. Just as lawyers develop mental check lists for typical matters of significance in personal injury cases, divorces, wills, etc., so should they prepare to spot the most important choice of law problems. This project deserves high priority in any lawyer's list of "should do's" since the check list could be used in almost every case. One purpose of this article is to suggest its major components.

Check lists commonly guide fact preparation and presentation. But for conflict of laws what is needed is a guide to the process of analyzing the facts in order that the advocate may uncover the many legal battlegrounds that offer promise of victory by reference to the law of another state or by holding the court to its own books.

The process by which most courts select and explain which state's legal rules should govern the various issues of a case whose facts extend beyond the forum has become so articulate and organized that it is more than an approach. It is a method. Like methods employed in other areas of law, not only does it point up characteristic problems

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and mold the form of rules, but it also mirrors underlying policies and principles and thus is not irrelevant in evaluating consequences.

It is particularly important for lawyers to understand the relation between the method employed in analyzing a conflicts case and the rules, principles and policies which govern the field, since it is from the inter-action among these factors that cases are decided and new conflict of laws rules made. The present method, which might be called the traditional method, evolved side-by-side with the development of the vested rights theory, and the method can be defended in terms of this theory.<sup>1</sup> However, since the local law theory came upon the conflicts scene there has been a sustained attack on the manner in which the traditional method has been applied.<sup>2</sup> Proponents of the local law theory argue that while the traditional method of analyzing a conflicts case is not inconsistent with their theory, some further evolution in the method is necessary—usually in the direction of providing more flexibility in its application.<sup>3</sup> Today, the traditional method itself may be in imminent danger of crumbling from the power of a fresh onslaught by Professor Brainerd Currie.<sup>4</sup> Under his analysis the local law theory cannot be served by the traditional method of analyzing the facts of a case, and he suggests a new method with emphasis on the forum state and its governmental interests. Attorneys who find their client's interest best served by the present method must, of course, be prepared to defend it. Opposing counsel must attack. Let it be hoped that the clash is energetic and learned, since only by study of many thoroughly argued cases will the courts be in a position to determine what justice demands.

Thus a second purpose of this article is to outline the major arguments pro and con which have been used to evaluate and/or direct the development of the traditional method, and which as the battle progresses will increasingly become a vital part of the process of analyzing a conflict of laws case. In large part this is an explanation

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1. The great work is Beale, *A Treatise on the Conflict of Laws* (1935) (hereinafter cited as Beale).

2. See Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942).

3. For a list of such studies, dealing with specific problems see Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 *U. Chi. L. Rev.* 474 (1956); see also Morris, *The Proper Law of a Tort*, 64 *Harv. L. Rev.* 881 (1951); Schuman & Prevezer, *Torts in English and American Conflict of Laws: The Role of the Forum*, 56 *Mich. L. Rev.* 1067 (1958).

4. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 *U. Chi. L. Rev.* 227 (1958); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *Stan. Law Rev.* 205 (1958); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *Duke L.J.* 171; Currie, *On the Displacement of the Law of the Forum*, 58 *Colum. L. Rev.* 964 (1958).

of the relationship between the method and (1) its natural parent the vested rights theory, (2) its foster parent the local law theory, and (3) the competing method and objectives advanced by Professor Currie.

### I. THE TRADITIONAL CHOICE OF LAW METHOD

The first step in the choice of law method currently employed by our courts is apparent from the form of the rules which result, e.g., "the validity of a will of movables is governed by the law of the decedent's domicil."<sup>5</sup> The first part of the rule constitutes a determination of the kind of problem facing the court (e.g., "the validity of a will of movables"), and the second part is a statement of the facts which connect that kind of problem with the jurisdiction whose law governs (e.g., "is governed by the law of the decedent's domicil"). Selecting the concepts which delineate the various kinds of problems and determining which kind of problem exists in the case at bar has been called "primary characterization."<sup>6</sup>

The terms which form the array of characterization possibilities seldom are distinguished in judicial opinions from similar concepts used in purely local cases. However, when application of a purely local characterization would lead to results at odds with policies motivating the conflict of laws, the courts usually acknowledge that characterization concepts are not necessarily at one with local concepts and characterize the problem by making use of conflict rather than purely local law policies. For example, in *Toledo Soc'y for Crippled Children v. Hickok*,<sup>7</sup> the court characterized the problem as one of the validity of a will of immovables (although real-personal rather than movable-immovable is customary in local law) and rejected the contention that equitable conversion should be used to transform the problem into one relating to the validity of a will of movables, even though the court assumed, *arguendo*, that it would have used the doctrine of equitable conversion had the case involved only local facts. Said the court:

[T]o use as a basis for selection of a particular law between conflicting laws a doctrine which may not even exist in some jurisdictions is obviously less desirable than a more realistic basis such as the movable or immovable character of the object in question.<sup>8</sup>

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5. See, e.g., Restatement, Conflict of Laws § 306 (1934).

6. See Robertson, *Characterization in the Conflict of Laws* (1940); Robertson, *A Survey of the Characterization Problem in the Conflict of Laws*, 52 *Harv. L. Rev.* 747 (1939), reprinted in *Ass'n of Amer. Law Schools, Selected Readings on Conflict of Laws* 144 (1956) (hereinafter cited as *AALS Readings*).

7. 152 *Tex.* 578, 261 *S.W.2d* 692 (1953).

8. *Id.* at 591, 261 *S.W.2d* at 701.

After having given a "kind" or "subject" label to each problem of a case, pursuant to the primary characterization branch of its choice of law rules, the forum then attempts to trace each problem by use of a connecting factor to the law of the state which the forum believes to have exclusive (or at least predominant) interest and power to create, affect or destroy rights because of the relationship of the facts to its territory at the time the legal problem in question was called into being.

Under this method one characterization per problem and one connecting factor per characterization is par for the course. Alternative or multiple connecting factors are not in common use. For example, California uses the domicile of the parties as a connecting factor to determine the law governing the capacity of family members to sue one another for torts (at least where California is the domicile).<sup>9</sup> Most other jurisdictions call this a tort problem and use the place of injury as the connecting factor.<sup>10</sup> That the problem might be characterized in the alternative or that the forum might apply its own law if it happened to be either the place of injury or the domicile would be a radical suggestion within the framework of the traditional method.

Assuming that the forum has characterized a problem and selected the connecting factor, it then localizes the connecting factor to the particular jurisdiction whose law will be the guide, e.g., the law of the place of making a contract will be localized as the law of Illinois. Most of the connecting factors in common use appear reasonably concrete and easy to localize. However, often it is necessary to call subsidiary rules into play, such as that a contract is made when and where the last act necessary for its creation is performed.<sup>11</sup>

After the forum has localized the problem, at least tentatively, a subtle complexity may exist. What should be done if the forum finds state *R* to be the place of making but state *R*, using the same connecting factor as the forum, would find on the same facts that the place of making was state *S*? In *University of Chicago v. Dater*<sup>12</sup> something of the sort was presented. There the Michigan forum in making reference to the law of Illinois as the law of the place of making discovered that Illinois would conclude that the place of making was Michigan. Thus the question was presented whether in localizing the connecting factor the forum should "qualify" the factor by localizing as would the state of reference or whether the forum should ignore this phase of the law of the state of reference and proceed under its own localizing

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9. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

10. See annot., 22 A.L.R.2d 1248 (1952).

11. See Restatement, Conflict of Laws § 311, comment d (1934).

12. 277 Mich. 658, 270 N.W. 175 (1936).

concepts. The Michigan court qualified the connecting factor and returned the case to the law of Michigan. However, tradition has it that the connecting factor is a concept which the forum should find within its own conflict of laws, and it should not be led astray by "incorrect" doctrines found in the law of the state of reference.

After the problem is localized to a specific state of reference, the forum faces the question whether the "law" of the state of reference which is to be used as a guide in decision is composed solely of those rules which *R* would apply to a purely local case or whether reference should also be made to the conflict of laws rules of *R* to learn how *R*, as forum, would have decided the case. If the forum looks only to the local or internal rules of *R* it is said to "reject the renvoi." If, on the other hand, the forum looks also to the choice of law rules of *R* and thus might "transmit" the reference onto a third state or "remit" the reference back to the forum, it is said to "accept the renvoi." If the forum accepts the renvoi it must decide whether merely to localize the connecting factor of *R* and apply the local law of that state (which is called accepting the single or partial renvoi), or whether to inquire if *R* accepts the renvoi and if it does look not only to the local law of the state of reference indicated by *R*'s choice of law rules, but also to the choice of law rules of that state and so possibly undertake reference to a fourth state. This is called accepting the double or total renvoi.

English decisions have supplied examples of accepting the total renvoi. In *In Re Annesley*<sup>13</sup> one of two sisters received a residuary bequest from their English mother and the disinherited sister asked the English court to apply the law of France where their mother resided at her death and under whose law only one-third could be devised. England referred to the law of the domicile at death for problems of the validity of a will of movables; France used nationality. Judge Russell, speaking for himself, would have preferred to look in the first instance to the local law of France upon finding that under English law the decedent died domiciled there. However, he felt bound by precedent to look not only to the local law of France, but also to its connecting factor of nationality and to its view of renvoi. The French connecting factor of nationality led back to England, but since France accepted the single renvoi this reference back included the English choice of law rule of the domicile. The English court, accepting the total renvoi and therefore doing what a French court would have done with the case at bar, ultimately localized the case to the law of France.

Complex? Most assuredly. Necessary? American courts generally

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13. [1926] Ch. 692.

say "no";<sup>14</sup> reject renvoi except for land titles and validity of divorce counsels the Restatement.<sup>15</sup>

Let it be granted then that a court has characterized a given problem, assigned to it a connecting factor, and localized the case without regard to how it would be localized by the state of reference. Two steps remain before the forum descends from conflict of laws to local law, either its own or that of some other state of reference, for ultimate disposition of the case.

If reference has been made to the law of another state the forum must decide what rules of the state of reference, if any, conform to the field of law whose concepts helped to forge the connecting bridge by their use in primary characterization.<sup>16</sup> This inquiry may be called "secondary characterization" since it is a kind of mirror image of primary characterization which began the process. This step of the process has had the least judicial discussion in the United States since the general quality of legal ideas does not vary greatly from state to state. It seems clear, however, that if the problem arose the courts would look through superficial similarities or differences in concepts in order to determine the true correspondence between the primary characterization and foreign legal concepts.

Finally, after the forum determines what rules of the state of reference are referred to by the forum's choice of law process, as thus far described, the forum determines whether to place limitations on reference. The usual grounds for limitations on reference are procedure, public policy and penal laws.<sup>17</sup>

As to a refusal to give effect to a rule of the state of reference because it is procedural, the commentators would have it that only those rules of the state of reference which would not affect the outcome and which would be inconvenient to administer should be refused en-

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14. See Griswold, *Renvoi Revisited*, 51 *Harv. L. Rev.* 1165 (1938), *AALS Readings* 160.

15. *Restatement, Conflict of Laws* §§ 7-8 (1934).

16. If the question arises in connection with concepts which appear to be subordinate to those employed in the primary characterization, the matter has been called "secondary characterization"; if the problems arise anew, as where the forum would refer to the law of Germany for guidance on inheritance and it provides that "legitimates" may inherit in certain shares and the question arises "who are legitimates," it has been described as raising a "preliminary question" calling for a "primary characterization of the second order," i.e., shall the question be determined according to German law or should the forum begin the process with another primary characterization relating to legitimacy. See Robertson, *Characterization in the Conflict of Laws* cc. 5-6 (1940).

17. See Stumberg, *Conflict of Laws* c. 5 (2d ed. 1951). He points out that there are several other minor limitations including the existence of local conditions under which suit may be brought in the forum.

forcement.<sup>18</sup> The courts, however, have a strong tendency to rely more on local law classifications and call "procedure" any rule relating to the manner of initiating proceedings, pleadings, or to the mode and effect of proof of facts. Many of these rules, such as burden of proof and presumptions, have a strong effect in determining the outcome. Furthermore, some courts have used the distinction as one for primary characterization; and others have based a secondary characterization on it. Thus the application of this step of the method, although universally recognized, is very unsettled.<sup>19</sup>

Regarding public policy, most courts follow the formula of Cardozo, who said:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.<sup>20</sup>

A refusal to enforce a law on the ground that it is penal is usually supported by the test enunciated in *Huntington v. Attrill*:

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.<sup>21</sup>

So concludes the traditional process of analyzing a conflict of laws case. To summarize, the forum will:

1. Characterize the legal problem.
2. Select the connecting factor for each legal problem given a characterization.
3. Localize the connecting factors.
4. Deal with renvoi, should there be a conflict of connecting factors either because the foreign state would use a different factor for the same characterization or because the foreign state would use a different primary characterization.
5. Delineate the area of local law to which reference will be made.
6. Determine if any limitations on reference exist in terms of procedure, public policy or penal laws.

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18. See, e.g., id. at 155-60.

19. See Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933), AALS Readings 499.

20. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918). See Paulsen & Sovorn, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956).

21. 146 U.S. 657, 673-74 (1892).



## II. HOW THE TRADITIONAL METHOD IS RELATED TO THE VESTED RIGHTS THEORY

. American conflict of laws began with Justice Story and his theory of comity:<sup>22</sup> a forum permits foreign law to operate if and when the forum finds a rational reason to do so.<sup>23</sup> Under this theory there is no binding compulsion, either in international law or in the forum's own law, to grant comity.

Not satisfied with this "hit or miss" approach to the problem of operation of foreign law, Professor Beale sought to make conflict of laws principles an integral part of the forum's law, binding with as strong a compulsion as that governing local rules. He found the solution in the nature of law and legal rights. According to Beale, all law is territorial in operation and affects rights if and only if acts are performed within the territory. Said he:

An essential characteristic of the law is its generality . . . . Another characteristic of law is universality. . . . If law be regarded as a right-producing principle, then every act must in accordance with the law change or not change existing rights. . . . It follows also that not 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. If two laws were present at the same time and in the same place upon the same subject we should have a condition of anarchy. By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction.<sup>24</sup>

If this be so, it appears that only the law of the forum can ever be operative within its borders and any notion that foreign law may operate there for reasons of comity or for any other reason must be rejected. Beale accepted this implication, saying:

It is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law.<sup>25</sup>

Yet, of course, Beale would not have the forum entirely disregard foreign law where the facts of the case were connected with a foreign territory, for he noted:

Some proper law must have governed the juridical situation at the moment of its occurrence; the effort of the court is to determine what the law was; and that involves a question of the power of some particular law to extend to and rule the juridical situation.<sup>26</sup>

22. Story, *Conflict of Laws* (1834).

23. For a lucid explanation of the comity theory as well as the vested rights and local law theories see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 *Harv. L. Rev.* 361 (1945), *AALS Readings* 48.

24. 1 Beale § 4.12, at 45-46.

25. *Id.* § 5.4, at 53.

26. *Id.* § 1.1, at 2.

Here is an evident dilemma. If the forum makes reference to a foreign law it appears to permit its application within the forum's boundaries—a result which according to Beale is against the very nature of law. Yet if reference is not sometimes made to foreign law the result would be that the forum's law would be added to or substituted for that of the territory in which the relevant acts occurred—a “condition of anarchy.”

Beale resolved this dilemma and added compulsion for states to incorporate choice of law rules into their own law by his theory of the way in which the law protects interests. He first defined an interest as “a human demand or desire which is connected with some person, thing or act”<sup>27</sup> which is protected by the “creation of legal rights in persons or personal relations and in things.”<sup>28</sup> He then classified rights which guard and protect legal interests into primary, secondary and remedial rights, i.e., “what the law does is to create right after right, in a long series, in the effort to repair injuries to protected interests.”<sup>29</sup>

Under Beale's theory, a primary right is a principle which declares that an interest is legally protected, e.g., an interest in personalty is protected by a primary right against assault. If this right is violated (“destroyed” says Beale) by a wrongdoer who commits an assault, then “the law creates a new right [a secondary right] which is regarded as equivalent to the one destroyed by the wrongdoing, and this new right takes the place of the violated right. This is a right to damages or other reparation.”<sup>30</sup> Finally, if the wrongdoer fails to satisfy this secondary right by making due reparation, the law provides a remedial right to sue and enforce judgments. Thus it can be seen that destruction of a primary right is a fact that calls for creation of a secondary right, which, in turn, is a fact that in combination with the fact of lack of reparation, gives rise to a remedial right. Since remedial rights are thus not automatic concomitants of either primary or secondary rights they are in a sense independent of these prior rights. Therefore, Beale is able to say:

The affording of a remedial right, being independent of the secondary right, is a matter solely to be determined by the sovereign from whom the remedy is demanded . . . .<sup>31</sup>

In determining when to grant or deny a remedy, the forum may take into account, as one of the facts, whether the law of some other jurisdiction has vested a secondary right. Thus, in resolution of the

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27. *Id.* § 8A.1, at 58.

28. *Id.* § 8A.6, at 62.

29. *Id.* § 8A.7, at 63.

30. *Id.* § 8A.7, at 63-4.

31. *Id.* § 8A.28, at 86.

dilemma of how the forum can refer to foreign law and yet apply only its own, Beale stated:

If . . . the Conflict of Laws of the state provides that a question at issue shall be determined in accordance with the foreign law, that means that it shall be determined by the court acting solely under its own law, and that the terms of the foreign law constitute a fact to be considered in the determination of the case.<sup>32</sup>

Since under Beale's theory the plaintiff approaches the forum asking that a remedial right be recognized on the basis of secondary rights which vested under the law of the appropriate jurisdiction because primary rights granted by that law had been destroyed, the conflict of laws becomes part of the forum's machinery for determining if a remedial right should be granted. Under such a theory the polar star must be a policy related to remedial matters and, logically enough, Professor Beale explained the doctrines of the field in terms of such an axiom of justice, saying:

One of the most important purposes of a systematic and rational application of the principles of the Conflict of Laws is to secure a uniform enforcement of the legal rights and duties arising from any transaction.<sup>33</sup>

He refers, of course, to uniform enforcement of secondary rights, and the traditional method of analyzing a conflicts case, viewed from the framework of the vested rights theory, purports to lead to just such uniform enforcement.

The key to understanding the inter-relation between the traditional method and the vested rights theory is Beale's concern that one and only one jurisdiction's law of primary and secondary rights operate at any given time in the same place on the same subject matter. A forum concerned with granting or denying remedial rights is led by its choice of law rules to that one jurisdiction. Thus, primary characterization (the first step in application of the traditional method) is a delineation of the subject matter which is to be investigated as to time and place, and that subject matter represents the area of primary and secondary rights which may have been violated. At this stage of applying the traditional method, however, the forum is not looking to foreign law to characterize the problem, but rather primary characterization concepts must come from the forum's own law, according to Beale, and of course will closely relate to concepts used in the forum's local law.

The second and third steps in applying the traditional method, i.e., selection of the connecting factor and localizing it, pin point the subject matter as to time and place. The method of selecting the

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32. *Id.* § 5.4, at 53.

33. 3 Beale § 584.1, at 1599.

connecting factor is molded after the logical nature of the law of primary rights which determines the moment of violation of a primary right by studying the chronology of time and place. For example, a negligence action arises when a defendant who is in such position that he owes a duty to the plaintiff breaches that duty and proximately causes injury. Until plaintiff is injured no primary right regarding negligence has been destroyed. Thus, to determine under which jurisdiction's law primary and secondary rights regarding negligence arose, the forum must trace the chronology of events to the place of injury. The jurisdiction in which injury occurs is the only jurisdiction whose primary rights relating to the protection of personalty from negligence have been destroyed. Hence, to determine whether to grant remedial rights to the plaintiff under its own law, the forum will look only to the law of the foreign jurisdiction where the injury occurred (considering such law as a fact) to decide whether primary and secondary rights have been destroyed.<sup>34</sup> And so it is with the other legal subjects demarcated by primary characterization.

Alternative connecting factors cannot be recognized under this method and theory, since that would admit the possibility of more than one territory's law governing the situation at the same time and place and in regard to the same subject matter. Furthermore, the connecting factor for each problem should be a single concept, whether it be a high abstraction such as domicile or a more concrete one such as the place of injury. Otherwise, there might be confusion as to when and where the crucial event occurred.

The fourth step of the traditional method, i.e., dealing with *renvoi*, is easily hurdled within the framework of Beale's theory. *Renvoi* is rejected primarily because the doctrine appears on its face to assume that the conflict of laws of the state of reference is to be given some operative force as the law of the forum.<sup>35</sup> For a similar reason, the forum will not qualify its connecting factor to localize the case as it would have been localized under the law of the state of reference.

Rejection of *renvoi* and qualification points up the distinction under the vested rights theory between the local law of the state of reference and its conflict of laws rules. If secondary rights vested under a foreign state's laws because of the occurrence of certain acts within its territory which destroyed primary rights, then only that state's law, considered as a fact, should be looked to in determining whether the plaintiff is entitled to recover. However, this does not admit that the conflict of laws rules of the state of reference have any part in the forum's handling of the problem. If the state of reference employs

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34. 2 Beale § 377.2, at 1287.

35. 1 Beale § 7.3, at 56.

incorrect conflict of laws principles to determine remedial rights so that had the case been brought there, the court would have fashioned its remedy upon the law of some other jurisdiction, it is unfortunate; but the appropriate solution, at least in most cases, is for that state to improve its conflict of laws, not for other states to subvert their correct principles. Otherwise, uniform enforcement of secondary rights would not result. Further, Beale seems to have felt that for the sake of securing uniformity in the enforcement of secondary rights it would be better for forty-seven states to follow the correct connecting factor, even though the state of reference to which this led would have applied a different one, than for forty-seven states to get involved in the complexities of accepting *renvoi* in order to mold their remedial rights after those which would have been granted by the state of reference had suit been instituted there. The plaintiff should not complain about this rejection of *renvoi* and qualification, since under Beale's theory he had no vested right in the remedial law of the state of reference—only in the secondary rights granted by that state—and localization by the forum to that state must be done under the only possible law, the law of the forum.<sup>36</sup>

The fifth step of the traditional method, i.e., delineating the area of local law of the state of reference to which the forum will look, needs little discussion or justification within the vested rights theory. Acceptance of the theory compels the forum to refer to the rules of the foreign state governing the subject matter of the case, and it is usually a yeoman's task for the forum to determine which rules of the state of reference conform to the field of law about which the case is concerned.

If the traditional method has thus far been correctly applied by the forum (in terms of the vested rights theory), it would have been led to consider, as a fact, the particular law relating to primary and

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36. It should be noted that Beale was not entirely inflexible about this. He would permit a forum to look to the choice of laws rule of the state of reference, considering it as a fact, for problems of title or of divorce because of a "paramount social importance" in uniformity of treatment. *Id.* § 8.1, at 57. And he would permit a similar result if the forum looked to the law of the situs to determine succession to movables but the situs would look to the law of the domicile at death. He did not admit that this was another exception to the ban against *renvoi* but contended that the reference to the domicile was not really a conflict of laws doctrine, saying: "[T]he Conflict of Laws of all common-law states is that property passes on the death of the owner as it does by transaction during his lifetime, in accordance with the law of its situs at the moment. The ordinary rule of succession, namely, that movables pass in accordance with the law of the domicile, is not a doctrine of the Conflict of Laws, strictly speaking, but is a rule of the common law of succession, that is, a part of the law of the state of situs." *Id.* § 8.2, at 58.

secondary rights of the state in which the critical act or event occurred. The sixth step is to consider whether any limitations on this reference exist. Beale would only very reluctantly permit limitations on reference which might affect the outcome, since the effect would be to weaken the uniform enforcement of vested secondary rights. With regard to limitations by reason of procedural matters, Beale stated:

[T]he ultimate question is as to how inclusive the reference to the foreign law may be without seriously hampering the administration of justice . . . .<sup>36a</sup>

[T]here must be a balancing of the interests of the parties, the court, and the respective states. If the practical convenience to the court in adopting the local rule of law is great, and the effect of so doing upon the rights of the parties is negligible, the law of the forum will be held to be controlling.<sup>37</sup>

Beale was even more cautious with regard to limiting reference to foreign law because it was contrary to the law or policies of the forum. However, he bowed reluctantly, though respectfully, to the cases involving this issue by saying:

Since the local court is necessarily the best judge of the public policy of the jurisdiction in which it sits, it would indeed be presuming a great deal to suggest that its conclusions in regard to such matters are mistaken. Nevertheless it may properly be pointed out that differences in law do not necessarily constitute a sufficient basis for a declaration that the rule of the foreign state is contrary to the strong public policy of the forum. There is, moreover, in the law of every jurisdiction a strong policy in favor of recognizing and enforcing rights and duties validly created by foreign law. These considerations would seem to indicate that the application of the rule of this section should be extremely limited. This is especially true as between the states of the United States, for not only is there little or no variation in the fundamental policies of their respective laws, but here, even more than elsewhere, a uniform enforcement of right is greatly desirable.<sup>38</sup>

Thus it appears, at least on the surface, that the vested rights theory and the traditional method constitute a rational, coherent system very likely to bring into actuality the uniformity which is the ultimate objective. However, a survey of the cases and literature indicates that happiness does not abound. It has been said that the results of applying the theory are not always consistent with the theory, that the method and the theory are too inflexible, that the theory itself is not sound and even if used through application of a logically consistent method to produce its hoped-for consequences,

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36a. 3 Beale § 584.2, at 1601.

37. Id. § 584.1, at 1600.

38. Id. § 612.1, at 1651.

it does so only at the sacrifice of other, more important, objectives.<sup>39</sup> As to this last criticism, some have felt that the traditional method could be retained, although altered somewhat, and together with a different theory its application would result in attaining a desirable balance of objectives; while Professor Currie believes that both method and theory should be replaced. These latter viewpoints will be discussed in parts III and IV of this article.

Some criticism has been levied to the effect that certain of Beale's results under his theory are not consistent with the theory. For example, Professor Cheatham has contended that rejection of renvoi is an inconsistency in the application of the vested rights theory, saying:

When the renvoi element is rejected and F [the forum] employs the X [state of reference] internal law to determine the rights of the parties, it cannot be said that F is enforcing an X-created right, for the only legal right the party could have enforced in an X court was based on the internal law of the other state, Y.<sup>40</sup>

However, this criticism is wide of the mark since it ignores the critical distinction between remedial and secondary rights. Under Beale's theory the forum determines that secondary rights vested under the law of the state of reference. The forum then enforces its own remedial rights just as the state of reference would enforce its own remedial rights had suit been brought there, even though such enforcement might have been done in an "erroneous" manner (under the forum's concepts) by a determination that the secondary rights were vested by the law of some third state. Thus Cheatham's criticism of the application of the vested rights theory which would result in rejecting renvoi is actually a rejection of a crucial tenet of the theory.

Indeed, most criticism of the traditional method is actually criticism of the vested rights theory. Attacks leveled at primary characterization as being too inflexible and resulting in only broad, general characterization are actually attacks upon the theory, since there is nothing in the traditional method itself which precludes narrow characterizations. Likewise, the method leaves open the door for invention of new connecting factors when it is perceived that they would better lead to the jurisdiction which had the power to create secondary rights.

It appears that a greater pitfall than any inflexibility in the method or theory has been the mechanical application of rules without consulting the theory as a guide. However, it must be granted that the theory is cast in terms of necessity and nothing on its face has any direct relation to principles of justice which might help guide application of the method. This has tended to produce inflexible rules and the

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39. See Cheatham, *supra* note 23.

40. *Id.* at 380.

courts have been generally unwilling to look behind the rules for other factors which would give them a basis for a different characterization or connecting factor.

Whether or not this difficulty could be remedied by further attention to the vested rights theory seems, today, largely beside the point since the local law theory has come upon the scene to remedy the alleged defects and current discussion proceeds in terms of local law. Thus, the future of conflict of laws method must be understood in terms of the changes which local law theory has made in analysis and objectives.

### III. LOCAL LAW THEORY: NEW POLICY FOR AN OLD METHOD TO IMPROVE CONSEQUENCES

The impetus for the local law theory came in part from concern with the judicial consequences of the vested rights theory. It also paralleled a general shift in jurisprudence from the analytical, with its emphasis on necessity (what is or what must be), to sociological jurisprudence with its weighing of social interests, concern with consequences, and broad policy considerations.

In formulating the most famous statement of local law theory, Professor Walter Wheeler Cook accepted the territorial nature of law, as had Story and Beale, and followed Beale's proposition that a forum always enforces its own law. However, he dropped the crucial feature which had enabled Beale to find a juridical compulsion to follow conflict of laws rules, i.e., the succession of rights theory with its distinction between secondary and remedial rights. According to Cook, if a plaintiff was declared by a court to have a right to sue, then the forum enforces a right created by its own law, although it might look to other laws as well as to social and economic policy in deciding the case. Said he:

[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in so doing adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected . . . . The forum thus enforces not a foreign right but a right created by its own law.<sup>41</sup>

Since Cook did not postulate that any one event might give rise to remedial rights in every potential forum throughout the world, he appeared to disagree with Beale, who said:

[I]t must be clear, from every consideration of justice and from every detail of practice, that a court can give a man only what the law has already given him a right to receive.<sup>42</sup>

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41. Cook, *The Logical and Legal Bases of the Conflict of Laws* 20-21 (1942).

42. 1 Beale § 8A.27, at 84.



Under Cook's analysis the forum is freed from the obligation to search for a secondary right which vested according to the law of an appropriate jurisdiction, and the forum may, therefore, frame choice of law rules and method on the basis of "all relevant facts of life required for wise decision."<sup>43</sup> Application of this theory creates greater flexibility in use of the traditional method of analyzing a conflicts case, for if the forum is concerned only with enforcing its own rights created by its own law rather than secondary rights vested by some foreign law, it is easier for the forum to more narrowly characterize a problem and use new connecting factors based upon "all relevant facts." The forum need no longer conduct a chronological search for some one event which gave rise to a secondary right. Further, the forum need not worry if a particular decision creates an overlapping of governing law since the theory does not admit of any vesting of rights under the law of one particular jurisdiction.

Indeed, so flexible is the local law theory that it places conflict of laws in much the same position as Beale found it when he opposed the comity theory. The comity theory assumed that foreign law would be used as a guide when the forum so desired. So does the local law theory, although the two theories may be distinguished on the rather semantic grounds that under comity foreign law operates as law whereas under local law theory it is just another fact. On its face the local law theory appears to remove the compulsion for a court to operate under conflict of laws rules which Beale could find generated by his concept of succession of rights. Local law theorists appear to bank on the greater maturity of our system today than at the time of the comity theory, upon the aid of the Supreme Court in enforcing the full faith and credit clause, and upon the judicial habit built by the vested rights theory of taking cognizance of foreign law. In short, it is reasoned that perhaps it is safe today to loosen the bonds of compulsory reference in order that better reference can be made.

Yet, unfortunately, Cook gave little specific guidance for development of method or rules. Local law replaces the succession of rights with little more than the hope that if problems suggested by the traditional method are studied carefully in light of narrow fact situations and all of the conflict of laws and local policies of the forum and of potential states of reference, a new set of conflict of laws rules will gradually emerge—a set of rules more responsive to the actual needs of society. Attempts have been made, since Cook's initial work, to indicate what considerations other than uniformity should be employed in the new analysis. One of the most scholarly articles suggests

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43. Cook, *op. cit. supra* note 41, at 45.

that the forum should consider the consequences of alternative choices for connecting factors, and:

appraise these results in the light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other . . . .<sup>44</sup>

Specific policies which might guide such deliberations have been sought in the cases and an effort has been made by Professors Cheatham and Reese to determine their relative importance. Studies of narrow areas have suggested new characterizations and connecting factors.<sup>45</sup>

However, despite the new emphasis on policy and narrow rules, the essence of the traditional method has not been changed. The search for some jurisdiction whose law governs still continues, both by the courts and by local law commentators, and the search is conducted largely independent of the policies of the forum's local law. It is the nature of the problem itself, as revealed by a primary characterization, which forms the basis of the search, and thus there continues to be the assumption that conflict of laws is a branch of law apart from the various local fields which, under Beale's theory, would have been used to fix primary and secondary rights. Utilizing only the conflict of laws rules of the forum, the search ultimately leads to the one jurisdiction whose law the forum believes controlling, and that law will then be referred to whether or not the forum has a substantial connection with the case. Otherwise, uniformity would not result; and, in one sense, uniformity has become more persuasive under the local law theory than under the vested rights theory. It has been suggested, for example, that the forum should attempt to decide the problem at issue as would the state of reference had the point been litigated there on the same facts.<sup>46</sup> Thus local law would achieve uniformity even with respect to remedial rights—a goal for which Beale did not directly strive.

The influence of local law theory on the traditional method of analyzing a conflicts case can be summarized as follows:

1. *Primary characterization*: Characterizations by the forum are not restricted to any concepts of primary rights, so a specific problem may be characterized narrowly to further one or more conflict and/or local policies of the forum. As an extreme example, a problem could be characterized in terms involving all the facts of the particular case

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44. Cavers, *A Critique of the Choice-of-Law Problem*, 47 *Harv. L. Rev.* 173, 192-93 (1933), *AALS Readings* 101, 114.

45. Cheatham & Reese, *Choice of the Applicable Law*, 52 *Colum. L. Rev.* 959 (1952). See also the articles cited supra note 3.

46. See, e.g., Note, 17 *U. Chi. L. Rev.* 388, 391-92 (1949).

so that the same characterization might never again be used. Newer and narrower characterizations can be proposed to meet the needs of the increasing complexity of cases.<sup>47</sup>

2. *Connecting factor*: Alternative connecting factors become possible since it is no longer necessary to search for the critical event; e.g., the courts may use either the law of the place of injury or the law of the place of acting for problems of negligence,<sup>48</sup> whichever place granted a remedy,<sup>49</sup> was more up-to-date,<sup>50</sup> seemed to have a greater interest in the outcome, or applied the same law as the forum, etc.

3. *Localizing the connecting factor*: Qualification becomes more acceptable since one of the conflict of laws policies acknowledged by the local law theory is uniformity of outcome and this policy dictates that the forum should consider how the state of reference would decide the case at issue.

4. *Renvoi*: In order to prevent the rights of the parties from being dependent upon the circumstance of the forum in which the case is brought, it has been suggested by a distinguished writer that:

domestic courts referred abroad should . . . as a matter of course, look first at the 'whole law' of the other state, and undertake to dispose of the case as the foreign court would dispose of it; and if the foreign court would in its disposition apply some rule of conflict of laws the domestic court should do the same.<sup>51</sup>

5. *Delineation of applicable law*: In line with the above developments, the forum should always seek to apply the law which the state of reference would apply.

6. *Limitations on reference*: Based on the conclusion that limitations on reference have been used by many forums as devices to avoid applying unsatisfactory characterizations and connecting factors thought dictated by the vested rights theory, it has been suggested that if characterizations and connecting factors are improved by use of

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47. For examples, see the articles cited supra note 3. A court which accepted "vested rights" would probably employ a single characterization for both intentional and negligent wrongs because in both instances it was the place of the injury. A court which accepted local law theory might separately characterize intentional wrongs because the basic policy involved is punishment of anti-social conduct and therefore it might call for use of the law of the place of acting since that place had the dominant interest in preventing the conduct involved. See Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 Minn. L. Rev. 1 (1951).

48. Rheinstein, *The Place of Wrong, A Study in the Method of Case Law*, 19 Tul. L. Rev. 4 (1944).

49. Cook, *op. cit.* supra note 41, at 345.

50. Hoff, *The Intensity Principle in the Conflict of Laws*, 39 Va. L. Rev. 437 (1953).

51. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1182 (1938), AALS Readings 160, 171.

local law theory then the procedure and public policy limitations (categories swollen by furtive escapes from the rigors of vested rights) should be held to a minimum.<sup>52</sup> Again, the case should be decided as though litigated in the state of reference and these limitations preclude attaining that objective. The categories themselves have been criticised as being too general to promote careful, continuous discrimination of fact situations in light of policy considerations.

Despite the outpouring of thought as to each step of the traditional method and how it might be altered, there has been little thought of abandoning the steps themselves. It has been assumed that careful examination of each step, keeping in mind the interplay among the steps, would result in a new system of rules pertaining to each step for each problem, with consequences in accord with objectives, and with a uniformity in enforcement of justly selected remedies.

But all is not well. If Beale's theory suffered from overmechanization, the local law theory suffers from too little mechanics indicating how policy is to be determined and worked into method. Consequences remain inconsistent and predictability often reaches low-ebb. Recently, Professor Brainerd Currie has taken that bull by the horns.

#### IV. BRAINERD CURRIE: CONFLICT OF POLICIES AND THE GOVERNMENTAL INTEREST METHOD

Professor Currie, in several fascinating and brilliant articles, accepts local law tenets but suggests that the slate be cleared of the traditional method if consequences in accord with rational objectives are to be attained.<sup>53</sup> He asserts:

We would be better off without choice-of-law rules . . . we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws."<sup>54</sup>

Departing from the attempt to fuse a multitude of conflicts policies into a delicate system of balancing, he reverts to a single goal, reminiscent of Beale. However, instead of concentrating on uniformity in enforcement of secondary rights Professor Currie concentrates on the policies which Beale would call those of the law relating to primary rights. The true objective to guide determination of a case thus must be defined in terms of the intelligent determination of which state has a legitimate governmental interest in the application of its internal policy to the various problems of the case. Viewed in this light, the entire field is not so much conflict of laws as it is conflict of policies. The basic question to be answered is: "If the policies expressed in the

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52. Stumberg, *op. cit.* supra note 17, at 155.

53. See note 4 supra.

54. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *Duke L.J.* 171, 177-78.

forum's internal rules differ from those of possibly applicable foreign policy how can it be rationally determined which policy shall yield?"

The traditional method answers this question by seeking one rule for each of a certain number of generalized types of problems, classified in terms of the facts of the case and the type of legal problem, with little regard to the location of the forum. This is to promote uniformity of result and discourage forum shopping. Professor Currie is willing to sacrifice uniformity of result as an ideal to guide method on the ground that the goal is impossible to attain by judicial decision if policies are in true conflict, and he is ready to reexamine the questions of whether forum shopping is the evil it has been pictured and whether, if evil, it can be controlled in some fashion other than by choice of law rules. He believes that irrational subversion of internal policy of the forum is too high a price to pay for uniformity.<sup>55</sup>

Professor Currie thinks that the courts often have taken cognizance of these views which give consideration to the forum's internal policies and to its governmental interest. In support of his thesis he has exhaustively studied the conflict of laws problems presented by married women's contracts and by survival statutes. With regard to married women's contracts, he poses this case among others: Suppose a married woman and her creditor reside in a state which protects married women by invalidating their contracts. Suppose further that suit is brought in that state on a contract executed in a state which does not make this exception to its general policy of enforcing contracts. If the forum applied the traditional connecting factor—the place of making—it would subvert the forum's policy which would rationally be concerned with married women residing there (or that of any state which offered similar protections), without advancing the policy of the state of reference, which rationally would be interested in applying its rule only to creditors or married women residing therein. The traditional method and its usual connecting factor would create an apparent conflict of policy where none really exists—a false problem, says Currie, which, by use of the place of making connecting factor would be given an irrational solution. Currie recognizes that under the traditional method the forum could manage to avoid irrational results through one of the "escape devices," e.g., public policy, procedure, fraud on the law, or by use of a novel or disingenuous characterization. Indeed, says Currie, only such misuse of the traditional method has permitted it to remain in judicial vogue this long:

A sensitive and ingenious court can detect an absurd result and avoid it. I am inclined to think that this has been done more often

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55. See, e.g., Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227, 261-63. This theme runs through the entire series of articles.

than not, and that therein lies the major reason why the system has managed to survive.<sup>56</sup>

Of course, this is not a satisfactory equilibrium because:

At the same time, we constantly run the risk that the court may lack sensitivity and ingenuity, we are handicapped in even presenting the issue in its true light, and instances of mechanical application of the rules to produce indefensible results are by no means rare. Whichever of these phenomena is the more common, it is a poor defense of the system to say that the unacceptable results which it will inevitably produce can be averted by disingenuousness if the courts are sufficiently alert.<sup>57</sup>

Tinkering with the method in this case (perhaps by using a different connecting factor—the law of the residence of the married woman) would not overcome Currie's objections to the method, since such manipulation obscures the fact of the conflict of policies and thus postpones ultimate solution of the problem involved where several states have different policies and legitimate interest in their application. For example, use of the place of residence of the married woman as the connecting factor would not be a complete solution since then the protected interest would always be preferred to the general policy of enforcement of contracts—a policy in which the state of the creditor's residence, as forum, would have a legitimate interest. In such a situation the courts cannot realistically use rules to choose between the competing policies since the judgment is essentially a political one. Faced with a political problem the forum must resolve it in favor of its own law. But the traditional method does not permit this since it obviously would mean disuniformity of result, i.e., the creditor's state as forum would find for the creditor; the defendant's state as forum would find for the married woman. Until the law permits this problem to be faced, rational alternative solutions may not be sufficiently explored and employed.

Having evaluated the consequences of applying the traditional method in light of the true objective of rationally choosing between conflicting state interests, Currie has with some reluctance generalized his findings into a new method, cautioning, however, that at this point: my principal reason for venturing on this hazardous enterprise is that it provides a convenient way of pointing out problems which require further analysis.<sup>58</sup>

His method for cases in which the purpose of a possible reference to foreign law is to find a rule of decision is as follows:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

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56. Currie, *supra* note 54, at 175.

57. *Id.* at 175-76.

58. *Id.* at 171.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of its policy . . . .

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply to the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum even though the foreign state also has an interest in the application of its contrary policy, and a fortiori it should apply the law of the forum if the foreign state has no such interest.<sup>59</sup>

Application of the Currie method would, obviously, mold a new form of conflict of laws rules. Instead of designating one factor as determinative for all cases involving a certain subject (both those cases in which the forum has a potential governmental interest and those in which it does not), the primary rules would be expressed in terms of the circumstances which would lead the forum to apply its own law. A legislative example would be:

The provisions of this act [invalidating contracts by married women] shall be applied in all cases in which the married woman is a resident of this state, or of another state whose laws provide a similar immunity.<sup>60</sup>

In making his statement of the method and its characteristic form of rule, Professor Currie inserts a word of caution against substituting a new kind of unqualified generality (i.e., always apply the law of the forum) in place of the older kind of generality embodied in primary characterization. With regard to a state's formulation of what factual connections give it an interest in applying its own governmental policy when it is the forum, Currie states:

Such specifications must, of course, be drafted with wisdom and restraint, and with careful regard to the moderate interests of the state.<sup>61</sup>

As an example, Currie cites the result of a Nebraska case<sup>62</sup> where a contract, executed elsewhere, called for interest rates higher than permitted by Nebraska law. The contract was enforced by a Nebraska

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59. *Id.* at 178.

60. Currie, *supra* note 55, at 257.

61. *Id.* at 259 n.58.

62. *Kinney Loan & Finance Co. v. Sumner*, 159 Neb. 57, 65 N.W.2d 240 (1954).

forum against a Nebraska resident on the ground that its policy was to protect citizens against exactions in excess of a reasonable range of rates and not against any exaction in excess of a particular rate.

Although Professor Currie's method and theory as to objectives are an extreme departure from the vested rights theory and from anything found on the face of all but a few judicial opinions, it has been constructed too scholarly and carefully to be ignored. Indeed, although Currie goes no further in predicting the future than modestly to suggest that "one might even risk the prediction that this is the form in which the conflict-of-laws of the future will be cast,"<sup>63</sup> I think the prediction can be risked that the entire Currie method may become the method of the future. At the very least it will be a force in molding future developments. One obvious reason for this expected impact of the Currie method is that evaluated simply as method, without regard to its consistence with the objectives on which it is based or whether these objectives are sound, it has the advantage of simplicity. It also has the appealing feature of focusing the court's attention on the relationship between the forum's policy and the factual elements of the case, the satisfactory adjustment of which is the fundamental objective of the field, according to Currie. Thus, he has integrated objectives and method to problems and consequences much more successfully than Beale, who was only able to tie theory and method in a way which did not emphasize the real problems and the guiding objectives and whose method was thus liable to produce unsatisfactory consequences.

Before attempting to evaluate Currie's method in terms of objectives and probable consequences, it should first be noted precisely what changes must be made in present judicial method with its attendant rules. It is in these terms of change that the battles will be fought in the courts, even though in the law journal articles the battles may rage on the "higher" plane of theory and objectives. What, then, happens to each of the steps with which the courts are accustomed to dealing?

Primary characterization, as a device to select a connecting factor for all cases involving the characterized problem, is no longer necessary. As Currie says:

The problem of characterization is ubiquitous in the law, and can never be wholly avoided. Without choice-of-law rules, however, there would be no occasion for the specialized function of characterization as the mode of discriminating among the available prefabricated solutions of a problem.<sup>64</sup>

Thus, problems will be characterized according to local, internal concepts to see how the case would be decided under that law and to

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63. Currie, *supra* note 55, at 259.

64. Currie, *supra* note 54, at 178.



determine what local policies are involved. The forum then can take the final step of determining whether the case has such factual contacts with the forum that it has a legitimate governmental interest in applying its own law.

If the forum determines that it has such a legitimate governmental interest, its own law is applied and the conflict of laws process is over. The other five steps of the traditional system simply are not needed.

However, if the forum determines that it has no interest in deciding the case, then it must inquire whether any other state has a legitimate governmental interest. Such an inquiry is not pursued by characterizing the problem and referring to some one state as the state of reference. Rather, the forum merely asks of all possibly relevant states of reference what their local law is and whether, in view of the policies inherent in that law and the factual connections with that state, any foreign state has a legitimate interest in the application of its policy. Thus the traditional concept of connecting factors is eliminated. There may be different connecting factors for each of the different policies found in each of the possibly relevant foreign states. Determination of what is a relevant factual connection with any one state depends upon how the law of that state would characterize the problem and its own local policy. Naturally, after application of the method in many cases, certain contacts would become associated with certain fact situations so that a new system of connecting factors would emerge, similar to the present system of connecting factors. However, their operation would be quite different. Further, since there would be no connecting factors, in the traditional sense, the qualification problem disappears under the Currie method.

As to the *renvoi* step of the traditional method, Currie says:

And, though I make this suggestion with some trepidation, it seems clear that the problem of the *renvoi* would have no place at all in the analysis that has been suggested. Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state. The closest approximation to the *renvoi* problem which will be encountered under the suggested method is the case in which neither state has an interest in the application of its law and policy; in that event, the forum would apply its own law simply on the ground that that is the more convenient disposition. Is it possible that this is, in fact, all that is involved in the typical *renvoi* situation?<sup>65</sup>

Although it is evident that in searching for a rule of decision for a given case, the forum would ultimately apply internal law of a foreign state (if the forum has decided not to apply its own local law), it

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65. *Id.* at 178-79.

seems that the forum should not apply a foreign rule if that state had announced in one of its choice of law rules that it did not assert an interest in determination of the problem. Yet this seems to be the result of the suggested method. For example, if the forum looked to the state of a married woman's residence and found that under its choice of law rules the law of the place of making the contract was considered the factual connection of paramount importance, it would seem that the forum should not apply the law of the state of residence but rather should consider what interest in the case was asserted by the state of making. In other words, it seems that the forum should not simply ask what legitimate interests potential states of reference have, applying concepts which are logical from the viewpoint of the forum, but should determine what interest each foreign state would assert and then ask whether such interest is legitimate. Thus the forum would look to the "whole law" of a possible reference state, including its choice of law rules, not with the thought in mind of a possible remission or transmission according to *renvoi*, but simply to discover whether the state has asserted an interest in applying its law in the particular situation. It can be expected that Currie will have more to say on *renvoi* and perhaps will clarify his stand on this particular point.

Delineating the area of foreign law to which the forum looks would obviously be done in strict accord with the concepts of the foreign state since the sole questions are how would the foreign state's law resolve the case, why, and does that reason give it a legitimate interest in the application of its law to the facts of the case at bar.

Professor Currie has not yet dealt with the final step of the traditional method, i.e., problems of limitations on reference. Logically, however, the forum could not refuse to apply foreign law because of policy of the forum state, else the forum would have applied its own law in the first place. The same appears to be true of rules which might be labeled procedural, at least where they might influence the outcome.

This comparison of each step of the present method familiar to the courts with the method suggested by Currie indicates how widely he departs from what can be found in the cases. However, new theories cannot be tested solely by the cases already on the books since the cases may not be achieving sound policy objectives. It is in the realm of objectives that Currie's theory will probably take its first knocks, and Currie himself has so admitted:

I have been told that I give insufficient recognition to governmental policies other than those which are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on.<sup>66</sup>

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66. *Id.* at 181.

He defends on the grounds that it is necessary to emphasize the obstacles of the present system in order to bring to bear on the real problems all the resources of jurisprudence, politics and humanism, "each in its appropriate way."

It seems to me that again Currie is being overly modest about the merits of his own system. Matched against the most important conflict of laws policies as found in the cases by Professor Cheatham,<sup>67</sup> Currie's system appears to stand up well. Cheatham's policies (in the order of their importance) and the effect of Currie's system upon those policies could be summarized as follows:

1. *Fulfill the needs of the interstate and international system:* This very general policy is kind of a catchall, and it certainly cannot be said that the Currie system, on its face, will not meet this policy consideration.

2. *Apply its own local law unless there is a good reason for not doing so:* The Currie system would always carry out this policy since it is a cornerstone of his method; and the same may be said of policy number 3, which is;

3. *Seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law.*

4. *Strive for certainty, predictability and uniformity of result:* The Currie system could be certainly and predictably applied by each forum. Predictability of result would depend upon determining in which states suit might be successfully instituted, and this can usually be predicted. As to uniformity of result between jurisdictions, the method might gain as much as is lost by removing false problems. However, in those instances where conflicts of policy exist and the Currie method chooses the forum, a disuniformity, preventable by some other rule, develops. However, it would seem that we could live with this. The Supreme Court presently permits disuniformity within constitutional limits,<sup>68</sup> stating that prima facie a state can enforce its own law.<sup>69</sup> It can be assumed that since moderation is a part of the Currie theory unjustified disuniformity should not occur, and, in any event, the Constitution would be brought to bear if a forum asserted too broad an interest. Furthermore, such disuniformity as did occur would be based on express policy conflicts and might provide a spur

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67. See note 45 supra.

68. See Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1 (1945), AALS Readings 229.

69. See *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

to Congress to exercise its proper powers to resolve authoritatively the conflict of policies.<sup>70</sup>

5. *Strive to protect justified expectations*: If the Currie method is adopted persons would expect that the law of the state with a legitimate connection would be applied, if suit could be brought in that state. In most instances one concomitant of the system is that the forum, in examining its interest, will determine that its laws are designed to protect residents. If so, a system of personal law will tend to appear and, perhaps, persons do justifiably expect that in most instances the law of their residence will be applied.<sup>71</sup>

6. *Strive to apply the law of the state of dominant interest*: In most cases the forum does have the dominant interest, but it is certainly true that this policy strongly counsels moderation, as does Professor Currie.

7. *Devise rules by which it is easy to determine applicable law and which are convenient to administer*: This is one of the very real advantages of the Currie method.

8. *Seek to apply the fundamental policy underlying the broad local field involved*: This is implicit in the Currie system, since its basic premise is one of concern with policy.

9. *Do justice in individual cases*: Since the forum is permitted to determine governmental interest in the case at bar, there is every opportunity for the flexibility needed to do justice in each case.

Finally, the Currie method should be praised since it can serve as a constant reminder to legislators to state the conflict of laws rules for the legislation at hand. Perhaps one of the reasons legislation has in the past not incorporated choice of law provisions is that legislators, concerned with the immediate problem of application of the statute to local facts, were reluctant to engage in the additional enquiry necessary to formulate a broad rule which would apply to all situations. The problem is narrowed, made easier and more inviting to legislators by the Currie system.

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70. That Congress unquestionably has such powers see 1 Crosskey, *Politics and the Constitution in the History of the United States* 545-47 (1953). See also Cheatham, *Federal Control of Conflict of Laws*, 6 *Vand. L. Rev.* 581 (1953), *AALS Readings* 255; Jackson, *supra* note 68.

71. Beale explicitly rejects the notion of a personal law. 1 *Beale* § 5.2, at 52. The substantial use made of domicile as a connecting factor partially undermines that rejection and use of local law undermines it still further. See Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 *Ind. L.J.* 297, 303-04 (1958).

## V. EFFECTIVE CONFLICT OF LAWS ADVOCACY

In the present state of the cases and commentaries, the choice of law area is like a giant grab bag. A host of conflicting suggestions and rules can be found for almost every problem in every jurisdiction. Thus, effective advocacy is of great importance if the field is to be clarified and developed to achieve results in accord with rational objectives.

Here, as elsewhere, the courts are influenced by authority, analysis, consequences and broad considerations of justice. An effective argument views the case in terms of all four, showing, if possible, how all point to one result.<sup>72</sup> To be most effective, of course, the argument must be consistent. For example, certain consequences cannot be pointed to as desirable when they are not consistent with the analysis employed or with broad considerations of justice relied upon. Nor can an analysis be effective if it does not square with the methods and rules found in the cases. Nor can authority without reason be safely relied upon. Accordingly, I believe the single most important feature for good conflict of laws advocacy is to see the relationship between the general lines of argument used in all cases and the special lines of argument relevant to choice of law problems, and then to make the special lines of argument consistent within themselves. For example, an argument in vested rights terms cannot be effectively bolstered by reference to policy objectives thought correct by Currie, unless it can be shown how the vested rights theory can logically be explained in terms of those objectives.

The overall picture could be charted as follows:

<i>General Lines of Argument</i>	<i>Conflict Lines of Argument</i>		
1. Justice	Uniformity	9 Cheatham Policies	Legitimate Govern- mental Interest (forum primary)
2. Analysis	Vested Rights Theory	Local Law Theory	Local Law Theory
3. Authority	6-step Traditional Method plus Rules of Cases	Amendments to Traditional Method	Currie Method
4. Consequences	(Left blank because requires study of a great number of factors depending upon the particular case)		

Of course, this is a general picture and the advocate may find it necessary, depending on the problem and the state of authority in the forum, to cross lines as they are presently thought to exist. For example, suppose an advocate needs the Currie method to arrive at a

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72. I have developed this theme further at 10 J. Legal Ed. 347 (1958).

result favorable to his client, but the forum is fairly strongly committed to the traditional method. Is there any way in which the advocate could interpret Currie's method as an amendment to the existing method and thus obtain his desired result without the forum chucking all precedent overboard? (Similar problems arise with regard to the now more conventional amendments brought about by the local law theory, but they have been discussed.)

The first and most hopeful device if legislation is involved is to take a cue from Currie himself, who says of his method:

This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.<sup>73</sup>

Thus, an argument could be constructed that in cases involving some foreign facts a determination must always be made of when the legislature intended a particular statute to be applied, and that the particular legislative policy involved has displaced traditional conflict of laws method and policy.

In common law cases, an advocate faced with the necessity of relying on the Currie method before a court committed to the traditional method might treat his argument as an expansion of the public policy category of the traditional method. Thus, the forum should apply its own law and public policy, he would argue, when it has a legitimate interest to so do. More likely, the advocate could interpret his argument as a deeper insight into characterization and connecting factors. That is, he could contend that problems involving legitimate governmental interests of the forum should be characterized as problems calling into force the law of the forum.

Another type of argument is to use the objectives of one scheme, e.g., the Currie objectives, as a defensive weapon to urge the court to alter its application of the traditional method, if it feels bound by it, in order to achieve in the case at bar the policy proffered as desirable. This argument is an interim type of pressure, since ultimately the court would have to move one way or the other. Another possibility is to argue that one theory is best suited to certain types of problems while another (the one promising favorable results) is applicable to the case at bar.<sup>74</sup> Many other crossings can undoubtedly be invented.

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73. Currie, *supra* note 54, at 178.

74. This thesis is developed by Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 *Harv. L. Rev.* 361, 392-93 (1945), *AALS Readings* 48, 69.

It is necessary, of course, to be thoroughly familiar with all of the objectives, theories and methods in order to prevent embarrassing loop-holes from developing in such arguments.

## VI. CONCLUSION

Conflict of laws is in transition, though where it goes, nobody knows. If advocates are to lead and development not be blind, the interrelationships between method, theory, objectives and consequences must be kept in mind. The simple check list suggested in the first part of this article must become a three-headed check list, if the advocate is to be in the forefront of conflicts developments and if he is to achieve the best results in his own particular cases. Starting with the steps of the traditional method, he must be aware of the amendments to the method suggested by the local law theory, and he should be familiar with the Currie method and its potentialities as either a completely new method or as another series of changes grafted upon the traditional system. Further, the successful advocate will know how any result in a particular case can be related to the various methods, theories and objectives. A combination of an increasing number of cases with conflicts potentialities and advocates aware of conflicts problems and possible solutions brightens the horizon for the conflicts field.

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