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Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles

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Reviews

Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles.
By Moffatt Hancock. William S. Hein Co. 1984. Pp. xviii, 446.

This is a collection of the more important articles on conflict of laws that Professor Hancock has written since 1960; in addition, it contains a chapter, hitherto unpublished, on *Allstate Ins. Co. v. Hague*,¹ the Supreme Court's most recent foray into constitutional limitations on the power of a state to apply its law in situations involving foreign facts. Many of us undoubtedly read the majority of these essays at the time when they first appeared in law review form. It is good that they are now available in a single book. We are thereby afforded a convenient opportunity to refresh a memory that may have grown dim and to gain a new insight into Professor Hancock's thinking.

Hancock is a brilliant and talented scholar. He is interested primarily in the methodology that he believes the courts should use in deciding choice-of-law questions. On this score, he evinces no doubt. He is sure that there is but one true path for courts to take, and he states his position forcefully and directly. No one can read this book without being challenged to give deep thought to what in his own view is the proper approach to choice of law. He can agree with Professor Hancock. But if he does not, he will almost surely feel forced to reevaluate-or at least to attempt to reevaluate-the alternative approach that he favors.

Professor Hancock is convinced that all questions of choice of law should initially be approached from the standpoint of construction and interpretation. The first step for a judge or a lawyer is to isolate the potentially applicable local law rules of the states having contacts with the case. These rules should then be subjected to the ordinary processes of construction and interpretation to determine whether their underlying purpose would be furthered if they were to be applied to determine the issue at hand. If this would be true of only one of these rules, this is the rule that should be applied. If, however, the underlying purpose of two or more rules would be furthered by their application, the case becomes more difficult. Professor Hancock suggests that this difficulty may sometimes be obviated by an inquiry into the relative strength of the

1. 449 U.S. 302 (1981)

policies that underlie each rule so that the rule which embodies the strongest policy can be identified and applied. If it proves impossible to establish on a reasoned basis that one policy is stronger than another, Professor Hancock suggests that a possible solution is for the forum to apply what it deems to be the best of the competing rules. No attempt is made to spell out all the considerations that the author believes a court should bear in mind in its search for the better law. One factor he deems important is whether a given rule is applied in a majority or only in a minority of states. Also important is whether the states that have a particular rule are increasing or decreasing in number. A rule that is in the course of being abandoned should usually be regarded less favorably than a rule that is increasing in popularity.

From what has been said above, those who are versed in conflict of laws will realize the similarity between Hancock's suggested approach and that advocated by the late Professor Brainerd Currie. Indeed Professor Hancock is lavish in his praise of Currie and is quick to admit the debt that he owes him. Like Hancock, Professor Currie believed that the proper approach to problems of choice of law is through the interpretation and construction of the potentially applicable local law rules of the states having contacts with the case. If the purpose of only one of these rules would be served by its application to the issue at hand that is the rule that should be applied. On this point, Hancock and Currie are in agreement. They differ, however, in the situation where the purpose of the forum rule, and also that of some other state, would each be served by its application. Here Currie would say that the forum rule should be applied without regard to any feeling the court might have that the other state has a greater interest in the decision of the case. Hancock, however, as we have seen, does not advocate so draconian a course. In his view, the forum in such a situation should engage in a further inquiry into the relative strength of the policies underlying the competing rules and should also consider which of these rules is the better from the standpoint of policy and justice.

A word should be said at this point with respect to what Hancock means by *interpretation and construction*. He nowhere suggests that a detailed inquiry should be made into whether the enacting legislature would have wished to have its rule applied to the situation at hand. This is entirely understandable. The legislative history of a state rule is frequently unavailable and, even if it were, it would be the rare case where this history would cast any light on

what extraterritorial application, if any, the legislature would have wished that its rule be given. Probably the legislature never thought about this problem at all and, in any event, the burden involved in trying to ascertain a usually non-existent intent would rarely be worth the effort. Instead Professor Hancock applies what is really his own hunch in determining the underlying purpose of the rule involved and whether this purpose would be served by the rule's application to the issue at hand.

There is another point on which Professor Hancock and Currie are in agreement. This is that territorial contacts should count for nothing except to the extent that they have relevance to the policy underlying a particular rule. So, for example, little or no weight should be given to the place of conduct and injury in determining the applicability of a rule that limits the amount recoverable in an action for wrongful death. On the other hand, this place should have almost exclusive significance when it comes to determining appropriate standards of conduct. This is because a state has an obvious concern in regulating activity that takes place within its territory.

Much can be said in support of the interpretation and construction approach that is advocated by Professor Hancock. As we have seen, this approach does not involve any serious attempt to ascertain actual legislative interest which in any event would frequently be non-existent. What is really advocated is that the judge should use his best judgment and reasoning processes in deciding what purpose, or purposes, a statute or other rule was probably intended to serve. He should do so for the obvious reason that it makes no sense to disregard a rule of a state whose purpose would be served by its application and to apply instead the rule of another state whose purpose would not be served. Also, although legislative history will usually be lacking, a fair conclusion can frequently be reached on what was the probable purpose, or purposes, intended. The dangers inherent in the process should, however, be borne in mind. It should constantly be remembered that any conclusion as to a rule's purposes will be in the nature of a guess, however educated it may be. There is also the danger of ascribing non-existent purposes to a rule, and of disregarding actual ones, in order to arrive at what is thought to be the best solution of the case on the merits.

Professor Hancock is at his best, and most brilliant, in discussing the conflict of laws problems posed by charitable testamentary gifts and by transfers of interests in land. He demonstrates conclusively

that the courts have fared best in these areas when they have looked for guidance to what in their best judgment were the purposes sought to be achieved by the potentially applicable rules of the states involved. Contrariwise, they have fared worst when they have disregarded these purposes and unthinkingly applied some broad choice-of-law rule, such as one calling for application of the law of the situs. *Toledo Society for Crippled Children v. Hickok*² is an abysmal example of the latter sort. There a Texas court insisted on upholding the validity of a will leaving interests in Texas land to various charities although Texas had apparently no connection with the charities involved and the testamentary provision was invalid under the law of Ohio, the state of domicile of the testator and of all of his beneficiaries. Professor Hancock is surely right in stating that the purpose of the Texas law which permitted complete testamentary freedom with respect to charitable gifts could hardly have been served by its application in that particular case. Surely Ohio was the only state of interest and its rule should have been applied. Professor Hancock is also correct in stating that such doctrines, as equitable conversion, have been used in choice-of-law cases essentially as subterfuges to permit the courts to escape, when they felt it appropriate to do so, from the rule calling for application of the law of the situs in cases involving interests in land.

Professor Hancock does not fare as well, in the opinion of this reviewer, in the area of torts. Possibly this is because torts rules can frequently be thought to have a number of purposes which are likely to point in different directions in choice-of-law cases. Possibly this is also because one is particularly likely in torts to have strong feelings about what should be the ultimate outcome of the case. If application of a given rule would lead to the desired outcome, there will be a natural tendency to ascribe purposes to the rule that would lead to its application and to disregard other possible purposes that would point to a different result. Professor Hancock's discussion of *Cipolla v. Shaposka*³ will serve as an illustration. In that case, the plaintiff, a Pennsylvania domiciliary, was injured while riding as a guest-passenger in an automobile in Delaware. The automobile was registered and insured in Delaware and the defendant driver was domiciled there. Delaware, but not Pennsylvania, had a guest-

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

3. 439 Pa. 563, 267 A.2d 854 (1970)

passenger statute. Suit was brought in Pennsylvania where the defendant had judgement by reason of the application of the Delaware statute. Professor Hancock deplors this decision. He tells us that

. . .the Delaware anti-guest statute had two policies neither of which was specifically directed to collisions occurring in Delaware. The statutory policy of protecting Delaware citizens from liability would have been applicable to any collisions involving them as defendants in Delaware or elsewhere. The policy of protecting insurance counsel from the hazards of collusion was directed exclusively to litigation in Delaware courts.

How can Professor Hancock be sure that the Delaware statute had only the two purposes that he mentioned? He cites nothing in support of his conclusion and other plausible purposes come easily to mind. It seems quite likely that another purpose of the statute was to insist that a guest-passenger should evince gratitude for the free ride given him by not seeking recovery for injuries suffered as a result of the driver's ordinary negligence. Still another possible purpose would be to encourage persons, while in Delaware, to offer free rides to others by giving them limited immunity from liability in tort. Both of these latter purposes, it will be noted, would, in Professor Hancock's words, be "specifically directed to collisions occurring in Delaware."

In the absence of a precise legislative history, there can be no means of knowing with any certainty what purposes the Delaware legislature actually had in mind when it enacted the guest-passenger statute. What can be said with some confidence is that Professor Hancock has fallen short of exhausting the many possibilities. Indeed, he has fallen so far short that it is difficult to avoid the suspicion that he was so eager to reach a given result — i.e. disapproval of the Pennsylvania court's application of the Delaware statute — that consciously or unconsciously he disregarded plausible statutory purposes that would have been furthered by application of the statute. Certainly, Professor Hancock's analysis of *Cipolla v. Shaposka* case can hardly be termed statutory interpretation and construction.

The same can be said about Professor Hancock's discussion of *Neumeier v. Kuehner*,⁴ a decision by the New York Court of

4. 31 N.Y. 2nd 121, 286 N.E. 2d 454 (1971)

Appeals. In that case, a New Yorker drove his automobile to Ontario where he picked up a guest-passenger who was domiciled in that province. While travelling in Ontario, the automobile was struck by a train and both the driver and the passenger were killed. Suit to recover for the passenger's wrongful death was brought in New York where the defendant prevailed in the Court of Appeals by reason of the Ontario guest-passenger statute. Professor Hancock disapproves of this result, arguing that no policy of either Ontario or New York would have been subverted by a judgment for the plaintiff. In his view, the only purpose of the Ontario guest-passenger statute was to protect Ontario domiciliaries while New York had no policy looking for the protection of host-drivers. Again Professor Hancock seems blind to possible policies that would point the other way. One cannot be sure that the Ontario statute did not also have the purpose of making guest-passengers grateful to their hosts and not seek recovery from them for simple negligence. The statute might also have had the purpose of encouraging persons in Ontario to offer free rides to others. Both of these policies, if they existed, would have been furthered by application of the Ontario statute. Turning now to New York, it is clear that New York had no explicit policy favoring the host-drivers. On the other hand, a rule which does not protect one party may well be designed to protect another. It seems highly probable that at least one purpose of the New York rule was to protect guest-passengers. But what guest-passengers? Undoubtedly, the New York legislature had no intention to protect all guest-passengers in the world. It seems logical to assume the purpose of the New York rule was directed to New York domiciliaries and also perhaps to all guest-passengers injured in New York. It is by no means clear that New York would have wished its rule to be applied to the disadvantage of a New Yorker and in favor of a guest-passenger who was injured in the state of his own domicile whose law gave him no protection with respect to the issue at hand. This seems to be another example of a situation where Professor Hancock is being result-selective in emphasizing only those purposes which point to the result he wishes to reach. He does not really interpret and construe; rather he picks and chooses among possible purposes.

This reviewer has other differences with Professor Hancock. He would give considerably greater effect to territorial contacts in choosing the applicable law. He would rarely be influenced, if ever, by what in his view is the better law. Experience reveals that courts

have consistently found their law to be the better one.⁵ Emphasis on this factor has led, and almost certainly would continue to lead, to parochialism. Also this reviewer questions the value, except perhaps in a most obvious case, of attempting to assess the strength of the policy embodied in a particular law. Such attempts are likely to be time-consuming and would often prove non-productive. Worse still, there is the constant danger that a judge, consciously or unconsciously, would let his desire to reach a particular result influence his assessment of a policy's strength or weakness.

In any event, this reviewer's basic disagreement is with Professor Hancock's insistence that there is only one correct approach to choice-of-law, namely, through the construction and interpretation of the potentially applicable laws of the states having contact with the case. Surely a judge should be concerned with the purposes sought to be achieved by these laws. Sometimes, however, these purposes cannot be ascertained and on other occasions a law may have a number of purposes that point in different directions so far as concerns choice of the applicable law. When all is said and done, Professor Hancock is too much of a simplicitist. His suggested approach is important but there are other values and factors that a court should consider in deciding a problem of choice-of-law. One of these values is that a court should be concerned with protecting the justified expectations of the parties, which is of particular importance in such areas as contracts and trusts. Other important values, mentioned here only by way of example, are that in deciding choice-of-law questions a court should have regard for the best interests of the interstate and international systems and should seek to further the basic policies underlying the substantive field involved such as torts, contracts, trusts and workers' compensation.

In conclusion, this reviewer wants to reiterate that he has real admiration for Professor Hancock's work. Hancock forcefully identifies an important consideration with which courts should be concerned in deciding choice-of-law cases. That he does not possess the entire truth is not surprising since, like the rest of us, he is a

5. Only one case is presently known where the court applied the law of a second state on the ground that it was better than its own. In *Frummer v. Hilton Motels International Inc.*, 60 Misc 840, 304 N.Y.S. 2d 335 (1969) the court applied the comparative negligence rule of England (also the place of injury) in preference to the New York rule of contributory negligence.

human. He is an important laborer in the field of choice-of-law. His efforts, and hopefully also those of the rest of us, will aid the courts in their search for the ultimate truth.

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Natural Law and Natural Rights. By John Finnis. Oxford: Clarendon Press 1980. Pp. XV, 425.

In this book John Finnis attempts to develop a traditional natural law theory which is sensitive to contemporary issues, responds to current criticisms of the doctrine, and is stated without the confusing theological terminology which usually mars such attempts. His clear statement of a theory whose roots go back to the work of Aristotle and Aquinas make this book a "must read" for anyone interested in the philosophy of law. *Natural Law and Natural Rights* stands as a worthy competitor to H.L.A. Hart's *The Concept of Law* and R.M. Dworkin's *Taking Rights Seriously*, the two works which, thus far, have dominated philosophic thought in this century about the nature of law and morality. I have no doubt that Finnis' book will become the standard reference for both supporters and opponents of natural law theory.

Finnis recognizes that any complete theory of law must state what law is (what make propositions of law true or false), what law ought to be (what laws a good society morally ought to have), and what the relationship between law and morality is. Legal positivists argue for the Separation Thesis; the doctrine that what law is is a question of (value neutral) social fact, and that, hence, what laws we ought to have is a conceptually distinct question. Positivists, typically, attempt to foist upon natural law theorists the absurd doctrine that there is a tight conceptual connection between law and morality so that bad law is not even law at all. But Finnis argues that the nature of the relationship between law and morality has, contrary to what some passages from Aquinas would suggest, always been of little interest to natural law theorists. Rather, he holds that the authority of any system of law stems solely from the fact that only those

standards for regulating human behaviour which allow for interpersonal activity in ways which permit and foster human flourishing can have moral worth. Reasonable people, Finnis argues, will not be content with a system of laws that accomplishes nothing more eliminating the disutilities which result from uncoordinated interaction. This feature of the law, where law is seen as a vehicle for attaining true moral worth, is illuminated by Finnis through a careful discussion of the nature of promising. Indeed, his account of promising, contained in Chapters IX and XI, is one of the most lucid available in the literature. Finnis has here, it seems to me, the basis for a cogent account of the conceptual part of a general theory of law. Unfortunately, he does not spend much time developing this account, for it is the normative part of legal theory which really interests Finnis.

Finnis develops his moral theory by arguing that something is truly good if, and only if, it is what the man with a well developed sense of practical reason would accept as a basic value. Something is a basic value if, independently of any set of purposes or institutional framework, it is good in itself. He then argues that such a man would find that there are seven basic values; seven things good in themselves. These are; life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion. Not only are these the basic values but, so Finnis would have it, they are the only basic values and they are self-evidently basic values. Finnis then goes on to develop an axiom based moral theory from this starting point. Finnis' basic axiom is that one ought never to act in a way that will thwart any of the seven basic values. The good society will adopt all, and only, those laws which serve to best protect people in their individual pursuit of these basic values. His account of which laws such a society will adopt is truly impressive.

Now, there are well known problems with any moral theory based on self-evident principles. We want to know, for instance, what to say to the person who simply refuses to recognize that a putative basic value really is a basic value? And what about someone who agrees with us about which values are basic but who holds that he or she simply does not care to pursue them (or let us pursue them)? Do we simply discount such peoples preferences? Or perhaps we should lock them up or expel them? I cannot delve into these questions here. I simply note that they are serious problems — problems which Finnis recognizes and attempts to meet — and report that I did not find his solutions very satisfying.

Let us turn to the vital question of whether Finnis has got the correct list of basic values. I think he is mistaken on several counts. First, the most surprising thing about Finnis' list is that it does not include pleasure; the thing most philosophers, if they have thought that anything is a basic value, have thought of as intrinsically valuable. Indeed, Bentham and Mill held that pleasure was the only basic value. Finnis argues that pleasure is not a basic value by employing Robert Nozick's thought experiment about an experience machine, a machine which provides one with all sort of pleasurable experiences. Would you, asks Finnis and Nozick, allow yourself to be attached to the experience machine if you knew that this move was irrevocable? Finnis takes the negative answer to this question to show that pleasure is not a basic value. But he is clearly wrong here. All that Nozick's thought experiment shows is that pleasure is not the *sole* basic value. (I doubt that, on careful analysis, the argument would show even this; but this is certainly the most that it shows.) So, contra Finnis, pleasure must be a self-evident basic value if anything is; something anyone possessed of practical reason would want to have. Furthermore, if Nozick's argument did establish that pleasure was *not* a basic value then, by parity of reason, it would also show that several things Finnis thinks are basic values, aesthetic experience, play, and religion, are, in fact, not basic values. (Aristotle, for example, recognized this when he discussed whether play was an intrinsic value and concluded that it wasn't because we play so that we can work, not work so that we can play.) I conclude that Nozick's experience machine does not serve Finnis' purposes. It fails to show that pleasure is not a basic value and shows that several of Finnis' basic values are not really intrinsically valuable.

But there are other problems with Finnis' list of basic values. Religion, as Finnis analyses it, does not belong on the list for it is nothing more than a combination of knowledge, play, and aesthetic experience. Nor do knowledge or practical reasonableness appear to me as basic values. (I don't think they are basic values and I am *sure* that they are not self-evident basic values.) Nor is life a plausible candidate for being a basic value. Life may well be a necessary condition for those things which are intrinsically valuable. But, as Plato recognized, it does not follow from the fact that something is a necessary condition for having that which is of value that the necessary condition is intrinsically valuable. Rather it is but instrumentally valuable. Finally, Finnis argues that the basic values

are incommensurable so that his theory cannot be recast as a version of utilitarianism. But, Finnis' arguments that basic values are incommensurable all depend on general scepticism about other minds. But this poses a dilemma for either these sceptical arguments are incorrect (as I think they are) and Finnis should have been a utilitarian (albeit a negative one) or they are correct, in which case knowledge, practical wisdom, and friendship should be stricken from Finnis' list.

Finnis' refusal to see that utility is a coherent concept leads to disastrous results when he comes to discuss Dworkin's work. Dworkin holds that one has a right to something when it would be wrong to deprive you of that something even if depriving you of it would increase the general welfare overall. Finnis dismisses Dworkin here simply by noting that this definition of a right depends on the notion of general welfare and this, so Finnis would have it, is an incoherent concept. But this is just stilly. Dworkin explicitly defines rights in terms of utility because he recognizes that utilitarianism offers the most substantial challenge against his theory. Dworkin could have defined a right in contrast to any other theory (defined in contrast to Finnis theory someone has a right when it is wrong to deprive him or her of what that right provides even if so depriving him or her would harm someone's pursuit of some basic value. How could Finnis complain about this?) His quick dismissal of Dworkin is particularly unfortunate because Finnis' own theory about the nature of legal systems could, quite naturally, have drawn on Dworkin's work.

But these problems with *Natural Law and Natural Rights* do not show that Finnis has failed to attain his goal of resurrecting natural law theory from its present perceived status of but little more than a complex academic joke.

Minor misprints are found on page 92 (where section IV.4 is mislabeled "VI.4") and page 106 (where "threat" should be "treat"). Neither of these seriously mar this excellent work.

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