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Article

Vested Rights, "Vestedness," and Choice of Law

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This Article is dedicated to the memory of Robert Cover, z"l. "Whoever teaches Torah in this world will be privileged to teach it in the world to come." B.T. *Sanhedrin* 92a.

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The choice of law revolution is under attack.¹ In a familiar pattern, once-new critiques have become old verities, and are now themselves ripe for dethronement. This Article is one piece of that revisionist campaign. It differs from some of the rest of the genre, however, in both focus and intent. To my mind, the vested rights tradition in whose overthrow the current orthodoxy was born combined a jurisprudential core with a set of

1. See, e.g., Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Cavers, *Contemporary Conflicts Law in American Perspective*, 3 RECUEIL DES COURS 75 (1970); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); McDougal, *The New Frontier in Choice of Law—Trans-State Laws: The Need Demonstrated in Theory and in the Context of Motor Vehicle Guest-Host Controversies*, 53 TUL. L. REV. 731 (1979); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

further premises and details. The American choice of law revolution attacked the core *and* the additional premises *and* the additional details. The reassessment now beginning to stir has on the whole taken the critique of the core for granted, while attempting to revivify some of the rest. My own strategy, by contrast, will be to concede most of the periphery and to work at tightening, explaining, and justifying the core.

In setting out these ambitions, I do not claim that my efforts are more profound or thoroughgoing than those of others. For one thing, my core may be someone else's periphery. Quite apart from that, a jurisprudential core may not amount to all that much; it may turn out to be small, or indistinct, or even empty. That brings me to the intent of this Article, which is not only to say something about choice of law, but also to work through an exercise—an experiment—in applied jurisprudence.² By applied jurisprudence, I mean the effort to examine fundamental ideas about the nature of law, not primarily for the sake of either justifying or refining them, but in order to generate specific conclusions about the shape of legal doctrine and institutional practice. The aim of such an exercise is twofold: to say something practical, and also to say something about how much of practical value can be said. In the case at hand, my conclusion is that certain ideas about the nature of law—ideas as basic as the proposition that law is about the recognition and enforcement of norms—can yield a thin but relatively solid foundation for choice of law. I call this foundation “vestedness”—to mark it as an offspring but not a clone of traditional vested rights theory. Although my account of vestedness offers nothing close to a full-fledged reconstruction of choice of law doctrine, it does advance some ideas about the paths such a reconstruction might take.

This exercise in applied jurisprudence also turns out, if in a limited way, to be an exercise in intellectual history. The story of choice of law, as told in this Article, is a story of intellectual lag. The choice of law revolution was solidly grounded in one theme within the larger movement of American Legal Realism. Legal Realism, of course, no longer holds a monopoly on sophisticated legal thought, and what remains of it has matured in ways that cast doubt on some of its original claims. Modern American choice of law doctrine, however, while by no means idle, has not kept up with the further progress of the important debates in whose atmosphere it was conceived. To a large extent, it is trapped in assumptions that should no longer be considered self-evident. Hence my claim that the old critiques have become the new verities, and hence the need for a forward-looking counter-revolution.

2. Cf. Lowenfeld, *Revolt Against Intellectual Tyranny*, 38 STAN. L. REV. 1411, 1411 (1986) (“conflict of laws is applied jurisprudence”).

Section I of this Article provides something of the historical background for the problems that I will address. Section II defines the counter-revolutionary notion of vestedness and discusses its attributes and consequences. Section III is a necessary digression that establishes, by way of a distinction between "Norm-Based" and "Decision-Based" views of law, the broader jurisprudential framework within which my defense of vestedness will proceed. Section IV, the most important section of the Article, undertakes that defense. Section V concludes the discussion with some thoughts on the road ahead.

I. THE STORY SO FAR: ORTHODOXY AND REVOLUTION IN CHOICE OF LAW

The saga of orthodoxy and revolution in the development of American choice of law doctrine is well-known.³ My skeletal and selective version of that story will focus on Joseph Beale and A.V. Dicey, two of the great masters of classical Anglo-American vested rights theory, and on Walter Wheeler Cook and Brainard Currie, two of the leaders, in succeeding generations, of the choice of law revolution.

A. *Orthodoxy*

In the view of Beale and Dicey,⁴ the problem of choice of law was presented whenever a case arguably involved the application of the law of one or another jurisdiction, or the law of a jurisdiction foreign to the forum.⁵ Their analysis was grounded in an often explicit but rarely separated conglomerate of ideas that can be distilled into four basic, conceptually distinct premises.

First, Beale and Dicey were convinced that—subject to the forum's control over procedure and its right to refuse to entertain a cause of action at all—the aim of choice of law was to discover the place, whether the forum or some other regime, whose law governed the set of facts at issue in an adjudication, and by whose law legal rights "vested" with regard to those

3. For standard accounts of that history, see, for example, E. SCOLES & P. HAY, *CONFLICT OF LAWS* §§ 2.4-.17 (1982); Korn, *supra* note 1, at 802-20.

4. I do not intend, by treating "Beale and Dicey" as almost a single entity in my account, to deny the differences between them. Over and above divergences of tone and emphasis, Beale and Dicey disagreed sharply about a number of important issues in choice of law doctrine. See, e.g., *infra* note 11 (role of *lex fori* in allowing cause of action in tort); *infra* note 34 (*renvoi*); *infra* note 94 (rights/remedy distinction).

5. 1 J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* § 1.1, at 1 (1935); A. DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* 1-2 (2d ed. 1908). As I discuss in more detail, see *infra* text accompanying notes 33-34, Beale and Dicey argued that, in applying a foreign legal norm, a court does not, strictly speaking, enforce the foreign legal order as such, but only enforces rights created under that foreign law.

facts, *at the time that those facts occurred.*⁶ (Hence, of course, the term “vested rights theory.”⁷) To exponents of the classical tradition, this aim of choice of law followed inevitably from the more general axiom that a court’s task in adjudicating the merits of any case, whether or not the case raises questions of choice of law, is to determine and enforce the law that applied to a set of facts, and the rights created under that law, not as of the time of the litigation, but as of the time of the occurrence of those facts.⁸

Second, Beale and (to a somewhat lesser extent) Dicey, in setting out to describe the rules of choice of law, held that the law governing a given legal interaction was almost always the law of the place in which certain discrete, specified events in that interaction took place. In articulating this so-called territorial view of choice of law,⁹ Beale and Dicey did not entirely rule out reference to other variables such as the domicile of one or more of the parties.¹⁰ Indeed, they even seemed willing at times to look to variables that eventually came to be associated with the choice of law revolution.¹¹ Nevertheless, for Beale and Dicey, a fundamentally territorial system of choice of law was a natural consequence of the fundamentally territorial character of legal authority in the modern world.¹²

Third, in the spirit of their times, Beale and Dicey sought—insofar as consistent with the decided cases, which they took to be their data—to treat choice of law as a self-contained, deductively derived system of rules,

6. 1 J. BEALE, *supra* note 5, § 1.1; A. DICEY, *supra* note 5, at 23–27, 58–59.

7. See L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 218–23 (1986) (discussing vested rights approach in choice of law).

8. 1 J. BEALE, *supra* note 5, § 1.1, at 2; 3 *id.* § 378.5; A. DICEY, *supra* note 5, at 9.

9. I say so-called because there are very different views of choice of law that might equally well be characterized as “territorial.” Cf. *infra* text accompanying notes 21–25 (discussing Cook’s critique); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970) (advancing neo-territorial view).

10. 1 J. BEALE, *supra* note 5, § 9.3 (discussing importance of domicile in choice of law); 2 *id.* §§ 119.1–149.1 (discussing status and its relationship to domicile); A. DICEY, *supra* note 5, at 463–68 (discussing domicile as partial determinant of status and status-related rights).

11. See, e.g., 2 J. BEALE, *supra* note 5, §§ 121.2, 129.4, 130.1 (alluding to state “interests” and other policy concerns in discussion of choice of law rules for marriage); *id.* §§ 333.2–4 (canvassing both “theoretical” and “practical” considerations in discussing various possible rules for determining law that should be applied to contract); A. DICEY, *supra* note 5, at 645–49 (arguing that, under English choice of law, tort only actionable if both wrongful where it was done *and* actionable as tort in England). Indeed, it might be argued that Dicey’s account of a “*lex loci plus lex fori*” rule in the context of torts compromises not only his territorial purism but also his commitment to vested rights. The short answer is that Dicey’s scheme essentially establishes (though he did not put it this way) nothing more than a general “public policy” limitation on the enforcement of foreign-created rights in tort, see *infra* text accompanying note 64, and thus does not violate the basic principle “enjoining the recognition of rights acquired under the law of any civilised country.” A. DICEY, *supra*, at 646.

In Beale’s case, his occasional forays into discussions of “policy” sometimes led to analyses that a modern reader would almost certainly find repugnant. See, e.g., 2 J. BEALE, *supra*, § 132.3 (discussing choice of law rules for “miscegenation”).

12. See, e.g., 1 J. BEALE, *supra* note 5, §§ 2.1, 5.2.

operating at a relatively high level of abstraction, and grounded in a small, relatively fixed and self-evident set of concepts.¹³

Finally, Beale and Dicey, though committed to the enforcement of fixed rights that “vested” on the basis of abstract, territorial rules, insisted that every forum was the master of its own efforts at choice of law. In particular, they believed that: (1) the law of choice of law—that is, the body of rules directing a court to apply the law of one or another jurisdiction—was a part of the law of the forum, and not a branch of public international law or a law imposed on the forum by some other jurisdiction;¹⁴ and (2) different jurisdictions could, without contradiction, employ different rules of choice of law.¹⁵ Interestingly, these ideas were disputed *within* the general classical tradition to which Beale and Dicey belonged. A number of authors were determined, unlike Beale and Dicey, to link private international law to public international law; others, unconstrained by Beale and Dicey’s brand of legal positivism, searched for a common law of choice of law, grounded in fundamental principles and applicable in all places.¹⁶

B. Revolution

1. Cook’s Critique

Walter Wheeler Cook, whose work in choice of law dates mostly from the 1930’s, was one of the leading practitioners of the great “Realist” movement in American legal scholarship. In his work on conflict of laws, Cook embraced the once-debated notion that forums were masters of their own efforts at choice of law, but assailed each of the other basic threads of the classical approach represented by Beale and Dicey. Cook was often no more anxious to untangle these strains than were Beale or Dicey, but distinct arguments can be extracted from his work. For my own purposes,

13. See, e.g., *id.* § 3.4, at 25 (law “in great part . . . consists in a homogeneous, scientific, and all-embracing body of principle”); *id.* § 4.12, at 48 (“common law was systematic; that is, it consisted of a system of thought based upon principles which covered every possible occurrence”); A. DICEY, *supra* note 5, at 20–21 (“the number of well-established rules with regard to the choice of law . . . is small . . . [Choice of law] is no mere mass of incoherent maxims; it is rather a system of rules, all of which have a relation to each other”). The extent of Beale’s and Dicey’s conceptualism was not, however, quite as extreme as their critics sometimes suggested. See, e.g., 1 J. BEALE, *supra* note 5, §§ 4.7–8 (discussing legal change); A. DICEY, *supra*, at 16–21 (discussing tension between “theoretical” and “positive” methods of treating choice of law). In Beale’s case, part of his reputation as the archetypical conceptualist was based on an outline of choice of law that he appended to a casebook he edited more than thirty years before the appearance of the treatise relied on in this Article. See 3 J. BEALE, *Summary of the Conflict of Laws*, in A SELECTION OF CASES ON THE CONFLICT OF LAWS 501 (1902).

14. See 1 J. BEALE, *supra* note 5, §§ 5.1, 5.3; A. DICEY, *supra* note 5, at 3–4, 9–10, 14–15, 20.

15. See 1 J. BEALE, *supra* note 5, § 5.1; A. DICEY, *supra* note 5, at 19–20.

16. See generally 1 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 8–11 (1958) (citing authors).

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it makes sense to build something of a chiasmus by proceeding, as I have already begun to do, in reverse.

Cook's critique of the conceptualist pretenses of traditional choice of law was of a piece with functionalist "realist" analyses of other fields of law. Cook tried to show that much of choice of law learning was arbitrary or driven by faulty logic and word fetishes, and that it reached conclusions required neither by principle nor by policy.¹⁷ He also suggested that the real work of choice of law was often performed, not by the celebrated rules that pronounced which law would govern a contract or a tort, but by the low-visibility process of characterization that assigned disputes to one or another legal category in the first place.¹⁸ Cook argued that many of the terms used in choice of law, such as domicile, movable property, or procedure, were only useful as shorthand for the considerations underlying their use, and that there was no good reason to expect those words to bear the same meaning in all their uses.¹⁹ More generally, he urged attention to concern for clarity, policy, and contextuality, and was skeptical of the ability of even the best abstract rules to meet the needs and challenges of choice of law.²⁰

Cook agreed with Beale and Dicey that law in the modern world was a territorial phenomenon.²¹ He saw little connection, however, between that idea and the resolution of many live questions in choice of law. Cook pointed out that any case in which choice of law was an issue was likely to contain elements connecting it to more than one territory, and that there was rarely a logically exclusive way of pinning down such a case to one or another of those territories.²² Thus, for example, Cook argued that when various parts of an allegedly tortious chain of events take place in different jurisdictions, there is no justification, within the logic of territorialism alone, for the traditional common law identification of *the* place of the wrong with only the last event in that chain.²³ Even more subversive of the territorialist tradition, though, was Cook's rejection of the notion that the law governing a legal interaction must be identified by reference to a particular predetermined dispositive event; he was thus quite willing to propose, in the case just described, that courts should apply "whichever of the two (or more) domestic rules is most favorable to the plaintiff."²⁴

17. See, e.g., W.W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 42-44, 154-57, 281, 350-88 (1942).

18. *Id.* at 214-25.

19. See, e.g., *id.* at 158-67, 194-203, 301-10.

20. See, e.g., *id.* at 30-31, 35, 42-46, 159-70, 185-86, 201-03, 244-51, 311-46, 417-19.

21. Cf. *id.* at 41 n.76 ("The present territorial organization is of course not the only possible form, though probably most of us would regard it as the only convenient one.")

22. See, e.g., *id.* at 311-22, 351-70, 433-37.

23. See, e.g., *id.* at 314-18, 321-23, 345.

24. *Id.* at 345.

Finally, Cook suggested that reference to domicile (which, after all, also reflects the connection of persons to territories) would best reflect the purposes of certain legal rules and the actual grounds for their enforcement.²⁵

Cook's critique was most thoroughgoing, if not obsessive, with regard to the first, most jurisprudential, premise of the orthodox choice of law tradition. Cook challenged the whole notion that courts go about enforcing rights, created by foreign law, that somehow "vest" well before trial and accompany their bearer into court. Part of his analysis was descriptive, or even definitional: Cook understood notions such as "law" and "rights" functionally (he claimed "scientifically"²⁶), as referring to nothing more than predictions of what courts would in fact do.²⁷ Thus, a set of facts in the world could not, in Cook's view, create any single set of vested rights, but rather "as many 'rights,' all growing out of the one group of facts under consideration, as there are jurisdictions which will give the plaintiff relief."²⁸ Moreover, Cook argued that when a forum purported to be applying the law of another sovereign, it was in fact doing no such thing, because it was making no effort actually to behave as the court of that other sovereign could be predicted to behave in adjudicating the case at hand.²⁹

In Cook's analysis, a forum purporting to apply foreign law or enforce a foreign-created right only enforces "a right created by its own law,"³⁰ though incorporating, as part of that law,

a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in many groups of cases . . . the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element*.³¹

Cook also observed that the assimilation of foreign rules of decision into

25. See, e.g., *id.* at 435-36.

26. See *id.* at 29.

27. *Id.* at 29-31.

28. *Id.* at 33.

29. See, e.g., *id.* at 32, 241-42, 330-31. The most glaring, though by no means the only, example of this purported gap between rhetoric and reality was the practice, enshrined at least by Beale, see *infra* note 34, of rejecting the *renvoi*—that is, enforcing vested rights on the basis of a definition of foreign law that often excluded any consideration of the foreign legal system's own rules of choice of law, with the result that a forum might recognize a "foreign" right that a court actually sitting in that foreign legal system would, on the basis of its own choice of law doctrines, refuse to recognize. See *id.* at 31-33, 330-35.

30. *Id.* at 21.

31. *Id.* at 20-21; see also, e.g., *id.* at 31, 222, 342-43.

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a forum's law rarely had anything to do with the " 'power' or 'jurisdiction' of the particular court or state to decide the case before it in a certain way. Cases involving power arise only where some limitation is imposed by some system of positive law—such as the federal constitution. Other limitations on power do not exist."³² Thus, a forum's choice of law decisions could be nothing but expressions of its own policy, and any law that the forum applied would have to be, in a real sense, local law. To claim anything more was to engage in obfuscation and delusion.

At first glance, it might appear that this part of Cook's analysis was merely quibbling. After all, Beale and Dicey themselves argued that choice of law was local law in the sense of being in the forum's hands.³³ They even insisted, in language echoing Cook's own, that a court cannot, strictly speaking, enforce foreign law, but only foreign-created rights, and that it does so through operation of its own law.³⁴

Cook was not simply quibbling, however, in his account of choice of law as local law. For Cook insisted that, if rights did not vest, and if "law" applied only in court and not before, and if a rigid, deductive, territorial system of choice of law rules was neither possible nor desirable, then choice of law was not only local in some finicky sense, but could only be, in its entire theory and practice, a reflection of the forum's own principles and policies. Consequently, cases in which choice of law was an issue could only be decided, in Cook's view, "by the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc."³⁵ and intelligent choice of law doctrine could only develop if grounded in pragmatic and wise "social and economic policy."³⁶

32. *Id.* at 41.

33. In fact, David Cavers argued many years ago that Cook himself often confused his own local law theory with other local law accounts that were really much more akin to vested rights theory. See Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950). In the rest of my account, I will (with some regret) subordinate the power of Cavers' argument to expositional convenience, and, unless the context indicates otherwise, continue to associate the term local law exclusively with Cook's theory and its offspring.

34. See 1 J. BEALE, *supra* note 5, § 5.4 ("The law of the forum is the only law that prevails as such. The foreign law is a fact in the transaction."); A. DICEY, *supra* note 5, at 25 (when courts are "popularly said to enforce a foreign law, what they do, in reality, is . . . to enforce not a foreign law, but a right acquired under the law of a foreign country"). Moreover, although Beale and Dicey disagreed with each other on the *renvoi* question, compare 1 J. BEALE, *supra*, § 7.3 (forum should only adopt internal rules of law of foreign legal system, and not its choice of law rules) with A. DICEY, *supra*, at 79–81, 715–23 (contending that English courts look to "whole law" of foreign legal systems, including their choice of law rules), they both recognized, in any number of contexts, that a court looking to foreign law was by no means always obliged to act as if it were itself a foreign court.

35. W.W. COOK, *supra* note 17, at 43.

36. *Id.* at 46.

2. *Of Rules of Assimilation*

By almost any standard, the notion that *some* choice of law doctrines might be, in the strictest sense, matters of local law, has to be recognized as a valuable contribution to clear thinking about choice of law. Consider, for example, the question of marriage. An interested forum might, as a matter of its own policy, want to recognize only those marriages entered into according to some standard of solemnity or publicity. It might, however, be less concerned with how a marriage is solemnized than that it is solemnized. If so, it might make sense, as a matter of the forum's own policy, to look to the law of the place in which a marriage was celebrated as one guide to its validity. Similarly, in contract law, a forum might, as a matter of its own policy, want to respect the presumed intentions of the parties, looking to the law of the place where a contract was made as a guide to those intentions. These examples could be multiplied, and might well encompass not only a forum's policies about specific substantive areas of law, but also considerations of fairness or convenience of a more general sort.

I will refer to these sorts of strictly local choice of law rules as "Rules of Assimilation." Clearly, a good deal of choice of law can be understood in terms of Rules of Assimilation, and the old texts were deficient in paying too little attention to their role.³⁷ In particular, the existence of Rules of Assimilation suggests that, in some cases, there is no real need to choose between the forum's substantive law and some foreign substantive law, since the former, sensitively interpreted, assimilates the terms of the latter. This happy result is what later theorists came to call a false conflict.

The question that remains, however, is whether all choice of law rules must be Rules of Assimilation. What should a court do when, even after it has exhausted its battery of Rules of Assimilation, it is faced with a true conflict between its own social and economic vision and that of some other legal system connected with the case? Inevitably, Cook's theory implied that, at that point, a forum could do nothing but apply *lex fori* (that is, "local law" without assimilation). If this conclusion was not always clear in Cook's writing, it was probably because he often overlooked, in his

37. It bears noting, though, that it was not Cook but Wesley Hohfeld who seems to have first clearly articulated the possibility that some choice of law rules could best be understood in terms of what I have called Rules of Assimilation. See Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 9 COLUM. L. REV. 492, 515-22 (1909); cf. W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 416 n.55 (1973) (discussing possibility that some of Cook's ideas on conflict of laws derived directly from Hohfeld). Hohfeld's aim, however, was to distinguish between Rules of Assimilation and other rules of choice of law, not to argue that choice of law was nothing but Rules of Assimilation. See also A. DICEY, *supra* note 5, at 59-63 (discussing difference between choice of law principles that look to foreign law as *source* of alleged right, and those that look to foreign law as *interpretation* of alleged right).

pragmatism, the possibility that there might be deep and profound substantive differences among nations or states.

Put another way, Cook first argued that judicial decisions purporting to enforce foreign-created vested rights did no such thing, and that courts in fact did no more than incorporate into the forum's law "a rule of decision identical . . . in scope with a rule of decision found in force in another state or country."³⁸ He then assumed that this account was inconsistent with the possibility that a court might apply a set of rules that did not take the forum's vision regarding the outcome of a case to be dispositive, but rather inquired, on the basis of some set of second-order criteria, whether that vision or some other should govern the case at hand. Why Cook might have made this assumption, and whether a convincing alternative story can be told, are among the questions that this Article will have to face.

3. *Currie's Critique*

Brainerd Currie, working in the 1950's and 1960's, was in many respects not a Legal Realist.³⁹ But he was a disciple of Cook's and a firm believer in Cook's jurisprudence. Currie wrote that "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another,"⁴⁰ and cheerfully took Cook's "local law" view of choice of law as the only alternative theory worth considering. Currie brought out more clearly than Cook some of the implications of the "local law" view. For one thing, Currie explicitly rejected the possibility that choice of law might operate through the use of second-order rules that, though local in their source, operated on the rest of local law from without, so to speak, and were therefore incommensurable with it.⁴¹ There might be policies justifying a forum's reference to foreign law, but those policies had to pass muster in light of the totality of the forum's law, and not the other way around. More particularly, Currie argued that the assimilation of foreign rules of decision into the forum's practice could be justified only on the basis of the forum's own policies and values, and that such justifications would have to

38. W.W. COOK, *supra* note 17, at 20-22.

39. See Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1588 n.6 (1985); Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 577-78 (1985); cf. Currie, *The Materials of Law Study* (pt. 3), 8 J. LEGAL EDUC. 1, 64-78 (1955) (sympathetic but critical examination of effects of certain aspects of Realist Movement on American legal education).

40. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 6 (1963).

41. See, e.g., *id.* at 52-53, 616-17, 706.

overcome the presumption that a forum would, as a matter of course, apply its own domestic rules of decision.⁴²

All of this was preliminary, however, to Currie's own two distinctive contributions to the choice of law revolution. First, Currie developed, in a way that Cook never did, a complete theory of false conflicts. This theory began with the claim that the purposes underlying particular laws could most usefully be understood in terms of state interests in achieving certain ends on behalf of certain persons.⁴³ Which persons? Obviously, persons within the state's political community, whose own interests may have had something to do with the enactment of the legislation in the first place.⁴⁴ Thus, implicit in every law is a built-in limit on the range of situations to which it purposefully can be applied: A state allowing for survival of actions in tort suits, for example, will have no interest in applying that doctrine on behalf of plaintiffs not domiciled in the state, while a state not allowing for such survival of actions will have no interest in applying its doctrine when neither the tortfeasor nor the tortfeasor's estate nor the beneficiaries of that estate have anything to do with the state.⁴⁵

With these premises in hand, Currie concluded that there was a class of cases in which—by virtue of the particular configuration of parties to the dispute relative to the configuration of state interests represented by various rules of decision invoked by those parties—only one state had any real interest in the application of its law to the facts at hand. These cases represented "false problems."⁴⁶ They were also the cases in which traditional choice of law rules, with their arbitrary focus on the situs of certain discrete events, were most likely to lead to results not in the interests of any legal regime, including the legal regime whose rules of decision were being applied.⁴⁷ Currie's own solution to false conflicts was relatively simple: If only the forum had an interest, it should apply its own law without hesitation or compunction;⁴⁸ if only some regime other than the forum had an interest, the forum could dismiss the suit, or in the alternative could display some mild deference and fellow feeling by incorporating the foreign rules of decision into its own law.⁴⁹

Currie's second contribution to the choice of law revolution was his proposed solution of true conflicts. Again, his suggestion was simple:

42. *See, e.g., id.* at 52-53, 183-84.

43. *See, e.g., id.* at 117-18, 143-46.

44. *See, e.g., id.* at 85, 143-46, 719. *But cf. id.* at 186 (recognizing possibility of "rational altruism").

45. *Id.* at 144-45.

46. *See, e.g., id.* at 107, 163, 189, 726.

47. *See, e.g., id.* at 107-10, 151-52, 180-81.

48. *Id.* at 184.

49. *Id.* at 61-63, 184, 607-08.

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There might in principle be policies that would lead a forum with an interest in applying its own rules of decision to a case to defer to the rules of decision of another state.⁵⁰ Such policies, however, are too vague, tentative, and intangible to count for much, and courts are ill-equipped to conduct the sort of balancing of interests that serious attention to such policies would require.⁵¹ Thus, in Currie's view:

The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law . . . simply because a court should never apply any other law except when there is a good reason for doing so.⁵²

4. *Of Rules of Scope*

Much of Currie's work has been severely criticized. His analysis of state interests, for example, is often arbitrary, dogmatic, narrow, and vaguely unrealistic. Indeed, Currie's domiciliary-centered scheme of choice of law is in many ways as rigid and unconvincing as the territorial catch-phrases of Beale and Dicey.⁵³ Moreover, a number of commentators have suggested that Currie's analysis of true conflicts slighted both the importance of values such as comity, reciprocity, and uniformity,⁵⁴ and the fact that courts often balance competing policies and interests and might be expected to manage the task as well in their efforts at choice of law.⁵⁵ My own interest in Currie, though, is somewhat different.

One of Currie's basic claims was that a purposive reading of legal rules may suggest limits, of a sort relevant to choice of law, on the range of situations to which those rules sensibly should be applied. I will refer to the sorts of considerations that might justify such limits as Rules of Scope. The claim that Rules of Scope might exist (as opposed to any specific

50. *Id.* at 93-94.

51. *See, e.g., id.* at 52-53, 181-82, 272-82.

52. *Id.* at 119.

53. *See, e.g.,* Brilmayer, *supra* note 1, at 405; Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 35-37, 50 (1984).

54. *See, e.g.,* E. SCOLES & P. HAY, *supra* note 3, § 2.6, at 19-20; Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 3, 9-10 (1963); Korn, *supra* note 1, at 777, 965-69; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938-44 (1975).

55. *See, e.g.,* Baxter, *supra* note 54, at 21-22; Peterson, *Weighing Contacts in Conflict Cases: The Handmaiden Axiom*, 9 DUQ. L. REV. 436, 440-44 (1971).

Critics have also pointed out that Currie's formula for resolving true conflicts contains at least one significant, perhaps fatal gap: It does not provide any guidance to a "disinterested" forum required to choose between the laws of two or more other "interested" jurisdictions. *See infra* note 225 and accompanying text.

description of their content) is surely right. Indeed, the kind of law-reading that Currie suggested (whatever one thinks of how he went about it) may not be all that different from the gamut of purposive interpretations that help us match legal rules to particular sets of facts in contexts unrelated to choice of law. Moreover, the old choice of law tradition made little effort to identify Rules of Scope, and Currie deserves credit for articulating issues that should have been obvious all along.

A number of questions remain, however, to which this Article will try to respond. The first of these exactly parallels the puzzle provoked by Cook: Assume that a court, having exhausted its stock of Rules of Scope with respect both to the forum's law and to one or more foreign laws, still confronts a true conflict. Why was Currie, like Cook, so sure that, in order to resolve the conflict, the court could not coherently apply second-order criteria that are neutral with regard to the forum's own first-order rules of decision and are incommensurate with—that is, cannot be weighed against—those first-order rules? The second question is more specifically aimed at Currie: Why was Currie so committed to the view that courts, in adjudicating particular legal disputes, were primarily charged with “consistently advancing the policy of [their] own state[s]?”⁵⁶ Is that really all there is to it? Or is it possible to draw a very different picture?⁵⁷

56. B. CURRIE, *supra* note 40, at 119.

57. The tale I have just told has been scandalously selective. Choice of law had a history before Beale and Dicey. See 3 J. BEALE, *supra* note 5, §§ 21–78; E. SCOLES & P. HAY, *supra* note 3, §§ 2.1–4. Moreover, the transition from orthodoxy to revolution was by no means as clear as I made it appear, particularly since Beale wrote some of his most definitive works well after his opponents had already made their own views well known. In addition, my account has essentially ignored any subtle changes that may have occurred in the views of Dicey, Beale, Cook, and Currie during the course of their careers.

Finally, the history of choice of law since the revolution has been particularly complicated. See Ehrenzweig, *A Counter-Revolution in Conflicts Law?: From Beale to Cavers*, 80 HARV. L. REV. 377 (1966); Korn, *supra* note 1, at 802–20. The old orthodoxy has, of course, had its defenders, here and there, more or less. See, e.g., Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667 (1953); Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT'L & COMP. L.Q. 268 (1959) (mixed evaluation); de Sloovere, *The Local Law Theory and Its Implications in the Conflict of Laws*, 41 HARV. L. REV. 421 (1928); de Sloovere, *On Looking Into Mr. Beale's Conflict of Laws*, 13 N.Y.U. L.Q. 333 (1936) [hereinafter de Sloovere, *Mr. Beale's Conflict of Laws*] (“moderate defense”); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938) (policy-based defense); Stimson, *The Law Governing the Creation of Rights and Duties Between Persons Subject to Different Laws*, 48 VA. L. REV. 643 (1962) (proposing, without much reasoned argument, that applicable law is law to which obligor was territorially subject at “significant time”). Meanwhile, the victorious insurgency has embraced a dizzying variety of views other than those of Cook and Currie, including views that combine support for revolutionary theory with practical prescriptions that revert, in one way or another, to older patterns. See, e.g., Hill, *supra* note 39; Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981). And judicial practice, unusually responsive to academic ferment, see generally J. MARTIN, *CONFLICT OF LAWS* 206–59 (2d ed. 1984) (casebook survey of judicial reception of modern scholarly theories), has never quite settled down, see Hill, *supra* note 39, at 1600; Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); Korn, *supra* note 1, at 820–958, and seems resolved principally to avoid the subject of choice of law as much as possible. Cf. *Keene Corp. v. Insurance Co. of N.*

II. VESTEDNESS

In the remainder of this Article, I will explain and defend a specific counterrevolutionary normative proposition in choice of law, which I call “vestedness.” The notion of vestedness represents a reworking of the first principle in the constellation of ideas that I described in Section I as associated with the vested rights theory of Beale and Dicey. This reworking, although faithful to its forebear in many respects, differs in formulation and tone. In particular, it substitutes relatively precise operational criteria for metaphors, and it incorporates in the logic of a single proposition various notions that, in their original form, might have appeared as statements and counter-statements strung awkwardly together. More important, the part of vested rights theory with which I associate vestedness is *only* a part of that tradition, and I ignore or reject much more of what I described earlier as important to that theory. My hope is that the new label will simultaneously acknowledge the connection and let me define my own more narrow path.

A. *Vestedness Defined*

Subject to various interpretive glosses I will introduce shortly, vestedness can be defined as a principle of law requiring that *the court of any forum should, in selecting the criteria governing the substantive elements in an adjudication, apply choice of law criteria that could be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication.* Thus, a choice of law rule requiring a court in an auto collision case to apply “the law of the place of the crash” is consistent with vestedness because any other forum, if it employed the same choice of law rule, could be expected to find the same crash-site and apply the same substantive law. On the other hand, a rule requiring a court to apply, either as a first or last resort, “the law of the forum” is not consistent with vestedness, because the application of exactly

Am., 667 F.2d 1034, 1041 n.10 (D.C. Cir. 1981) (avoiding choice of law determination by deciding that all possible state laws on question of first impression were identical), *cert. denied*, 455 U.S. 1007 (1982); Islamic Republic of Iran v. Pahlavi, 94 A.D.2d 374, 464 N.Y.S.2d 487 (1983) (dismissing suit against deposed Shah, in part because of difficulty of determining and applying Iranian law), *aff'd*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 105 S. Ct. 783 (1985); Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640, 640, 646 (1984) (observing that courts have generally ignored potential choice of law issues in right of publicity cases). In the meantime, two Restatements have appeared, the first drafted principally by Beale, and the second a theoretical hybrid that has been attacked by all sides. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

For all this, Beale and Dicey, Cook and Currie, provide the most convenient reference points for my own enterprise, the former because buried somewhere in their problematic vision is the core of what I want to say, and the latter because they give voice, so eloquently and uncompromisingly, to much of what I most want to reject.

the same rule by other forums would lead each forum to apply its own, possibly very different, substantive law.

A simpler way of putting the matter might be that the principle of vestedness fundamentally rejects the notion of *lex fori* (and along with it Cook and Currie's theories of local law) and requires that a forum decide choice of law questions on the basis of second-order criteria that are in themselves forum-neutral, which is to say, based on the assumption that the merits of a case should not depend on where it happens to be brought. This alternative formulation, however, is woefully imprecise and inadequate. The opportunity to explain why this is so should allow me to explain some of the terminology used in the more formal definition of vestedness, spell out its implications, and illustrate some of the deep points of connection between vestedness and traditional vested rights theory.

Although vestedness is grounded in a rejection of *lex fori*, that rejection is complex. In some respects, vestedness is broader than a simple rule of forum-neutrality. Vestedness, for example, does more than disqualify choice of law rules that explicitly refer to the forum; it also excludes more clever efforts at referring to the law of the forum by nominally forum-neutral criteria, such as "the law of the place in whose courthouse the piece of paper that started the lawsuit happened to be lodged."⁵⁸ Such criteria would necessarily change their reference if the identity of the forum were different, and could not therefore be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication.⁵⁹ Similarly, because vestedness applies to choice of law "criteria" at any level of abstraction, and not just isolated choice of law rules, it would also cut out, for example, a principle requiring a forum to apply "the law of the place selected by that choice of law rule—in

58. An even more clever example would be "the law of the place where the parties or their agents were last to be found in the same room."

59. Too much should not be made of this result, however. Vestedness excludes choice of law variables whose reference is rigidly tied to the identity of the forum—that is, variables that would change if the identity of the forum happened to be different. It does not exclude variables whose reference only correlates with, or influences, the choice of a forum. Thus, for example, even if most fender-bender suits were brought in the jurisdiction in which the fender-bender occurred, and even if this correlation were in fact causal, that would not exclude a choice of law rule looking to the "law of the place of the fender-bender," because in any given case, the choice of a different forum could not change the place of the collision.

(I am fully aware that lurking here are deep philosophical issues having to do with "possible worlds," "non-rigid designators," and other such notions. See generally S. KRIPKE, *NAMING AND NECESSITY* (rev. ed. 1980). I doubt, however, that a more rigorous analysis, even if I were qualified to give it, would contribute much to my argument, and I ask unconvinced readers to treat this part of the analysis as a definitional gloss. I should add, though, that if notions of reference and identity were rigorously brought to bear here, they might well reveal that the kinds of examples with which the text at this footnote has been concerned would violate even the looser formulation of vestedness as forum-neutrality.)

itself consistent with vestedness—that in the aggregate of cases most often results in the application of the law of the forum.”

In more important respects, however, vestedness is a narrower notion than simple forum-neutrality. In particular, vestedness—like the classic articulations of vested rights theory⁶⁰—does not, despite the strictures of the previous paragraph, require a forum to adopt choice of law criteria that will generate outcomes at trial identical or even similar to those in other forums. The most important reason for this result is that the constraint of vestedness is addressed to each forum individually. It does not assume that different forums adopt the same choice of law regime. It only requires that whatever regimes are adopted, they be such that, if they were employed by other forums, they would be expected to generate the same substantive criteria.

Even in a world in which every forum adopted the same choice of law rules, adherence to vestedness would still not guarantee identical results. Recall first that vestedness applies only to the “substantive elements” in an adjudication. By substantive elements, I mean, in a traditional sense, the criteria by which a court evaluates the primary or out-of-court conduct or status of the parties. Substantive elements, of course, should be distinguished from “adjective” issues such as procedure, evidence, and jurisdiction.⁶¹ They should also be distinguished from those aspects of the law of remedy that do not directly reduce to statements about substantive, out-of-court duties that parties owe to each other as a result of the violation of other substantive, out-of-court duties.⁶² And even if this brief ac-

60. See *supra* text accompanying notes 14–15.

61. Cf. Risinger, “Substance” and “Procedure” Revisited, 30 UCLA L. REV. 189 (1982) (proposing model for distinguishing between substance and procedure in various contexts).

62. For example, to the extent that rules about the measure of damages for breach of contract reflect the actual out-of-court obligation that the breaching party has to the breached-against party as a result of the breach, they constitute, for present purposes, substantive elements of a case. On the other hand, a court’s choice between an injunction and a declaratory judgment would be non-substantive, and could not be constrained by vestedness. This classification roughly accords with traditional American choice of law doctrine. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 12 (1934). It also roughly accords with the scheme in Risinger’s valuable essay, *supra* note 61. Risinger convincingly distinguishes the rights/remedy distinction from the substantive/procedural distinction, *id.* at 190–203, and defines the latter in terms of the difference between rules (including rules of remedy) that we would tell an omniscient, omnipotent factfinder and rules that we would not need if we had an omniscient, omnipotent factfinder. *Id.* at 204–11. Risinger thus ends up treating most aspects of the law of remedy (as distinguished from the laws of procedure and evidence and so on) as substantive. To the extent that I differ with Risinger, it is not only because my definitions do not match his perfectly, but also because I think that there might well be contexts in which, even under his scheme, principles of remedy might reflect the lack of an omniscient, omnipotent factfinder rather than a direct substantive judgment about legal relations in the world. For a more precise and less conclusory discussion of the character of the law of remedy, which takes advantage of the conceptual apparatus I develop later in this Article, see *infra* note 94.

The substance/procedure distinction as understood here should also be distinguished from the more outcome-determinative test applied by federal courts in drawing the line between federal and state law in diversity litigation. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Guaranty Trust*

count leaves room for debate at the margins, the determination of even undeniably non-substantive questions of law clearly can affect an outcome at trial.⁶³ For that matter, vestedness is consistent with (though it does not require) the “public policy exception”—that much-maligned escape-hatch in vested rights theory—because the exception in its classic formulation is related only to a court’s decision to accept or decline jurisdiction, and not to its decision on the merits once it takes a case.⁶⁴

In addition, recall that vestedness only requires choice of law criteria that can be “expected to” generate identical sets of substantive criteria. The phrase “expected to generate the same” is meant to be taken primarily in a formal, rather than a purely descriptive, sense. Clearly, two judges sitting in different forums could *in fact* look at the same accident and find two different crash sites or find the same crash site but differ over what the law of the crash site actually is. In both of these cases, though, the differences in the judges’ conclusions would be the result of some disagreement between them, not of a variable uncontroversially apparent in the task of determining the crash site. Indeed, two judges sitting in the same forum might just as easily disagree about the location of the crash site or the requirements of a substantive regime. By the use of the phrase “expected to,” I mean to focus on the structure of choice of law criteria rather than the vagaries of their application.

The constraint of vestedness is satisfied so long as forums can be “expected to” apply the same substantive criteria, even if they disagree about the content of the criteria they are “expected to” apply. For example, federal courts of appeals in the United States generally follow their own interpretations of federal law without feeling bound by the views of courts of appeals in other circuits.⁶⁵ When disagreements occur, however, the

Co. v. York, 326 U.S. 99 (1945). Why the federal rule is the way it is in itself an interesting question of intellectual history, fortunately beyond the scope of this Article.

63. The substance/procedure distinction also suggests that the phrase “in selecting” in my formal definition is more complex than it appears at first glance. Certain procedural constraints, such as issue preclusion, law of the case, and pleading requirements can, in fact, preclude a particular court from selecting much of anything for itself. The requirement of vestedness, therefore, can only apply to the extent that a court is procedurally unhampered from “selecting the criteria governing the substantive elements in an adjudication.” This qualification, however, is less profound than it may seem. First, the sort of procedural obstacles I have in mind are limited and doctrinal, and they do not or need not pose a problem in the general run of cases in which courts have jurisdiction. Second, each of these procedural obstacles assumes that whatever issue or issues cannot now be litigated on the merits could have been litigated were it not for the neglect of one or another party, or were in fact litigated in a prior proceeding. *See also infra* text accompanying notes 198–201.

64. *See* Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160 (1932); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 comment a (1971); 3 J. BEALE, *supra* note 5, § 612.1; *see also* E. SCOLES & P. HAY, *supra* note 3, § 3.15.

65. *See, e.g.,* United States v. Carson, 793 F.2d 1141, 1147 (10th Cir. 1986); Continental Sec. Co. v. Interborough Rapid Transit Co., 165 F. 945 (2d Cir. 1908). *But cf., e.g.,* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 281–83 (2d Cir. 1981) (holding that one federal court of appeals should generally defer to other courts of appeals on interpretation of laws of states within their circuits); Gill

issue is not framed as one of choice of law, but rather of the interpretation of the same law: Each court does not consider the other courts to have made a different choice of law, but to have adopted a mistaken view of the same law.⁶⁶ If and when the Supreme Court decides the issue, its views are taken as an authoritative correction of one or another lower court's substantive mistake. At no point in this process would vestedness intervene.⁶⁷

The rather specialized way in which vestedness seeks to achieve forum-neutrality becomes even more sharply etched in light of the most important operative difference between vestedness and traditional vested rights theory: Vestedness is nothing like a full-fledged choice of law system in itself, but only a thin constraint on choice of law regimes. To construct a full-fledged choice of law system would require not only a whole set of further principles specific to the choice of law enterprise itself, but also an array of political and legal principles that go well beyond and behind that enterprise, and very likely some arbitrary conventions to fill in the details. Put another way, vestedness requires that the content of choice of law criteria should be forum-neutral, but has—at least on the surface⁶⁸—little to say, in itself, about a forum's selection of one set of forum-neutral choice of law criteria rather than another.

Vestedness has nothing whatsoever to say, for example, about the sort of “territorialism” that was understood by many of its adherents, as well as many of its critics, to be part and parcel of vested rights theory.⁶⁹ Thus, although a rule requiring a court to apply the “law of the place of the crash” satisfies vestedness, so would a rule requiring a court to apply “the law of the place of the injured party's domicile,” or “the law of the place in which the alleged injurer's paternal grandmother was born,” or “the law of the place nearest in alphabetical order to the name of the make of

v. Austin, 157 F. 234 (1st Cir. 1907) (taking view, since discarded, that circuit court would generally follow precedent set by other circuits).

66. Note, though, that even if two courts have different views of the same body of law, one may consider the other's views to be relevant to an adjudication, not by virtue of vestedness, but by virtue of the sorts of Rules of Assimilation discussed in Section I, at *supra* text accompanying note 37. See, e.g., *FTC v. Grolier Inc.*, 462 U.S. 19, 26–27 (1983); cf. Note, *Using Choice of Law Rules To Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078 (1984) (proposing that federal law interpretations by courts of appeals be subject to special set of choice of law rules).

67. In the text, I have assumed for the sake of simplicity that neither substantive criteria nor choice of law criteria can be “expected to” allow for some measure of discretion. The assumption is controversial, even within the jurisprudential tradition in which this Article falls. Eventually, I will relax the assumption by partially bracketing issues arising out of the possibility of at least one sort of judicial discretion. See *infra* text accompanying notes 138–42.

68. *But cf. infra* text accompanying notes 237–51 (discussing view that choice of law is single trans-jurisdictional entity, and possible implications of that view).

69. I am, of course, not the first to suggest that Bealian territorialism can be separated from the rest of traditional vested rights theory. See, e.g., de Sloovere, *Mr. Beale's Conflict of Laws*, *supra* note 57, at 346.

the plaintiff's car." For that matter, a choice of law rule, in order to be consistent with vestedness, need not invoke the notion of place at all. Consider, for example, a rule instructing the forum to look to "the law of the parties' common religious community."⁷⁰ Nor need it even be outcome-neutral. Consider, in this connection, a rule instructing the forum to look to "the law favoring recovery."⁷¹ Nor need it refer to any positive system of law at all. It would not violate vestedness, although it might pose other problems, for a choice of law rule simply to require a court to "apply natural law."

The thinness of vestedness can be illustrated with particular force by the following example: Although it would violate vestedness for a Canadian court to employ a choice of law rule that required it to look to the "law of the forum," it would not violate vestedness for the Canadian court to apply a choice of law rule that required it always to look to the "law of Canada." The difference is that the latter rule, if it were applied by any other forum, would yield the same law—namely, the law of Canada. Indeed, a choice of law rule requiring a court to apply "the law of Canada" is in this respect structurally similar to a choice of law rule requiring a court to apply "the laws of nature and of nature's God."

What renders the "law of Canada" rule implausible is not vestedness, but certain quite uncontroversial features of contemporary political theory, in particular the idea that no one nation or state has a monopoly on sovereign authority.⁷² Indeed, most choice of law analysts of any stripe would

70. Cf. Palestine Order in Council, arts. 47, 51 (1922) (matters of personal status governed by law of religious community), reprinted in 3 LAWS OF PALESTINE 2580-81 (rev. ed. 1934); Shava, *The Nature and Scope of Jewish Law in Israel as Applied in the Civil Courts as Compared with Its Application in the Rabbinical Courts*, 5 JEWISH L. ANN. 3 (1985) (explaining role of civil courts in applying aspects of religious law); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (deferring to ecclesiastical determination in intra-church dispute); Watson v. Jones, 80 U.S. 679 (1871) (same); Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985) (barring on constitutional grounds assertion of jurisdiction by state civil rights commission over religiously-inspired employment practices in pervasively religious school); Cabinet v. Shapiro, 17 N.J. Super. 540, 86 A.2d 314 (1952) (defining kashrut in context of libel suit brought against local rabbinical council); Pramatha Nath Mullick v. Pradyumna Kumar Mullick, 52 I.A. 245 (P.C. 1925) (referring to religious law to define Hindu idol as legal person). The variety of sources just cited is meant to illustrate, among other things, that a secular court can, in many cases, apply religious law whether or not it chooses to defer to the interpretations placed on that law by particular religious authorities. It would also bear some analysis, in each of these contexts, whether what is at stake is a full-fledged choice of law rule, or something more akin to a Rule of Assimilation.

71. For accounts suggesting this or a similar principle, see, for example, D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 166-76 (1965); W.W. COOK, *supra* note 17, at 345; M. HANCOCK, *Three Approaches to the Choice-of-Law Problem*, in *STUDIES IN MODERN CHOICE-OF-LAW* 1, 3, 8-15 (1984).

72. Note that I am referring to this sort of proposition as a matter of political rather than legal theory. I realize that the dichotomy is somewhat perilous, and that my own use of it may be somewhat idiosyncratic. As should become apparent in the course of the Article, though, it serves my expositional purposes to limit the phrase "legal theory" to understandings of the status of law and the nature of adjudication, and to relegate to "political theory" equally important questions about, for example, the nature of sovereignty, the sources of law, legislative competence, and the like.

probably go further and find implausible any choice of law rule that did not, at least in formal terms, treat all legitimate sovereigns equally. On the other hand, if we put vestedness aside, and just looked to a political principle positing the equality of sovereigns, a *lex fori* rule (although *not* a “law of Canada” rule) would pass with flying colors. A proponent of *lex fori* is willing, after all, to grant any forum the privilege of applying its own law; a Canadian court employing *lex fori* becomes entitled to apply Canadian law because Canada is the forum, not because Canada is Canada. Only when the principle of equality of sovereigns is combined with the principle of vestedness do both “the law of the forum” and “the law of Canada” lose their plausibility.

This example suggests an even deeper point. Although the “Canada” rule itself might seem a trifle unrealistic, any choice of law criterion will limit the decisionmaker to some finite set of possibilities, with a typical such set being a list that begins with “the law of Afghanistan” and ends with “the law of Zimbabwe.” In other words, the political theory needed to fill in any choice of law regime—particularly if it is constrained by vestedness—must include some conception of the nature of sovereignty and the identity of legitimate sources of law, and that conception by its nature may not admit of an infinity of legitimate sovereigns.⁷³ Moreover, the political theory will have to determine what the notion of a legitimate source of law or legitimate sovereign power entails—whether, for example, it excludes choice of law rules favoring recovery in tort suits, or allowing parties to a contract to select the law by which the contract should be governed, or refusing to recognize the institution of slavery, or subordinating individual sovereign choices to certain trans-jurisdictional substantive principles, or constraining positive law as a whole by some theory of natural law.

In this Article, I will from time to time invoke, and on the whole take for granted, the commonplace and common sense political theory that treats nation-states (and certain of their subdivisions) as possessing the exclusive power to make and enforce law; that supposes that each independent nation-state is, at least in formal terms, the equal of any other; and that restricts the limits on the law-making power of those nation-states to a narrow set of formal and substantive constraints. This commonplace account is not, however, required by vestedness. Nor does it reflect, if the truth be told, my own view of the matter.⁷⁴ It simply provides a

73. Similarly, the principle of equality of sovereigns presupposes some view of which sovereigns are to be considered equal.

74. Cf. Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980) (my student Note, proposing choice of law analogy for free exercise clause of First Amendment).

relatively clean and minimally distracting framework for going about my business.

I have contended that a "law of Canada" rule is implausible, and that a host of other choice of law criteria consistent with vestedness might or might not be plausible depending on a forum's political and legal commitments. In this account, vestedness is a thin constraint in principle, but its practical effect on the shape of choice of law doctrine can be, by way of its interaction with other principles, powerful and profound.

But is this really so? Notice that the instruction to apply the "law of Canada" is, as far as a Canadian court is concerned, in some sense equivalent to the instruction to apply "the law of the forum," since both instructions, when employed by a Canadian court, generate the same results. Moreover, a Canadian court might argue that because it has neither the power nor the desire to tell other forums what choice of law criteria to adopt, the "law of Canada" rule does not, in fact, "violate" the principle that all sovereigns are equal.

My own initial inclination would be to dismiss this sort of maneuver as nothing more than intellectual bad faith, a cheap example of trying to have it both ways.⁷⁵ If a legal regime adopts a rule, after all, it should mean it. And the "meaning" of a rule telling a Canadian court to apply "the law of Canada"—or at least the meaning invoked to support the claim that the rule is consistent with vestedness—is that the law of Canada should apply regardless of the forum. To then retreat from this position by arguing that the rule is also consistent with the principle of equality of sovereigns is to confuse the content of a rule with mere institutional limits on its application.

On further reflection, however, I realize that this response, as well as other notions I have advanced, may well reflect nothing more than my own jurisprudential biases. Who is to say, after all, that the meaning of a rule, or its consistency with one or another constraint, is found in its content rather than its application? Let me then do what I have done before, and resort to definitional fiat, leaving any more explicit justification for later: The (counter-factual) assumption that a particular forum's choice of law criteria would be applied by other forums should be understood not only as the device for testing those criteria against vestedness itself, but also as an indispensable ingredient in the forum's understanding and evaluation of those criteria in light of whatever other political and legal principles (themselves consistent with vestedness) the forum may find important. With this addendum in place, there remains nothing in the

75. To be sure, an actual Canadian court would never think of resorting to such a game; it would either accept the principle of vestedness in good faith or reject it in good faith. But that, of course, may be another way of stating my point.

principles of vestedness to prevent Canada from adopting “the law of Canada” as the universal substantive benchmark. But it could do this only if Canadian decision-makers really believed that Canada is the world’s only legitimate source of positive law. Similarly, vestedness requires that whatever notions of sovereignty and legitimacy a forum may adopt, it must actually “mean” them, and mean them—whether or not anyone else chooses to listen—universally.

B. *Vestedness (Not Quite) Defended*

The principle of vestedness might be defended in any number of ways. My own defense is laid out in Section IV of this Article, and will require some preliminary stage-setting in Section III before it can get underway. It might be useful, however, to canvas some other possible approaches, and see where they might lead.

To begin with, it is conceivable that vestedness could be fit into a scheme of Rules of Assimilation and Rules of Scope of the sort that I have suggested were a lasting contribution of the choice of law revolution. I do not dismiss this possibility, but it strikes me as either unlikely or unilluminating. Rules of Assimilation and Rules of Scope, after all, are not choice of law meta-principles, but rather readings of domestic law grounded in the patchwork of individual substantive and institutional concerns manifested by sovereign governments. There is no immediately apparent reason why these concerns should give rise to anything like vestedness. Even if they did, it is even harder to imagine vestedness being enshrined as a universal, overriding principle rather than one factor among many in courts’ decision-making. More important, if such a result could somehow be defended, it might well only point to some deeper justification—that is, a meta-principle—that would invite examination on its own terms.

One very specific sovereign interest, which might be characterized as either within or outside the set of Rules of Assimilation and Rules of Scope, is that elusive and confused aspect of foreign relations called “comity.”⁷⁶ As many traditional vested rights theorists recognized long ago, however, the problem with basing a defense of forum-neutrality on the notion of comity is that the two ideas fit together only imperfectly.⁷⁷ First,

76. For the classic Anglo-American articulation of comity as the foundation for choice of law, see J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 35 (1834). The rhetoric of comity has by now lost most of its cachet in choice of law scholarship and cases, although it remains important in such related areas as recognition of judgments, trans-national litigation, and the act of state doctrine.

77. Both Beale and Dicey suggested that the notion of comity was either vacuous, or—to the extent it suggested that the enforcement of foreign-created rights was a matter of discretion, politeness, or judicially-managed foreign relations—potentially mischievous and confusing. See J. BEALE, *supra*

traditional vested rights theory, as well as my reformulation of one part of it, may well require that a forum stand ready to apply the law of a jurisdiction with which it seeks no comity at all, or with which it is even at war, as long as that jurisdiction remains somehow legitimate.⁷⁸ Second, neither theory depends on reciprocal behavior by other forums. Third, a foreign forum might well be more offended by the specific *content* of a choice of law regime than by its compliance with one or another abstract overarching constraint, and vestedness leaves most questions of content open. Fourth, as Currie demonstrated quite convincingly, it is not even clear why one or another version of *lex fori*—openly and unapologetically employed—would always be more damaging to friendly relations or reciprocal respect than one or another version of vested rights.⁷⁹ Finally, even if vestedness did serve the cause of comity, it remains unclear why vestedness should be an overarching constraint on a legal regime's choice of law apparatus. After all, comity, however important, must surely give way in certain very large classes of cases to other interests of equal or greater importance.⁸⁰

All this is not to say that foreign (or interstate) relations are irrelevant to choice of law. Vestedness, even if it primarily manifests some other imperative, may well also serve the cause of comity or enlightened self-interest. But, on the whole, vestedness itself, to invoke the words of Dicey only somewhat out of context, “does not arise from the desire of [a] sovereign . . . to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.”⁸¹ So once again, we are left looking for those underlying conceptions of justice that will animate the enterprise.

One possible source of justice might be found in a body of super-

note 5, § 6.1; A. DICEY, *supra* note 5, at 10–11; *accord* Loucks v. Standard Oil Co., 224 N.Y. 99, 159 N.Y.S. 282, 120 N.E. 198 (1918) (Cardozo, J.).

78. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 113 (1965) (arguing that United States courts should apply laws of unrecognized but politically effective foreign regimes, if required by normal conflict of laws rules, to extent that those laws relate to matters of essentially private nature, or to transfer of local property among local nationals); J.H.C. MORRIS, THE CONFLICT OF LAWS 6, 505–06 (3d ed. 1984) (citing English cases applying law of enemy country in time of war).

79. See, e.g., B. CURRIE, *supra* note 40, at 121–23, 188–92, 278–82, 489–90, 524–25.

80. The reason comity is a relatively unsure guide in choice of law is not only that comity is a vague and uncertain notion. To the contrary, the objections raised in the last paragraph would still hold—and might even be demonstrable—if we shifted from the vocabulary of “friendly relations” to the relatively more precise game-theoretic vocabulary of “long-term self-interest” and “joint maximization.” Indeed, unromantic game-theoretic analysis might suggest a set of additional variables, not the least of which turn on asymmetries of power and interest, that render it unlikely that the search for a winning strategy would hit upon as unitary, abstract, thin, and crotchety a principle as vestedness.

81. A. DICEY, *supra* note 5, at 10–11.

jurisdictional positive law such as international law, or, in the American interstate context, federal constitutional law. The problems here, however, are similar to those already canvassed. First, even if vestedness is important and commendable, international law and constitutional law may well have good and sufficient reasons for not mandating it, unless we imagine that these bodies of law render compulsory everything that is important and commendable. Second, even if international law or constitutional law do mandate vestedness, their reasons for doing so might be too specific. International law, as relevant here, is generally concerned with the special characteristics of nation-states and transnational actors in a violent world. American constitutional law, as relevant here, is concerned with the special characteristics of a federal system within one relatively unified nation-state. Why should either of these speak in terms that would resonate with the concerns of all forums in all cases? Finally, if international law or constitutional law did resonate in this way, that would certainly point to a more fundamental set of principles, and we would be better off looking directly to those principles in the first place. Indeed, without committing myself one way or another, I will simply assume in this Article that vestedness is not required of nation-states by public international law, or required of States of the Union by the Constitution.

In turning to more fundamental principles, one that quickly comes to mind is "equality." After all, isn't vestedness just a variation on the notion that like cases should be treated alike, or, more relevant here, that like cases should be treated alike regardless of the forum in which they happen to be heard? This sort of account⁸² begins to approach the argument I actually have in mind. Equality, however, is not the best underlying idea to serve in this case. In the first place, I have already demonstrated that vestedness does not guarantee actual equality in judicial outcomes. It guarantees only one somewhat narrow form of hypothetical equality, and it is not at all clear on the face of things why this is the sort of equality with which a legal regime should be concerned. Even more important, invoking the principle of equality provokes but does not really answer the fundamental debate within choice of law regarding exactly what is meant by equality. The norm of equality seems violated when the fortuity of where a case is brought determines the outcome. But it also seems violated when a single forum treats two cases differently simply because of the fortuity of where some event took place or where some party is domi-

82. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Griswold, *supra* note 57, at 1184-87; von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS., Spring 1977, at 27. *But cf.* O'Connor v. O'Connor, 201 Conn. 632, 519 A.2d 13 (1986) (uniformity of result sometimes must be subordinated to other goals of choice of law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment i (1971) (uniformity sometimes purchased at too great a price).

ciled.⁸³ The first intuition points to something like vestedness. The second intuition leads straight to *lex fori*, and the rejection of vestedness. To choose between these two intuitions will require a set of ideas more detailed than the slogan of equality.

A similar response is evoked by a variation on the equality theme—namely, the aversion to forum-shopping.⁸⁴ To state the obvious one more time, vestedness bears only the most attenuated connection to preventing forum-shopping, since it by no means guarantees that different forums will decide the same case the same way. Even if vestedness could eliminate forum-shopping, it is unclear why forum-shopping in the adjudicative context should strike us as inherently distasteful, while other types of jurisdiction-shopping—from the establishment of corporate residence to the flight for freedom by political refugees—give us little pause.

In admitting my skepticism about these various ways of defending vestedness, I do not mean to reject them out of hand. The part of me that wants to defend the notion of vestedness out of intuitive loyalty is eager to seize any ammunition. This Article is not just a brief, however. I have outlined some alternative approaches in order to map the territory. In presenting my own argument, I will try to uncover the important, if very general, attitudes of mind that led me to an intuitive acceptance of vestedness in the first place.

III. BACK TO BASICS: VESTEDNESS AND THE NATURE OF LAW

My attempt to provide a principled, jurisprudentially-grounded argument in favor of the principle of vestedness in choice of law depends on a rather particular strategy. I begin by identifying two general types of approaches to the nature of law, which I call Norm-Based and Decision-Based.⁸⁵ This classification is not wholly original,⁸⁶ particularly in its

83. For two very different instances of this sort of intuition at work, see *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (holding, in major product liability class action in which plaintiffs were exposed to allegedly toxic chemical in one of three countries and arguably suffered their injuries in all 50 states and several foreign countries, and defendants' manufacturing and other activities also took place in numerous places, that all interested states would agree on single "national consensus" law to apply to all plaintiffs and defendants in suit), and *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972) (holding that, as long as forum has some substantial connection to case, court's "primary responsibility is to follow its own substantive law" regardless of situs or domicile).

84. See, e.g., *Meecker v. Meecker*, 52 N.J. 59, 243 A.2d 801, 806 (1968); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Baxter*, *supra* note 54, at 9-10; *Brilmayer*, *supra* note 1, at 399, 427; cf. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (discouragement of forum shopping one aim of federal *Erie* doctrine in diversity cases). *But cf.*, e.g., R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 2-3 (3d ed. 1986) (expressing skepticism about importance or possibility of discouraging forum-shopping).

85. A natural question at the very start is whether my account of these two types of theories will treat them as normative or positive forms of explanation. Actually, my discussion cannot easily be characterized as either strictly descriptive or strictly prescriptive. Sometimes, and particularly in a

broad outlines, and it simply identifies two families of legal theories (not in and of themselves directly concerned with choice of law), each of whose adherents often disagree with each other on important details but usually recognize their common cause against the other camp.⁸⁷

Roughly speaking, the Norm-Based view is the more venerable of the two, finding expression in both the classical idealist and positivistic theories of law. After being somewhat eclipsed in the early part of this century, the Norm-Based view has recently regained support from a varied group of theorists and other scholars. In my account, I rely largely on the writings of scholars such as H.L.A. Hart, Lon Fuller, and Ronald Dworkin—a diverse group in and of itself—but this focus should not be taken to be a full inventory of Norm-Based theories, or an implicit limit on the shape these theories can take. Also roughly speaking, the Decision-Based view is best identified with certain strains in American Legal Realism and its offspring.⁸⁸ For my own purposes, however, I will define the class of Norm-Based theories as broadly as I can, and define the class of Decision-

brief attempt at justification contained in a set of footnotes near the end of this part of the Article, *infra* notes 186–91, I simply juxtapose the two types of arguments. More often, my account combines “is” statements with “ought” statements. As a number of scholars have pointed out, attempts to describe certain phenomena, in particular “institutional facts” or practices subject to “thick concepts,” inevitably generate normative or evaluative conclusions about the boundaries of those phenomena. *See, e.g.*, J. SEARLE, *SPEECH ACTS* 50–53, 175–88 (1969); B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 140–42 (1985); P. FOOT, *Moral Arguments*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 96, 99–105 (1978); *cf.* H. PUTNAM, *REASON, TRUTH AND HISTORY* 127–49 (1981). Indeed, the is-ought distinction may not even make much sense as an organizing principle in these sorts of accounts.

Of course, skepticism about the classic is-ought distinction does not necessarily warrant, and I do not take it to warrant, attempts to infer an entirely general “ought” from an entirely specific “is.” In other words, the prescriptive statements in this and similar accounts are not of the form “ought, all things considered,” but rather, “ought, considering the nature of law.” *Cf.* J. SEARLE, *supra*, at 187–88; B. WILLIAMS, *supra*, at 126.

86. *See, e.g.*, G. CHRISTIE, *LAW, NORMS, AND AUTHORITY* 1–31 (1982); Bingham, *What Is the Law?*, 11 *MICH. L. REV.* 1 (1912); Hart, *Problems of Philosophy of Law*, in 6 *ENCYCLOPEDIA OF PHIL.* 264, 266 (1967); *cf.* Kornhauser & Sager, *Unpacking the Court*, 96 *YALE L.J.* 82, 92–97 (1986).

87. I do not claim that *all* legal theories fall easily into one or another of these grand divisions; some may best belong in a gray zone in between, and others may define themselves in terms to which my criteria simply do not apply.

88. The distinction that I am drawing between the Norm-Based and Decision-Based views of law is obviously analogous to the often-drawn distinction between rights-based and consequentialist theories of morality. The analogy is deceptive, however, because the controversy in legal theory that I am identifying is over the structure rather than the substance of a particular set of norms. Moreover, it is entirely possible to hold divergent views on the two sets of issues, and embrace, for example, a rights-based view of morality and a Decision-based view of law and judicial responsibility.

Along similar lines, the distinction between the Norm-Based and Decision-Based views of law might be analogized to the distinction that Bernard Williams draws between “morality”—thought of as a system of obligations—and the broader, richer realm of “ethics.” *See* B. WILLIAMS, *supra* note 85, at 174–96. This analogy is equally deceptive, however, if only because the powerful claim that obligation-based theories of morality impoverish themselves by treating moral questions too much like questions of law, *see id.* at 190–92, does not necessarily have any bearing on whether law itself can appropriately confine itself to the consideration of questions of law.

Based theories as narrowly as I can. I do so because the next, more important step in my argument tries to demonstrate that accepting the basic elements of any Norm-Based theory should lead one to embrace the notion of vestedness in choice of law.

I do not try in these pages to construct a full-fledged defense of the Norm-Based view of law itself; but the intentionally inclusive way in which I construct that view will, I hope, sweep in a healthy proportion of the relevant audience. Moreover, much of the ambition of the Article will have been fulfilled if I can demonstrate that vestedness is at least respectable—that it is supported by a broad and prominent jurisprudential tradition—and that its rejection depended historically, and continues to depend, on adopting an alternative tradition that is relatively narrow and decidedly controversial.⁸⁹

A. *The Norm-Based View of Law*

If I wanted to be provocative, I might describe the Norm-Based view of law as representing, above all, a commitment to the rule of law. Since I have other aims, however, I will organize this composite account of many different Norm-Based theories by focusing in the first instance on a more mundane theme—separation. To be precise, Norm-Based theories posit the centrality of two basic distinctions or separations in the enterprise of law. Neither is necessarily absolute, but, even when partial and hazy, they establish the spirit of the enterprise and help explain its strange appeal.

The first distinction, to use John Rawls' phrase, is between "justifying a practice and justifying a particular action falling under it."⁹⁰ Particular legal norms may be promulgated to achieve any number of goals—such as maximizing utility, wealth, or fairness; manifesting natural reason; effecting a symbolic statement or a political compromise; or serving the interests of the ruling class. Once promulgated, however, a legal norm becomes part of a normative system that determines the legal status of various events and conditions in human life. According to the Norm-Based view of law, the reason for applying that norm in any particular case is not so much to achieve the underlying goal of the norm, but to uphold the normative system itself and the rights and duties created by that system. To paraphrase Rawls, when a child asks a parent a question about a rule of law, the parent can give any number of justifications for that rule. But

89. I should say that I will be forced during the course of my argument to make explicit some premises in addition to those articulated in my original account of the Norm-Based view. If I do not feel burdened by this admission, however, it is in part because one of my goals is to use the discussion of vestedness to reflect back on some conclusions about the Norm-Based view itself, and the course of the argument, detours and all, will serve me well in that effort.

90. Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 3 (1955) (footnote omitted).

when the child asks “Why was J put in jail yesterday?,” the parent can only answer something to the effect of “Because he robbed the bank at B. He was duly tried and found guilty. That’s why he was put in jail yesterday.”⁹¹ To such a question, “there is nothing one can do but refer to the rules.”⁹²

The powerful implications of this vision of the law are not always apparent. Vindicating a legal norm and vindicating its underlying purposes often amount to the same thing. When the two do diverge, however, the Norm-Based view upholds the importance of the norm as a goal in and of itself, and finds a fundamental purpose, and a special nobility, in its vindication.

The second distinction posited by a Norm-Based view of law is between the existence of legal norms (and resulting legal rights) and the enforcement of those norms by particular institutions in particular cases.⁹³ That is, legal norms can be said to have an “objective” meaning that exists apart from the content of compulsory judicial judgments. In fact, not only *can* norms exist apart from their enforcement, but the very notion of their existence entails the possibility that they will not always be enforced.

This distinction has at least three important consequences. First, it supports the crucial notion in legal culture that courts and other official tribunals are normally engaged in the business of trying to discover pre-existing legal rights. Second, it renders intelligible the claim that particular judicial decisions regarding such rights can be “wrong”—not just misguided or contrary to expectations, but inconsistent with the objective answer required by the legal norm at issue.

Third, the distinction between norms and their enforcement helps give content and plausibility to a set of further distinctions that are important to both the theory and practice of the law. One of these distinctions, which plays a part in the definition of vestedness, is between the substantive merits of a case, which involve the out-of-court obligations of the parties, and adjective, in-court issues such as standing, jurisdiction, procedure, and evidence. Another distinction, just as important if less well understood, is

91. *Id.* at 5.

92. *Id.* at 27; *see also, e.g.*, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 82-88 (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 11-13, 19-23 (1968); R. WASSERSTROM, *THE JUDICIAL DECISION* 138-71 (1961).

93. *See, e.g.*, 1 J. BEALE, *supra* note 5, § 4.6; H.L.A. HART, *THE CONCEPT OF LAW* 79-84, 132-35 (1961); H. KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 30, 39-40, 118-19 (A. Wedberg trans. 1945); Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L.J.* 1240, 1248-51 (1934) (“The law is not what the courts administer but the courts are the institutions which administer the law.”); *cf.* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212, 1221 (1978) (arguing in context of American constitutional law that “norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits”).

between primary legal rights and the remedies by which they are vindicated.⁹⁴

The two fundamental separations I have discussed—between the goals of legal norms and the goal of the rule of law, and between the existence of legal norms and the fact of their enforcement—are, of course, closely related. If the task of courts is to vindicate rights and duties that attach to events in the world, then it makes sense, even if it may not be logically required, to suppose that those rights and duties exist even if a court fails to enforce them. In other words, the Norm-Based view of law views the legal process in terms of three fundamental stages: the coming-into-being of a legal norm,⁹⁵ the occurrence of an event or condition to which that norm applies, and the institutional enforcement of the attendant legal consequences.⁹⁶ The relationship between these three events is not necessarily

94. Both the substantive/adjective and the rights/remedy distinctions, and particularly the relationship between them, are subject to a number of interpretations within the Norm-Based discourse. See generally Risinger, *supra* note 61. Joseph Beale described a process in which the violation of primary rights (for example, the right not to be assaulted) gives rise to secondary rights (a claim on damages from the assaulter), which in turn can be enforced by virtue of remedial rights available in one or another tribunal. 1 J. BEALE, *supra* note 5, §§ 8A.25–28; see also Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 553–54 (1913) (distinguishing primary (or antecedent) relations, secondary (or remedial) relations, and tertiary (or adjective) relations). In this account, secondary rights are substantive, defining real-world obligations of the parties apart from the process of judicial enforcement. Moreover, most of the content of what is conventionally described as the law of remedy resides in these substantive secondary rights. See also *id.* So-called remedial (or in Hohfeld's parlance, tertiary or adjective) rights, by contrast, pertain only to a party's entitlement to couple the terms of already-defined secondary rights to the engine of state power, subject to rules of jurisdiction, procedure, and the like that are not themselves part of the law of remedy.

A quite different analysis, suggested in part by Dicey's treatise and in part by developments in American public law, would locate considerably more of the law of remedy on the adjective side of the substantive/adjective distinction, either by supposing that secondary rights are not always specific enough to generate fully determinate judicial remedies without some further inquiry, see, e.g., *Califano v. Westcott*, 443 U.S. 76, 89–93 (1979) (unconstitutionally underinclusive statute can be remedied by extension, nullification, or an intermediate solution, depending on equitable and institutional consideration); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–94 (1976) (certain forms of equitable relief “pretty thoroughly” disconnect rights and remedies), or by supposing the possibility of a direct line between primary rights and judicial remedies, cf., e.g., A. DICEY, *supra* note 5, at 645–49 (under appropriate circumstances, tort suit may be maintained in England for conduct wrongful, though not actionable, under law of place where that conduct occurred); *id.* at 708–12 (law of forum governs questions of remedy; thus, suit could be maintained in England for breach of foreign contract, even under circumstances in which breach would not be actionable under relevant foreign law); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (discussing judicial creation of damage remedies for constitutional violations), or by emphasizing that the content of judicial remedies might well be constrained by exigencies of litigation and enforcement that are not—and could not be—captured in the simple articulation of either primary or secondary rights, see, e.g., Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 596 (1983) (even “Rights Maximizing” judge cannot always avoid remedial imperfections resulting from “instrumental difficulties in achieving remedial goals”); Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741, 1742 (1985) (arguing that controversy over remedial costs should not obstruct full articulation of substantive rights at stake).

95. “Coming-into-being” is an intentionally vague term, which is meant to accommodate a whole set of views about how laws do in fact come into being.

96. The third of these stages—enforcement by an independent adjudicator—is not strictly necessary to all Norm-Based views of law. Moreover, I do not mean to suggest that the three stages always

simple or static. What is crucial is that the Norm-Based view identifies the second of the stages as itself pregnant with legal action: Law-making is usually forward-looking, enforcement is usually backward-looking, but between them is the here and now crystallization of the stuff to which they both refer.

Stated otherwise, the combined effect of the two distinctions characterizing the Norm-Based view of law is to draw a sharp line between the adjudicative function⁹⁷ and other things that governments do. In fighting fires, building roads, shooting fleeing felons, and waging limited nuclear wars, the agencies of government act on the demands of the moment to do the good as they see it, subject to constraints of practicality and ideology. In specific adjudications, however, the point is not to achieve an ideal balance of goods, but to judge human beings on the basis of a previously defined conception of the good to which they were expected to adhere. Law is, in that sense, an autonomous discipline, never entirely reducible to economics or politics or even general moral philosophy.⁹⁸ In Dworkin's terms, the adjudicative process vindicates "principles" rather than "policies";⁹⁹ in Fuller's terms, it is constrained by the morality of law rather than the calculus of allocation;¹⁰⁰ in Hart's terms, it seeks to enforce rules "meant to be taken seriously as standards of behavior."¹⁰¹ Or, to switch to

occur in some simple chronological sequence; in particular, some forms of legal enforcement may come *before* the fact. *See, e.g.*, MASS. CONST. pt. II, ch. 3, art. 2, as amended by Article 85 of the Articles of Amendment (providing for advisory opinions by supreme judicial court); 28 U.S.C. §§ 2201-2202 (1982) (providing for declaratory judgments in federal courts); *Responsa*, in 14 ENCYCLOPEDIA JUDAICA 83-95 (1972) (discussing history and role of *responsa* in Jewish law).

97. Note that the adjudicative function is not necessarily coextensive with everything that judicial institutions legitimately do. *Cf.* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476-82 (1983) (discussing distinction between judicial and administrative or ministerial court proceedings).

98. *See* Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38 (1981). This is not to say that law is *in every sense* autonomous, or that it is *not at all* reducible to other forms of inquiry.

99. R. DWORKIN, *supra* note 92, at 82.

100. L. FULLER, *THE MORALITY OF THE LAW* 15-30, 170-77 (1964); *cf.* Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1284-92 (1985).

101. H.L.A. HART, *supra* note 93, at 39. Some Norm-Based theorists take this claim even further, arguing that legal norms themselves (at least in traditional areas such as torts, contracts, and criminal law) should not be concerned with justice writ large, but only with one aspect of justice, known variously as corrective or commutative justice. *See, e.g.*, C. FRIED, *CONTRACT AS PROMISE* (1981); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Weinrib, *Toward a Moral Theory of Negligence Law*, 2 J.L. & PHIL. 37 (1983); *cf.* Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986) (applying broad notion of corrective justice to equal protection law). *See generally* J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 167-209 (1984) (comparing corrective justice theories with other accounts of the foundations of tort and contract law). The broad account of the Norm-Based view offered in this Article, however, by no means requires this constraint; the distinction between distributive and commutative justice, which perfectly captures the nature and limits of adjudication, may or may not capture the nature and limits of law, and its use for that purpose may actually ignore the primary distinction, so strongly emphasized here, between the reasons for a rule and the reasons for applying it in a particular case. *See* R. DWORKIN, *supra* note 92, at 83; Kronman, *Contract Law and*

the rhetoric of law as hermeneutics¹⁰²—a rhetoric profoundly resonant with, whether or not completely embraced by, the Norm-Based view: Adjudication is at its heart an act of reading rather than an act of engineering.

I have already suggested that the essence of every Norm-Based theory is not just norms, but a system of norms.¹⁰³ One reason for this is that the process by which norms come into being is always identified with some source of legitimacy or validity. For some Norm-Based theorists, the source is natural reason,¹⁰⁴ or—as in the most time-honored theory of natural law—positive legislation bounded by natural reason.¹⁰⁵ For others, the ground of validity consists in the will of a sovereign,¹⁰⁶ or the application of a basic constituting rule¹⁰⁷ or some other fundamental criterion. In any event, it is quite unexceptionable that one would speak of the norms justified by natural reason as the system of natural law, the norms justified by the political process of Grenada as the system of Grenadian law, and so on.

This account, however, can only go part of the way in explaining why we think of norms as forming systems. After all, a system of norms is more than a set of norms. A system of norms fits together. It is capable, as a whole, of forming the basis for judging behavior and establishing rights and duties. It is by their membership in a system that norms are evaluated, ranked, and reconciled. Perhaps most important, only through the existence of a system does it become possible to state and satisfy what may be the most basic practical requirement of legality—a rule of non-contradiction, which requires that a given event not be governed simultaneously by two directly opposite norms.¹⁰⁸ For the Norm-Based view to

Distributive Justice, 89 YALE L.J. 472, 501 (1980).

102. See, e.g., J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); Garet, *Comparative Normative Hermeneutics*, 58 S. CAL. L. REV. 35 (1985).

103. In this Article, I will use the phrase “normative system” to refer to a system of norms, understood as relatively abstract entities, and the phrase “legal regime” to refer to a normative system plus the actors and institutions who most directly apply themselves to its generation, enforcement, or articulation.

104. See, e.g., 2 S. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 145–58, 772–78 (1688, Oldfather & Oldfather trans. 1934); cf. R. DWORKIN, *supra* note 92, at 22–45, 81–123 (arguing that content of law is determined by “principles” as well as “rules”).

105. See 28 THOMAS AQUINAS, *SUMMA THEOLOGICA*, Prima Secundae, Qus. 90, 95 (Blackfriars ed. 1966); cf. 2 E. COKE, *INSTITUTES* 50 (4th ed. 1671) (arguing that Acts of Parliament are void if contrary to common law); Bonham’s Case, 8 Co. Rep. 114a, 118a, 77 Eng. Rep. 646, 652 (1610) (Lord Coke) (same).

106. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133–34 (Library of Ideas ed. 1954).

107. See H.L.A. HART, *supra* note 93, at 97–107 (discussing rule of recognition and legal validity).

108. See L. FULLER, *supra* note 100, at 65–70; H. KELSEN, *supra* note 93, at 374–75, 406; Hohfeld, *supra* note 94, at 557.

get off the ground, a judge (or anyone else) who seeks to discover what norm applies to a set of facts must be directed to that norm by some procedure, and that procedure in turn defines the system of which the norm is a part.¹⁰⁹

B. *Amplifications and Qualifications*

I contended at the start of this discussion that the Norm-Based view encompasses broad and deep currents in jurisprudential thought. To make that point convincing, I will need to discuss in some detail a number of amplifications and qualifications on the basic account.¹¹⁰

1. *Conceptualism*

In the first place, the commitment of the Norm-Based view to the relative autonomy of the law does not necessarily imply a commitment to legal conceptualism, by which I mean the belief that law is a self-contained logical system whose contents can be derived by a process of deduction from a relatively small number of axioms without reference to external factors such as policy or purpose.¹¹¹ As I have already suggested, a Norm-Based theorist can acknowledge that legal norms have specific purposes grounded in one or more social policies, and that those norms can change over time in response to revised social policies or needs. In addition, someone who holds the Norm-Based view need not believe that normative systems depend on a small number of basic rules that form the axiomatic ground for all the system's other rules. Finally, and perhaps most importantly, the Norm-Based theorist can believe that legal norms should be interpreted, in small or large part, by explicit consideration of the policies or felt needs that underlie them.¹¹²

109. Cf. H.L.A. HART, *supra* note 93, at 92-93 (discussing how "rules of recognition" tie individual primary norms together into single system of law).

110. I should, however, emphasize at this point the limited ambition of this discussion. Not only am I describing a *family* of legal theories, which requires that many questions of detail be left open, but this account is not exhaustive. In writing this Article, I have often been tempted to let the jurisprudential tail wag the choice of law dog. Insofar as I have not completely succumbed to that temptation, my intention in the account that follows is to limit myself to themes that are either particularly important to an understanding of the Norm-Based view, or that will serve a particular purpose at later points in the Article.

111. See Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5-20 (1983).

112. At the same time, though, the Norm-Based view does give some intellectual respectability to conceptualism: If the interpretation of a system of norms is at the heart of the adjudicative process, then a method of interpretation that seeks to lend some order to that system cannot simply be laughed out of the arena. Moreover, the Norm-Based view is probably incompatible with a thoroughgoing and uncompromising legal instrumentalism. For one thing, even a hermeneutic that explicitly looks to policy must, if it is to remain credible as a method of *interpretation*, recognize that some concern for the language of a rule—call that concern formalism if you like—is an inevitable part of interpreting that rule, that the most convincing reading of a rule will sometimes diverge from its underlying policy, and that the underlying policy of some rules is lost in the mists. Cf. R. UNGER, *LAW IN MODERN*

2. Enforcement

Nothing in the basic Norm-Based view should be taken to suggest that Norm-Based theorists are unconcerned with the actual enforcement of legal rights or the actual operation of legal regimes.¹¹³ On the contrary, their approach provides a particularly compelling perspective from which to evaluate the performance of legal regimes.¹¹⁴ In addition, Norm-Based theorists are in general quite prepared to admit that alongside the “internal”¹¹⁵ or “dogmatic”¹¹⁶ perspective on law there exists an equally important “external” or “sociological” perspective with its own equally legitimate interests and modes of explanation.¹¹⁷ They simply argue against the jurisprudential reductionism that denies the internal perspective its own day in court.

Finally, any Norm-Based theory founded at least in part on institutions of positive law—that is, most of the Norm-Based theories in the contemporary discourse—will of necessity recognize a link between the content of a normative system and the course of actual events. At the very least, most positivistic Norm-Based theories,¹¹⁸ as well as many accounts of natural law,¹¹⁹ assert that for a norm to be a valid member of a mature normative system, it must in some way be enacted¹²⁰ or recognized¹²¹ by the positive legal authority whose task it is to define that system.¹²² Moreover, some positivistic accounts condition the continued validity of a norm on a general pattern of ongoing recognition or enforcement by the same or other authorities.¹²³ Indeed, even Norm-Based views of law that reject these

SOCIETY 209–10 (1976) (discussing “purposive legal reasoning” and arguing that “the policies by which the modern lawyer wants to justify his elaborations of the law tend either to become abstract to the point of meaninglessness or to appear as expressions of an effort to manipulate all rules so as to further the arbitrary preferences of particular interest groups”).

113. See *supra* note 103 (distinguishing “normative system” from “legal regime”).

114. This Article itself is, of course, ultimately a study in the enforcement of legal rights.

115. See H.L.A. HART, *supra* note 93, at 55–56, 86–88; cf. R. DWORKIN, *LAW'S EMPIRE* 78–85 (1986) (discussing “internal” and “external” forms of skepticism).

116. 1 M. WEBER, *ECONOMY AND SOCIETY* 311–12 (G. Roth & C. Wittich eds. 1968).

117. Cf. H. KELSEN, *The Pure Theory of Law and Analytical Jurisprudence*, in *WHAT IS JUSTICE* 266, 269 (1957).

118. See, e.g., H.L.A. HART, *supra* note 93, at 59–60; H. KELSEN, *PURE THEORY OF LAW* 10–13 (M. Knight trans. 2d ed. 1970).

119. See 28 THOMAS AQUINAS, *supra* note 105, Prima Secundae, Qu. 90, arts. 3–4, at 13–17.

120. See J. AUSTIN, *supra* note 106, at 9–21. *But cf. id.* at 31–33 (discussing “tacit” commands).

121. See H.L.A. HART, *supra* note 93, at 59–60.

122. In some Norm-Based theories, that defining power is located in the judicial rather than the legislative function. See, e.g., J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 190–202 (2d ed. 1980) (discussing membership in a legal system in terms of recognition by “primary organs”). Even this type of Norm-Based account, however, by virtue of its emphasis on a relatively formal notion of legal validity, clearly maintains the distinction between norms and their enforcement. See *id.* at 197–202.

123. See, e.g., H. KELSEN, *supra* note 118, at 11 (minimum of effectiveness as condition of legal norm's validity, and effectiveness requires that norm be applied by legal organs in concrete cases). *But cf.* H. KELSEN, *supra* note 93, at 119 (as long as legal order as a whole does not lose its efficacy, there may exist isolated norms which are valid and yet are not efficacious, though doctrine of desuetude can

conditions and identify the existence and meaning of norms with the ongoing life of an organic normative community, might well recognize that the instruments of adjudication and enforcement play a major though not exclusive role in that organic process.¹²⁴

None of this, however, alters the fundamental premise of the Norm-Based view that the description of a set of norms is not identical with a description of its institutional enforcement. However complex or subtle the relationship between legal validity and enforcement may be, they remain separate forms of explanation. Although enforcement may, to some degree, be a prerequisite to validity, the two are not identical. Indeed, the very notion of a relationship between the two, as long as that relationship is not one of identity, merely restates the Norm-Based thesis. In any Norm-Based theory, the case of an unenforced right may be problematic, even terribly problematic, but it is never incoherent. If a norm is a valid member of the normative system of a legal regime—however the notion of validity may be defined—then any individual judge who fails to enforce it not only deviates from some statistical pattern, but is also, from the point of view internal to that legal regime, “wrong.”¹²⁵

3. *Ontology*

But what exactly is the status of this legal enterprise? Opponents of the Norm-Based view have spent a good deal of ink denying the metaphysical reality of legal norms or rights “existing” independent of their enforcement.¹²⁶ This critique, however, naively assumes that if norms and rights actually existed, they could only be ethereal beings brooding beyond the stratosphere or perched on top of flagpoles. In fact, Norm-Based theories may adopt any number of views on the ontology of law. First, they may

eventually render unenforced norm invalid by operation of the negative legal effect of custom). For more doctrinal discussions of desuetude, see, for example, 1A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 23.25 (1972); Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964).

124. See, e.g., F.C.V. SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24–31, 43–60 (A. Hayward trans. 1831) (describing interrelationships between customary law and work of jurists); Cover, *Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1985) (recounting “narratives of jurisdiction” and their role in “anarchic” theory of law).

125. This point suggests yet another reason why Norm-Based theories are concerned with enforcement: Precisely because they recognize the possibility of “wrong” judicial decisions, they must grapple with the status of those decisions. In fact, most Norm-Based theories and most legal regimes recognize an independent legal obligation to obey even wrong judicial decisions. Indeed, one way of thinking about judicial jurisdiction is that it confers, within its terms, the right to be wrong. Only in the absence of jurisdiction, if then, see, e.g., *Stoll v. Gottlieb*, 305 U.S. 165 (1938), is a “wrong” judicial decision a nullity as well as a mistake. This topic, of course, requires much more elaboration than I can provide here.

126. See, e.g., J. FRANK, LAW AND THE MODERN MIND 50–99 (1930); Bingham, *Legal Philosophy and the Law*, 9 ILL. L. REV. 98 (1914); Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC'Y 25 (1980).

bravely commit themselves to the view that norms and rights are in fact real entities, akin to electrons and complex numbers. Second, they may take norms and rights to be “real,” but only in a different—distinctively normative—sense. According to this view, legal norms say something true about what law-abiding persons *ought* to do and legal rights say something true about what adjudicators *ought* to do.¹²⁷ Third, they may argue that reference to norms and rights reflects a way of talking or thinking grounded in a community’s shared life, and that norms and rights, whether or not real, are as good as real. Finally, they may adopt a philosophically pragmatic or contextualist approach to the whole business, eschewing any search for ultimate reality, convinced that all relevant reality is the product of distinctive and equally valid human activities. Those holding this view would judge the value of thinking in terms of norms and rights, as well as the value of thinking in terms of tables and chairs or complex numbers, by whether “they *pay*.”¹²⁸

Whichever approach a Norm-Based theory takes, several things are clear. First, under none of the four views just outlined, including the first, are rights a species of invisible gremlins that are spawned in auto accidents and other disagreeable events and come screaming into court on the heads of litigants. Second, the four views may constitute points along a continuum, with the fourth view arguably closing a circle linking back to the first.¹²⁹ Third, it is possible to *do* much of what a Norm-Based jurisprudence requires without definitively deciding which of the four approaches—or some other approach—is the proper ground for that doing, just as a scientist may do a good deal of science without committing herself to a full-fledged ontology of science. Finally, in light of the first three observations, a merely ontological critique of the Norm-Based view may well be not only naive, but also off target. Norms and rights may “exist” whether or not they are “real,” and if belief in their existence pays, then it may pay to believe it.¹³⁰

127. This normative view of law should be distinguished, of course, from the proposition that persons *ought* to be law-abiding. See generally *supra* note 85. What is at stake, therefore, is not an absolute “ought,” but rather an “ought” that is internal to a particular discourse.

128. W. JAMES, *The Sentiment of Rationality*, in *THE WILL TO BELIEVE AND OTHER ESSAYS* 63, 104 (1956); see N. GOODMAN, *WAYS OF WORLDMAKING* 17–19 (1978); R. RORTY, *Pragmatism, Relativism, and Irrationalism*, in *CONSEQUENCES OF PRAGMATISM* 160, 166 (1982).

129. This point essentially restates, as relevant to the present discussion, more general observations found in R. RORTY, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, in *CONSEQUENCES OF PRAGMATISM*, *supra* note 128, at 139; B. WILLIAMS, *Wittgenstein and Idealism*, in *MORAL LUCK* 144 (1981).

130. Cf. N. GOODMAN, *supra* note 128, at 120–21 (approximations to truth may be preferred “to what may be regarded either as truths or as more exact truths”).

4. *Interpretation*

In a similar vein, something needs to be said (though little original, I am afraid) about perhaps the central issue in contemporary jurisprudence—interpretation. Norm-Based theories posit that legal rules have an “objective” meaning independent of their enforcement. But legal rules consist of words, and words, after all, must be interpreted. If interpretation cannot be detached from the persons doing the interpreting, then the whole Norm-Based structure may be in trouble.

Unraveling this problem requires two steps. The first step is to give some content to “objectivity.” Simply put, Norm-Based theories need not reject the deep skepticism found in much of modern thought about the ultimate objectivity of language, including the language of rules. As others have pointed out, the aim of the Wittgensteinian revolution—some would say its reactionary aim¹³¹—was not to deny but to explain the social use of language and rules.¹³² Although Wittgenstein and other like-minded thinkers set out to deprive language and rules of a certain epistemological status, they also established a *social* explanation for why language, in fact, works.¹³³ Whether or not the rules that govern our lives have any inherent meaning, we are able to understand each other and make common use of those rules in a given social context by virtue of a more or less shared set of predispositions. However manipulable language is in theory, interpretive communities are able to find common ground in distinguishing credible from incredible interpretations. Objectivity is simply the ability to arrive at meanings that, over some range of time and space, are more or less shared.¹³⁴

131. See, e.g., R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 11–12 (1984).

132. For arguments in the legal literature similar to mine, but more extended and detailed, see, for example, Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory*, 34 AM. U.L. REV. 1231 (1985); Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671 (1984); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

133. See S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 86–95 (1982). Interestingly, both Kripke and Unger compare this move to Hume’s “skeptical solution” to his “skeptical doubts” about the reality of causation. *Id.* at 62–63; R. UNGER, *supra* note 131, at 46; see also P. F. STRAWSON, *SKEPTICISM AND NATURALISM* 14–21 (1985) (discussing continuities and differences between Hume’s and Wittgenstein’s responses to skepticism).

134. Indeed, the Wittgensteinian move not only fails to undermine the Norm-Based view of law, it may even, by the very depth of its claims, bolster the credibility of that view. Wittgensteinian skepticism extends, after all, not just to rules of law, but even to the rules of addition. See S. KRIPKE, *supra* note 133, at 7–22. Thus, a critic who discounts claims of legal “objectivity” grounded on mere “convention,” see Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9–25 (1984) (arguing that, although law is indeterminate or incoherent, legal decisions may be predicted to some extent because they are conditioned by legal culture, conventions, common sense, and politics), must also grapple with the fate of addition, not to mention the rest of life. See Yablon, *Law and Metaphysics* (Book Review), 96 YALE L.J. 613 (1987) (reviewing S. KRIPKE, *supra*). On the other hand, a truly contextualist philosophy should be doubly skeptical about any effort to judge legal reasoning, and find it wanting, according to the criteria of other allegedly more “objective” forms of

The meaning of legal rules may change over time and across communities, and the sages of the common law¹³⁶ and other legal traditions¹³⁶ may be right to insist that the full meaning of a rule cannot be reduced to a finite set of propositions.¹³⁷ But in spite of all this—or because of it—systems of legal rules work. Thus, not only may norms and rights “exist” whether or not they are “real,” but if norms and rules seem to have meanings, then it may well pay to treat them as if they do.

5. *Discretion*

But doesn't the task of construing legal language pose special problems? Surely, common sense tells us that quite apart from the subtleties of modern philosophy, legal rules often seem ambiguous and problematic. At this point, Norm-Based theorists¹³⁸ engage in an important and by now all-too-familiar intramural dispute about the degree of legitimate discretion open to those whose task it is to interpret the law.¹³⁹ Regardless of which

discourse. See Stick, *supra* note 132 (arguing that Singer, *supra*, mischaracterizes legal reasoning and misapplies work of philosophical critics such as Richard Rorty); cf. H. PUTNAM, *supra* note 85, at 143 (criticizing arguments for moral subjectivism).

I do not mean to suggest that the Norm-Based view of law can *only* be sustained by this sort of eclectic contextualism, any more than I think that it is undermined by it. One can believe that scientific reasoning is more “objective” than legal reasoning, cf. B. WILLIAMS, *supra* note 85, at 138–39, and still think that legal reasoning is objective enough.

135. See, e.g., 1 W. BLACKSTONE, COMMENTARIES *66 (equitable interpretation necessary to apply law to particular cases that the law could not have foreseen or expressed); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21–23 (1921) (“The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.”); Carter, *The Proposed Codification of Our Common Law* (1884), reprinted in THE LIFE OF THE LAW 115, 119–20 (J. Honnold ed. 1964) (“The fallacy . . . in assertions that whatever is known can be written, and that if a rule of law can be written by a judge in an opinion, it can be written and enacted in a Code, consists in the false assumption that courts lay down rules *absolutely*, whereas, they lay them down *provisionally* only.”).

136. I have in mind in particular the relationship between the “written” and “oral” Torah in Jewish law. See T.Y. *Sanhedrin* 22a (“If the Torah were handed down cut and dried, [the world] wouldn't have a leg to stand on.”); T.B. *Hagiga* 3b (“just as a plant grows and increases, so the words of the Torah grow and increase”).

137. See H. PITKIN, WITTGENSTEIN AND JUSTICE (1972).

138. For present purposes, I am leaving the orthodox natural law position out of the debate.

139. According to one view, best expressed by H.L.A. Hart, most norms have a core of settled meaning and a periphery that may well be horribly indeterminate. A conscientious judge, then, will be constrained to a point in her decisionmaking by a web of norms, but will be forced, beyond that point, to exercise her discretion to fill in the remaining gaps. See H.L.A. HART, *supra* note 93, at 120–27; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608–12 (1958). Another view, identified with Ronald Dworkin, argues that, in principle, there is no room for discretion in the conscientious judge's decisionmaking, as long as the system of legal norms is understood to include not only express “rules” but also a thick collection of equally constraining “principles.” See R. DWORKIN, *supra* note 92, at 22–39. A good many disagreements about the meaning of legal norms exist, in Dworkin's account, simply because most of us lack the Herculean faculties of mind that are necessary to discern the “right answer” every time. A third view, more orthodox and more moderate (and perhaps more Wittgensteinian) than either of the first two, agrees with Dworkin that it is wrong to imagine that norms are determinate to a point and wide-open thereafter, but also agrees with Hart that norms are not fully determinate. According to this third view, legal interpreta-

position in this debate makes the most sense, I need only emphasize here that each is well within the Norm-Based conversation. The general Norm-Based account does not require that norms be fully determinate, only that they be determinate enough to exist. More important, even if discretion plays some role in Norm-Based theories, this role is limited to hard cases or the hard aspects of all cases. This type of discretion (call it “residual discretion”) differs from a very different type of discretion that by its own terms grants (and often bounds) that discretion (call it “affirmative discretion”).¹⁴⁰ The exercise of residual discretion seeks its own diminishment—its own undoing, so to speak—and in that sense represents a commitment to the centrality of norms and an explicit rejection of affirmative discretion.¹⁴¹

The debate over judicial discretion, although important in the larger scheme of things, can largely be bracketed in the context of this Article’s particular project. To the extent that substantive norms are not fully determinate, the “set of substantive criteria” referred to in the formal definition of vestedness can be thought of as a set of constraints rather than fully-specified results—particles in a Heisenbergian rather than a Newtonian universe. But it still remains to choice of law to select *which* of those sets of constraints should be applied in a given case. Therefore, as long as legal norms are at all meaningful, the notion of choice of law remains coherent, and the articulation of its basic principles remains desirable.

tion, *at every point*, is characterized by a shifting and interactive combination of constraint and discretion. See, e.g., E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1961); FISS, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744–55 (1982).

140. For attempts to draw similar distinctions, see, for example, Fletcher, *Some Unwise Reflections About Discretion*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 269; Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).

141. Common law jurisdictions, for example, employ the doctrine of precedent to transform the discretionary results of one case into non-discretionary constraints on the next. More generally, it might be said that a responsible judge seeks in the very exercise of residual discretion to narrow that discretion, in the words of Michael Polanyi,

down to zero by the stranglehold of his own universal intent—by the power of his responsibility over himself

. . . While the choices in question are open to arbitrary egocentric decisions, a craving for the universal sustains a constructive effort and narrows down this discretion to the point where the agent making the decision finds that he cannot do otherwise. *The freedom of the subjective person to do as he pleases is overruled by the freedom of the responsible person to act as he must.*

M. POLANYI, PERSONAL KNOWLEDGE 309 (1958). (Note that Polanyi employs this discussion of judicial method to help explain his theory of *scientific* discovery.)

This sort of account also suggests that the Hart-Dworkin debate might rest in part on something of a misunderstanding. Whereas Hart only acknowledges the existence of residual discretion, Dworkin attacks what he mistakenly reads as a defense by Hart of bounded affirmative discretion as a general feature of the application of norms. On the other hand, whether or not Hart and Dworkin disagree about the nature of the judicial office, they definitely disagree about the sources of legal norms, and their debate about discretion may only obscure that more fundamental conflict.

A similar story can be told about elements of discretion in choice of law itself. Vestedness excludes choice of law principles that permit affirmative discretion, just as it bars choice of law rules that call for random selection. On the other hand, a vestedness-constrained choice of law regime can accommodate the use of residual discretion in the interpretation of choice of law rules simply by refining the phrase "expected to generate the same" to discount for the vagaries of application as well as articulation.¹⁴² And of course, if there is no such thing as residual discretion, then there is nothing, at least in principle, to worry about at all.

6. *Judicial Lawmaking*

This discussion of discretion leads to the next point: Norm-Based theories need not claim that courts do not "make law." Certainly, the exercise of residual discretion (if it exists) might be thought of as lawmaking, because it brings a norm (or a more refined version of an old norm) into being.¹⁴³ Moreover, a judicial decision might be entirely "wrong" as an adjudicative act but at the same time legislate valid positive law—"right" by definition—for the future.¹⁴⁴

Yet while judicial lawmaking is surely admissible in the Norm-Based universe, it should not be confused with two other distinct phenomena. First, adjudication generally occurs in the context of a judicial bureaucracy. These bureaucracies, for reasons related to the rule of law itself, generally value not only correct decisions; they also value the correct management of the decision-making process through the exercise of those parts of the "adjective" law concerned with imperatives such as consistency, re-

142. For that matter, the first gloss could easily be understood to encompass the second.

143. The exercise of affirmative discretion cannot be thought of as lawmaking because, by definition, it does not bring a norm into being.

144. This legislative force of a wrong decision should be distinguished from its immediate enforceability. See *supra* note 125 and accompanying text.

The dynamics of judicial lawmaking are not identical to those of legislative lawmaking. For example, single judicial decisions do not, in typical common law theory, carry the same authority as individual statutes; to work they must, more so than statutes, fit into the legal landscape. See *Boys Mkts. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring); *State v. Michels Pipeline Constr.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974). This may only be a matter of degree, however; many courts, for example, are famous for conforming statutes to the common law rather than the other way around.

In civil law theory, judicial lawmaking and even *stare decisis* are particularly suspect, although some scholars of the civil law have suggested that judicial decisions can become law by virtue of first being incorporated into "customary" jurisprudence. See generally J. DAWSON, *THE ORACLES OF THE LAW* (1968) (discussing trends in various civil law jurisdictions).

Judicial lawmaking poses a range of special problems, not the least of which is the unfairness of applying retrospectively decisions that are essentially legislative in character. Despite these problems, nothing in the Norm-Based view requires that the conceptual and practical distinction between the coming-into-being of norms and their enforcement manifest itself as a strict institutional separation between the legislative and judicial offices of government.

pose, and hierarchical accountability.¹⁴⁵ There is some tension between institutional imperatives and substantive justice,¹⁴⁶ and the exercise of judicial lawmaking in the course of decision management can reduce some of that tension by defining it away. Nevertheless, it would be a mistake to assume that decision management and judicial lawmaking are co-extensive. In fact, the clearest example of decision management without judicial lawmaking is found in the very sort of cases with which choice of law is most concerned—namely, when a court of one sovereign applies the law of another, and therefore exercises adjudicative jurisdiction without any claim to legislative jurisdiction.

The second phenomenon I want to discuss returns us to legal ontology and epistemology, and their interrelation.¹⁴⁷ To believe that norms exist in some sense independent of their enforcement is not necessarily to believe that the way to discern the content of those norms must be radically individualistic or undeferential.¹⁴⁸ Every interpreter of the law need not be entitled *a priori* to equal respect. It might be reasonable to think that judges, by virtue of their training, experience, competence, participation in a process of collective deliberation and institutional transmission, or (in common law ideology) their opportunity to test their interpretations in the crucible of actual application, are more entitled to deference on the truth of their legal pronouncements than the rest of us.¹⁴⁹ In this sense, judges

145. These values do not, of course, enjoy equal degrees of adherence by all legal regimes. *See, e.g.*, M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 16–70 (1986) (discussing differences between “hierarchical” and “coordinate” ideals of judicial organization); M. SHAPIRO, *COURTS* 194–222 (1981) (discussing general absence of appeal and hierarchal judicial organization in traditional Islamic legal culture).

146. *Cf. Shea v. Louisiana*, 470 U.S. 51, 59–60 (1985) (defending decision to apply newly defined Fourth Amendment rule retroactively to cases pending on appeal, but not cases on collateral attack: “The distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come.”); *Ellison v. Georgia R.R.*, 87 Ga. 691, 695–96, 13 S.E. 809, 810 (1891) (“Some courts live by correcting the errors of others and adhering to their own.”); 87 Ga. at 719–20, 13 S.E. at 817 (commenting, on overruling precedent, that “the able and learned [trial] judge who presided in this case . . . had he been at liberty to follow his own convictions as to the true law,” would probably have decided the case differently. “This is the second instance in which we have been constrained to reverse him as a consequence of correcting a misleading decision of this court. His willingness to abide by authority which ought to control him for the time being, is not the least conspicuous of his many judicial virtues.”).

147. *See Coleman, Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

148. *Cf. id.* at 141 (distinguishing “epistemic” and “semantic” understandings of rule of recognition).

149. Among the classic expressions of faith in the distinctive legal expertise of judges are E. COKE, *REPORTS*, pt. 12, at 63, 65 (4th ed. 1738), *reprinted in* 77 Eng. Rep. 1342, 1343 (1907) (legal causes “are not to be decided by natural Reason but by the artificial Reason and Judgment of Law, which Law is an Act that requires long Study and Experience, before that a Man can attain to the Cognizance of it”); W. BLACKSTONE, *COMMENTARIES* *73 (judges are “depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from [the] ‘lucubrations

not only have authority, they are authorities.¹⁵⁰

Recognition of judicial expertise does not render trivial the distinction between norms and their enforcement.¹⁵¹ It should also be clear how expertise can be distinguished from judicial lawmaking. For one thing, lawmaking is self-validating in precisely the way that expertise is not. In addition, any complete account of expertise would probably need to distinguish between greater and lesser judges, and recognize whatever authority is held by persons not possessing the judicial office, including—dare I say it—legal scholars.¹⁵² Finally, expertise, in common with decision management, can exist even in the absence of any legitimate legislative jurisdiction. Thus, to say that judges speak the law is not necessarily to say that they make the law, although they may in fact do some of each.

To identify all of these phenomena is not to say that they can always be told apart. For that matter, the easy post-modern position might be that it would be impossible, even in principle, to untangle completely every last

of twenty years'] . . . and from being long personally accustomed to the judicial decisions of their predecessors."); and *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring in judgment) (Founders "set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be as 'free, impartial, and independent as the lot of humanity will admit.'"). *But cf., e.g., Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12 (1979) (judges' "capacity to make a special contribution to our social life derives not from any personal traits or knowledge, but from the definition of the office in which they find themselves and through which they exercise power.").

The questions raised by these sources about the relevance of putative expertise to the definition or legitimation of judicial authority must, of course, be placed in the broader context of philosophical and social science debates about the nature and limits of political authority in general. *See, e.g., G. CHRISTIE, supra* note 86, at 83-146; C. FRIEDRICH, *TRADITION AND AUTHORITY* (1972); *NOMOS I: AUTHORITY* (C. Friedrich ed. 1958) (collection of articles by various authors); Bell, *Authority*, in *ROYAL INSTITUTE OF PHILOSOPHY LECTURES, 1969-70*, at 190 (1971); Winch, *Authority*, in *POLITICAL PHILOSOPHY* 97 (A. Quinton ed. 1967).

On a possibly more mundane level, considerations of putative expertise often figure in legal doctrines and debates relating to the allocation of authority among different judicial and quasi-judicial actors. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3254-55 (1986) (discussing relative expertise of courts and administrative agencies in interpreting agency's statutory grant of jurisdiction); *Merrell Dow Pharmaceuticals v. Thompson*, 106 S. Ct. 3229, 3242-43 (1986) (Brennan, J., dissenting) (discussing relative expertise of federal and state judges in determinations of federal law); *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (holding, contrary to views of most other circuits, that no special deference should be accorded to local federal district judge's determination of state law).

150. *Cf. G. CHRISTIE, supra* note 86, at 94-95 (discussing and rejecting this view).

151. For one thing, expertise, in any secular regime at least, is at best only highly presumptive. We might defer to the views of judges—or, for that matter, scientists and lexicographers—but that deference is rarely indefeasible. Indeed, even a commitment to infallible expertise in some religious traditions confirms, by the special sorts of arguments necessary to defend it, an underlying distinction between truth and its utterance.

152. *Cf. Fletcher, Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981).

Recall that I am assuming throughout most of this Article a commonsense statist political theory that would limit positive lawmaking to the organs of the state. *See supra* text accompanying note 74. To the extent that this assumption is relaxed, there is no bar in principle to a wider dispersion of both lawmaking power and expertise, and the line between the two becomes more difficult and interesting.

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strand of lawmaking from every last strand of decision management from every last strand of expertise in the judicial function. But if these problems are subtle and even mysterious, that subtlety is best revealed, and best confronted, through the Norm-Based view itself.

7. *The World Beyond*

The basic Norm-Based view of law does not necessarily imply that there is nothing in life and society besides law. For one thing, there may be whole departments of human activity not governed, except at their borders, by law. Moreover, even governmental entities have more to worry about than the law. Many projects—fighting fires, building roads, shooting fleeing felons, and waging limited nuclear wars—may be constrained by law, but they attempt neither to establish norms for the future nor to judge the past; they are, sometimes literally, acts of engineering rather than reading. The same might be said about a whole range of allocative decisions made by government,¹⁵³ including the granting of television licenses and the managing of welfare programs.¹⁵⁴ The most interesting example, discussed by both Hart and Fuller, is taxation.¹⁵⁵ Imposing a tax and rendering a judicial judgment may seem similar, in that both impose practical consequences by reference to a person's conduct or status. According to the Norm-Based view, however, taxation and adjudication are profoundly different precisely because taxation does not imply a normative conclusion. An assessment of a tax looks to the past, but is not concerned with judging the past, only with using it as a measure through which to meet the needs of the present.¹⁵⁶ Indeed, recognizing a fundamental difference between taxation and adjudication may be as good a litmus test as any of one's basic sympathies with the Norm-Based view of law.

Even within the adjudicative process, the Norm-Based view cannot claim a monopoly. Many aspects of adjective law, for example, have traditionally and self-consciously been understood to include a present-looking calculus otherwise excluded from the Norm-Based universe. Increasingly,

153. This is actually a subject of some controversy in administrative theory. See generally E. BARDACH & R. KAGAN, *GOING BY THE BOOK* (1982); J. MASHAW, *BUREAUCRATIC JUSTICE* (1983); Diver, *The Optimal Precision of Administrative Rules*, 93 *YALE L.J.* 65 (1983); Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978); Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 *DUKE L.J.* 163.

154. Admittedly, these activities are often carried out in quasi-judicial form, but this sort of confusion of categories may sometimes disserve both allocative efficiency and the rule of law. See Fuller, *supra* note 153.

155. See L. FULLER, *supra* note 100, at 75; H.L.A. HART, *supra* note 93, at 39.

156. Cf. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 *U. PA. L. REV.* 47 (1977).

the same latitude is being asserted with respect to questions of remedy.¹⁵⁷ In addition, a few corners of legal process—the determination of child custody for instance—are arguably entirely informed by considerations of present welfare rather than retrospective judgment.¹⁵⁸ These instances, however, are the exceptions that prove the rule. To say that people come to court with rights arising out of the effect of legal norms on events in the world is not to say that courts do not have an independent interest in the orderly and efficient processing of legal claims. Nor does it imply that the vindication of rights can always proceed unproblematically from the substance of those rights. And if we believe that the custody of children should not be treated as a reward or punishment for parental conduct, it may make perfect sense for child custody determinations to be based as much as possible on the best interests of the child. Indeed, it is no coincidence that precisely in contexts like procedure and child custody, but never in the basic task of determining substantive issues, legal regimes routinely recognize, even encourage, a measure of the prerogative that I earlier called affirmative discretion.

Still, this account leaves something very important unacknowledged. The Norm-Based view of law makes certain claims about the nature of legality and legal judgment. One can imagine a society that rejected the institution of legality entirely—whose notion of conflict resolution centered entirely on the needs of the present. The existence of such a society would not, however, prove that the Norm-Based view of law was wrong; it would merely prove that not all societies govern themselves by law.

Even a society that takes the rule of law seriously might well recognize other normative demands, coming from outside the legal discourse, which would override the norm-generated rights of litigants.¹⁵⁹ Imagine, for example, a civil suit in which the defendant threatened to set off a small nuclear explosion if he lost. That might not be the time to be fastidious about the rule of law.¹⁶⁰ But the possibility of such cases proves very little.

157. See *supra* note 94 (citing sources); see also, e.g., *Local 28 v. EEOC* 106 S. Ct. 3019, 3034–35 (1986) (plurality opinion) (courts vested with broad discretionary power to award appropriate relief to remedy unlawful discrimination); *Kakalik v. Bernardo*, 184 Conn. 386, 395–96, 439 A.2d 1016, 1020–21 (1981) (availability of specific performance in contract suit is not matter of right, but depends on equitable considerations).

158. See Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984). To the extent that this account characterizes the child custody process correctly, that process differs from typical adjudication not because the standards that come into play are less determinate—one can easily imagine a child custody process guided by very determinate, indeed mechanical, rules—but because the custody inquiry does not ground claims of right on the application of law to a normative judgment of parties' conduct.

159. For a particularly powerful defense of this idea, see J. SHKLAR, *LEGALISM* (1964).

160. I use this melodramatic example only because more standard cases would raise the issue of the extent to which the law already incorporates within it the demands of morality and common sense. See *supra* note 139 (discussing debate on judicial discretion). Lord Denning, the now retired great British judge, for example, once denied the accusation that his jurisprudence surrenders to the pleas of

In the first place, they are by their nature extraordinary.¹⁶¹ In addition, each case would have to be justified by an extraordinary set of considerations to explain not only why the rule of law should be put aside, but also how an officer whose privileged place in the polity is defined and justified by her service to the law is authorized to put it aside. Moreover, from a Norm-Based perspective, there would always exist, even in such cases, a “true” (or at least approximately “true”), distinctively *legal* answer to the dispute in court, regardless of the fact that something as distracting as the threat of mass destruction prevented that truth from being pronounced.¹⁶² Extra-legal considerations that may come into play in an adjudication can prevail only over against the more specialized normative demands of legality; the rule of law can be ignored, but it is there to be ignored, and the result of ignoring it is in some sense not a legal judgment at all, but merely a command.

Finally, and most importantly, although non-legal considerations may come into play in an adjudication, this does not imply that judicial decision-making characteristically or necessarily consists of *balancing* legal and non-legal considerations to achieve an optimal result. Indeed, the Norm-Based view of law assumes that a judge can act coherently on the basis of a legal conclusion that runs counter to the judge’s own view of what would be best, all things (including the law) considered.¹⁶³ If, in other contexts, disjunctions between all-things-considered judgments and decisions to act are aptly characterized as examples of “incontinence”¹⁶⁴ or “unfree actions”¹⁶⁵ that may be precisely why in the legal context

Bassanio, the character in Shakespeare’s *The Merchant of Venice*, who begs Portia to “Wrest once the law to your authority. To do a great right, do a little wrong” W. SHAKESPEARE, *THE MERCHANT OF VENICE*, IV, i, 214–15 (K. Myrick ed. 1965). Instead, Denning called himself a “Portia man,” loyal to the law, but willing to avoid an “unjust decree” by construing the law “so as to do what justice and equity require.” DENNING, *THE DISCIPLINE OF LAW* 30–31 (1979). *But cf.* C. GILLIGAN, *IN A DIFFERENT VOICE* 105 (1982) (discussing Portia to very different effect).

161. This is not much of an argument as it stands, and the suspicious reader is urged to ignore it and go on to the next point. Lurking behind this claim is not only an empirical guess, but also two very personal, and decidedly vague perceptions: (1) that most actual normative systems are rich and supple enough (vacuous and manipulatable enough, if you prefer) to avoid the need to discard them, and (2) that a norm-centered worldview is powerful enough to redefine and transform the very considerations that are weighed against it.

162. *Cf.* R. UNGER, *supra* note 112, at 204.

163. *See generally* J. RAZ, *PRACTICAL REASON AND NORMS* 35–47, 143–44 (1975); G. VON WRIGHT, *NORM AND ACTION* (1963); Rawls, *supra* note 90. For more general philosophical defenses of the view that one can coherently act on a decision that runs counter to one’s view of what is best all things considered, see, for example, ARISTOTLE, *THE NICHOMACHEAN ETHICS* bk. VII, chs. 2–3; Davidson, *Freedom to Act*, in *ESSAYS IN ACTION AND EVENTS* 63 (1980); Davidson, *How Is Weakness of the Will Possible?*, in *id.*, *supra*, at 21 [hereinafter Davidson, *How Is Weakness of the Will Possible?*]; Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHIL.* 5 (1971); Watson, *Free Agency*, 72 *J. PHIL.* 205 (1975).

164. Davidson, *How Is Weakness of the Will Possible?*, *supra* note 163, at 21; *see* ARISTOTLE, *supra* note 163, at bk. VII, chs. 2–3 (discussing moral incontinence).

165. Watson, *supra* note 163.

Norm-Based theorists strive for a "government of laws and not men."¹⁶⁶ And if this premise contains within it the seeds of both honor and tragedy, then a Norm-Based theorist would argue that these merely reflect the potential for both honor and tragedy in the enterprise of law.

C. *The Decision-Based View of Law*

The intellectual origins of contemporary Decision-Based jurisprudence in the United States can be traced to Oliver Wendell Holmes, Jr. and his famous aphorism: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."¹⁶⁷ For my purposes, though, I want to identify the earliest expressions of the Decision-Based view in modern American jurisprudence with the work of John Chipman Gray and, even more clearly, Joseph W. Bingham, two prominent precursors of American Legal Realism.¹⁶⁸ In the Realist movement, the Decision-Based view appeared as one theme among many.¹⁶⁹ Among its most articulate defenders, at least at certain points in their careers, were Karl Llewellyn, Jerome Frank, Underhill Moore, and of course, Walter Wheeler Cook. In contemporary legal scholarship, the Decision-Based view appears in three principal ways: (1) in the work of a relatively small number of scholars who are the direct heirs to the more theoretical and systematic branch of Realism;¹⁷⁰ (2) in some expressions of the Critical Legal Studies Movement;¹⁷¹ and (3) as a background assumption, rarely articulated and often diluted, in at least some corners of standard or mainstream legal scholarship.¹⁷²

166. MASS. CONST. pt. 1, art. 30.

167. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Whether Holmes really belongs in the Decision-Based camp, aside from his role as semi-mythical precursor, is an important question about which I express no views.

168. See J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909); Bingham, *supra* note 86.

169. Cf. W. TWINING, *supra* note 37; Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931).

170. See, e.g., G. CHRISTIE, *supra* note 86; D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468 (1978).

171. See, e.g., Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Singer, *supra* note 134.

172. Two examples drawn almost at random are: Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 572-73 (1986) (assuming that strict liability in tort is entirely independent of behavior of defendant or duty owed by defendant to plaintiff, and that only rationale for strict liability is policy of risk distribution); Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 159-65 (1985) (assuming that only responsible way for federal court sitting in diversity to decide question as to which state law is unsettled is to attempt to predict how highest state court would decide issue, and that any effort by federal court to analyze underlying principles of state law represents nothing more than impermissible exercise of "independent judgment").

The categorization of contemporary law and economics analysis in terms of the dichotomy I have drawn between the Norm-Based and Decision-Based views of law presents a particularly interesting problem. On the one hand, the emphasis in much of the law and economics literature on the incentive

The Decision-Based view is most simply described as the antithesis of the Norm-Based view. Specifically, the Decision-Based view rejects as metaphysical nonsense or worse the two distinctions at the heart of Norm-Based jurisprudence: the distinction between the existence of legal norms and their enforcement, and the distinction between the varied purposes of legal norms and the single-minded purpose of adjudication.

The first distinction strikes many Decision-Based theorists, in Joseph W. Bingham's words, as "a manifestation of false fundamental notions of logic":¹⁷³

Certainly there are rules and principles of law, as there are rules and principles of biology or of architecture or of any other science or art. . . . A rule of law is a generalized abstract comprehension of how courts would decide concrete questions within its scope. A principle of law is an abstract comprehension of considerations which would weigh with courts in the decision of questions to which it is applicable. . . . There is nothing authoritative in the existence of a rule or a principle. . . . If these generalizations accurately indicate potential legal effects within their scope, or comprehend accurately considerations which would be given weight by courts in the decision of cases, they are valid rules or principles of law.¹⁷⁴

Indeed, some Decision-Based theorists go so far as to deny any particular import even to the explicit considerations by which judges justify their decisions, and instead look exclusively to the effects of their decisions on actions in the world.¹⁷⁵

With regard to the second distinction, Decision-Based theorists take as desirable, or even as logically or psychologically inevitable, exactly the account of adjudication that Norm-Based theorists reject—namely, that ad-

effects of legal rules leads to a view of adjudication consistent with, though by no means identical to, the standard Norm-Based model. See Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10–12 (1984) (distinguishing ex post perspective in adjudication, which simply apportions gains and losses between parties, from ex ante perspective, which looks to articulation of rules to guide out-of-court behavior). On the other hand, that same emphasis on incentives often leads law and economics analysis to deny any normative content to legal rules over and above the behavior they can be expected to induce. See, e.g., A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 29–32 (1983) (discussing theory of "efficient breach" in contract law). More generally, the consequentialist philosophy underlying much of law and economics often leads to a view of legal process too instrumentalist to fit easily into the Norm-Based account.

173. Bingham, *supra* note 86, at 17 n.17.

174. *Id.* at 22 (footnote omitted); see also, e.g., J. FRANK, *supra* note 126, at 46 (law consists of "actual law . . . a past decision . . . or probable law . . . a guess as to a future decision").

Decision-Based theorists do, of course, often distinguish between "law-in-action" and "law-in-books" or between "law as it is" and "law as it should be." Nevertheless, although both of these distinctions are valuable and entirely consistent with most Norm-Based theories, they do not capture what Norm-Based theorists have in mind when they refuse to identify law with judicial practice.

175. See, e.g., K. LLEWELLYN, JURISPRUDENCE 81 (1962); Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).

judication is a generalized effort to achieve what is best between the parties or in the world at large.¹⁷⁶ Although most Decision-Based theorists will admit that respecting settled expectations is in many instances important, they see it as a contingent good—perhaps one good among many—not the defining goal of the enterprise of law.¹⁷⁷

As a consequence of its rejection of the fundamental premises of Norm-Based theory, the Decision-Based view also denies the validity or importance of the whole collection of subsidiary distinctions so lovingly surveyed above. If, for example, the most charged moment in a legal dispute is not the “occurrence of an event or condition to which [a] norm applies,”¹⁷⁸ but the occurrence of a compulsory judicial order, then the distinction between rights and remedies appears as either a muddle or a subterfuge. For similar reasons, the distinction between substantive and adjective issues, in the Decision-Based view, is at best a useful organizational principle,¹⁷⁹ while concoctions such as residual discretion and presumptive expertise are too obscure to worry about at all. Decision-Based theorists also reject the principle of non-contradiction, taking particular delight in the unsurprising discovery that judicial decisions often contradict each other.¹⁸⁰ Finally, Decision-Based theorists reject on two counts the notion that extra-legal considerations in an adjudication can only prevail, if they are brought to bear at all, “*over against* the more specialized normative demands of legality.”¹⁸¹ First, no considerations are by their nature extra-legal, and, second, all official decisions of judges are by their nature law.

Just as the Norm-Based view is broader than it seems at first glance, the Decision-Based view is narrower. It represented only one (atypically abstract) strain within American Legal Realism, and today represents

176. See, e.g., Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Singer, *supra* note 134, at 65; Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928); cf. R. UNGER, *supra* note 112, at 192-242.

177. See, e.g., Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982); Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951). I do not mean to suggest that Norm-Based theories are themselves ultimately concerned with *psychological* expectations. The circularity implicit in looking at bare expectations is obvious. In any event, a theory of law grounded in such expectations would be difficult to defend in an area such as torts, in which actual expectations are often attenuated. What is at stake in Norm-Based adjudication is not so much the vindication of particular expectations but the vindication of a system of norms capable (subject to the limitations of language) of giving rise to specific legitimate expectations.

178. See *supra* text accompanying note 96.

179. See, e.g., K. LLEWELLYN, *THE BRAMBLE BUSH* 84 (1930); Cook, “*Substance*” and “*Procedure*” in the *Conflict of Laws*, 42 YALE L.J. 333 (1933).

180. See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Powell, *Current Conflicts Between the Commerce Clause and the State Police Power, 1922-1927*, 12 MINN. L. REV. 470 (1928); cf. Tushnet, *Marxism as Metaphor* (Book Review), 68 CORNELL L. REV. 281, 288-89 (1983) (posing existence of “rules and counterrules” as challenge to Marxist analysis of law).

181. See *supra* text accompanying note 163 (emphasis added).

only one strain within Critical Legal Studies and similar movements.¹⁸² For example, the Decision-Based view should not be confused with a simple *interest* in the actual behavior of judges and other actors, provided the interest falls short of the assertion that sheer behavior alone is necessary to the complete study of legal phenomena. Nor should it be confused with the critiques of conceptualism that remain perhaps the most important legacy of the Realist movement; as I have made clear, a Norm-Based theorist need not be a conceptualist. Nor should it be confused with the expressions of rule-skepticism that were the second significant legacy of Realism, provided the rule-skepticism tapers before denying *any* force or meaning to rules.¹⁸³ Nor, finally, should it be confused with efforts at uncovering the social context, or class biases, or plain old power plays behind the facade of particular legal norms or systems of norms,¹⁸⁴ as long as those efforts do not deny any significance or independent meaning to the facade once it is constructed.¹⁸⁵

D. *The Norm-Based View (Not Really) Defended*

I have already promised that I will not try here to provide a full-fledged justification of the Norm-Based view of law. Others much more capable than I have done so with at least some success.¹⁸⁶ I cannot resist, however, trying to squeeze into the margin some account, abridged and schematic as it is, of the leading arguments for the Norm-Based view,

182. Roberto Unger, for example, has been careful to disassociate himself from a thoroughgoing Decision-Based perspective. *See, e.g.*, R. UNGER, *supra* note 112, at 56 (“To arrive at a proper appreciation of what the concept of a legal order is meant to describe, one must tread a narrow path between opposite errors,” one of which “consists of the tendency to treat the generality and autonomy of a legal order as merely ideological pretenses that ought simply to be set aside by one who would understand how law operates.”); *id.* at 256 (“Whenever we set aside the fact of consciousness, we fall into behaviorism. Whenever we disregard the limitations of consciousness, we slide into idealism.”).

183. It might be worth noting, though, that an entirely *unskeptical* attitude about the determinacy of rule-like language by no means constitutes acceptance of the Norm-Based view that those rules can generate a distinctively legal set of rights.

184. *See, e.g.*, D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE* (1975); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). As these examples illustrate, materialist accounts of legal enactments do not come only from the political left.

185. One particularly interesting and eloquent attempt at understanding both the social context of particular legal norms and the independent significance of the rule of law is found in E.P. THOMPSON, *WHIGS AND HUNTERS* (1975). Within the Critical Legal Studies Movement, the “relative autonomy of the law” remains a subject of interesting internal debate. *See, e.g.*, Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529 (1977).

186. *See, e.g.*, R. DWORKIN, *supra* note 92, at 82-90; L. FULLER, *THE LAW IN QUEST OF ITSELF* 53-62 (2d ed. 1940); H.L.A. HART, *supra* note 93, at 55-57, 79-88, 97-107, 132-44; Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931).

while the text of the Article moves on to its own more narrow commission. The arguments are diverse: Some defend the Norm-Based view by reference to the inadequacies¹⁸⁷ and internal contradictions¹⁸⁸ of the Decision-Based view; others defend the Norm-Based view on its own merits, as a descriptive proposition,¹⁸⁹ or a prescriptive one,¹⁹⁰ or something of

187. The beginning of wisdom about the Decision-Based view may be the recognition that the strain of legal realism with which it began was grounded in larger intellectual movements (primarily outside professional philosophy) that were influential in the early part of the century, but are now commonly considered naive or incomplete. See generally L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 1-44 (1986) (discussing aspects of intellectual background of American Legal Realism); W. TWINING, *supra* note 37, at 3-83 (same). These movements included modern forms of positivistic nominalism that saw "word magic" as the main threat to clear thought, see C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* 40-47 (1927), and theories of psychological behaviorism that often reduced human consciousness to observable motions and responses, see, e.g., J. WATSON, *PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST* 9-15, 346-56 (1919); and reduced human decisionmaking to the aggregation of miscellaneous predispositions, see, e.g., K. LEWIN, *FIELD THEORY IN SOCIAL SCIENCE* (D. Cartwright ed. 1951); E. TOLMAN, *PURPOSIVE BEHAVIOR IN ANIMALS AND MEN* (1932). For instances of some of these premises in the work of the legal realists, see, for example, W.W. COOK, *supra* note 17, at 8, 154-56; Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238 (1950); Green, *The Duty Problem in Negligence Cases*, 28 *COLUM. L. REV.* 1014 (1928); Moore, *Rational Basis of Legal Institutions*, 23 *COLUM. L. REV.* 609 (1923). Legal realism also often displayed a wistful envy of the hard sciences, see, e.g., Cook, *Scientific Method and the Law*, 13 *A.B.A. J.* 303 (1927); Oliphant, *Facts, Opinions, and Value-Judgments*, 10 *TEX. L. REV.* 127 (1932), and a commitment to a particularly unrestricted form of utilitarianism, see, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935).

For contemporaneous critiques of the reliance of legal realism on such premises, see, for example, Cohen, *Philosophy and Legal Science*, 32 *COLUM. L. REV.* 1103 (1932); Cohen, *Justice Holmes and the Nature of Law*, 31 *COLUM. L. REV.* 352 (1932); Fuller, *American Legal Realism*, 82 *U. PA. L. REV.* 429 (1934); Kantorowicz, *supra* note 93. Today, nominalism, behavioralism, scientism, and utilitarianism are all less potent cultural trends. Just as important, more recent dominant versions of these trends have lost many of the special, mock radical twists that drove the legal realist enterprise. See, e.g., R.M. HARE, *MORAL THINKING* (1981); E. NAGEL, *LOGIC WITHOUT METAPHYSICS* (1956); G. RYLE, *THE CONCEPT OF MIND* (1949); Goodman & Quine, *Steps Toward a Constructive Nominalism*, 12 *J. SYMBOLIC LOGIC* 105 (1947).

One way of understanding why all this should be so is to note that the common denominator of the premises supporting Decision-Based realism was a species of metaphysical optimism. The realists believed that, behind the illusions of the law, there was a solid, undeniable, and unitary reality about which they could be "realistic." Current intellectual discourse is less confident, cf. *supra* text accompanying notes 131-37 (discussing interpretation), but has replaced that loss of faith with new respect for the multiplicity of ways that human beings construct the world around them in an ongoing effort at life and understanding. See, e.g., N. GOODMAN, *supra* note 128; R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); W. SELLARS, *SCIENCE, PERCEPTION, AND REALITY* (1963); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 3d ed. 1958). The lesson for law here may be that, while it assimilates the insights and findings of past and present realists, it must also remain skeptical of their limited vision of how to construct legal reality.

188. Quite apart from the grand arguments outlined in note 187, *supra*, the Decision-Based view suffers from a more specific defect. As critics of legal realism have long pointed out, the Decision-Based view must itself resort at some point to rules that are not merely identical with behavior. This is because a Decision-Based account, even in its descriptive moments, must ultimately decide who a judge is, and how a judge differs from a thief in the dark. See H.L.A. HART, *supra* note 101, at 133. This constitutive decision must be based on some criteria independent of behavior or else it can never get off the ground. And once a Decision-Based theory admits a role for such criteria, it is less clear how the theory can dismiss the notion that law in general is not identical with the conduct of officials.

189. To begin with, the Norm-Based view simply gives a better description than do other accounts of the ordinary understanding of law and legal norms. In common usage, and certainly in internal discourse, we do tend to think that the content of law is distinct from the acts of officials, and that legal judgments should on the whole reflect past behavior rather than present engineering. Simi-

each.¹⁹¹ Whether all of the arguments are consistent with each other is a good question, but an undertaking beyond the ambition of this Article.

larly, that a court might be wrong as a matter of law, or that there might be a right without a remedy, strikes few of us as incoherent. Indeed, there is something to the idea that the realists, at their most critical, could fashion apparent paradoxes out of the ordinary understanding of law only by exploiting the very meanings that they rejected. See H.L.A. HART, *supra* note 93, at 132-44; cf. J. SEARLE, *supra* note 85, at 186 n.1 (questioning use of terms internal to institution to attack institution). Of course, the very existence of a Decision-Based strain in the realist movement might itself pose something of a challenge to the descriptive claims of Norm-Based jurisprudence, but only to the extent that the Decision-Based view was more than an external academic account, and actually ingratiated itself into the law's internal understanding. Cf. *infra* text accompanying note 257 (discussing need for inquiry into historical character and role of choice of law revolution).

The Norm-Based view of law also makes sense, in a way that the Decision-Based view does not, of the "curious person" in legal culture. The curious person, unlike the "bad man" headlined by Holmes, has moments when he wants to know what is legally right, and not merely what will keep him out of trouble; he wants to know what a court should decide, as a matter of law, and not merely what it will decide.

In addition to reflecting the ideology of legal culture, Norm-Based jurisprudence also makes sense of a host of specific features of legal discourse, ranging from the substance/procedure and rights/remedy distinctions to such notions as the difference between legality and immunity, the complexities of breach of contract, and—of course—the ability of a court to apply the law of a foreign jurisdiction.

Finally, and perhaps most profoundly, the Norm-Based view is able to broaden the horizons suggested by the secular nation-state and take seriously (although some of its versions are more interested in doing so than others) the internal perspectives of legal regimes, such as those of religious communities and tribal societies, that are marked by an explicit reliance on the transcendent (and not merely objective) character of law, a lack of powerful or clearly defined enforcement mechanisms, or a drive to legal "curiosity" under circumstances no "bad man" could bear. See, e.g., E. EVANS-PRITCHARD, *THE NEUR* 158-76 (1971) (discussing Neur legal system, including its strong conception of "rights"); R. KIRSCHNER, *RABBINIC REPOSA OF THE HOLOCAUST ERA* (1985); Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For an eloquent demonstration of the importance of recognizing the continuities between statist legal regimes and other communities of legal discourse, see Cover, *id.*

190. The Norm-Based view can be commended, in purely instrumental terms, for promoting a whole series of values important to a system of ordered liberty: procedural regularity, official non-arbitrariness, protection of settled expectations, maximum substantive liberty, high moral drama for the masses, the effective creation of efficient social incentives, and the like. See, e.g., F. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973); R. POSNER, *THE ECONOMICS OF JUSTICE* 73-76 (1981); J. RAZ, *THE AUTHORITY OF LAW* 219-22 (1979); cf. West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986) (attempting Freud-influenced defense of rule of law). These consequentialist arguments for Norm-Based jurisprudence differ from the consequentialist calculus that often figures within Decision-Based jurisprudence. A consequentialist account of Norm-Based jurisprudence can still insist that legal analysis itself is in some distinctive way non-consequentialist.

Quite apart from its instrumental advantages, the Norm-Based account can also be defended in Kantian terms as the only possible basis for legitimizing the law's regulation of private affairs. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 36-39 (J. Ladd trans. 1965); R. DWORKIN, *supra* note 92, at 82-86; J. RAWLS, *A THEORY OF JUSTICE* 235-43 (1971); Hart, *Are There Any Natural Rights?* 64 PHIL. REV. 175 (1955). In this view, treating a trial as simply one more opportunity to realize some social good necessarily treats the litigants as mere means to an end. By contrast, an account of law that treats a trial as a forum in which pre-existing rights and liabilities are vindicated treats the litigants as ends in themselves—as autonomous beings bound to each other by entirely reciprocal legal obligations and experiencing through the legal process the unfolding of the consequences of those reciprocal bonds.

191. This last approach combines a number of the arguments made so far, and comports most closely with this Article's general commitment to Norm-Based jurisprudence as a set of institutional facts or thick concepts that are not usefully pigeonholed as either strictly descriptive or strictly prescriptive. According to this view, law is a purposive enterprise with distinct characteristics and consequences. Law is about legality and legal judgment, and these attributes, by their nature, imply a

There are probably some readers who, before (or despite) my “marginal” defense of the Norm-Based view, thought the alternative a straw man. That would be delightful. My own view is that the issue is not so easily settled. Indeed, despite my commitment to Norm-Based jurisprudence, I sometimes think in my (more skeptical) heart of hearts that the controversy ultimately comes down to intellectual temperament and commitments.

A possibly more important question, though, is whether any practical consequences actually follow from adopting either the Norm-Based or the Decision-Based view. In some contexts, such consequences seem limited: a greater or lesser degree of judicial willfulness, perhaps; subtle differences in the sorts of arguments that can legitimately be brought to bear in understanding and evaluating doctrinal results, probably; a different style of legal scholarship, certainly. There are, however, fields of law in which jurisprudence can inform legal doctrine forcefully and specifically. Choice of law, because the issues it raises expose the legal enterprise to the bone, is perhaps the best example. And that brings us back to the principle of vestedness and its place in choice of law.

IV. VESTEDNESS (AT LAST) DEFENDED

A. *The Negative Case*

Let me begin with the negative case in favor of vestedness before going on to an affirmative argument. It should now be obvious how strongly the critique of traditional vested rights theory mounted by Walter Wheeler Cook and Brainard Currie depended on the presuppositions of the Decision-Based strains of legal realism.¹⁹² Cook’s work depended on Decision-Based jurisprudence; indeed, his work was central to the task of defining that jurisprudence as a component of the Realist agenda. And Currie, precisely because he was in so many respects not a legal Realist, illustrates how commonplace the Decision-Based thesis became even for those historically or temperamentally separated from the movement in which the thesis did its most powerful work.

Indeed, at the risk of making this account appear too neat, I would suggest that Cook and Currie represent, respectively, the two faces of the fundamental conflict between the Decision-Based and Norm-Based views

special internal morality to the functioning of the legal process. Other coercive institutions may be guided by different moralities, but for law to make sense—for a legal judgment actually to be what it purports to be—it must be consistent with the law’s distinctive and singular purpose. See L. FULLER, *supra* note 100; Fuller, *supra* note 153; Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).

192. Cf. L. KALMAN, *supra* note 187, at 25–27 (placing Cook’s attacks on Beale in context of realist enterprise).

of law. That is, Cook's criticism of the notion of vested rights seems grounded precisely in a rejection of the Norm-Based distinction between the content of rules and their enforcement, while Currie's affirmative proposal to resolve true conflicts by sole reference to the law of the forum seems equally grounded in a rejection of the Norm-Based distinction between the purposes of particular laws and the purposes of the adjudicative function.

Cook's argument for a strictly local law account of choice of law turned on the allegedly scientific insight that

“[R]ight,” “duty,” and other names for “legal relations” are . . . not names of objects or entities which have an existence apart from the behavior of the officials in question, but terms by means of which we describe to each other what prophecies we make as to the probable occurrence of a certain sequence of events—the behavior of the officials.¹⁹³

It bears emphasis, however, that this claim could not have sustained the rest of Cook's analysis if it were only, as Cook sometimes implied, an attack on the “reification” of the law: As suggested in Section III, there is more than metaphysics at stake here. Similarly, Cook's premise should not be mistaken for the hackneyed proposition that “law is what the judges say it is.” Cook was interested in establishing not only the content of the law, but also its nature, and that nature apparently was not a matter of norms, whether reified or not, whether judge-made or not, but a matter of behavior. Since behavior has, by definition, only an external face, Cook could not admit a difference between internal and external perspectives. Nor could he admit the possibility of binding, self-imposed limits on judicial conduct, or the possibility that choice of law might encompass a second-order process of decision-making more complicated than the simple act of applying local law. Nor, finally, could he admit that a court might coherently understand a foreign-created right as something other than a prediction of how a foreign court would behave if faced with the same set of facts, and might enforce that right without necessarily conforming its own behavior, in all respects, to that prediction.

When I discussed Currie's views in Section I of this Article, I asked why he might have been so deeply convinced of the claim that courts, in adjudicating particular legal disputes, were primarily charged with “consistently advancing the policy of [their] own state[s].”¹⁹⁴ As it now turns out, only a Decision-Based view of law would propose such an un-

193. W.W. COOK, *supra* note 17, at 30 (footnote omitted).

194. See *supra* text accompanying note 56.

mediated and uncomplicated connection between the purposes of particular legal norms and the task of courts. Even more revealing is the fact that when Currie did refer to legal values associated with the process of adjudication itself, he treated those values as simply one more set of state interests, and then found that they were rather meager interests at that; presumably, a different assumption about the nature of the values underlying the rule of law might have led him to a different assessment of their importance.

For that matter, it might be said of both Cook and Currie that the attention they devoted to the admittedly idiosyncratic subject of choice of law only obscures the extreme implications of the views they held. If, for example, there are as many rights in any dispute "as there are jurisdictions which will give the plaintiff relief,"¹⁹⁵ then it might also follow that there are as many rights in that dispute as that number multiplied by the average number of judges (or possible judicial outcomes) in any one jurisdiction. If Cook were unhappy with this amendment, the only way he could demur would be to recognize that judges in a legal system are united by a common set of legal norms to whose enforcement they are pledged.¹⁹⁶ But that would admit into the analysis the idea that law embraces a normative framework conceptually distinct from its enforcement, and would define that framework in terms of second-order constraints on first-order decisionmaking. Admitting those ingredients into Cook's analytic apparatus might suddenly open up the possibility of second-order criteria confining not only law itself, but also choice of law, and of courts applying second-order criteria to enforce not only the norms of their own legal system, but also, if appropriate, the norms generated by a different legal system, without necessarily binding themselves to behave as if they were a foreign court.

Similarly, Currie's rejection of judicial disinterestedness in choice of law invites one to wonder whether there are any limits on the extent to which courts should use the adjudicative opportunity to promote state "interests" in cases that do not raise a choice of law issue. Indeed, can the notion of legal "liability" itself survive Currie's account, or should courts simply compensate favored classes and penalize disfavored classes whenever they happen to appear in court? If Currie were not willing to go that far, he

195. See *supra* text accompanying note 28.

196. There is a superficially attractive alternative account to the effect that judicial outcomes in any given jurisdiction should be grouped together, simply as a matter of expositional convenience, by virtue of a relatively high degree of convergence in the predictions that can be made about them. This story, however, is empirically suspect. In the case of two legal systems with relatively similar choice of law doctrines, intra-regime variations in judicial behavior might in fact be greater than average inter-regime variations.

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would have to explain why the considerations that led him to that conclusion bore no relevance for choice of law.

Now, nothing I have just said demonstrates the truth or even the attractiveness of vestedness. Indeed, Cook and Currie, given their perspectives, would be entirely justified in thinking vestedness to be as silly as traditional vested rights theory, if not more so. What I have tried to demonstrate, however, is that Cook's and Currie's conclusions, by virtue of being tied so closely to a particular, and I would submit radically barren, set of jurisprudential premises, simply shift the debate to higher ground, and that vestedness, seen in the light of somewhat different (that is, Norm-Based) premises, appears considerably more sensible. The next step is to demonstrate that, within a Norm-Based discourse, vestedness is not only respectable, but is rationally entailed.

B. *The Affirmative Case*

The core of the affirmative argument for vestedness is very simple: Assume, as I will from here on, that the Norm-Based view of law is correct. Then, if the defining function of courts is to enforce legal rights that exist, in some sense, apart from their enforcement, any court committed to that view cannot hold that the analysis of substantive legal rights depends on the manner in which they are sought to be enforced or, more specifically, on the forum in which an adjudication happens to be brought. Moreover, if the (direct) function of any particular adjudication is not to further policies of one kind or another, but rather to judge human beings on the basis of norms to which they were expected to adhere, then a court's primary responsibility cannot be to represent its own sovereign's interests, or anybody else's. Rather, a court's role is to discover and enforce whatever normative structure—that is, set of legal rights—applies in the case at hand, whether that means looking to its own law or the law of some other authority legitimately capable of creating normative structures and generating legal rights. In addition to the Rules of Assimilation and Rules of Scope that Cook and Currie identified, therefore, there must be a further set of principles that resolve, in some second-order manner that purports to be forum-neutral, true conflicts among competing normative systems.

C. *Objections and Responses*

The argument as I have just put it is deceptively simple. For one thing, I have not yet fleshed out its implications, or connected it in detail to the full-fledged account of vestedness that I introduced earlier. Moreover, even putting aside objections that reduce to disagreements with the Norm-Based view of law itself, my argument remains potentially vulnerable to a

number of serious objections from within the Norm-Based discourse. I will attempt in the rest of this section to address both shortcomings by canvassing and discussing the principal objections to my view, as well as adding some nuance to the picture of vestedness in the process.

1. *Decision Management Revisited*

One possible Norm-Based argument against my position is that a choice of law regime inconsistent with vestedness can be justified, not only on the basis of the great metaphysical presuppositions of Decision-Based jurisprudence, but simply in the name of what I earlier called decision management.¹⁹⁷ For example, it is easy to imagine a choice of law rule generating *lex fori* through the back door by requiring that a court simply apply "the law it knows best."

The flaws in this argument are evident. The choice of law process is influenced by the imperatives of decision management; and issue preclusion, stare decisis and similar principles are no less applicable to it than to other fields of law.¹⁹⁸ There may even be rules of decision management specific to the choice of law process motivated by a legitimate concern that the courts of a forum are not always intimately familiar with the content of foreign laws. In particular, it is consistent with the principle of vestedness to require litigants to raise choice of law issues in their pleadings¹⁹⁹ and to bear the burden of presenting evidence on the content of foreign law.²⁰⁰ But the whole point of decision management is to direct and preserve the process of substantive decision, not to replace it. Somewhere through all the smoke and fuss, underlying principles must be visible, or else decision management has become decision pure and simple.²⁰¹

197. See *supra* text accompanying notes 145–46.

198. See *supra* note 63.

199. See, e.g., FED. R. CIV. P. 44.1; UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 4.01, 13 U.L.A. 357 (1962).

200. See, e.g., *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962) (applying Oklahoma rule that, in absence of proof of applicable foreign law, court will assume foreign law to be same as its own); *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir. 1956) (dismissing suit because plaintiff failed to meet burden of proving foreign law); 2 A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 1216 (10th ed. 1980) (discussing English rule that court will apply local law by default when foreign law is not proved). It is also certainly consistent with vestedness to develop principles of jurisdiction or *forum non conveniens* that would exclude the merits of a case from being heard unless the court could in fact apply its own law. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

201. Pleading and evidentiary requirements are such smoke and fuss; an unequivocal surrender to *lex fori*—back door or front—is a fire out of control. Decision management adjusts the imperatives of Norm-Based jurisprudence to the realities of human finitude. But human finitude cannot justify notions of decision management that are inconsistent—necessarily as well as contingently—with the premises of Norm-Based jurisprudence itself. Claim and issue preclusion prevent certain matters from being relitigated, but "[t]here is no reason to expect that the second decision will be more satisfactory than the first." *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Hierarchical ordering of courts requires lower court judges to put the views of their superiors ahead of their own, but there is little reason to think that lower court judges would be right more often without such hierarchies. Cf. *Dalton*, *Taking*

2. *Discretion Revisited*

The second objection is as follows: Assume for the moment that it is possible to distinguish purely domestic cases from cases in which choice of law is a live issue. Presumably, in cases of the latter sort, the normative system of one or another independent legal regime might legitimately govern the set of facts at issue. Every choice of law case, therefore, represents an indeterminacy in the law and requires for its resolution the sort of judicial discretion that I have already conceded plays a role in at least some Norm-Based theories. Because the exercise of this type of discretion is by definition an act of the forum, a forum-neutral view of choice of law makes no sense at all.

This objection radically misconceives the function of judicial discretion in Norm-Based theories. As I have argued above, the most pervasive and important type of discretion recognized by some (but not all) Norm-Based theories is residual discretion—interstitial decision-making that fills in gaps or unresolvable indeterminacies in the normative structure. The goal of any legal regime devoted to perfecting its Norm-Based jurisprudence must, however, be to equip itself with a set of interpretive conventions that will solve, or at least seriously constrain, the solution of as many legal issues as possible. If interstitial decision-making is required, it is not because there are times when various solutions are possible, or various lines of authority exist, but because there may be times when the set of pre-existing conventions is incomplete. There are “hard” cases in choice of law, just as there are “hard” cases in other fields of law; but there are also a great many cases in which the choice of law issue can be reduced to some predictable pattern just as amenable to solution by rules and interpretive conventions as any other legal issue. The solutions contained in the First Restatement (or for that matter the Second Restatement) may be bad solutions, but they are still capable of generating relatively determinate solutions to a whole class of choice of law problems.

The Norm-Based principle of non-contradiction, as applied both in the choice of law enterprise and in purely domestic cases, does not require

the Right To Appeal (More or Less) Seriously, 95 YALE L.J. 62, 86-92 (1985) (justice of outcome exists independently of appellate determination). Thus, if all judges were endowed with the unwavering ability to reach “correct” conclusions on matters of law, *cf.* R. DWORKIN, *supra* note 92, at 105-30, and all litigants presented their cases with infinite thoroughness, our present regime of decision management would be both unnecessary and innocuous. Claims subject to preclusion would always have been decided correctly the first time around, lower court decisions would never be reversed, and rules of pleading would always be moot. *Cf.* Risinger, *supra* note 61, at 205 (describing procedural impact of judicial omniscience). On the other hand, a choice of law rule such as “apply the law with which you are most familiar” would either be pernicious (if we imagine that even all-wise judges are more familiar with the normative system of their own legal regime than with others) or radically indeterminate (if we imagine them to be equally adept in all bodies of law). Consequently, such a rule would be both pernicious and incomplete even in our own finite but struggling world.

that there be no conflicting norms, but only that the interpretive enterprise *as a whole* articulate a method for resolving them. Consider this classic analogy: If a legislature enacts a law, and then enacts an entirely incompatible law some time later, we are in principle faced with a "conflict of laws" in resolving cases whose underlying facts arise after the passage of the later law.²⁰² Yet very few of us would think this "conflict" gives courts the license to apply their discretion to choose between the two enactments. Instead, we expect them to apply the interpretive convention long ago adopted to deal with this most predictable of "conflicts" and enforce the later law.²⁰³ This convention accords with our intuition and our political theory, but it is not logically inevitable. Legal regimes have adopted the contrary convention.²⁰⁴ What can be said, however, is that virtually all legal regimes will eventually discover the recurring pattern established by such conflicts over time, and will, if they are committed to the Norm-Based view of law, seek to adopt some convention to resolve them. Conflicts over space, though more complicated, are in principle very much the same.²⁰⁵

202. Traditional choice of law literature routinely saw conflicts-over-time and conflicts-over-space as two species of the same genus. *See, e.g.*, 1 J. BEALE, *supra* note 5, § 1.1, at 1 n.1 (topic of application of laws in time "makes use of similar principles" as conflict of laws); F.C.V. SAVIGNY, *PRIVATE INTERNATIONAL LAW, AND THE RETROSPECTIVE OPERATION OF STATUTES* 48 (W. Guthrie trans. 2d ed. rev. 1880) (two forms of conflicts are "distinct yet analogous"). And, not surprisingly, challenging the validity of this comparison has been one of the points in the attack mounted by the choice of law revisionists. *See, e.g.*, W.W. COOK, *supra* note 17, at 165-66; A. SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW* 10 (1970) (vested rights doctrine probably "emerged by means of an unfortunate misapplication of a concept meaningful in the area of intertemporal legal problems to the utterly different sphere of the operation of law in space") (footnotes omitted). *But cf.* B. CURRIE, *supra* note 40, at 458, 523, 598-99 (making limited use of analogies between intertemporal and interspatial conflict of laws).

203. The obvious exception to this convention in the American legal system is the case of an earlier constitutional provision conflicting with a later ordinary enactment. *See* THE FEDERALIST No. 78, at 468-70 (A. Hamilton) (C. Rossiter ed. 1961); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1045-49 (1984).

In countries with a tradition of parliamentary sovereignty and no written constitution, the power of one legislature to bind its successors remains a subject of some controversy. *See* H.L.A. HART, *supra* note 93, at 146-50 (discussing uncertainties in the rule of recognition); H. MAY, *THE SOUTH AFRICAN CONSTITUTION* 22-56 (3d ed. 1970) (discussing roots of South African constitutional crisis in 1950's).

204. *See, e.g.*, J. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30-55 (1957) (discussing seventeenth century English theory that common law was validated by its sheer antiquity, and that no presently ruling monarch could trench on rights guaranteed by the immemorial custom of realm).

205. There is one qualification that needs to be made to the paragraph in text. It is possible to imagine a legal regime responding to the principle of non-contradiction, at least on occasion, not by resolving a particular legal question, but by self-consciously deciding to leave the question unresolved. Indeed, Jewish law recognizes precisely that possibility in its doctrine of "teyku." *See generally* L. JACOBS, *TEYKU: THE UNSOLVED PROBLEM IN THE BABYLONIAN TALMUD* (1981) (cavassing Talmudic examples). Such a finding, however, must be recognized for what it is: an authoritative determination that no further answer is possible, not an invitation to the exercise of discretion in arriving at an answer. As a consequence, when an actual case arises involving a legal issue that has been determined not to be capable of authoritative determination, the resolution of that case must be rele-

3. *The Discreteness of Normative Systems*

One might argue that the above response only proves the folly of my project. My response assumes, after all, that the world's normative systems can be tossed together into one hypothetical super-system whose "conflicts" can be resolved with simple hermeneutic tricks. But aren't the normative systems established by different sovereigns grounded in completely divergent sources of authority, each conferring legal rights by its own terms? Isn't the decision to defer to one source of authority rather than another really a decision to pick among rights, rather than a discovery, by reference to a super-law, that some of those rights did not exist after all? Moreover, if what the court of the forum is really doing is choosing among rights, each of which exists, why shouldn't it favor the rights created by the sovereign for whom it is employed? In short, doesn't the principle of non-contradiction coherently apply only *within* legal regimes, and not *across* legal regimes?

At stake here are some central features of Norm-Based jurisprudence. The principle of non-contradiction that I have been invoking is not merely a formal or logical axiom subject to formal or logical delimitation,²⁰⁶ but a substantive proposition. Adjudication, in the Norm-Based view, is *judgment*, and judgment (subject to all of the important qualifications I have already discussed), consists of holding persons and events to the consequences of the norms by which those persons and events should have expected to have been judged. If a legal norm is valid, and if it properly applies to a given set of facts, it forms the basis for (legal) judgment of those facts. Thus, *if* a court can entertain the possibility that a set of facts were, as they occurred, legitimately subject to foreign legal norms—a conclusion the court is not compelled to reach, but which it very often will reach if it has adopted the sort of common sense and commonplace political theory outlined in Section II²⁰⁷—then it cannot simply treat those foreign legal norms as existing in some parallel universe unconnected to its own. Moreover, if an adjudicator reaches the conclusion that a set of facts is potentially subject to two valid legal norms arising from two legitimate normative systems, the adjudicator cannot give priority to one of those

gated to some further set of principles that remain noncommittal on the underlying substantive question. See *id.* at 302-07 (discussing various solutions proposed in post-Talmudic halakhic sources, including equal division of amounts in dispute, preservation of the status quo, and so on). Thus, even if something like "teyku" were conceptually available in the general run of choice of law cases, it would not vest the forum with the right to apply its discretion to decide which law properly applies to a case, but would rather require the forum to admit that it cannot find which law properly applies, and to fashion some fall-back solution consistent with that admission.

206. See *infra* text accompanying note 209.

207. See *supra* text accompanying note 74.

norms after the fact unless it can explain why that norm or normative system had priority during the fact.

In other words, the Norm-Based insistence on the objectivity of legal norms is more than a proposition about the objective *meaning* of legal norms;²⁰⁸ what is really at stake is the objective *force* of legal norms. Therefore, the effort to sort out apparently conflicting legal norms is not just a hermeneutic exercise that can be arbitrarily confined in any way that seems convenient. It is instead an effort to sort out from potentially competing candidates the norms that actually apply to a given set of facts in the world.

How does this sorting-out process work in the face of competing norms derived from equally legitimate but distinct normative systems? To deal with this question, it is useful to look once again to the purely domestic case. Consider that what we usually call a normative system, in its purely domestic variety, is often something of a fiction. As H.L.A. Hart and others have demonstrated, it is not always possible to trace the legal rules governing a jurisdiction to the will of one "sovereign," past or present. Indeed, many normative systems are made up of diverse and awkwardly juxtaposed commands created at different times by different sources of authority. The hermeneutic trick, as I suggested earlier, is to incorporate into the system a set of principles or conventions that will, in any given case, resolve the mess into a more or less determinate piece of a seamless web. Resort to that hermeneutic strategy, the principle of non-contradiction, is not required simply as a matter of logic or necessity.²⁰⁹ Rather, it arises out of an act of definition, even stubbornness, motivated by the character of the legal enterprise. Even if two contradictory norms logically can apply simultaneously to the same event in the world, a legal analysis that attempted to judge behavior on the basis of one of those norms while continuing to recognize the applicability of the other would not be an act of judgment at all.²¹⁰

Thus, the task of legal analysis might, for purely heuristic purposes, be seen to proceed in two distinct steps.²¹¹ The first step is to identify, on the

208. Indeed, it is perfectly possible, though rare in fact, for an opponent of Norm-Based jurisprudence to concede the objective cognitive content of norms.

209. Consider, for example, the argument of some contemporary philosophers that there is nothing illogical about the co-existence of equally true but entirely contradictory normative propositions. See B. WILLIAMS, *Ethical Consistency*, in PROBLEMS OF THE SELF 166 (1973); Marcus, *Moral Dilemmas and Consistency*, 77 J. PHIL. 121 (1980). But see Foot, *Moral Realism and Moral Dilemma*, 80 J. PHIL. 379 (1983). Cf. Donagan, *Consistency in Rationalist Moral Systems*, 81 J. PHIL. 291 (1984) (attempting to work through debate on moral consistency).

210. Moreover, any exercise of what I have called residual discretion vindicates the law's aspiration to judgment (even as it compromises the purity of that judgment) by committing the adjudicator to squeezing the last ounce of determinacy out of apparently indeterminate norms, and then stubbornly casting out whatever indeterminacy may in fact remain.

211. I do not mean to suggest by this heuristic model either that actual legal analysis does or even

basis of some account of competent lawmaking, the legal norms that *might* legitimately be said to apply to the case at hand. If this procedure yields contradictory norms, the second step is to decide, on the basis of some collection of formal or substantive principles or conventions, which of the competing primary norms *actually* applies to the case at hand. In the purely domestic case, the first step might yield a set of conflicting norms arising out of different lines of authority or different moments of legislative activity. In that event, the second step would consist of the sort of tidying and pruning that is among the most familiar tasks of the lawyer, legal scholar, and judge. Expanding our horizons a bit and adopting the sort of common sense and commonplace political theory to which I have constantly referred, however, it may quickly become clear that among the conflicting norms that are floating around are norms coming out of distinct legal regimes. In that event, the task of legal analysis would involve, at least in part, the enterprise normally described as “choice of law.” Depending on a number of variables—including the exact shape of the political theory adopted for the first step, the way in which we go about distinguishing the first step from the second,²¹² and how we fit in Rules of Scope—it might turn out that there are no purely domestic cases at all, but only a spectrum of cases with choice of law components of varying difficulty.

None of what I have said should be taken to reject, either as a matter of theory or of cold hard fact, the existence of independent sovereigns and distinct legal regimes. Indeed, that part of the reigning political theory that allows us to understand the existence of independent sovereigns may well be the predominant influence in shaping choice of law rules. More important, nothing I have said suggests that independent legal regimes are required, as a matter of either legal theory or affirmative legal obligation, to recognize the legislative pretensions of foreign sovereigns or to devise particular choice of law rules that take one form rather than another. As defenders of traditional vested rights theory have insisted, a domestic legal regime’s attention to foreign law need not arise out of any direct duty (or perception of a duty) of deference to a foreign legal authority. Rather, the source of that attention is a self-imposed obligation to act in accordance with the rule of law. The choice of law exercise, as construed here, respects the separateness and independence of legal regimes precisely because it describes itself as a solution to jurisprudential challenges that are, as a matter of their legal import, entirely *internal* to such regimes.²¹³

should always treat these two steps as separate, or that much would be gained by attempting to detail exactly which issues are properly assigned to which step.

212. *But cf. supra* note 211.

213. The foregoing argument is not just a tautological edifice constructed around the unremark-

4. *Political Theory Revisited*

It might now be argued, however, that the degree of legitimacy accorded by legal regimes to each other is in fact much more begrudging and limited than I have acknowledged. Nation-states might, for example, be thought to treat each other like some religious legal regimes treat secular legal regimes (with tolerance but not much respect) or the way some secular legal regimes treat "natural law" (with respect but not much tolerance).

This objection can be understood in two ways. It might simply be a disagreement over the nature of commonplace political theory. In that case, it is inconsequential to the main thrust of my account, since I have repeatedly emphasized that I am using that political theory as an example rather than an axiom. As I have made clear throughout this Article, the constraint of vestedness will yield very different results given different underlying assumptions of sovereignty and legitimate lawmaking capacity.²¹⁴

The objection might also, however, be another effort to have it both ways—to cheat on a jurisprudential premise without explicitly rejecting it. If this is the issue at stake, anyone defending a theory of diluted legitimacy must articulate exactly what the actors in one nation-state think is going on, as a matter of law, in other nation-states, and whether that account in any way reflects back on what those actors think is going on in their own regime. My guess is that secular nation-states, in their estimation of each other's legitimacy—unlike religious legal regimes' views of secular legal regimes or secular legal regimes' view of natural law—could not entertain a vision of diluted legitimacy without seriously impairing their own right to govern.

Nonetheless, I should admit that my casual reliance on "common sense, commonplace political theory" does bracket issues that any full-fledged Norm-Based account of choice of law would have to confront. Consider, in particular, the central dilemma of traditional vested rights theory: should the courts of one legal regime enforce the truly unconscionable norms of another simply because a set of formal choice of law criteria mandates such deference? It should be obvious that a legal regime could, consistent

able proposition that independent political sovereigns recognize each other's legitimacy. A Decision-Based legal theory could assimilate exactly the same unremarkable proposition, but understand it to have entirely different consequences for legal practice. To a Decision-Based theorist, recognizing the legitimacy of a foreign legal regime can mean no more than recognizing the legitimacy of its adjudications. Thus, recognizing the legitimacy of that regime's legal norms can mean no more than recognizing the legitimacy of the norms *as enforced*. Any further concern about the objective force of legal norms and the unacceptability of legal contradiction would strike the Decision-Based theorist as metaphysical nonsense, somewhat akin to the sort of nonsense that Norm-Based theorists propound in purely domestic cases.

214. See *supra* text accompanying notes 72–74.

with the principle of vestedness and an uncompromising commitment to a Norm-Based view of judicial reasoning, respond in one of three ways to such a dilemma: (1) enforce the foreign norm; (2) refuse jurisdiction as a matter of “public policy” (though this does not help if the defendant rather than the plaintiff is seeking the benefit of the foreign norm); or (3) apply a substantive choice of law rule that renders application of that foreign norm unacceptable. The third option, however, would require the forum court to take the view that the unconscionable foreign norm could not legitimately be enforced in the foreign court either, and to explain how that conclusion could be squared with some more general theory of sovereignty. This may certainly be possible, but it is fraught with ideological controversies that cannot simply be elided.

In addition, a legal regime (or an individual adjudicator) in a given case could decide, consistent with my account but not with an uncompromising commitment to a Norm-Based view of judicial reasoning, that the rule of law should give way to the rule of the good. As I suggested in Section III,²¹⁵ this response is always open to an adjudicator, whether confronting a choice of law issue or any other issue. But this sort of move, if faced honestly, would raise a host of questions about the moral status of the adjudicator—questions that might well be as disturbing as the original concerns about the moral status of the norm being overridden. Moreover, such a move can never be justified on the basis that it represents a better legal *judgment*—for it excludes any legal judgment at all—but only on the basis that it yields a better result.

The approach being defended in this Article raises new questions even as it answers old ones. These questions are important, however, and they risk being ignored if the commitment to the reality of law is casually whittled away. More to the point, my account renders exceedingly difficult, lawless, or illegitimate, precisely those moves that the choice of law revolution considers most paradigmatic. And since most choice of law cases do not in fact raise the sort of deep dilemmas that would lead a legal regime to revise its view of sovereignty or abandon its conception of adjudication, the practical effect of that reversal of paradigms is uncompromisingly profound.

5. *Does Vestedness Prove Too Little?*

A fifth set of objections share some common themes and call for a common strategy of response. Each of the objections, like the previous concern, tried to turn the very catholicity of my analysis into its undoing. Each concedes some formal validity to vestedness; in fact, each comes pro-

215. See *supra* text accompanying notes 159–62.

gressively closer to accepting the full-bodied truth of vestedness. The point of the objections, however, is that vestedness is either logically trivial, practically inconsequential, or radically incomplete—in sum, too thin for its own good. My response in each case will force me to do what I have so far tried to avoid, which is to commit myself, however provisionally, to a more specific version of the Norm-Based view of law as a working jurisprudential instrument.

a. *Triadic Legal Relations.*

The first of the group of objections purports to refine the Norm-Based story: Any Norm-Based theory must already admit what both legal theory and doctrine have long recognized, namely, that normative structures are often or always relational—that they establish not rights and duties in the air, but specific claims between specific legal actors. Thus, the same act by a potential defendant might constitute a breach of a legal norm with respect to one potential plaintiff, but not with respect to another, and contradiction, correctly understood, in no way violates the premises of the Norm-Based approach to law.

Within any single legal system, the argument continues, the relational feature of legal norms is adequately described in binary terms. In the parlance of Wesley N. Hohfeld, there is a right for every duty, a liability for every power, and so on.²¹⁶ But the existence of multiple legal systems suggests that legal relationships are in fact triadic, with the sovereign and its courts as the third element of the triad.²¹⁷ Moreover, if we assume an implicit jurisdictional rule that any court will consider only normative relationships to which its own sovereign is a “party,” what emerges is a model of choice of law consistent with the Norm-Based approach but devoid of the chimera of vestedness. The task of a court is to assess the plaintiff’s liability to the defendant according to the law (including Rules of Scope and Assimilation) of the sovereign for whom the court does its work. The possibility that a court of a different sovereign might reach a different conclusion is no more relevant (and no more inconsistent with the Norm-Based approach) than the possibility that the same court might reach a different conclusion with respect to the claims pressed by a different plaintiff.²¹⁸

216. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923). This Article does not adopt Hohfeld’s terminology, but instead, following Cook’s example for once, uses words like right and duty in their generic sense. See W.W. COOK, *supra* note 17, at 53 n.15.

217. My formulation of this objection is based very loosely on Dworkin’s own very brief and somewhat obscure discussion of choice of law in R. DWORKIN, *supra* note 99, at 309–10. Hohfeld himself, incidentally, seemed to adopt an essentially binary view of the legal rights at stake in choice of law cases. See Hohfeld, *supra* note 37, at 493.

218. This argument, coming as it does from within the Norm-Based discourse, should not be

This story is a disingenuous account of the legal imagination. The objection does, however, contain a germ of truth that, ironically enough, helps to explain aspects of both classical choice of law and the notion of vestedness as explained in Section II.

Sovereigns and their courts are often direct parties to normative relationships with the subjects of sovereign lawmaking. To begin with, recall that neither vestedness nor traditional vested rights theory understands the notion of forum-independent legal rights to apply to matters like jurisdiction, procedure, and evidence. Such non-substantive or adjective fields all refer to conduct that occurs during the course of judicial proceedings. The general Norm-Based account sharply distinguishes adjective norms from primary norms for exactly this reason, refusing to treat the one as necessarily implicated in the realistic understanding of the other. Some specific Norm-Based theories of choice of law might go further, arguing that because adjective legal norms involve powers conferred on specific courts,²¹⁹ and obligations owed to and by them, the content of such norms can differ from one set of courts to another, much as primary norms can legitimately differ with respect to different legal contexts or relations among different legal actors. Indeed, establishing the adjective norms that apply in its own courts is arguably one of the basic functions of a sovereign. It might be surprising if adjective norms were not forum-dependent.²²⁰

Adjective norms are special because the forum itself is an actor in the normative play. The same is true of primary norms that govern actions of the sovereign. These two contexts, however, do not support the notion that the forum (as independent sovereign) is in every case some sort of silent partner in a triadic legal relation. Nor do these contexts provide any clear sense of what such a triadic legal relation would look like, or what its consequences would be.

If there is any support for the triadic model, it might be found in some specialized areas of the law, such as criminal law²²¹ and libel law.²²² Such

confused with Cook's superficially similar claim, grounded in a Decision-Based view of law, that for any set of facts there are as many rights as there are jurisdictions able to give the plaintiff relief. *See supra* text accompanying notes 28, 195.

219. *See supra* text accompanying notes 140, 157–58 (discussing use of affirmative discretion in application of adjective norms).

220. I do not mean to suggest that anything goes with regard to adjective norms. On the contrary, I have assumed throughout this Article that a legal system worthy of the name would require its adjudicative institutions to base their substantive legal judgments on an honest examination of primary norms and their consequences. Any fully detailed Norm-Based theory of law would be required to articulate the constraints that this fundamental obligation would place on the content of adjective norms. This would resemble the main project of this Article, which is to articulate constraints, not so much on adjective norms, but on the second-order primary norms that constitute the law of choice of law. In the absence of a fully detailed account, however, suffice it to say that whatever constraints the rule of law may put on norms of jurisdiction, procedure, evidence, remedy, and the like, enormous latitude, hence potential for enormous variety, remains.

221. According to standard American doctrine, a single criminal act can give rise to distinct crimi-

examples, however, are the exceptions that prove the rule. In these contexts, the same act involving the same parties and the same legal issue sometimes gives rise, according to the mundane but important evidence of legal doctrine, to a set of distinct cases arrayed according to jurisdiction. In most other contexts, the contrary is true: The same act with respect to the same parties and the same legal issue gives rise to the same case regardless of where the suit is brought. The clearest evidence of this common understanding is that claim preclusion normally bars plaintiffs from relitigating the same case in a different jurisdiction. Were it not for claim preclusion, a Connecticut court, for example, could hold that a single car crash constituted two distinct legal events governed by different legal regimes, and that a Wisconsin court's determination of fault in the "crash_{Wisconsin}" had no direct bearing on the "crash_{Connecticut}."

nal offenses, not only with respect to different victims, but also with respect to different sovereigns. *See* *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852). As a consequence, federal double jeopardy law holds that neither acquittal nor conviction in the courts of one sovereign (state, federal, American Indian, or foreign) bars prosecution by another sovereign for the same act. *See, e.g.*, *Abbate v. United States*, 359 U.S. 187 (1959) (upholding federal conviction after Illinois conviction); *Heath v. Alabama*, 106 S. Ct. 433 (1985) (Alabama conviction after Georgia guilty plea); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (Illinois conviction after federal acquittal); *United States v. Wheeler*, 435 U.S. 313 (1978) (federal prosecution after guilty plea in Navajo Tribal Court); *United States v. Martin*, 574 F.2d 1359 (5th Cir. 1978) (federal conviction after guilty plea in Bahamas).

Interestingly enough, this narrow view of the guarantee against double jeopardy runs counter to the rule in many other jurisdictions. *See, e.g.*, *Treacy v. Director of Pub. Prosecutions*, [1971] App. Cas. 537, 562 (H.L.) (Lord Diplock) (dictum) (referring to common law rule barring re prosecution in England "whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court" (citations omitted)); M. FRIEDLAND, *DOUBLE JEOPARDY* 357-70 (1969) (reaching similar conclusion); Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. REV. 1096, 1100-01 (1959) (indicating that French and German law, among others, preclude second criminal indictment when issue has already been resolved by recognized foreign tribunal exercising jurisdiction); *cf.* 2 M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* ch. 8, § 4.3 (1983) (discussing constraints in extradition treaties and other sources of international law against prosecution in one country after acquittal or conviction in another).

222. Some accounts of libel law suggest that the same defamatory message can constitute a series of distinct torts if it is communicated in a series of distinct "publications." *See* *RESTATEMENT OF TORTS* § 578 comment b (1938); *Cook v. Connors*, 215 N.Y. 175, 109 N.E. 78 (1915); *see also* *RESTATEMENT (SECOND) OF TORTS* § 577(A)(1) (1977) (applying same rule to more limited set of cases); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 149 (1971) (same). Moreover, liability for such distinct publications may vary according to this view, depending, for example, on the law of the place in which the publication landed. *See* *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 149 comment a (1971); *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364, 365 (D. Mass. 1940). *But cf.* *Prosser, Interstate Publication*, 51 MICH. L. REV. 959 (1953) (vigorous attack on common-law "multiple publication" rule). Thus, a plaintiff who lost a libel suit in one jurisdiction could bring essentially the same suit in another jurisdiction, subject to possible issue preclusion but not to claim preclusion, and might well legitimately win that suit on the basis of law different than that applied in the first suit. *See, e.g.*, *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288, 289 (2d Cir. 1941).

This view is now largely discredited, however, as to newspapers, magazines, and similar media of mass communication. *See* *RESTATEMENT (SECOND) OF TORTS* § 577(A)(3)-(4) (1977) (adopting "single publication" rule in substantive law of torts); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 150 (1971) (adopting "aggregate communication" rule in choice of law); *cf.* *Hartmann v. Time*, 166 F.2d 127 (3d Cir. 1947) (grappling with interaction of substantive and choice of law principles).

This argument is not just an exercise in tautology. What is significant is not that cross-jurisdictional claim preclusion exists. Nothing in a bare-bones Norm-Based account requires claim preclusion, and a Decision-Based account could easily accommodate claim preclusion without accepting the principle of vestedness. The crucial point is that the existence of claim preclusion, as understood in Norm-Based discourse, manifests the understanding that different lawsuits brought in different jurisdictions *can* be about the *same* case.²²³ This understanding, which should strike most of us as both absurdly obvious and mysteriously powerful, requires rejection of the triadic account of legal relations. In fact, once we reject the triadic account as a general hypothesis, even the examples that seem most troublesome can be reformulated in purely binary terms. Criminal law and similar public law fields are distinguishable because the sovereign is a legal claimholder as well as a lawmaker. Libel law is distinguishable because in a physical as well as a legal sense the same process of communication constitutes a series of distinct acts.

A second flaw in the triadic account is evident in the hurried but crucial gloss of an “implicit jurisdictional rule that any court will consider only [‘triadic’] normative relationships to which its own sovereign is a ‘party.’” In fact, no such general rule exists, and courts do occasionally hear cases in which their own sovereign, in its legislative capacity, has disclaimed any substantive interest.²²⁴ The problem of what to do with the disinterested forum, or what the disinterested forum ought to do, is well-known to have thrown a monkeywrench into Currie’s theory of interest analysis.²²⁵ Whereas a Decision-Based theory confronting such a problem has the wonderful advantage, however, of being able, when all else fails, to recommend that the court simply *decide*, the disinterested forum problem may be fatal to a strongly triadic Norm-Based theory. If a disinterested forum could sift through all the alleged rights at issue in a litigation, whatever

223. I am not denying that our understanding of “sameness” in cases might turn on matters of convention; I am emphasizing only that those conventions often recognize as the same case lawsuits brought before different courts.

224. There are, of course, corners of traditional choice of law doctrine that would seem to represent applications of a jurisdictional principle limiting adjudication of a sovereign’s governmental interests to the forum of its own courts. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 427 (1934) (criminal law); *id.* § 611 (actions for penalty). Again, however, these are the exceptions that prove the rule.

225. *See, e.g.*, R. CRAMTON, D. CURRIE & H. HAY, CONFLICT OF LAWS 298 (3d ed. 1981) (pointing out that Currie’s system “seems to break down altogether” when third state with no interest of its own is faced with true conflict between laws of two other states); Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 477–79 (1960) (“Professor Currie’s theory simply makes no provision for the treatment of a significant class of cases—significant particularly in a federation like the United States.”). Currie himself admitted this difficulty, and the range of possible solutions he advanced in his most extended treatment of the issue were, in his own estimation, tentative and not entirely satisfactory. *See* Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963).

their source, and regardless of whether such rights were binary or triadic, and could reach some conclusion, surely an interested forum could do exactly the same thing. More importantly, once we abandon an implicit jurisdictional bar, the interested forum, under the Rights-Based view, cannot avoid performing exactly the same sifting of conflicting claims of right in the exercise of legal judgment. And if that is so, what does the triadic assumption add to the analysis of vestedness?

b. *Legislative Intent.*

The next objection relates to the previous one in numerous ways, but it attempts a lateral, rather than a frontal, attack. Recall that one focus of Currie's work was the claim that the judicial duty to resort to *lex fori* often derived directly from legislative intent. Currie believed that when the legislative branch of a jurisdiction indicated a genuine interest in the welfare of a class of its own citizens, and that interest could be served by applying *lex fori*, the judicial branch of that jurisdiction generally had a duty to honor the legislature's policy choice by applying local law. Similarly, it could be argued here that the principle of vestedness must give way to legislative will, and can play a role only in the absence of legislative interests or in the interstices of legislative policy.

At first glance, the objection seems so peripheral as to be irrelevant: Vestedness is a normative proposition directed to legislatures as well as courts. If some legislatures require their courts to apply *lex fori*, that does not rebut or limit the normative force of the principle any more than would judicial decisions to apply *lex fori* on their own. In either case, the chosen course is simply benighted, and that is that.

The issue, however, is not so easily resolved. Put aside instances in which legislatures intentionally regulate choice of law. According to one reading of Currie, there remains, implicit in much legislation, a directive that the courts of the jurisdiction do everything they can to advance the substantive interests identified in the legislation. Thus, if a legislature passes a statute expanding a certain species of tort liability, that legislature's own courts should give priority to the legislature's intent to protect a class of tort *victims* over any impulse to apply some other jurisdiction's tort *law*. Such a directive may be jurisprudentially pernicious, but that does not make it go away. Despite their own inclinations, courts may have a constitutional duty to a particular legislature to obey the directive despite its conflict with the niceties of jurisprudential speculation. Consequently, even if vestedness is correct as a normative principle, the normative project that I have undertaken extends—in this view—well beyond judicial *or* legislative tinkering with choice of law doctrine. Vestedness,

then, is too grand to be significant in the actual, day-to-day process of litigation.

One rejoinder to this objection would emphasize that its reading of implicit legislative intent contradicts what we know of the actual intent of legislators, and reflects little more than Currie's own dogmatic preferences.²²⁶ There may be more at stake, however. The gravamen of the current objection is that—at least under certain constitutions (very) roughly like our own—legislative enactments, including substantive enactments, are not only sources of law in the narrow sense generally assumed by the Norm-Based view of law, but are also (or instead) bureaucratic directives to the adjudicative branch requiring it to act in a certain way or to pursue certain goals. This interpretation is certainly more congenial to a Decision-Based than to a Norm-Based view of law; but even the Norm-Based view, alas, cannot reject it out of hand. In the first place, once a Norm-Based perspective takes into account that legislatures are institutions existing under specific constitutions, and not just abstract generators of legal norms, then it must concede that a legislature may have the constitutional power to issue these direct commands. Second, a Norm-Based theory might recognize that certain legislative enactments, such as those concerning adjective norms and administrative matters like judicial salaries and courtroom design, should be thought of partly in bureaucratic or hierarchical terms. Third, even if a Norm-Based theory stipulates that, at some point, the intrusion of bureaucratic or hierarchical directives into the realm of primary norms betrays the rule of law, this does not help judges decide in individual cases whether an individual substantive statute is more than a source of law, narrowly defined.

The only recourse I have at this point, I am afraid, is to canons of interpretation. A judge may well have an institutional duty to obey a statute explicitly requiring the application of *lex fori* in a given set of cases.²²⁷ But if I have convincingly established a link between the rule of law and vestedness, there would be no good reason, in a system of government that considers itself bound by the rule of law, to interpret a substantive statute that is silent on choice of law as requiring courts to pursue the legislature's interests in ways that violate vestedness. Just as courts routinely interpret statutory silence on the issue of retroactivity to imply only prospective effect, courts should—and ever so quietly do—interpret statutory silence to imply that they should not intrude on the normative systems established by foreign sovereigns.

226. See Brilmayer, *supra* note 1, at 399–400, 424–27.

227. I am assuming, as I have throughout this Article, that no independent constitutional constraint will come to the rescue as a *deus ex machina*.

c. *Vestedness and Vested Rights.*

The last objection in this series is the least artful, but it is the most general and in some respects the most serious: Put aside clever dodges; the possibility still remains that vestedness ends up “vesting” far too little. Traditional vested rights theory, after all, supposed that the rights associated with a transient cause of action were vested—more or less fixed—at some defined time on the basis of some normatively relevant event in the world: celebration of a marriage, breach of a contract, commission of a tort, or the like. Although vested rights in choice of law and vested rights in constitutional law are distinct notions, the same phrase has been used in both contexts to signify a basic commitment to the ability of past events to determine present entitlements. If vestedness is nowhere near this robust, its claim to have captured the purest kernel of vested rights theory would be in doubt, and its practical import impeached.

Consider the following problem, which is inspired by actual cases.²²⁸ Traditional vested rights theory posited that the proper law to apply in a fender-bender was the law of the place of the accident. A more general commitment to the notion of vested rights might accommodate alternative choice of law criteria such as “the law of the accident victim’s domicile” or “the law of the injurer’s domicile,” where domicile is understood as domicile at the time of the accident. But what about “the law of [one or another] domicile at the time of suit”?²²⁹ More generally, why does the principle of vestedness select *lex fori* as the single villain of the piece, while seeming to tolerate so easily the variety of other ways in which a choice of law regime might allow later events to subvert legitimate expectations that may have been created in the course of earlier, normatively relevant events?

This objection—that vestedness “vests” far too little—is in some sense

228. See *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *Haines v. Mid-Century Ins.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970); cf. *Allstate Ins. v. Hague*, 449 U.S. 302, 318–19 (1981) (citing residence at time of litigation as relevant to reasonableness of state choice of law decision).

229. For some of the standard arguments on both sides of the question of post-accident changes in domicile, compare R. WEINTRAUB, *supra* note 84, at 345–49 (post-accident changes in residence should be taken into account when judging state interests) and Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 241–42 (1977) (state interests should be determined as they exist at time case presented in court) with Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (relevant residence and domicile of plaintiff were those at time of accident) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 7, Topic 1, introductory note, at 414 (1971) (suggesting that post-accident change in domicile should have no effect upon law governing most tort issues, but declining to resolve question definitively) and Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 155–60 (1981) (denying importance of interests belonging to state of post-accident residence). See also R. DWORKIN, *supra* note 92, at 309–11 (questioning whether consideration of defendant’s post-accident residence reflects state’s true policy interests).

quite tangential, since it concedes that vestedness is completely successful at its stated aim of enjoining the challenge to vested rights represented by *lex fori*.²³⁰ On the other hand, the objection is not simply a broad-scale attack on the much-emphasized fact that vestedness is not, and was never advertised to be, a full-fledged theory of choice of law.²³¹ The point of the objection, somehow, is that vestedness, whether or not too thin, is thin in the wrong places, and that if all vestedness can do is to enjoin *lex fori*, it has not captured the underlying principle linking *lex fori* to other betrayals of vested rights.

One possible response to this objection is that the notion of “vesting” it invokes is too elusive: Any choice of law rule will look to some set of events to establish—as to one or more issues of law—the legislative jurisdiction of a particular sovereign, but those events often will follow *other* events of equal normative relevance. A perfect example is the traditional rule that the place of injury provides the proper law in a tort case, even if the act causing the injury occurred much earlier and in a different place.²³² Even outside the special world of choice of law, legal bottom lines can change with alarming alacrity as events follow each other in succession: Marriage can be dissolved, a breach of contract can be cured, negligence can be neutralized by contributory negligence and then recalled by a “last clear chance.” Obviously, the objects of normative judgment in a system of vested rights are not only individual acts by individual parties, but whole transactions, or patterns of interactions, among parties.

Moreover, it is not even clear as a historical matter that traditional vested rights theory was completely committed to some general principle that rights should “vest” earlier rather than later. Certainly, Beale and Dicey both would object strenuously to a choice of law variable such as

230. Recall also my earlier demonstration (or at least stipulation) that vestedness excludes choice of law rules relying on transparent proxies for the forum, such as “the law of the place where the parties or their agents were last to be found in the same room.” See *supra* note 58 and accompanying text.

231. Thus, for example, the objection is not directed to the possibility, mooted earlier, of choice of law rules like “apply the law of Canada.” See *supra* text accompanying notes 71–72. With respect to such rules, vestedness is much less definitive than vested rights theory, but only because vestedness separates jurisprudence from politics, and not because vestedness is any less committed to the “vesting” of rights. If our governing notions of sovereignty were such that the legislative jurisdiction of Canada were universal and exclusive, then a choice of law rule requiring a forum to apply the law of Canada in all cases would be *exactly* the choice of law rule we would want, and would be as capable of strictly “vesting” rights as anything found in the First Restatement. Similarly, the objection is not directed at the entire, large class of possible choice of law rules consistent with the principle of vestedness *and* with governing political theory, but still outside the contemplation of traditional vested rights theory. Classical territorialism is one way to imagine that rights are vested, but is by no means the only way. See *supra* note 69. Even Beale, in criticizing choice of law theories grounded in personal status, did not argue that they were inconsistent with the general notion that rights vested, but only that they reflected a “medieval” sensibility. See 1 J. BEALE, *supra* note 5, § 5.2, at 52 (quoting Chetti v. Chetti, [1909] P. 67, 69 (Barnes, J.)).

232. See RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

“domicile at the time of suit.” At least some of their hostility to such a rule, however, would have to be ascribed to their brand of territorialism rather than to some independent intuition about when (as opposed to where) rights vest. Indeed, within the basic territorial paradigm, Beale and Dicey do not seem to have been committed to a general principle that earlier expectations trump later ones: The most obvious example is the “last event” rule in torts, but one might also point to the “place of performance” rule determining at least some contractual obligations,²³³ and, for that matter, to the fundamental shift away from domicile (usually an early fact) to situs (usually a later fact) as the determining variable for most choice of law issues. Whether vested rights theory stripped of the certainties of territorialism would still pack more punch than vestedness, then, is a difficult question, and perhaps a moot one at that.

Nevertheless, the objection that vestedness “vests” too little or too late has something more to it than a disguised nostalgia for territorialism. After all, it is no accident that when variables such as “domicile at the time of suit” have come into choice of law, it has not resulted from some special view of legal transactions, understood within a Norm-Based discourse, but from a campaign justifying a retreat to *lex fori* or otherwise guided by a Decision-Based jurisprudence. In fact, any effort to locate these moves within a Norm-Based discourse would run afoul of both territorialist objections and more fundamental understandings within the legal culture that there are conceptual boundaries to a legal transaction—limits on the relevant sets of events and actors—that make some choice of law variables irrelevant to any proper understanding of the exercise of legislative jurisdiction. Moreover, events like the initiation of a suit would be particularly unsound benchmarks in an account of law that separates primary behavior from legal enforcement. The time of suit is generally no more salient to the underlying dispute than an astrological conjunction or the judge’s breakfast.

Vestedness as a formal proposition does not capture these sorts of understandings in itself. It can, however, play its usual catalytic role, and it can also directly block trespasses whose real thrust is a resort to *lex fori*. Within the context of the Norm-Based account as a whole, vestedness can be a bridgehead—the first step of an inquiry that uses these understandings and others to rethink the enterprise of choice of law.

Is it then a defect of vestedness that it is only a bridgehead? I think not. Vestedness shares the task of defining and defending vested rights with other principles, but its place in the project is conceptually distinct and independently important.

233. See RESTATEMENT OF CONFLICT OF LAWS § 358 (1934).

The boundaries of legal transactions seem to be substance-specific, reflecting understandings of areas like tort and contract rather than law in general. Vestedness is not substance-specific; it is an external constraint on the working out of substantive principles. Thus, my focus on vestedness extracts from traditional vested rights theory a formal, self-contained core, derivable from jurisprudential premises that are themselves vital though formal. Vestedness differs fundamentally from notions defining the boundaries of tort or contract disputes; its closest kin is probably the principle of non-retroactivity—an equally formal constraint that attempts to regulate choice of law across time rather than across sources of authority.

Vestedness also deserves special notice because it claims a universal mandate. By contrast, the principles defining the boundaries of legal transactions are context-specific (unless they are so vague as to be only suggestive) and may vary significantly from one fact-pattern or area of law to another.²³⁴ These scattered and particularized notions are important and merit debate (as do all the other rules and sub-rules necessary to a full-fledged account of choice of law). They cannot, however, constitute the basic, practical test dividing classical Norm-Based accounts of choice of law from their revolutionary counterparts.

Finally, vestedness is, perhaps uniquely, a principle of choice of law. It therefore marks more than the difference between two different approaches to choice of law; it also marks the difference between a world with only one sovereign, in which vestedness would be purely academic, and a world—our world—in which many sovereigns cast their legislative nets over a shifting sea of people and events. A bridgehead perhaps, but a crucial bridgehead nevertheless.

d. *The Bottom Line*

My analysis of the current troika of objections has left in its track at least one important concern. In answering the first objection, I relied on understandings derived from the evidence of mundane but important legal doctrine. In answering the second, I relied on realistic canons of interpretation. In answering the third, I again invoked understandings within the legal culture, not relying on them this time, but recognizing their place in a full-fledged account of choice of law and locating the present project by reference to them. Each of these responses begs important questions about the nature and status of such understandings and canons, legal doctrine and legal culture. Are these features of legal systems fortuitous, or are

234. It may not even be impossible to reject the notorious “time of suit” ploy out of hand; consider, for example, a continuing tort in which the last event of legitimate normative significance at the time of suit would, by definition, be occurring at the time of suit.

they natural and inevitable? Would a legal world without them fall outside the domain of a true Norm-Based jurisprudence?

The answers to these questions are crucial, and not just for the truth or falsity of vestedness. On the one hand, the phenomenology of legal culture to which I have resorted might have demonstrated that even a self-consciously inclusive account of Norm-Based jurisprudence can, by a dialectical process, unfold a series of rich, detailed, and necessary conclusions about the life of the law.²³⁵ On the other hand, a more skeptical attitude about legal understandings, canons, doctrine, and culture might suggest that the story of vestedness is largely contingent: If a world filled with triadic legal relations were tenable, then vestedness, in that world at least, would be a charming, but empty, principle of law; if a world with self-destructing notions of interpretation were tenable, then vestedness, in that world at least, would be a weighty, but often irrelevant, principle of law; if a world in which legal transactions had no boundaries were tenable, then vestedness would be all right, but the rest of choice of law might be lost at sea.

Out of uncertainty rather than orneriness, I must leave all these questions open. And if the truth be told, I am not sure that the story I am

235. The dissection of binary and triadic relations, for example, can easily be read to suggest that private law—the law of individual binary relations—is logically prior to, or the model for, public law. Cf. *Amodu Tijani v. Secretary*, [1921] 2 App. Cas. 399, 406–10 (P.C.) (deciding, in property case arising in British colony, that “mere change in sovereignty is not to be presumed as meant to disturb rights of private owners,” and therefore upholding native usufructary title); *Pilans & Rose v. Van Mierop & Hopkins*, 97 Eng. Rep. 1035, 1038–40 (K.B. 1765) (suggesting deference to law merchant and needs of international commerce in deciding whether undertaking was supported by consideration); H.L.A. HART, *supra* note 101, at 77–96 (suggesting conceptual origin of law in rules of conduct understood by private individuals); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–68 (1973) (discussing Supreme Court’s historical adherence to private rights model); Pound, *Public Law and Private Law*, 24 CORNELL L.Q. 469 (1939) (defining “the new public law” and its threat to private law); Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1111 (1985) (third party beneficiary rule giving intended beneficiaries of public programs access to courts otherwise unavailable); Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985) (outlining significance of “private law” conception of torts). (As the varied character of these citations suggests, I mean this proposition to evoke a whole set of possible claims, not necessarily alike and not necessarily all consistent with one another.)

Similarly, the discussion of legislative intent may support the view that legal interpretation is not a hunt for mental states, but a purposive, constructive enterprise guided by the law’s own demands on itself. Cf. T.B. *Baba Mezia* 59a–59b (Talmudic narrative rejecting Heavenly Voice as arbiter of meaning of religious law, because “it [Torah] is not in heaven”); *id.* *Menakhot* 29b (narrative contrasting Moses as traditional receiver of all law at Mount Sinai and Moses as individual incapable of foreseeing or understanding all of the meaning to be found in that law); R. DWORKIN, *supra* note 115, at 313–54 (discussing idea of legislative intention as seen from perspective of “law as integrity”); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (criticizing use of legislative intent and proposing alternative methods).

Finally, the discussion of legal transactions and their boundaries may suggest a deeper, more complicated intercourse than has often been supposed between the substance of the law and its inner “morality.” L. FULLER, *supra* note 100, at 152–86.

telling suffers all that much for this indecision. Admittedly, the more wide-ranging conclusions about the nature of law that I dropped into a footnote²³⁶ might have to remain purely speculative, but they were never part of the central thrust of this Article. In any event, it is possible that necessity and contingency might not be the most important variables in the self-portrayal of a complex institutional phenomenon such as law. More importantly, it should be clear that whether or not very different legal worlds fall within the contemplation of Norm-Based jurisprudence, those worlds would differ radically from ours not only in their understanding of choice of law but in the entire range of their exercise of legal imagination. And that, I would venture, is a strong enough conclusion to merit a place for vestedness in a this-worldly, practical jurisprudence.

6. *Does Vestedness Prove Too Much?*

The final objection to everything said so far is that it has proved not too little, but too much. Vestedness requires that a forum take the content of substantive legal rights to be forum-independent. Yet cheerfully built into the very definition of vestedness is the idea that choice of law regimes themselves, as well as particular choice of law rules, are entirely forum-dependent. The content of choice of law rules, moreover, in contrast to adjective law and even to directives requiring courts to look to choice of law rules, are second-order primary norms defining which primary (substantive) norms apply in a given case. How then can the vesting of local law be reconciled with the forum's complete control over the rules of choice of law?

There are, it seems to me, at least two possible ways of meeting this challenge. One strategy would be to retreat to a much-diluted form of legal realism. The Norm-Based view of law, after all, is perhaps a metaphor—a way of telling courts and the rest of us how to think about the law—rather than a description of the “really real.” Although the Norm-Based view tells courts and the rest of us to treat legal rights as existing independent of the forum in which they happen to be enforced, courts must have some means of identifying those rights, and autonomous legal systems must themselves select those means. To ask for anything more in a world with many autonomous legal systems would be to submit either to paralysis or to a *reductio ad absurdum*. And no metaphor, however powerful, should be taken that far.

This answer is not bad, and might even provoke some saccharine thoughts about how the Norm-Based and Decision-Based perspectives really do converge after all. My own inclination, though, is to try another

236. See *supra* note 235.

route, taking comfort in the vinegary thought that the best defense is a good offense. Let me propose, as a better answer, that choice of law rights do vest, that their vesting is consistent with vestedness, and that it results neither in paralysis nor in a *reductio ad absurdum*.

Recall that, with regard to substantive legal norms, a forum can, consistent with the principle of vestedness, look to its own understandings when "the issue is not framed as one of choice of law, but rather of the interpretation of the same law."²³⁷ In such cases, courts reaching different conclusions rightly consider each other not "to have made a different choice of law, but to have adopted a mistaken view of the same law."²³⁸ Choice of law analysis therefore may be legitimately forum-dependent for the simple reason that its body of specific rules and principles constitutes a single trans-jurisdictional entity about whose content various forums happen to disagree.

Lest I be misunderstood, let me emphasize that I am not finally resorting to the claim that choice of law is a matter of public international law. Even if choice of law rules constitute a single trans-jurisdictional entity, the binding obligation to refer to that entity might arise solely out of jurisprudential considerations *internal* to individual legal systems.²³⁹ Nor am I urging that the choice of law canon constitutes a species of natural law, although it might. The trans-jurisdictional need not be the transcendental, and the sort of trans-jurisdictional "entity" I have in mind can be understood as "natural" or "conventional"—a shared effort at positive legal enactment and analysis—or neither, that is, nothing more than a project with a well-defined common end and varying views regarding the means to that end.

One way to understand what I have in mind is to consider the following analogy: Suppose that the United States Constitution had only one provision, to wit, "Federal law exists." Suppose further that there were no federal courts and no explicitly defined or centrally imposed principle of federal supremacy. One might still imagine state courts (1) concluding that they were bound by federal law, and (2) arriving at divergent views regarding the content of federal law. Under these admittedly bizarre circumstances, could we still conclude that the state courts involved were interpreting a real entity called federal law? A Decision-Based analysis would, of course, find the idea somewhat deranged. And it might well require a strong anti-nominalist stomach to take the plunge. Nevertheless, I submit that we could answer in the affirmative: "Federal law" in that

237. See *supra* text accompanying note 66.

238. *Id.*

239. See *supra* text accompanying note 213.

context would be very much the same sort of trans-jurisdictional entity I have in mind in describing “the law of choice of law.”²⁴⁰

Indeed, the advantages of treating the body of choice of law rules as trans-jurisdictional are not just formal. Consider again the truncated federal constitution just described. If such an arrangement actually existed, the diversity of state views on the content of federal law would be unsettling in a way qualitatively different from the occasional annoyance provoked by variations in the local laws of the various states. That discomfort might even be so great as to provoke a call for some arrangement among the states to reconcile their views of federal law—perhaps even a single supreme court to pronounce in some authoritative way which of the divergent views of federal law were correct.²⁴¹

In light of this thought experiment, it should come as no surprise that the diversity of official views about choice of law often provokes exactly the same sense of disquiet, qualitatively different from the reaction to cross-jurisdictional differences in tort or contract law, and sometimes leading to proposals for official joint action²⁴² or centralization.²⁴³ Moreover,

240. Somewhat more realistic examples include the law of admiralty, as it traditionally has been distinguished from both public international law and purely domestic law, *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 35 reporters' notes (1965); G. GILMORE & C. BLACK, LAW OF ADMIRALTY 45–46 (2d ed. 1975), and the notion of general common law articulated in cases such as *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). The latter example is both perilous and particularly interesting due to the enormous historical freight it carries. Indeed, the jurisprudential assumptions at work in *Swift v. Tyson* were later attacked as incoherent by Oliver Wendell Holmes, *see* *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928) (Holmes, J., dissenting), and eventually rejected by a Supreme Court working in the wake of the legal realist movement. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *But cf.* W.W. COOK, *supra* note 17, at 138 (almost defending *Swift v. Tyson*). (An alternative reading of the pre-*Erie* cases, I should add, is that they intended to recognize not a general common law distinct from the domestic law of the states, but the coordinate power of the federal and state courts to reach independently authoritative conclusions as to the content of state law. *See, e.g.*, *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (dictum) (“A determination . . . of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State.”); *Burgess v. Seligman*, 107 U.S. 20, 33–34 (1882) (noting existence of two coordinate jurisdictions with power to construe state law). This would suggest less an example of trans-jurisdictional law than the more general and not uncommon phenomenon of decentralized legal interpretation.)

241. A more realistic example is again close at hand: In the workings of the United States judicial system, the Supreme Court's exercise of discretionary jurisdiction is commonly thought to be particularly urgent in the resolution of issues of federal law on which the lower courts have split. *See* SUP. CT. R. 17(1)(a); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 221 (1975); Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 722–28 (1984). *But cf. supra* note 240 (drawing distinction between decentralized legal interpretation in general and trans-jurisdictional law as a special subset thereof).

242. Among the most prominent proposals for choice of law unification on the international front have been several conventions proposed by the Hague Conference on Private International Law. *See* Droz & Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 Nw. J. INT'L L. & BUS. 155, 180–96 (1981).

243. *See, e.g.*, Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 UCLA L. REV. 1191 (1967); Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS., Spring 1977, at 105; *cf. In re “Agent Orange” Prod. Liab. Litig.*, 580

this visceral sense of disquiet is entirely understandable: If "the law of choice of law" is really one trans-jurisdictional entity with varying interpretations, then the multiplicity of those interpretations suggests either that most of them are false or that different forums have inconsistently exercised their residual discretion, revealing in either event the baldly inexact character of the judicial craft.²⁴⁴

In light of all this, however, two questions still remain. The first question is whether I have, in positing a trans-jurisdictional component to choice of law, committed myself to an idea fatally inconsistent with the premises of certain Norm-Based theories of law, and thus (at the very least) jeopardized my claim that "accepting the basic elements of any Norm-Based theory should lead one to embrace the notion of vestedness in choice of law."²⁴⁵ My relatively confident answer is no. I have already taken some pains to anticipate most potential objections from Norm-Based theories adopting one or another version of legal positivism by emphasizing that the trans-jurisdictional entity I have in mind is sufficiently general in its outlines so as not to require any commitment to the existence of either natural law or public international law to get it off the ground. Indeed, if I do run into any trouble at all, it would probably come only from those versions of "hard-facts positivism"²⁴⁶ for whom the very vagueness of my idea of a trans-jurisdictional entity might cause some discomfort. A satisfactory response to that corner of the field, however, might well be that if the trans-jurisdictional canon of choice of law is nothing but "a project with a well-defined end and varying views regarding the means to that end," then the canon is not in itself a source of "law" at all,

F. Supp. 690, 698-99 (E.D.N.Y. 1984) (advocating application of "national consensus law"); B. CURRIE, *supra* note 40, at 125-27 (advocating promulgation of federal conflict of law rule under full faith and credit clause).

244. To say that a sense of disquiet is understandable, however, is not to say what, if anything, can or should be done about it. Vestedness neither requires "a forum to adopt choice of law criteria that will generate outcomes at trial identical or even similar to those in other forums" nor assumes "that different forums adopt the same choice of law regime." See *supra* text accompanying notes 60-61. Even if a forum feels bound by vestedness, it need not subordinate its views as to the correct construction of the trans-jurisdictional choice of law canon to the views of other forums. Thus, nothing in the principle of vestedness requires a move to institutional centralization or coordination. Whether such a move would be desirable in its own right is beyond the scope of this Article.

Nevertheless, the absolute interpretive freedom I am postulating is admittedly in tension with the notion of a trans-jurisdictional canon of choice of law. Putting structural innovations aside, my own—highly tentative—sense is that this tension is precisely the sort of problem to which the understanding of judges as experts in the law can fruitfully be brought to bear. Although judges in different forums are not required to take into account each other's views on choice of law, it may nevertheless be right and good that they do so, for the same reason that it is right and good that federal judges in different circuits look to each other's views of federal law, or that judges interpreting any body of law look to the views of scholars on that body of law. Moreover, the decentralization of the choice of law enterprise may be a reason to try to steer it toward rules that are not only widely approved but also sufficiently transparent to reduce subsidiary disagreements over their meaning.

245. *Supra* text accompanying notes 88-89.

246. See Coleman, *supra* note 147, at 145-48 (discussing "hard-facts" positivism).

but only a description of how individual legal regimes can come to their own understanding of governing law.

The second question I need to address is more serious and important: By invoking the very idea that choice of law rights vest on the basis of a trans-jurisdictional choice of law canon, however vague have I added something radically new to my original account of vestedness itself? According to the definition of vestedness at the beginning of Part II of this Article, all a legal regime must do to remain within the strictures of the principle is to “apply choice of law criteria that could be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication.” In light of my latest revelation, however, it seems that in addition to complying with that formal requirement, a legal regime must be careful to apply only those choice of law criteria that it concludes are demanded by a trans-jurisdictional canon of choice of law rules and principles.

Now, if the idea that the choice of law canon is somehow trans-jurisdictional were read to impose some requirement on the inner psychological workings of judges and legislators, it might indeed represent a change from the original definition of vestedness. That interpretation is by no means necessary, however, any more than it would have been necessary to understand the original definition of vestedness to look to inner psychological processes to decide whether a particular choice of law criterion was actually being “applied.” Putting such state of mind analysis to the side, then, I would argue that the idea that the choice of law criteria a forum applies must be consistent with some coherent account of a trans-jurisdictional choice of law canon in fact adds nothing new to the definition of vestedness; it was actually implicit in the account of vestedness all along.

Part of what I have in mind can be found in the notion of “good faith” that I invoked in discussing and dismissing the proposed rule requiring a Canadian court always to apply the law of Canada.²⁴⁷ The requirement of “good faith,” though it must have seemed more than a little jerry built when it first appeared, can now be understood to mean little more than that a forum should seek, through choice of law, to discover the substantive norms that actually applied to a given set of events as they occurred in the world. And that, in turn, really amounts to the proposition that a forum’s choice of law rules should represent, at least according to the forum’s own understanding, an account of those substantive norms that would, or should, be credible to other forums.

Good faith, however, does not do the whole job that needs to be done. A

247. See *supra* text accompanying note 75.

forum's choice of law criteria may be credible to other forums and still not represent the forum's own best account of what would be required by a trans-jurisdictional canon of choice of law. Consider, for example, a forum that surveyed all the possible choice of law rules to govern a particular issue, narrowed the list down to those rules that were generally reasonable and consistent with other relevant principles, and then picked one rule at random, with the avowed rationale that one result was no more arbitrary than another. Has the forum complied with vestedness?

It turns out that it has not. Recall that the definition of vestedness spoke in terms of choice of law "criteria" operating at every level of abstraction, and not just isolated choice of law rules.²⁴⁸ Thus, just as a forum would be violating vestedness if it selected its choice of law rules on the basis of a meta-criterion requiring it to apply "the law of the place selected by that choice of law rule—in itself consistent with vestedness—that in the aggregate of cases most often results in the application of the law of the forum,"²⁴⁹ so it also would be violating vestedness if it selected its choice of law rules on the basis of a principle requiring it to apply "the law of the place selected by that choice of law rule—in itself consistent with vestedness and other sound principles—that was selected by the pick of the draw." In neither case, after all, is there any reason to expect that the meta-criterion, if applied by other forums, would yield the same results. Indeed, it would appear that the only ultimate criterion that could generate a system of choice of law rules and principles consistent with vestedness would be a principle requiring the forum, to the extent it was able, to apply those choice of law rules that represented its best reading of the trans-jurisdictional canon of choice of law.

All of this is not to say that a forum must expend all of its available intellectual energy in articulating choice of law rules, or that it needs to abandon the demands of decision management.²⁵⁰ What is clear, however, is that a forum cannot, consistent with vestedness, arbitrarily avoid the imperative to universalize—the imperative to look beyond itself in reaching its own decision. Indeed, it is precisely at this point that the principle of vestedness finally can be seen to connect directly to ideas such as equality and the avoidance of forum-shopping, about whose significance I earlier was somewhat skeptical.²⁵¹ Equality in the context of a Norm-Based view of law does not mean—as some Decision-Based ethics might require—that courts should treat all persons equally, but rather that courts should treat all persons according to law, and as equal under the law. Yet

248. See *supra* text accompanying notes 59–60.

249. *Id.*

250. See *supra* text accompanying notes 145–47.

251. See *supra* text accompanying notes 82–84.

the common thread linking the idea of equality under the law to other applications of the ideal of equality is, after all, the imperative to universalize—to achieve that detached perspective in which no one set of parochial interests or claims has inherent priority over any other. Similarly, it should be evident now that (1) shopping for courts is distinctively problematic to a Norm-Based sense of the legal enterprise because legal rights actually attach long before any court acts on the matter; (2) shopping for courts also is distinctively problematic because it exploits judicial disagreement over a set of issues about which, given the goal of universalization, there should be no disagreement; and (3) there is something to be said for the proposition that the first two statements are really one and the same.

7. *To the Stars*

But does this really go far enough? Even if the law of choice of law vests in some attenuated sense, does it not still depend on certain underlying legal and political assumptions? And how do those in any sense vest? And what about the deeper propositions underlying those theories? Do they also vest? Indeed, even if the entire planet were to coordinate all of its thinking on choice of law, how would we guard against the possibility that the law that really vested all along was the law of a distant galactic government whose legislation is put on display in an office somewhere near Alpha Centauri?²⁵²

At this point, a version of my modified legal realist response may begin to look more attractive. As all Norm-Based theorists not committed to a strong version of natural law have long understood, internal legal analysis must eventually run into sociology. Or, to put a Wittgensteinian spin on the matter, the intimate connection between concepts and practice can be avoided for only so long. Or, to put it yet another way, too fanatical a search for foundations *will* eventually lead either to paralysis or to a *reductio ad absurdum*.

Yet, I would submit, none of this really represents any sort of retreat at all. To admit that law is ultimately a conversation rather than a self-sustaining fact of nature does not reduce the imperative to render that conversation consistent and coherent. To suggest that the law of distant planets is somehow beyond the scope of the conversation is no excuse for ignoring the law of Ontario.²⁵³ To suggest that interpretive communities are not infinite or transcendent is not to argue that the very finite interpretive communities in which we do participate should be denuded. To

252. See D. ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY* 34–36 (1979).

253. Perhaps it is also no excuse for ignoring the laws of non-state normative communities. See Cover, *supra* note 189; Note, *supra* note 74.

despair of the search for foundations is no excuse for gutting the rest of the house. On the contrary, the decidedly Norm-Based insight that law is a specialized normative discourse, lined up over against other forms of discourse, suggests that building attics rather than foundations is a central task of the lawyer.

Finally, if there is to be a convergence between the Norm-Based and Decision-Based views, it may well be on the Norm-Based view's terms. One of the premises of Norm-Based jurisprudence, after all, is that courts, and other interpreters of law, can be wrong. Admitting the possibility of error may be humbling and unsettling. In another sense, though, it is profoundly liberating, for it allows us to forge ahead in the absence of final answers. A legal system might decide one day that the law of some galactic empire, or the law of nature, or the law of Nature's God, should have governed its judicial decisions all along. Until that day comes, though, the best a legal system can do is to attempt to discover, with all due humility and audacity, which of the norms available for its consideration should govern which of the cases brought to its attention. As long as it takes that work seriously, it deserves to be called a legal system devoted to the enterprise humbly and audaciously called the rule of law.

V. BACK TO EARTH: THE ROAD AHEAD

So much for the cosmos. If vestedness is to prove its worth to a practical jurisprudence, it will have to return to Earth and do some work. Four related projects are at the forefront of what remains to be done.

The first project is the most obvious: to work on filling in the embarrassing gaps in the present account of vestedness and its role in choice of law. In particular, the notion of "substantive criteria" and the attendant distinction between substantive and non-substantive legal issues need more attention than passing comments and tentative footnotes. In addition, effort needs to focus on the division of labor that can, or does, or should exist between (1) second-order choice of law rules, which are in some sense trans-jurisdictional, and (2) first-order Rules of Scope and Rules of Assimilation, which may look like choice of law rules, but are really aspects of the local law of particular jurisdictions.

A second desirable project would be a review of current choice of law doctrines and practices to test whether they conform, in their particulars, to the constraint of vestedness (more of whose details would have been illuminated by the first project). The results of such a review might be surprisingly reassuring. Certainly, the purest forms of Currie's "interest analysis" would not survive the filter of vestedness; others' attempts to apply his methods and insights might. The same can be said, to cite only one example, for a good deal of the Second Restatement, whose constant

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effort to find which jurisdiction has the “most significant relationship” to a legal issue can be understood, on the whole, as aimed at deciding which jurisdiction’s law has “vested” as to that issue.²⁵⁴ Moreover, many of today’s doctrines and practices might look particularly good if the review focused on their actual content rather than their theoretical rationalizations.

A third project would involve making sure that those choice of law theories and doctrines that do comply with vestedness are in fact plausible structures in an analytic architecture governed by vestedness. Because vestedness plays a catalytic role in choice of law, it should be possible to work backwards, so to speak, recovering from choice of law propositions the premises (or the set of alternative premises) necessary to justify them in a Norm-Based discourse. If those premises then turned out to conflict with other settled ideas about the nature or sources of law, it might become necessary to modify those ideas, to look for other premises, or to decide that the choice of law theories or doctrines in question could not, after all, be accepted in good faith, in a choice of law regime that is consistent with vestedness and the rule of law.

For example, a prominent and controversial suggestion in the choice of law literature is to apply the “better law.”²⁵⁵ The better law can, of course, become a fig-leaf for the law of the forum,²⁵⁶ it can also be justified in a Decision-Based jurisprudence as the law preferred—in a Decision-Based calculus—by the forum’s court. But what sorts of premises would be necessary to justify the better-law approach and the possibility of forum-neutral tests for “betterness,” in a legal discourse governed by vestedness? Would these premises include notions of natural law or general common law? If so, could they be sustained consistent with everything else we might think about natural law and general common law? Similar questions can be asked about result-driven choice of law variables such as “the law sustaining liability” (in tort) or “the law validating the contract,” and even about the established notion that parties to a contract should be able, within broad limits, to choose the law that governs the contract.

A fourth project follows in part from the first three, but flows more

254. Cf. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 692 (1963) (Second Restatement “is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law.”).

255. See Ehrenzweig, “False Conflicts” and the “Better Rule”: Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847, 855–56 (1967); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295–304 (1966). For cases adopting some variation of the “better law” approach, see, for example, *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

256. See Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 674 (1983).

directly from the earlier skeletal intellectual history that tied the underpinnings of the choice of law revolution to American Legal Realism and Decision-Based jurisprudence. That history, particularly to the extent that it credits academics influenced by a Decision-Based jurisprudence with affecting actual judicial practice, is in some tension with the claims of Norm-Based jurisprudence to be a thoroughgoing account of law. The tension is far from fatal, of course, because even the descriptive side of Norm-Based jurisprudence, and certainly its prescriptive side, can easily survive pockets of deviation.²⁵⁷ Nevertheless, it would be important and interesting to trace, in the context of a story of jurisprudential clash, exactly how the choice of law revolution was received in the working life of the law. Did the Decision-Based prescriptions of the choice of law revolution (as opposed to its more moderate anti-conceptualist and anti-territorialist insights) have a lasting impact on judicial practice? If they did have such an influence, did it spill over into other fields of law, or was the Cook/Currie revolution a localized phenomenon that pushed choice of law to the periphery of legal practice and scholarship? Was whatever success Decision-Based choice of law enjoyed in the courts the result of misunderstanding, or greed, or real doubts about the nature of law and judicial duty? Or was there really, as just implied, more smoke than fire in the choice of law revolution—a striking gap between the enormous intellectual ferment apparent in the academy and the results felt in the courtroom? If so, can the gap be explained in part by acts of resistance grounded, self-consciously or not, in deep-seated jurisprudential intuitions animated by the powerful attraction of the rule of law?

VI. CONCLUSION

A commitment to the existence, validity, and importance of an “internal” perspective in the law has been one of the recurring themes of this Article. The internal understanding necessary to any Norm-Based view of law is necessarily counter-revolutionary, for it encourages a form of argument that embellishes the spare, or clarifies the obscure, or makes explicit the implicit, rather than one which shatters the vessels and starts anew.

At the same time, I hope this Article has shown that the internal need not be insular. On the small stage of choice of law, the ironic thesis of this Article is that, by lowering its sights from the contemplation of the state of humankind to the adjudication of legal rights, a court will be forced to look beyond its own spheres of concern, to confront and assimilate systems

257. *Cf. supra* note 85 (characterizing this Article’s argument as neither strictly descriptive nor strictly prescriptive). Indeed, the existence of deviant doctrines might play a role in the Norm-Based view of law analogous to the existence of unenforced rights in any particular system of law. *See supra* text accompanying notes 124–25.

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of values that are potentially alien and disturbing, and even to rely on principles of law whose source cannot be traced to any single nation or sovereign. On the larger stage of the life of law, the glory of the internal perspective is its power, not only to build a bridge between the ideal and the real,²⁵⁸ but to build a bridge that holds up, and carries, the traffic of great and small. Finally, the peculiar advantage of an internal perspective whose own deepest structures are sufficiently thin is that it may have the power to build a bridge that soars even as it spans, and that expands the possibilities of both the ideal and the real even as it hangs suspended over the chasm that, perhaps fortunately, remains between them.

258. Cover, *supra* note 124, at 181.