
ARTICLE

REALISM AND REVOLUTION IN CONFLICT OF LAWS:
IN WITH A BANG AND OUT
WITH A WHIMPER

CELIA WASSERSTEIN FASSBERG[†]

Conflict of laws scholarship in the United States in the middle half of the twentieth century produced what is commonly referred to as a “revolution.” Quite apart from its revolutionary content, this scholarship is extraordinary in three principal ways. First, it is extraordinary for its volume, its prominence and the eminence of many of those producing it. Following Joseph Story’s pioneering work in the nineteenth century¹ and well into the middle of the twentieth century, some of the best and brightest legal minds in some of the leading American law schools were devoting their not inconsiderable energies to this field, publishing in the best of the American law journals and spawning a vast literature—Joseph Beale² and Erwin Griswold,³ Wesley

[†] Judge Harry M. Fisher Professor of Private International and Inter-Religious Law, The Hebrew University of Jerusalem. I should like to thank Shyam Balganes and the University of Pennsylvania Law Review for organizing the Symposium and inviting me to take part in it, as well as the Editorial Staff of the Law Review for preparing my paper for publication. Special thanks to Alexander Bedrosyan for his helpful comments and suggestions.

¹ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1834).

² See, e.g., JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

³ See ELLIOT E. CHEATHAM, NOEL T. DOWLING, HERBERT F. GOODRICH & ERWIN N. GRISWOLD, CASES AND OTHER MATERIALS ON CONFLICT OF LAWS (1936); Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938) (discussing how the English and American courts have handled the *renvoi* problem); see also Erwin N. Griswold, *David F. Cavers*, 51 LAW & CONTEMP. PROBS., at i (1988) (discussing Cavers and his “principles of preference” in the field of conflict of laws).

Hohfeld,⁴ Ernest Lorenzen⁵ and Walter Wheeler Cook,⁶ Hessel Yntema,⁷ David Cavers,⁸ Albert Ehrenzweig⁹ and Brainerd Currie.¹⁰ Second, this scholarship is extraordinary for its fiercely intellectual and visceral nature. The literature reveals not only unusual analytical and comparative thoroughness but also unusual competitive relentlessness and interpersonal rhetorical argumentativeness.¹¹ The third extraordinary feature—with which this Symposium is concerned—is the striking impact this scholarship had on judicial practice in the United States and the equally striking absence of almost any impact on scholarship or judicial practice outside the United States.

Scholarly enthusiasm for conflict of laws in the United States came in two major waves. The first pitted a dark empire of rules against an enlightened world of rule-skeptics. The First Restatement of Conflict of Laws was completed in 1934 after eleven years of work under the leadership

⁴ See Wesley Newcomb Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 9 COLUM. L. REV. 492 (1909); Wesley Newcomb Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 10 COLUM. L. REV. 520 (1910); Wesley Newcomb Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909); see also RALEIGH C. MINOR & WESLEY NEWCOMB HOHFELD, *CONFLICT OF LAWS; OR, PRIVATE INTERNATIONAL LAW* (1901). For a vivid description of Hohfeld's inspiring teaching in the field of conflict of laws, see KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 491 (1961).

⁵ For a collection of his articles published between 1910 and 1945, see ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947).

⁶ See, e.g., WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942). The book contains eleven articles (in ten chapters) published between the years 1924 and 1939, and eight original chapters.

⁷ See, e.g., Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953).

⁸ See, e.g., David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173, 176 (1933); see also DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); DAVID CAVERS, *THE CHOICE OF LAW: SELECTED ESSAYS 1933-1983* (1985).

⁹ See, e.g., Albert A. Ehrenzweig, *Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 644 (1960); Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965); see also ALBERT EHRENZWEIG, *PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY* (1967).

¹⁰ See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

¹¹ Lorenzen and Ehrenzweig exemplify those who provided comprehensive comparative materials as a background to all their discussions. Cook and Currie exemplify the exhaustive analysis of every aspect of a case or a theory. The minute dissection of individual judicial or scholarly opinions and formulations that characterizes much of the writing from this period suggests the deeply personal nature of the disagreements. On the competition between Ehrenzweig and Currie, see, e.g., Herma Hill Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L. J. 747, 748 (1984). For a relatively moderate example of the tone of discussion, see Yntema, *supra* note 7, at 315, where he expresses regret that Cook did not reduce his own work, as well as the current conflicts dogma, to ashes from which a phoenix might arise.

of Joseph Beale, a student and then a colleague of Langdell. It was immediately reviled as an outdated set of abstract conceptual rules, the very model of Legal Formalism, quite at odds with the prevailing view of law.¹² Working at the very same time, Ernest Lorenzen, Walter Wheeler Cook and others systematically exposed to ridicule all the assumptions and components of the universally familiar type of rule promoted by Beale, excoriating their manipulability and the unreality of their premises. The second wave of conflicts scholarship, culminating in publication of the Second Restatement in 1971,¹³ was more constructive. Once the traditional formalistic rules had been discredited, attention was turned to producing alternative methods for resolving conflicts problems. These two waves of scholarship, together with the case law they generated, constitute what is now known as the American conflicts revolution.

Of the three major topics dealt with by the conflict of laws, the conflicts revolution in scholarship is traditionally talked of in the context of *choice of law*,¹⁴ even though it did have an impact on jurisdiction¹⁵ and foreign judgments.¹⁶ All these topics raise “private” concerns of justice between the parties and “public” concerns—both of relations between the individual and the state, and of relations between states—and in choice of law, the revolution focused on the way in which these concerns were addressed.

¹² See, e.g., Ernest G. Lorenzen, *The Restatement of the Conflict of Laws* 83 U. PA. L. REV. 555, 574 (1935); see also Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 473 (1927-1928) (reviewing in much the same spirit the HANDBOOK ON THE CONFLICT OF LAWS (1927) by Herbert Goodrich, the Special Advisor to Beale’s team).

¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Work on this Restatement began less than twenty years after the First Restatement was published and almost twenty years were needed for its preparation.

¹⁴ Perhaps the reason why this area was more obviously affected by the conflicts revolution is that in the United States, the areas of jurisdiction and foreign judgments are more closely governed by constitutional requirements of due process and full faith and credit, where the rhetoric of state interests is quite natural. By contrast, in choice of law, constitutional law serves as a constraint rather than as a positive source of law; the rhetoric of state interests is antithetical to traditional choice of law discourse and its introduction to this discourse was truly revolutionary.

¹⁵ For example, the move from territorial/power theories of jurisdiction to “minimum contacts”/fairness rhetoric, starting with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) can be attributed to the same line of thought that changed choice of law thinking. See MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW 119ff. (2004) (attributing the development of the *forum non conveniens* doctrine that enables courts to decline jurisdiction to Legal Realism).

¹⁶ This influence is less clear in the area of foreign judgments but some of the cases do reflect a similar move over time from Formalism to Realism. See, e.g., *Yarborough v. Yarborough*, 290 U.S. 202 (1933); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Williams v. North Carolina (II)*, 325 U.S. 226 (1945); *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

The rules of choice of law presented in the First Restatement were formulated in the traditional mode, the mode that is still employed in most legal systems. They posited a *legal category* (e.g., contract, tort, property, marriage, divorce, succession), each of which was linked by a characteristic *connecting factor* to a given system of law. Thus, for contracts, the place of contracting identified the legal system that would govern most questions concerning the contract;¹⁷ for torts, the place of the wrong would identify the law governing the tort;¹⁸ for property, the place of the property would identify the law governing the property;¹⁹ and for procedure, the identity of the forum would dictate the governing law.²⁰

The theoretical basis of these rules was that of territorialism and vested rights: the idea that human behavior at a particular time in a particular place creates rights. This idea defines the purpose of conflict of law rules as enforcing rights that have vested under the only law capable of controlling the legal consequences of conduct in a given set of circumstances.²¹ This essentially political purpose of distributing authority dictated the unique "jurisdiction-seeking" form of the rules (e.g., torts are governed by the law of the place of the tort). Story had already debunked the myth that choice

¹⁷ See RESTATEMENT OF CONFLICT OF LAWS §§ 311 (formation), 332 (validity), 333 (capacity), 334 (formalities), 347 (fraud, mistake, etc.) (1934). For references to the law of the place of performance in issues connected with performance, see *id.* § 355.

¹⁸ See *id.* §§ 378 (whether plaintiff sustained a legal injury), 379 (whether conduct creates liability), 383 (causation), 384 (existence of cause of action), 385 (contributory negligence), 386 (liability of master for fellow servant), 387 (vicarious liability), 388 (defenses), etc. Section 377 defines the place of the wrong as the "state where the last event necessary to make an actor liable for an alleged tort takes place." *Id.* § 377.

¹⁹ See *id.* §§ 211 (property in tangible things), 216 and 255 (capacity to convey land and chattels respectively), 217 and 256 (formalities of conveyance of land and chattels respectively), 218 and 257 (substantial validity of conveyance of interest in land and in chattels respectively), 220 (effect of conveyance of interest in land), 221 and 258 (nature of interest created by conveyance of interest in land and chattels respectively), etc.

²⁰ See *id.* § 585 (what law governs procedure).

²¹ See BEALE, *supra* note 2, at 1091 ("The question whether a contract is valid can on general principles be determined by no other law than that which applies to the acts [of the parties], that is, by the law of the place of contracting. . . . If . . . the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so."); see also *id.* at 1288 ("It is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort was committed. That is the place where the injurious event occurs, and its law is the law therefore which applies to it."). This view had already been sanctioned by Justice Holmes in *Slater v. Mexican Nat'l Ry.*, 194 U.S. 120, 126 (1904) and *Mutual Life Ins. Co. v. Leibing*, 259 U.S. 209, 214 (1922), and by Justice Cardozo in *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 120 N.E. 198, 201 (1918).

rules are universal and bind all states as international law.²² It was thus uncontroversial that the source of these rules was local. Nonetheless, the conflict of laws was presented as “part of the general system of the common law.”²³ These common but local rules were designed to tell the forum for every type of legal situation whose law should determine whether or not a right had vested. As such, they were multilateral—in the sense that they treated all states evenhandedly and determined the scope of each state’s control on the basis of its formal connection to the case, according the forum no advantage over foreign legal systems—and they identified the governing law irrespective of the substance of the competing rules.²⁴

Criticism of the formalist model of choice rules was related both to rule-skepticism and to skepticism about the theories inspiring the rules. On the theoretical level, Cook attacked the idea of vested rights.²⁵ Relying on Holmes’s view of law as a prophecy of what courts do in fact,²⁶ and proceeding from observation rather than deducing from general principles,²⁷ he demonstrated that far from applying foreign law, in a typical choice of law case, the forum applies its own law to create a local right, using a rule of decision from another system connected with the

²² See STORY, *supra* note 1, § 8 (“It is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as a matter of right.”); *id.* § 23 (“[W]hatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter”).

²³ RESTATEMENT OF CONFLICT OF LAWS § 4 (1934).

²⁴ There were two exceptions to these principles. The rule governing procedure referred exclusively to the law of the forum. See *supra* note 20. This rule too was evenhanded in the sense that it ascribed control to all states equally *qua* forum, but in effect it gave every forum an advantage over the laws of other states in the matters subjected to forum control. The Restatement also included the generally accepted substance-based reservations that no action can be maintained on a foreign law designed to further foreign governmental interests (§ 610), or to recover a penalty (§ 611), or if its enforcement is “contrary to the strong public policy of the forum” (§ 612).

²⁵ See COOK, *supra* note 6. Destruction of vested rights theory is often attributed to Cook. See, e.g., CURRIE, *supra* note 10, at 6 (claiming that Cook “discredited the vested rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another”); David F. Cavers, *The Logical and Legal Bases of the Conflict of Laws by Walter Wheeler Cook*, 56 HARV. L. REV. 1170, 1172 (1943) (“[Cook’s] technique has enabled him to destroy the intellectual foundations of the system to the erection of which Professor Beale devoted a lifetime.”). But see *infra* notes 29 and 83; ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 115 n.139 (N. E. H. Hull ed., 1997) (quoting Karl Llewellyn who described Cook’s publication of THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS as “one of the dirtiest things that was ever done in the history of American jurisprudence,” alleging that Cook stole Hohfeld’s work after Hohfeld died). For a less explicit form of the claim, see LLEWELLYN, *supra* note 4, at 492 n.b.

²⁶ See, e.g., COOK, *supra* note 6, at 15, 30.

²⁷ See *id.* at 8.

issue—usually the rule that would be used for an analogous domestic fact situation.²⁸ Furthermore, he demonstrated that issues of procedure, where forum law applies in any case, often modify what looks like a foreign right—or extinguish it—and that the public policy reservation can also prevent enforcement of a right that might well be enforced in another state. Observation thus yielded the insight that any right that is enforced is a local right in the sense that it verifies a prophecy of what will happen in the forum—or what forum officials will do—in the circumstances of the case.²⁹ This insight contributed to undermining the principle of territorialism. Since the foreign law was simply a datum used in constructing a right under local law, lacking any intrinsic normative power, each forum was free to decide whose law to apply, free of any purported obligation or any purportedly exclusive territorial control.³⁰

As for the rules themselves, Cook, Lorenzen, and others criticized these for encouraging mechanical jurisprudence and assuming that concepts can be applied without reference to policies and social interests.³¹ This line of scholarship exposed the manipulability of abstract categories and concepts, demonstrating that the rules did not produce foreseeable results and that the purportedly evenhanded treatment of forum and foreign law was spurious—judges tended to prefer their own law and to work towards applying it.³² A major area of attack was the problem of classification. Abstract rules based on categories are not as easy to apply as they may look. The category of procedure provides a notorious example of situations where application of local or foreign law depends on the question whether the issue is substantive or procedural, and where courts rarely provide good

²⁸ See *id.* at 20-21. On the distinction between this theory and the “homologous right” theory of Justice Learned Hand found in *Guinness v. Miller*, 291 F. 769 (1923), see David F. Cavers, *The Two “Local Law” Theories*, 63 HARV. L. REV. 822, 823-24 (1950).

²⁹ See, e.g., COOK, *supra* note 6, ch. 1; see also LORENZEN, *supra* note 5, at 109 (referring to Hohfeld’s fundamental legal conceptions for the idea that a right cannot be said to exist without a remedy for its enforcement); *id.* at 107 (referring to Hohfeld’s view that “[t]he courts of a sovereign state may attach any legal consequences whatever to any state of facts, including acts done in foreign countries” (citing Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1909), *supra* note 4, at 496, 520)). Then, referring to Cook’s comment on *Loucks v. Standard Oil*, Lorenzen further points out that Hohfeld had already made this notion—that the right being enforced is a local right—the basis of his course on the conflict of laws both at Stanford and Yale. *Id.* (citing W.W.C., *Recognition of “Massachusetts Rights” by New York Courts*, 28 YALE L.J. 67, 70-71 (1918)).

³⁰ See, e.g., COOK, *supra* note 6, at 10-19; LORENZEN, *supra* note 5, chs. 1 & 4.

³¹ See, e.g., COOK, *supra* note 6, ch. 6; Cavers, *supra* note 8, at 178.

³² On the predominance of forum law see, in particular, Ehrenzweig, *Lex Fori—Basic Rule*, *supra* note 9; Ehrenzweig, *Proper Law*, *supra* note 9.

reasons for one classification or the other.³³ Cook argued that concepts and rules can be understood differently in different contexts. He demonstrated persuasively that rather than dealing with the question where the line between substance and procedure is—as if they were objective, constant categories—one should ask for what purpose the line is being drawn and acknowledge that for different purposes the line may be drawn in different places.³⁴ Lorenzen further argued that classification should be determined by the forum on the basis of policy, expediency, and justice.³⁵

Dissatisfaction was also expressed with other aspects of traditional rules. Lorenzen criticized their rigidity.³⁶ Hessel Yntema launched a frontal attack on the very idea that choice of law rules or principles could be presented in black-letter form.³⁷ David Cavers argued that jurisdiction-seeking rules that ignored the substance of the rules were themselves unjustifiable.³⁸

Taken as a whole, these insights bolstered an emerging view that there were no general choice of law principles, that choice of law problems cannot appropriately be resolved by designating a controlling jurisdiction on the basis of one constant territorial factor, and that their resolution should take into account the content of the “competing” laws.

It is uncontroversial that this attack on the traditional model of choice of law rules, led in no small part by some of the leading Legal Realists, was inspired by Legal Realism. The realist rebellion against mechanical jurisprudence and Formalism, the realist idea that there is no such thing as a right, the realist exposure of the myth that decisions can be made on the basis of pure deduction independent of the facts of the case and the policies involved, and the realist insistence on making explicit these factors, are all essential elements of the scholarship dedicated to discrediting traditional choice of law thinking.

The second wave of scholarship attempted to offer alternatives to the model that had been so successfully discredited, alternatives that would

³³ See, e.g., LORENZEN, *supra* note 5, chs. 4-5 (discussing the traditional problem of *conflicting* classification, i.e., where the forum and foreign law have different views on the classification of a set of facts or a rule). Cook focuses rather on the problem of classification by the forum, for purposes of choice of law as distinct from domestic law.

³⁴ See, e.g., COOK, *supra* note 6, chs. 6-8 (dealing with domicile and the classification of presumptions and burdens of proof as substantive or procedural).

³⁵ See LORENZEN, *supra* note 5, at 15, 17. Notably, Lorenzen's writing, like that of some other contemporary scholars (e.g., Yntema, Griswold) makes extensive reference to foreign civil law and common law scholarship.

³⁶ See, e.g., LORENZEN, *supra* note 5, chs. 9-10 (discussing requirements of form in contracts and in wills); *id.* ch. 13 (discussing the choice rule in tort).

³⁷ See Yntema, *supra* note 12, at 468.

³⁸ Cavers, *Critique*, *supra* note 8, at 173-76.

avoid the mechanical blindfolded dictate of the traditional rules and require explicit rational choices between substantive solutions. Rather than rules, this scholarship is notable for seeking to develop an “approach.”³⁹ Brainerd Currie is probably the most prominent of these scholars. His razor-sharp mind continued to focus on the traditionally political element of choice of law—namely allocating control to different legal systems. But he agreed that one fixed, predetermined, formal connecting factor could not accomplish this aim rationally. Rather, control should be allocated on the basis of governmental interests.⁴⁰ In a dazzling series of articles, he demonstrated that changes in the constellations of facts change the interest of a state in application of its law. He thus advocated that in each case the court should first analyze the various competing governmental interests. In most cases, he argued, this would reveal that only one state had an interest in having its law apply—meaning there was no conflict to be resolved. Such cases, where only one state had an interest in governing the issue, were regarded as false problems.⁴¹ He acknowledged that there would be cases of true conflict (where more than one state was found to have an interest). But he did not succeed in providing a principled way to resolve true conflicts, either when the forum was one of the interested states or when it was not.⁴² Almost as a default position, persuaded that state courts were not constitutionally appropriate arbiters of their own and other states’ interests, he generally advocated applying the law of the forum.⁴³

A series of other scholars, less troubled by the prospect of one state weighing and possibly rejecting another state’s policy, suggested alternative ways of resolving real conflicts. In the theory of “comparative impairment,” William Baxter recommended applying the law whose policy would be most undermined if it were not applied.⁴⁴ Robert Lefflar proposed a non-hierarchical list of “choice-influencing considerations,” all of which might be taken into account in choosing among potentially applicable laws: “predictability of results;” “maintenance of the interstate and international

³⁹ See Willis L. W. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972) (“By ‘approach’ is meant a system which does no more than state what factor or factors should be considered in arriving at a conclusion.”).

⁴⁰ For a typical expression of astonishment at the willingness to abandon in choice of law cases the concern for substance and policies that is so prevalent in domestic cases, see CURRIE, *supra* note 10, at 50ff.

⁴¹ *Id.* at 163-72, 180ff (exemplifying typical formulations).

⁴² *Id.* at 62-64, 117-20, 184, 606-69.

⁴³ *Id.* at 181-182 (“[A]ssessment of the respective values of the competing legitimate interests of two sovereign states . . . is a political function of a very high order. This is a function that should not be committed to courts in a democracy . . .”).

⁴⁴ See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

order;” “simplification of the judicial task;” “advancement of the forum’s governmental interest;” and “application of the better rule of law.”⁴⁵ Ehrenzweig advocated always applying forum law unless a very good reason is shown for deviating from it.⁴⁶ Focusing more on the interests of the parties and individual justice, Cavers ultimately proposed rules of substantive preference to guide the courts—rules which made the choice turn not on state interests but rather on substantive results. Such rules would eliminate the need to engage in ad hoc analysis of policies and would determine the governing law a priori on the basis of substantive considerations. Thus, for example,

[w]here the liability laws of the state of injury set a higher standard of conduct or of financial protection . . . than do the laws of the state where the person causing the damage has acted or had his home, the laws of the state of injury should determine the standard and the protection, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.⁴⁷

Long before many of these theories had been articulated—as early as 1954—the academic ferment had already crept into the case law. *Auten v. Auten*⁴⁸ is often cited as the first case to abandon a traditional choice of law rule: instead of applying the law of the place of contracting, Justice Fuld set out to identify the law of the place with the most significant contact with the matter in dispute.⁴⁹ This analysis was based on what is called the “center of gravity” or “grouping of contacts” approach, designed to identify the law with the *most significant* relationship to the matter.⁵⁰ In the landmark case of

⁴⁵ See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966); Robert A. Leflar, *Conflicts of Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

⁴⁶ See, e.g., Ehrenzweig, *Lex Fori—Basic Rule*, *supra* note 9; Ehrenzweig, *Proper Law*, *supra* note 9. He acknowledged that there were “true” choice of law rules, such as the rule that land is subject to the law of the *situs*. *Id.* It was never made completely clear what might constitute a “good reason” to deviate from forum law in other cases.

⁴⁷ CAVERS, *THE CHOICE OF LAW PROCESS*, *supra* note 8, at 139.

⁴⁸ 124 N.E.2d 99 (N.Y. 1954).

⁴⁹ *Id.* at 101-02. Interestingly, Justice Fuld cited authority for applying the law of the place of performance or the law intended by the parties rather than the law of the place of contracting. Nonetheless, he chose to deviate from the model of rules altogether.

⁵⁰ The decision cites *Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (Ind. 1945), where the court expressed dissatisfaction with the state of decisions and resorted to “a method used by modern teachers of Conflict of Laws” referring to contemporary casebooks for the position that the choice of law rules in contract boil down to the court trying to find the state with the most significant contact to the parties and the transaction. The decision also refers to judicial decisions and academic writing, including a Note where the grouping of contacts approach is suggested as a

Babcock v. Jackson,⁵¹ where the defendant sought to rely on “the law of the place of the wrong” that shielded him, as a negligent host, from liability for damage caused to the plaintiff, the same judge produced perhaps the most famous of the early cases signaling a departure from the choice of law rule in torts.

Writing the opinion of the court, Justice Fuld insisted that “the law of the place of the wrong” need not apply invariably.⁵² After identifying the jurisdiction with the *most* contacts to the issue, he then proceeded to apply governmental interest analysis to confirm his choice.⁵³ He argued that “the law of the place of the wrong” had no interest in applying its policy of protecting negligent hosts to an out-of-state host, driving a car insured outside the state, with respect to an out-of-state plaintiff, and instead, he applied the law of the common domicile of the plaintiff and the defendant.

Courts in other states also began to use the new rhetoric and the new methodologies.⁵⁴ But well before the academic influence had become entrenched, the Second Restatement, adopted in 1969 and published in 1971, incorporated a curious mélange of academic proposals. Although much of this work was presented in the form of traditional rules that were said to encapsulate the accumulated wisdom of case law,⁵⁵ in a number of areas of

rationale of decisions on choice of law in contract. See Barbara Page, Note, *Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV. 490, 498-99 (1953).

⁵¹ 191 N.E.2d 279 (N.Y. 1963).

⁵² *Id.* at 280-81, 285.

⁵³ *Id.* at 284.

⁵⁴ See, e.g., SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 40, 44-45 (2009) (tracing the chronological state-by-state shift away from the traditional rules in contract and tort).

⁵⁵ See Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 515-516 (1983) (isolating the fields of contract and tort as areas in which it was difficult to identify rules); see also SYMEONIDES, *supra* note 54, at 33-35 for a classification of the different kinds of rules that were employed. Some are simple *rules*. For example, a number of issues relating to land—such as the validity and effect of a transfer of land, the devolution of interests in land upon death of the owner intestate, the legitimacy of an heir to inherit, the ability of an adopted child to inherit and the validity and effect of a will transferring interests in land—are determined by the law . . . of the situs.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223, 236, 237, 238, 239 (1971). Succession to movables and a number of related issues—the legitimacy of heirs, succession by adoptees and the validity and effect of a will—are determined by “the law . . . of the state where the decedent was domiciled at the time of his death.” *Id.* §§ 260-63. The law of the forum is applied to a large variety of issues of procedure. See *id.* §§ 124 (on the law governing the form of action); 126 (on the law governing service of process); 127 (on the law governing pleading and conduct of the proceedings); 129 (on the law governing the mode of trial), etc. The local law of the state of incorporation is applied to many issues concerning corporations—requirements for incorporation, termination or suspension of a corporation, and shareholder liability. See *id.* §§ 296, 299, 307. There are also a number of *default rules*. For example, section 146 provides that in an action for personal injury “the local law of the state where the

law, the Second Restatement requires an ad hoc analysis.⁵⁶ Thus, some sections open with the general principle that the issues will be “determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties”⁵⁷ The question how the law with the most significant relationship was to be identified was referred to “the principles stated in section 6.”⁵⁸

injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.” *Id.* § 146. For similar formulations, see *id.* §§ 147 (injury to tangible things); 148 (fraud and some cases of misrepresentation); 149 (defamation); 303 (who are shareholders); 304 (shareholder participation in management and profits); 306 (liability of majority shareholders). Still other *presumptive rules* simply indicate what the applicable law “will usually be” For examples of this type of rule in tort, see *id.* §§ 156–160. And in contract, see *id.* §§ 188, 198–199.

⁵⁶ SYMEONIDES, *supra* note 54, at 35.

⁵⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); see also *id.* §§ 208 (assignability of contractual right); 209 (validity of such assignments); 212 (discharge of contract without performance); 222 (the interest of parties in a thing). Sometimes a rule referring to the law with the most significant relationship then discusses which law this will “usually be.” See, e.g., *id.* §§ 283 (validity of marriage); 287 (legitimacy of a child).

⁵⁸ In some cases the reference adds that “[c]ontacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:” See, e.g., *id.* § 145, which specifies that in tort these contacts include

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- and (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. In contract, in the absence of choice by the parties, they include

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188.

Section 6 is thus central to the application of these rules. Moreover, its accompanying comment confirms that it serves as a background to the entire Second Restatement. This comment portrays the rules appearing in the Restatement as having evolved "in accommodation of the factors" listed in section 6; or, as the Reporter Willis Reese later explained, the factors listed there represent a set of values reflected in the rules. Section 6 gave precedence to local statutory directives on choice of law, subject to constitutional restrictions, but it then provided that in the absence of any such directive (and to this day there are few such statutory directives in the United States),

the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁵⁹

The comment stresses that these factors are not an exhaustive list; that they are not listed in order of their relative importance; that they are not all relevant in every case and that, in a given case, they may well point in different directions.⁶⁰ Thus regardless of whether or not it did in fact represent values reflected in the rules, section 6 encouraged a broadly discretionary approach to choice of law that completely undermined any sense that the area was governed by rules. The formula was evidently an unsystematic collection of pieces of different proposals, which both perverts many of the ideas it purports to adopt⁶¹ and is difficult to apply in

⁵⁹ *Id.* § 6.

⁶⁰ *Id.* § 6 cmt. c.

⁶¹ *See, e.g.*, SYMEONIDES, *supra* note 54, at 32 (discussing the deviation from what looks like Leflar's list of choice-influencing considerations and the deviation from what looks like Currie's policy analysis).

practice.⁶² Nonetheless, this too became a major source of inspiration for courts.

Since conflict of laws is a matter for state law in the United States, it is hardly surprising, given the range of methods available, that the states differ among themselves in the realm of conflict of laws. Fortunately, the remarkable eclecticism and the uneven distribution of choice of law methodology throughout the United States has been admirably and consistently recorded, most prominently by Symeon Symeonides, who publishes an annual survey of developments in conflict of laws and tabulates the labyrinthine geographical and subject matter distribution of the different methodologies as it changes from year to year.⁶³ It is difficult to do justice to the nuance and detail of his exhaustive analyses, but the most basic of his conclusions are sufficient for our purposes. It turns out that very few states adhere to the First Restatement (e.g., only about twenty percent of states still cling to the *lex loci contractus* and *lex loci delicti* rules) and that at least in contract and tort, most states have adopted some form of a new methodology.⁶⁴ Thus his latest survey shows that in both contract and tort, or in at least one of these fields, only fourteen states adhere to traditional rules; twenty-eight states have adopted the Second Restatement; six use the significant contacts methodology; two use governmental interest analysis; two use *lex fori* theories, five use better law theory and ten use a combination of modern methodologies.⁶⁵

Contrary to the premise of this Symposium, then, modern methodology inspired by Legal Realism has had a *major* influence on judicial decisions. So much so that even in those states that have not abandoned the First Restatement, the courts feel the need to engage with new approaches and to justify their decision *not* to adopt one.⁶⁶ Furthermore, at least in the areas of contract and tort, the traditional role of Restatements has been reversed from description to prescription, from a record of judicial trends to a confused record of scholarship, and its academically inspired formulae have

⁶² See Albert Ehrenzweig, *The "Most Significant Relationship" in the Conflict Law of Torts: Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROBS. 700 (1963) (urging discontinuation of the project); Arthur Taylor von Mehren, *Recent Trends in Choice of Law Methodology*, 60 CORNELL L. REV. 927, 928 (1975); see also Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521-552-562 (1982-1983).

⁶³ For a comprehensive account of the cumulative effect of the American conflicts revolution, see SYMEONIDES, *supra* note 54.

⁶⁴ Symeon C. Symeonides, *Choice of Law in the American Courts: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 282 (2014).

⁶⁵ *Id.*

⁶⁶ For examples of such cases, see William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196 (1997).

themselves turned into a kind of black-letter law in which concepts have been replaced by virtually unbounded discretion.⁶⁷

In contrast to its huge impact on courts in the United States, the vast and prolific American literature on choice of law methodology was widely read and widely cited by scholars, legislators, and courts outside the United States, but was wholeheartedly and unequivocally rejected by them.⁶⁸ While many of the concerns that had troubled American Realists troubled other legal systems too, these systems responded not by rejecting the traditional model but by re-forming it.

Recognition of the local source of choice of law rules combined with both the challenges of technological change and the understanding that private law is a social tool to encourage each state to adapt local choice rules to local values and changing circumstances. Theoretical attention was devoted to the problem of identifying the place of contracting for contracts formed in increasingly technological and non-territorial ways, and the place of a tort for conduct that increasingly produces remote and widespread damage. The appropriateness of the place of the contract or the place of the tort as dominant connecting factors was itself questioned as the function and emphasis of both contract law and tort law changed.

At the same time, traditional rules were modified to provide solutions to the problems of blindness to content and rigidity. Promotion of *substantive concerns* was addressed by rules offering alternative connecting factors. These rules come in a variety of formats.⁶⁹ For example, validation of contracts and wills is promoted by allowing their formal validity to be controlled by any of a number of laws.⁷⁰ Protection of consumers from dangerous products is promoted by allowing the plaintiff to choose which of the alternative laws offered should govern.⁷¹ Financial support for family

⁶⁷ For the effect of scholarship on recent state codification, and thus also on doctrine, see SYMEONIDES, *supra* note 54, at 116-121.

⁶⁸ Examples are too many to mention. Any textbook from a common or civil law system outside the United States can be relied on to include a discussion, and a rejection, of the American revolution.

⁶⁹ For an early American proposal in this direction, see LORENZEN, *supra* note 5, ch. 9.

⁷⁰ See, e.g., Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 11, 2008 O.J. (L 177) 6, 13 [hereinafter Rome I] (incorporating the rule recognized in many systems in this regard); see also Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961, 510 U.N.T.S. 177 (validating a disposition that complies with any one of a number of laws).

⁷¹ See, e.g., EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [EGBGB] [INTRODUCTORY LAW TO THE CIVIL CODE], Aug. 18, 1896, BUNDESGESETZBLATT [BGBL.] 2494, as amended, art. 40, para. 1 (Ger.) [hereinafter GERMAN EGBGB] (on tort); LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [SWISS FEDERAL CODE OF

members can be guaranteed by directing that as between a number of alternative laws, that which provides support should apply.⁷² Accessibility of divorce can be promoted by allocating residual application to local grounds for divorce.⁷³

Substantive concerns can also be promoted by creating special choice of law rules. Many of the problems that plagued American case law arose in special categories of contract and tort such as consumer contracts, employment contracts, insurance contracts, and product liability. In the United States, these emerging issues appeared to underscore the need for detailed policy and governmental interest analyses in order to avoid the mechanical nature of traditional rules built on large categories such as contract and tort. Outside the United States, these concerns produced special legislative rules. The European Regulation dealing with choice of law in contract (Rome I) has special rules for choice of law in contracts of carriage, consumer contracts, employment contracts and insurance contracts.⁷⁴ Similarly, the European Regulation on choice of law in non-contractual obligations (Rome II) includes special rules for product liability, for damage caused by unfair competition and acts restricting free competition, for environmental damage, for infringement of intellectual property rights, and for damage caused by industrial action.⁷⁵ These are regional uniform choice rules that replicate and confirm existing trends in the member states.⁷⁶ The Hague Convention on the Law Applicable to Traffic Accidents⁷⁷ is another example of special choice of law rules adapted to a specific area of law for which the general choice of law rule is not sufficiently nuanced.

PRIVATE INTERNATIONAL LAW], Dec. 18, 1987, RO 1776 (1988), art. 135 (Switz.) [hereinafter SWISS CPIL] (on product liability).

⁷² See, e.g., Council Decision 2009/941/EC on the Conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, Annex, art. 4, paras. 3–4, 2009 O.J. (L 331) 17, 19.

⁷³ See, e.g., Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969 (as amended in 2009), 23 LSI 151, § 5 (1969) (Isr.) (referring to a number of alternative laws and finally providing, as a residual rule, divorce by consent, i.e., a special substantive forum rule).

⁷⁴ Rome I, *supra* note 70, arts 5–8, pp. 11–13.

⁷⁵ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), arts. 5–9, 2007 O.J. (L 199), 40, 44–45 [hereinafter Rome II].

⁷⁶ See, e.g., GERMAN EGBGB, *supra* note 71, arts. 29 (consumer contracts), 30 (employment contracts), as they were prior to Rome I, *supra* note 70; see also SWISS CPIL, *supra* note 71, arts. 120 (consumer contracts), 121 (employment contracts), 134 (claims arising from traffic accidents), 135 (product liability), 136 (unfair competition), 139 (infringement of personality rights), 141 (direct actions against insurers).

⁷⁷ May 4, 1971, 965 U.N.T.S. 416.

Flexibility has also been incorporated into existing rules—most notably in the form of exceptions. Some of these exceptions are fixed—in both the circumstances in which they can be invoked and the direction in which they permit deviation. Thus, for example, the “common domicile” exception to the choice of law rule in torts recently adopted by the member states of the European Union is indifferent to the consequences of applying that law and is limited to a specific constellation of facts—that the parties involved have a common home.⁷⁸ Other exceptions are more flexible and discretionary, both in the circumstances in which they may be invoked and in the direction in which they permit deviation. The statutory English choice of law rule in torts applies “the law of the country in which the events constituting the tort . . . occur” and then provides that

[i]f it appears, in all the circumstances, from a comparison of—(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and (b) the significance of any factors connecting the tort or delict to another country, that it is substantially more appropriate for the applicable law . . . for any . . . issues, to be the law of the other country, the general rule is displaced and the applicable law . . . is the law of that other country.⁷⁹

German law contains a number of similar exceptions.⁸⁰ The European Regulations in contractual obligations (Rome I) and in non-contractual obligations (Rome II) include similar formulations indicating that when it is clear from the circumstances of the case that the contract or tort is more closely connected with a country other than that indicated by the rule, the law of that other country shall apply.⁸¹ So, too, the Swiss Federal Code of Private International Law includes a broad and flexible exception for all cases (excepting only those where the designated law has been chosen by the

⁷⁸ See, e.g., GERMAN EGBGB, *supra* note 71, art. 40, para. 2; Rome II, *supra* note 75, art. 4 para. 2; see also SWISS CPIL, *supra* note 71, art. 133, para. 1 (appearing as the rule, rather than an exception).

⁷⁹ Private International Law (Miscellaneous Provisions) Act, 1995, c. 42, §§ 11–12 (U.K.). Section 12 continues and provides a nonexhaustive list of factors that may be taken into account as connecting a tort to a country.

⁸⁰ See, e.g., GERMAN EGBGB, *supra* note 71, art. 46 (dealing with property and providing that, “[i]f there is a substantially closer connection with a law of a country other than that applicable under arts . . . then the law of that other country shall apply”); see also *id.* art. 41 (dealing with torts and adding that “[a] substantially closer connection may be based in particular on . . .”).

⁸¹ See Rome I, *supra* note 70, art. 4, para. 3; see also Rome II, *supra* note 75, art. 4 para. 3 (providing further that a pre-existing relationship between the parties might indicate such a connection).

parties). It provides that the designated law will not be applied in those “exceptional situations where, in light of all circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law.”⁸² All these provisions give the court flexibility and discretion to deviate from the rule. At the same time, they are exceptions, and not the rule, and in order to invoke them, the court has to explain clearly the grounds for deviation and why the law they choose to apply is more closely connected. Notably, none of the exceptions permits the court to decide on the basis of substantive preferences.

American scholarship was no more influential on the theoretical level. The enormous intellectual effort invested in discrediting the theory of vested rights and establishing the local source of choice of law principles was considered neither necessary nor helpful in the task of rationalizing and developing choice of law.⁸³ It was readily acknowledged that the source of rules is local; that the forum might have legitimate concerns that blind, evenhanded, multilateral jurisdiction-seeking rules are unable to accommodate; and that the categories of procedure and public policy ought to be minimized and used with caution, so as to reduce ad hoc manipulation and forum preference. But scholarship outside the United States focused more explicitly on explaining and regulating the forum advantage and its implications. Rather than discarding multilateralism and all it implied, this scholarship sought to provide a systematic framework for developing complementary tools that would, on the one hand, permit the forum to promote its own interests and values in a controlled way and, on the other, take into account the interests of other states.

The various strands of unilateralist literature proved a fruitful source of inspiration. Extreme unilateralism, holding that no sovereign has the power (or the authority) to control the scope of application of any law but its own,⁸⁴ is unable to constitute an entire system of choice of law. Unilateral

⁸² SWISS CPIL, *supra* note 71, art. 15.

⁸³ While Cook is routinely cited both in common law and civil law sources for his monumental work, the contemporary French scholar Arminjon is cited in the same breath. *See, e.g.*, J.H.C. MORRIS, *THE CONFLICT OF LAWS* 508 (3d ed. 1984) (citing Arminjon alongside Cook and Lorenzen). In general, the significance of Cook's intellectual achievement is minimized. Morris regarded his theory as sterile and pointed out that once it is understood that choice of law rules have a local source, grinding the theory of vested rights and territorialism into the dust is not essential to the construction of a rational system of choice of law. *Id.* at 512; *see also* Yntema, *supra* note 7, at 315-16 (noting the sterility of Cook's work as well as his apparent lack of awareness of developments in political and legal theory regarding sovereignty and of the decline of vested rights doctrine in European scholarship, most prominently that of Savigny).

⁸⁴ This view, originating with Wächter, formed the basis of the choice of law rules of the German Civil Code of 1900. *See* Carl Georg von Wächter, *Über die Collision der Privatrechtsgesetze*

rules that delineate the scope of application of forum law identify the situations in which forum law will apply, but they provide no guide when forum law does not apply, and when either no other law wishing to apply—or more than one such law—is found. Nonetheless, this literature recognized the importance of policy in private law and the difficulty of determining its application in a formal, abstract, evenhanded way. Similarly, the literature promoting the possibility of immediate application, or mandatory rules—the idea that rules embodying policies of signal social, economic or political importance could not be subjected to multilateral choice rules and might require that the possibility of applying foreign law be ruled out altogether⁸⁵—was of limited scope since such rules are rare. But this theory developed a political foundation for identifying situations in which it might be justified to abandon multilateral choice rules and require application of forum law alone.

Discussions such as these paved the way towards a reconceptualization of choice of law as a *process*, which, rather than rejecting multilateral egalitarian choice rules altogether, simply delays their application: they are brought into effect only after legitimate local concerns have been exhausted. Local concerns can be expressed in a number of ways: through special substantive rules designed only for foreign cases;⁸⁶ through mandatory rules that can never be deviated from; and through unilateral scope definitions for select rules. Formulation of all these rules requires and justifies special attention to substance since they each depend on particular social or economic policies. But once these special local substantive concerns are guaranteed, traditional abstract, content-blind choice of law rules can be

verschiedener Staaten, 24 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 161 (1842). It was further developed by other scholars in Europe, more recently and fully by Gothot in Belgium. See Pierre Gothot, *Le renouveau de la tendance unilatéraliste en droit international privé*, 60 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1, 209, 415 (1971). It is somewhat different from Currie and Ehrenzweig's view that the forum should generally apply its own law. Nonetheless Ehrenzweig was clearly influenced by continental scholarship.

⁸⁵ For major contributions to this literature in chronological order, see P. Graulich, *Règles de conflit et règles d'application immédiate*, 2 MÉLANGES JEAN DABIN 629 (1963); Ph. Francescakis, *Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois*, 55 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (1966); Ph. Francescakis, *Y-a-t-il de nouveau en matière d'ordre public?*, TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ, 1966-1969 (1970); J. KARQUILLO, *ÉTUDE DE QUELQUES MANIFESTATIONS DES LOIS D'APPLICATION IMMÉDIATE DANS LA JURISPRUDENCE FRANÇAISE EN DROIT INTERNATIONAL PRIVÉ* (1977).

⁸⁶ These would constitute a modern form of the Roman *ius gentium*, which provided a set of private law rules for non-Romans, parallel to those of the *ius civile* that were originally for the exclusive use of Roman citizens. J. INST. 1.2.1.

employed. This evenhanded multilateral tool is thus postponed to the last stage of the choice of law process.

It is, however, significant that the legitimacy of unilateral policy considerations did not lead to an automatic forum advantage but rather promoted an openness to the specific interests implicit in foreign law. Recognizing the policy implications of private law rules challenges the traditional assumption that choice of law deals only with private law and that private and public law are clearly distinct. This in turn undermines the traditional assumption that public law is territorial in scope and enforced only territorially (in its own home by its own sovereign), and that as a result, it is never possible to apply foreign public laws—for example, rules that a foreign sovereign might regard as mandatory. Scholars began to consider if and when such foreign mandatory rules might be incorporated in a multilateral choice of law scheme. While originally arousing enormous opposition, this issue has recently been addressed in codification and in the EU regulations, which now admit the application of foreign mandatory laws in certain circumscribed circumstances.⁸⁷

Thus, just as in the United States, the “nationalization” of choice of law undermined the characteristics of traditional choice rules that stifle the individual social and legal character of each society and prevent substantive consideration of choice problems. But while American scholarship encouraged the courts to reject rules and engage in discretionary case-by-case analysis, focusing on state interests and policies, other systems developed a systematic multi-stage choice process which incorporated a range of tools, each adapted to maximizing a different local or international concern. Some of these tools were developed and proposed in the United States too: Ehrenzweig and Currie can to some extent be identified with unilateralism; Lorenzen was an early proponent of alternative choice rules; Justice Fuld’s proposal in *Babcock v. Jackson* was merely to permit an exception to the rule, and in his later judgments he tried to formulate limits to that exception.⁸⁸ Nonetheless, these were never incorporated into a systematic model for coping with both the private and the public internal and international aspects of choice of law.

There were a number of good reasons for rejecting the new learning outside the United States. Perhaps the most obvious is the incompatibility of unrestrained judicial policy analysis with non-American legal traditions. In civil law systems, judges are not entrusted with the development of doctrine and although they have broad powers of interpretation, they are

⁸⁷ See, e.g., SWISS CPIL, *supra* note 71, arts. 18–19; Rome I, *supra* note 70, § 9; Rome II, *supra* note 75, art. 16.

⁸⁸ See *infra* note 97.

confined by the conceptual structure of systems in which rules tend to be codified, or at the very least legislated.⁸⁹ Despite the influence of *Interessenjurisprudenz*, systematic and analytical thinking are still highly regarded as guarantees of predictability and neutrality, and discretion tends to be far more limited than in the common law. Even in common law countries outside the United States, where judges do have an acknowledged role in developing the law, the traditional supremacy of the legislature and the preference for procedural rather than substantive justice constrain the free exercise of discretionary judicial power.⁹⁰ So, too, it is often said that the American methodologies may be appropriate for the type of conflict that is most characteristic in the United States—namely, interstate conflicts—because, on the one hand, there is a degree of cultural similarity between the states, and on the other, there are political constraints to state power and built-in mechanisms for cooperation. By contrast, these methods are not appropriate for international conflicts, which are the main focus of private international law in the rest of the world.⁹¹

Whatever the reasons for rejecting the American revolution outside the United States, it is perhaps more significant that, even within the United States, the influence of the conflict of laws revolution was never uniform, its extent has always been controversial, and it is apparently now waning.

Few scholars were able successfully to challenge the great iconoclasts, and since the second generation of scholars, discourse has been largely dominated by debate over the new methodologies. Nonetheless, the

⁸⁹ France is exceptional in the area of conflict of laws, which was developed almost exclusively by the courts. For a discussion of more general judicial creativity and innovation in France, see MITCHEL DE S.-O.-L'É. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004). Nonetheless, judicial discretion is not a traditionally recognized tool.

⁹⁰ See, e.g., P. S. ATIYAH AND R. S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987) (demonstrating the English preference for procedural justice).

⁹¹ While it may be appropriate for one American state to evaluate the policies of another—where there is a large degree of cultural similarity and an overarching constitution to prevent overreaching—the political sensitivity of such judicial behavior is greater in the international arena where cooperation and conventions are the only form of constraint. Nonetheless, if this methodology is appropriate for interstate problems it is curious that it was not adopted, at least for those problems, in other multi-system unions such as Canada, Australia, Germany and Switzerland. Quite apart from considerations of legal tradition, it is noteworthy that in all these countries, unlike the United States, the conflict of laws is part of federal law or of general common law. If this factor affects the appropriateness of discretionary policy analyses, the conflict of laws might have developed differently in the United States had the area been recognized as common or federal law. In this context it is perhaps significant that, in a number of fields, the European Union, where there now are overarching constraints, has chosen to adopt uniform (i.e., common) choice rules in the traditional form (with some degree of flexibility) rather than a more discretionary methodology.

voluminous literature on conflict of laws in the second half of the twentieth century was devoted to scathing analysis and criticism of each of the methodologies and the cases that purported to apply them. Even the Second Restatement, with its curious mix of methods, attracted as much criticism as had its predecessor three decades earlier.⁹²

So, too, in the courts, no one methodology was ever adopted by a majority of states. Indeed it is difficult to classify the leaning even of any individual state.⁹³ This is due partly to the fact that methodologies vary over different areas of law, and partly—perhaps more importantly—to the fact that the use of the various methodologies available is eclectic. Courts do not engage in one rigorous theoretical analysis, but rather employ a mix of terminology and tools, often misusing them and even subverting their original intent. For example, the courts may claim to be using Currie's governmental interest analysis, but then, contrary to his principles, they weigh the interests of competing states.⁹⁴ The general sense seems to be that courts employ the rhetorical tools provided by academic discussions in order to justify reaching what they perceive to be the best result.⁹⁵ Ironically, this type of decisionmaking is exactly what realist scholarship criticized about the First Restatement.⁹⁶

Furthermore, the new methodologies have only been significantly employed in the fields of contract and tort. In other areas, courts generally follow the orthodoxy of the First Restatement, reproduced in many of the rules of the Second Restatement. Even in contract and tort, some of the newly converted judges attempted quite early on to formulate new rules. In *Tooker v. Lopez*, Justice Fuld—concurring with the majority opinion that, since *Babcock v. Jackson*, the case law had been inconsistent—suggested that the time was ripe to formulate rules that would embody the policy analyses performed in a number of cases.⁹⁷ In recent years, courts are making ever

⁹² See *supra* note 57 and accompanying text.

⁹³ See SYMEONIDES, *supra* note 54, at 66-69. Symeonides further suggests that methodology is irrelevant to results. *Id.* at 70. Nonetheless, he defends the attempt to classify states according to the methodology they employ. *Id.*

⁹⁴ See SYMEONIDES, *supra* note 54, at 68.

⁹⁵ *Id.*

⁹⁶ It is similarly ironic to note how many of the terms used by Currie to excoriate traditional conceptual thinking—"irrational," "hypnotic," "mystical," "intoxicating," "spurious," "futile," "arbitrary," "a field of sophism, mystery and frustration"—apply to the newer methodologies, including Currie's own. For a fuller list of terms used by Currie to describe traditional conceptual thought, see MORRIS, *supra* note 83, at 516.

⁹⁷ See 249 N.E. 2d 394, 403-04 (1969) (Fuld, J., concurring). Judge Fuld repeated his suggestion as Chief Judge in *Neumeier v. Kuehner*, 286 N.E.2d 454, 456 (1972), after acknowledging the difficulty involved in identifying policies and recognizing that the Ontario policy behind the guest statute was not what had been assumed in *Babcock v. Jackson*.

more explicit and conscious use of the default rules proposed in the Second Restatement.⁹⁸ Many courts still exploit the rhetoric of the new methodologies, but many scholars now frankly acknowledge that the revolution has reached a dead end and advocate a return to more traditional methods in conflict of laws, including codification of bounded discretionary rules.⁹⁹

The reason for all this appears to be quite simple: the proliferation of academic and judicial theories was unable to provide a systematic response to many of the emerging concerns and, more importantly, it produced confusion and a daunting sense of complexity. In 1988, Erwin Griswold bemoaned the fact that “the coherence of the field of conflict of laws was rapidly being demolished by the effect on the courts of the negative approaches” of scholars such as Cook, Lorenzen and Currie, and he continued:

These writers had shown well enough that the orthodox approach of the nineteenth century was not inevitable, but they had not provided a workable substitute which would guide conflict of laws decisions by some sort of a rational approach. . . . The net result has been, in my view, a kind of chaos in much of the conflict of laws field¹⁰⁰

In 1996 Justice Scalia described interest analysis as having “laid waste the formerly comprehensible field of conflict of laws.”¹⁰¹ One court, rejecting the Second Restatement, referred to a Wisconsin case that described it as a “method of analysis that permit[ted] dissection of the jural bundle constituting a tort and its environment,” and continued:

That sounds pretty intellectual, but we still prefer a rule. The lesson of history is that methods of analysis that permit dissection of the jural bundle

⁹⁸ For a description of this phenomenon, see Patrick J. Borchers, *The Emergence of Quasi Rules in U.S. Conflicts Law*, 12 Y.B. PRIVATE INT'L L. 93, 100 (2010) (“Important state high courts have recently eschewed a purely open-ended approach in favor of one that begins with the applicable quasi rule of the Second Restatement.”).

⁹⁹ See, e.g., SYMEONIDES, *supra* note 54, at 423ff.; Ralf Michaels, *After the Revolution—Decline and Return of U.S. Conflict of Laws*, 11 Y.B. PRIVATE INT'L L. 11, 29-30 (2009). It is interesting that the sense of disillusionment recorded in much of the modern scholarship has reawakened interest in the more evolutionary approach of other systems of conflicts and produced a willingness to consider other options, as evidenced in both Michaels's and Symeonides's work. Early American conflicts scholars routinely included comparative analyses. See, e.g., LORENZEN, *supra* note 5; Griswold, *Renvoi Revisited*, *supra* note 3. Since the middle of the twentieth century, however, scholars in the United States have largely ignored foreign conflicts thinking. Perhaps it is not coincidental that both Symeonides and Michaels received their initial legal training in civil law countries.

¹⁰⁰ Griswold, *David F. Cavers*, *supra* note 3, at iv; see also Richman & Riley, *supra* note 66, at 1203-06 (listing reasons given by courts for preferring the First Restatement).

¹⁰¹ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting).

constituting a tort and its environment produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply. . . . [W]e generally eschew the more strained escape devices employed to avoid the sometimes harsh effects of the traditional rule. Nevertheless, we remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. . . . We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today.¹⁰²

Legal Realism had revealed some elementary truths: it is not always good to be content-blind; it is not always good to be rigid; it is not always good to be multilateral and egalitarian. But the “high legal purpose” of realist thinking produced “low legal analysis” in conflicts law.¹⁰³ The total rejection of conceptual thinking destroyed the field it was supposed to save¹⁰⁴ and frustrated the basic expectation of lawyers, judges, and the general public that law provide a minimal degree of certainty and predictability.¹⁰⁵ The retreat from discretion towards more structured tools reflects the shortcomings of second-generation conflicts scholarship.

In the light of the proposition at the basis of this Symposium—that Legal Realism had far less an impact on practice than might have been expected given the education of most legal practitioners—it is curious that conflicts scholars had as much influence as they appear to have had in the United States. The judges who introduced these analyses were educated during the heady time when Legal Realism was emerging. They were students of the *fons et origo* of the trenchant scholarship that dramatically exposed the doublespeak of conceptual thinking. But if a realist education

¹⁰² Paul v. Nat'l Life, 352 S.E.2d 550, 554-56 (W. Va. 1986)

¹⁰³ BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 22 (1983) (discussing Realism in general).

¹⁰⁴ See Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1407 (1996). The past half-century has also witnessed a striking decline in interest in the conflict of laws in the United States. I am told that conflict of laws courses are taken by far fewer students today. There are far fewer articles on conflicts, they rarely appear in major journals, and they are far less innovative than those published in the first three quarters of the twentieth century. So, too, the tone of much of today's literature is less strident, less urgent, and less impassioned. Recent literature confirms that the vigor and thrill have gone out of the field and that revolutionary zeal has declined.

¹⁰⁵ See Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, (2015) (discussing the fundamental necessity of concepts in law and their inherent adaptability to change). Balganesh and Parchomovsky focus on the role of concepts in the development of the common law, but of course the centrality of concepts has always been recognized as the genius of the civil law too.

did not have this effect in other areas, why did it in conflict of laws, and why was its impact limited to the fields of contract and tort? These two issues may be related to the special nature and status of conflict of laws, as well as to the tone and focus of Legal Realism.

Until the First Restatement, the area of conflict of laws had barely been taught in American law schools and the subject was not extensively discussed in the literature. Few judges would have had sufficient knowledge and imagination to be able to challenge an overwhelming wave of sophisticated iconoclastic writing and teaching. In addition, the enthusiasm and originality of the new scholarship must have been infectious, encouraging judges to become part of what looked like a march towards enlightenment. Furthermore, the prominence of the first-generation scholars and their writing, as well as the tone of their debates, may well have created a climate in which it was no longer conceivable or respectable to resort to abstract conceptual rules. "Doctrinalism" was regarded not simply as foolishness, but rather as sacrilege, and the high priests of Realism and their writings served as powerful intimidation against anyone who contemplated heresy.¹⁰⁶

Perhaps more importantly, conflict of laws is an area of law uniquely conducive to demonstrating the major premises of Realism. First, choice of law is the area that, more than any other, reveals the relativity of rights. A right granted by one state will not necessarily be recognized and enforced in another. It is thus meaningless to say that X has a right. The most that can be said is that X has a right under the law of State A, or that X has a right (under the law of State A) that will be recognized and enforced by State B. In this light, the conflict of laws demonstrates one of the central tenets of Realism—that there is no such thing as a "right."¹⁰⁷ Second, as a set of

¹⁰⁶ The tone of twentieth-century conflicts scholarship was clearly part and parcel of Legal Realism. Gilmore provides a telling description of the way traditional legal thinking was treated when he was at law school: it was "held up to scorn," "pilloried as nonsensical," and its theorists were "caricatured as simpleminded reactionaries." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 87 (1977). Ackerman describes how any attempt to map the common law became the object of "realist ridicule" and was seen as "a symptom of personal immaturity," a kind of intellectual cowardice. ACKERMAN, *supra* note 103, at 12. Herma Hill Kay provides an equally telling image in the specific realm of conflicts when she quotes Chief Justice Traynor referring to traditional thinking as the "Dark Age," and the realist critique as an "*avant garde* . . . against the idol with clay feet and a wooden head." Kay, *supra* note 11, at 785. This kind of intellectual intimidation is, of course, not unique to Realism and accompanies many academic trends, but it has some explanatory value.

¹⁰⁷ See Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) ("[A] right is only the hypostasis of a prophesy . . . that the public force will be brought to bear . . ."). It is surely not coincidental that some of the foremost realists were conflicts scholars. Nor should it be surprising to discover that Hohfeld developed his fundamental legal conceptions while teaching conflict of laws. See LLEWELLYN, *supra* note 4, at 492 ("And it was amid the conflict of the laws

formal rules about rules and when they apply—rather than rules about human conduct—choice of law rules are a perfect representative of the classical legal thought that Realism sought to destroy. Their use of abstract legal concepts embodied the idea of the autonomy of law, the idea that private and public law are clearly distinct, the idea that private law is value-neutral and free of political considerations, the Langdellian idea that law is a unified set of legal principles reflecting doctrinal order, and the integrationalist idea expressed in *Swift v. Tyson*¹⁰⁸ that there is a common set of rules binding all states. As such, choice of law served as a perfect model for demonstrating that categories are easily manipulable, that the distinction between private and public is empty, that judges have myriad paths for subterfuge, that the vastly differing fact situations cannot be reduced to black-letter rules and must each be treated independently, and that there is no common set of rules—each state develops and applies its own law. Few other fields were as well suited to the realist project.¹⁰⁹

It was, however, the second generation of scholarship that best explains the dramatic impact of Realism on judicial thinking in the area of conflict of laws. The new academic methodologies may have been difficult to apply, but they offered more than the simple insight that judges are not guided solely by rules, and more than a general prescription to be explicit about the facts and the policies affecting judicial decisions. They seemed to offer concrete ways in which judges could present their decisions as rational, objective and based on relevant considerations.¹¹⁰ Justice Traynor, a central figure in conflicts thinking, widely regarded as one of the two most influential common law judges of the twentieth century,¹¹¹ explained the appeal of the academic:

that he worked out in their completeness the massive outlines of his jurisprudence. It was in that crucible of conflict that his fundamental concepts took their final shape.”). For a similar view, see Walter Wheeler Cook, *Hohfeld’s Contributions to the Science of Law*, 28 *YALE L.J.* 721, 738 (1919) (“Undoubtedly, [Hohfeld’s] studies in the conflict of laws led him to see more clearly than ever the necessity for a careful analysis of fundamental conceptions . . .”).

¹⁰⁸ See 41 U.S. 1, 16 (1842).

¹⁰⁹ The conflict of laws was so perfect an example of what Legal Realism sought to discredit that Jerome Frank mockingly referred to the fundamentalist conceptualism of the legal profession as a whole as “Bealism.” See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 177 (1992) (quoting JEROME FRANK, *LAW AND THE MODERN MIND* 397 (1930)).

¹¹⁰ See SYMEONIDES, *supra* note 54, at 91–92 (suggesting a number of reasons for the success of the Second Restatement).

¹¹¹ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 591 (1973) (citing Cardozo and Traynor as the two central common law judges of the twentieth century who transformed American private law, each of whom was influenced by Realism in different ways); see

[I]n Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts in the *Restatement* have been shattered by the devastating attacks of Cook and Lorenzen The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage He has a better chance to arrive at the least erroneous answer if the scholars have labored in advance to break ground for new paths.¹¹²

The fortuitous fit between choice of law rules and the realist project also suggests why the impact of the methodological revolution was limited to the areas of contract and tort. These two fields were areas of huge growth and development during the twentieth century. They are the fields in which technological, social and economic changes posed the greatest challenge to traditional choice of law rules all over the world. With changing ideas about the foundations of contract law and of tort law, one simple rule pointing to the place of contracting or the place of conduct could not contend with problems arising from modern communications and modern industry. Not coincidentally, contract and tort were also central to the realist critique of law, and thus constituted a perfect laboratory for realist experiment.¹¹³

In this sense, the conflicts revolution seems to have had far more to do with Realism than with conflict of laws and, having failed to live up to its great promise, it is not altogether surprising that the revolution is dying a slow death. Once released from the tyranny of Realism, American choice of law will be free to use the insights of Legal Realism to develop new doctrine that is both sensitive to substantive concerns and flexible, without being totally discretionary.

also HORWITZ, *supra* note 109, at 189. On Traynor's contribution to choice of law, see Kay, *supra* note 11.

¹¹² Roger J. Traynor, *Law and Social Change in a Democratic Society*, U. ILL. L.F. 230, 234-35 (1956).

¹¹³ Property was another focus of realist thinkers, but the persuasive power of the choice of law rule assigning control of property rights to the law of the *situs* is enormous, and it survived the conflicts revolution largely unscathed.