

Conflicting Justice in Conflict of Laws

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ABSTRACT

Choice-of-law rules determine which national law (not necessarily that of the forum) applies in private law matters that cross over multiple jurisdictions. Given the ubiquity of interpersonal cross-border relations, choice-of-law rules play an enormous role in securing justice in the transnational social realm. For example, they determine whether individuals can recover retirement benefits from worldwide investments through pension funds, whether they can receive compensation following an accident abroad, or whether their foreign marriages, divorces, adoptions, or support orders will be recognized or invalidated at home.

Yet the legal field of conflict of laws has always been divided between two theoretical paradigms known as “conflicts-justice” and “material-justice,” such that a unified view of justice in the transnational realm has remained elusive. It has long been assumed that contrary to material-justice theories, conflicts-justice theories are disinterested in the actual substantive result of a dispute reached through the application of choice of law rules. It is presumed that from a conflicts-justice perspective, choice-of-law rules are thought to ensure justice simply by identifying the proper geographical link between the individuals or the action and the state whose law is applied. This Article shows that these assumptions are the result of deep misunderstandings about the analytical premises of conflicts-justice theories. Through a detailed account of the intellectual history of theories of justice in conflict of laws in the second half of the twentieth century, this Article argues that the conflicts-justice and material-justice theories are in fact complementary, and that their different insights work in tandem to secure justice

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for cross-border private law matters. It further shows that, contrary to widespread assumptions by scholars and judges alike, the two theories lead to the same results in some of the most controversial tort law scenarios.

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I. INTRODUCTION

Choice of law, one might say, deals precisely with what its name indicates. As the main subfield of conflict of laws (alongside rules of international jurisdiction, recognition, and enforcement of foreign judgments), choice-of-law rules are meant to “choose” the applicable law (not necessarily that of the forum) in private-law matters that have connections to multiple jurisdictions. For example, choice-of-law rules determine which tort law applies when an accident occurs in a different jurisdiction from the one in which one or both parties are domiciled, or which contract law applies when an agreement is made in one jurisdiction but performed in another.

Contrary to this apparent simplicity of the purpose of choice-of-law rules, the mere bread and butter of the field—settling conflict of laws—is enmeshed in a much broader conflict of theories of justice.

This should not be entirely surprising. As Arthur von Mehren pointed out,

neither justice nor acceptance by those affected by a rule's application or institution's operation is fully achieved where the legal, social, and economic units involved do not coincide [T]o the extent that the persons affected belong to different communities and these communities do not share the same values and purposes, the sociological and political bases for acceptance of a rule's application or an institution's operation are significantly diminished.¹

Given these challenges posed by transnational legal matters, it is only to be expected that much conflict-of-laws theory would be developed with an aim to achieve justice in the transnational realm. What is more surprising is that conflict of laws developed two broad theories of justice that are generally considered as entirely distinct and potentially irreconcilable, although they often lead to very similar results.²

The “theory war” is between “conflicts-justice” (favored primarily in jurisdictions outside the United States) and “material-justice” (favored to a greater extent in the United States).³ According to conventional wisdom, the former is “preoccupied with choosing the proper *state* to supply the applicable law, rather than directly searching for the proper *law* or, much less, the proper *result*.”⁴ For example, within a conflicts-justice paradigm the law of the place where the tort occurred determines the rights and liabilities of the parties, regardless of whether it grants a remedy. In other words, under a conflicts-justice paradigm, “propriety is defined not in terms of the content of that law or the quality of the solution it produces, but rather in geographical or spatial terms.”⁵ Conflicts-justice insists that “[w]hat is considered as the best law according to its content, that is, *substantively*, might be far from the best *spatially*.”⁶ In other words, conflicts-justice insists that applying a law that seems most just in substantive terms could still be unjust if the law is in no meaningful way connected to the dispute and the parties. As a prominent conflicts-justice theorist put it, “the reasons why children inherit from their father are different from the reasons why they inherit from him

1. Arthur Taylor von Mehren, *Choice-of-law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 29–30 (1977).

2. For a detailed overview of the assumed divergences between the two perspectives, see Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631 (2005).

3. See *id.* at 1633.

4. Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM 125, 126 (P. Borchers et al. eds., 2001).

5. *Id.*

6. Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91, 184–85 (1964) [hereinafter Kegel, *The Crisis*].

according to the law of his last state of citizenship.”⁷ This is precisely what “material-justice” rejects. According to this view, the justice of applying a particular law can only be measured in substantive rather than geographical terms.⁸ In some versions of this view, for example, it is asserted that only the law that grants recovery to the plaintiff (whether or not this is the law where the act or injury occurred) can justly apply in a tort dispute connected to multiple jurisdictions.⁹

The “theory war” between the two perspectives reached its apex in the mid-twentieth century when two variations of conflicts-justice and material-justice theory crystalized on both sides of the Atlantic. In the United States, the so-called American conflicts revolution rejected any trace of conflicts-justice thinking.¹⁰ Brainerd Currie, the main protagonist of the revolution, developed a variation of material-justice theory known as “state interest analysis.”¹¹ According to this perspective, judges confronting a choice-of-law question should first ascertain the scope of the policy underlying the rules in conflict.¹² This analysis could reveal either a “false conflict” (i.e., only one state is interested in extending its regulatory policy to the transnational case), a “real conflict case” (both states are interested in having their laws applied in a transnational case), or an “unprovided-for case” (neither state is interested in having its law applied).¹³ In “real conflict cases” as well as “unprovided for cases,” the forum would apply its own law.¹⁴

On the other side of the Atlantic, the American conflicts revolution was received with much skepticism.¹⁵ In Germany, Gerhard Kegel became the main defender of conflicts-justice theory in response to

7. KLAUS SCHURIG, KOLLISIONSNORM UND SACHRECT: ZUR STRUKTUR, STANDORT UND METHODE DES INTERNATIONALEN PRIVATRECHTS 315 (1981).

8. See E. Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 YALE L. J. 736, 748 (1924) (“If the situation is one admitting of the application of ‘foreign’ law, the choice of the rule to be applied will be determined again in many instances by general social or economic considerations.”).

9. See Weinberg, *supra* note 2, at 1664.

10. See David Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 177 (1933) (distinguishing between “norm-selecting” and “result-selecting” theoretical perspectives) [hereinafter Cavers, *A Critique*].

11. See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1961) [hereinafter *SELECTED ESSAYS*].

12. *Id.*

13. For a helpful exposition of Currie’s methodology, see Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) [hereinafter *Married Women’s Contracts*].

14. See *id.* at 262.

15. For a detailed discussion of the way in which European scholars perceived Currie’s theory, see ALEX FLESSNER, *INTERESSENJURISPRUDENZ IM INTERNATIONALEN PRIVATRECHT* 6 (1990); see also Erik Jayme, *The American Conflicts Revolution and the Impact on European Private International Law*, in FORTY YEARS ON: THE EVOLUTION OF POSTWAR PRIVATE INTERNATIONAL LAW IN EUROPE 15, 15–27 (1990). For a positive reception of the American material-justice theories in Europe, see generally Christian Joerges, *ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS* (1971).

Currie's interest analysis methodology.¹⁶ Much like Currie, Kegel argued that choice-of-law rules must balance and attempt to reconcile different interests. However, Kegel argued that in conflict of laws "different interests, namely the interests of the parties, of commerce and of legal order, present themselves."¹⁷ Furthermore, those interests are primarily content independent. Individuals may have interests in the application of a law they are familiar with, regardless of its content.¹⁸ The community in which a tort occurs has an interest that all individuals align their activities to the standards in that community, whatever they may be.¹⁹ Divergent interests have to be balanced and weighed, but there is an interest in order, such that the balancing process cannot lead to *ad hoc* decisions.²⁰ It is in light of these content-independent interests that Kegel thought conflict-of-laws decisions by and large "must be made without regard for the decisions of substantive justice to be found in the different substantive laws."²¹

The theory war continues to this day.²² It was recently reignited when Kermit Roosevelt, one of Currie's main followers and the reporter of the upcoming Third Conflicts of Laws Restatement (the Restatement), was understood to have declared "state interest analysis" (Currie's theory of material-justice) to be the winner of the debate and thus the Restatement's proper theoretical foundation.²³

16. Kegel's first description of his theory was made in 1953. See Gerhard Kegel, *Begriffs- und Interessenjurisprudenz im internationalen Privatrecht*, in Festschrift HANS LEWALD (1953) [hereinafter Kegel, *Interessen*].

17. Kegel, *The Crisis*, *supra* note 6, at 198.

18. See Kegel, *Interessen*, *supra* note 16, at 274.

19. See *id.* at 275. For his analysis of conflicts-justice principles in the area of tort law, see GERHARD KEHEL, INTERNATIONALES PRIVATRECHT 265 (3d ed. 1971) ("It is in the interest of everyone, therefore in the interest of international cross-border movement that everybody guides their conduct by the standard of the place where the tort occurs, whether it concerns the tortfeasor, the victim or a bystander who is involved in the event.") [hereinafter INTERNATIONALES].

20. *Id.* at 277; see also Kegel, *The Crisis*, *supra* note 6, at 245 ("The law is in no way concerned with all facts (with wind and weather, waves on the sea, heat on the equator, cold in the North Pole), but with order and with the settlement of disputes between people whose interests are created by definite facts and which oppose one another.").

21. Kegel's theory, like all conflict-of-laws theories, allowed for an exception from the application of foreign law based on the "public policy" exception. Kegel, *The Crisis*, *supra* note 6, at 198.

22. Prominent critiques of interest analysis by American scholars include Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987). For a description of the continuous theory wars in the US, see Weinberg, *supra* note 2.

23. Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J. F. 293, 302 (2018) [hereinafter Roosevelt & Jones, *A Response*]. Note for example how Roosevelt & Jones describe the Second Restatement's attempt to include conflicts-justice and material-justice considerations as "a bit strange, because the way to satisfy the right answer

Despite the continuous theoretical battle, what exactly distinguishes these perspectives has remained a mystery. Ralf Michaels usefully summarized how little is currently known about the relevant distinctions between conflicts-justice and material-justice:

Most scholars seem to suggest that conflict of laws should be about conflicts justice, but sometimes tempered by substantive justice. The debate seems in need of further analysis. In particular, we do not really have a proper discussion of what conflicts justice would mean, in particular in what way it links to other philosophical conceptions of justice.²⁴

It is especially unclear how the two theories end up generating similar results, if they start from opposing theoretical premises, as it is commonly assumed.²⁵

Revisiting *Babcock v. Jackson*,²⁶ the case that generated the theory war, shows what continues to fuel the battle. Mr. and Mrs. Jackson invited Ms. Babcock on a weekend trip to Canada in Mr. Jackson's car. All parties were residents of Rochester.²⁷ Mr. Jackson lost control of the car, the car went off the highway into an adjacent stone wall, and Ms. Babcock was seriously injured.²⁸ She sued Mr. Jackson in New York.²⁹ At the time of the accident, Ontario had a statute precluding a guest from suing the driver for injuries resulting from an accident during a gratuitous trip, whereas New York had no such statute.³⁰ The New York choice-of-law rule at the time would have mandated the application of the law of the place of injury, in this case

factors is to select the right law, while the way to satisfy the systemic factors is more related to selecting the right choice-of-law methodology." *Id.* at 296, but ultimately conclude that a rule "can deliver right answers while also satisfying the systemic factors," *Id.* at 298, arguing that this is precisely what the third restatement is trying to do. *Id.* at 298 n.23. See Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J. F. 266 (2018).

24. Ralf Michaels, *Private International Law and the Question of Universal Values*, in THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW 22–23 (forthcoming 2020). In this paper I am interested primarily in showing the similarities and distinctions between the two theories. Elsewhere I explore how different aspects of the two theories can be combined in a unified theory of justice that connects to Thomas Scanlon's moral contractualism. See Roxana Banu, *A Moral Contractualist Perspective on the Conflicts-justice/Material-justice Distinction in Conflict-of-laws*, in PHILOSOPHICAL FOUNDATIONS OF CONFLICT-OF-LAWS (forthcoming 2020) [hereinafter Banu, *A Moral Contractualist Perspective*].

25. For an account of the similarities between recent codifications of conflict-of-laws, see SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014).

26. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

27. *Id.* at 280.

28. *Id.*

29. *Id.*

30. *Id.*

Ontario, regardless of whether it granted a remedy.³¹ This case seemed to highlight perfectly the “unjust and anomalous results” of a choice-of-law rule derived from conflicts-justice reasoning.³² In a break with tradition, the court noted that

Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law. The object of Ontario’s guest statute, it has been said, is “to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies” and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers. Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction.³³

The reasoning of the court and the decision to apply the law of the common domicile of the parties were considered “historic,”³⁴ cutting through the weeds of conflict justice theory,³⁵ “a landmark in the law.”³⁶ *Babcock* allegedly had managed to provide a fundamentally different mode of reasoning. It was assumed that conflicts-justice theory, with its “mechanical formulae,”³⁷ would certainly not have been able to appreciate that various policy considerations should allow courts to depart from an intransigent choice-of-law rule mandating the application of the law of the place of injury.

By contrast to the reasoning of the court in *Babcock*, in *Tolofson v. Jensen*, the Supreme Court of Canada argued that Canadian courts should hold steadfastly to the application of the law of the place of injury, even when the plaintiff and the defendant come from the same jurisdiction and even when the tortious act and the injury occur in different jurisdictions.³⁸ In complete defiance to the New York court’s reasoning in *Babcock*, the Supreme Court of Canada signaled its uncontested allegiance to the conflicts-justice theory that the New York court so thoroughly discredited.³⁹ Appearing to entirely confirm the material-justice scholars’ denigration of the value of conflicts-

31. *Id.*

32. *Id.* at 281.

33. *Id.* at 284.

34. Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233 (1963) [hereinafter Currie, *Comments*].

35. David Cavers, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1219 (1963).

36. Willis L. M. Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1251 (1963).

37. See *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 162 (1946).

38. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, ¶ 42 (Can. S.C.C.).

39. *Id.*

justice reasoning, the Canadian Supreme Court insisted that in principle no exception should be made from the application of the law of the place of injury since “between order and fairness, order comes first.”⁴⁰ Relying on *Tolofson* in subsequent cases, Canadian courts confirmed that in Canada, based on conflicts-justice reasoning, the law of the place of injury is chosen irrespective of the result reached in the case and irrespective of the socioeconomic context of the dispute.⁴¹

Thus, the theory war continues to influence policy decisions, methodological reform, and inevitably the lives and interests of many individuals. But while it is customary to associate material-justice theories and conflicts-justice theories with the divergent positions the American and Canadian courts took in *Babcock* and *Tolofson*, respectively, there is hardly any thorough discussion of the analytical foundations of the two theories.⁴² There is no appreciation for the vision of justice that originally motivated conflicts-justice, as opposed to material-justice theorists. Contemporary scholars and judges reference two divergent theories of justice without any appreciation for the analytical premises they were originally based on.

This Article revisits an important segment of conflict of laws’s intellectual history, namely the transatlantic dialogue between German conflicts-justice theorists and American material-justice theorists in the mid-twentieth century. This analysis shows a misunderstanding and misinterpretation of some of the main insights of conflicts-justice theories, which led to identifying divergences in the wrong places. Contrary to conventional wisdom, Part II shows that conflicts-justice theories are wrongly described as “neutral” and devoid of value judgment and are inaccurately described as formalistic as opposed to pragmatist. It is furthermore misleading to suggest that conflicts-justice theories were not attuned to state regulatory policies and interests. Furthermore, by outlining the intellectual context in which European conflicts-justice theories were developed, Part II argues that mid-twentieth century conflicts-justice theories do not belong to the universalist current Brainerd Currie reacted against, such that Currie’s critiques leveled against Joseph Beale’s theory do not apply to twenty and twenty-first century European conflicts-justice theories.⁴³ Although much conflict-of-laws scholarship centers on material-justice theorists’ critique of conflicts-justice, Part II reveals that conflicts-justice theorists turned the same critiques against material-justice theorists. They argued that it is material-justice theories which hide behind a façade of neutrality; that it was Currie

40. *Id.* at ¶ 56.

41. *Das v. George Weston Ltd.*, [2017] O.J. No. 3542, ¶ 225 (Can. Ont. Sup. Ct. J.).

42. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); *Tolofson*, 3 S.C.R. 1022.

43. See SELECTED ESSAYS, *supra* note 11.

who retained the old universalists' obsession with state sovereignty, which made it impossible for him to conceive of any balancing of regulatory policies; and that it is Currie's description of state interests which is formalistic rather than pragmatic.⁴⁴ This is not meant to declare winners in this exchange of insults. Part II of this Article merely illustrates that reading material-justice and conflicts-justice debates through the lens of classical dichotomies of formalism versus pragmatism, state interest versus value neutrality, or universalism versus particularism is not particularly helpful and does not allow us to see what distinguishes the two theories and whether the distinctions matter. From one side or the other, either theory can appear formalistic, neutral, or unduly universalistic. On these premises, the theory war is likely to continue forever because its protagonists simply speak past each other.

Part III argues that two more nuanced theoretical premises distinguish the two perspectives, rather than any appeal to formalism, universalism, or neutrality. It further argues that rather than being irreconcilable, these distinctions can be reconciled and should be seen as complementary sides of a unified justice paradigm. The first distinction lies in the way in which material-justice and conflicts-justice theorists describe the relationship between the state and the law. Material-justice theorists embraced a (particularistic) instrumentalist notion of the law,⁴⁵ which led them to conclude that the application of foreign law involves the promotion of foreign state policies.⁴⁶ Conflicts-justice theorists offered different understandings of law and justice, which allowed a two-step methodological process of decoupling and then recoupling the state to the law.⁴⁷ The first stage decoupling of the state from the law enables conflicts-justice theory to postulate a principle of formal equality between legal systems and opened up the conceptual possibility of balancing interests.⁴⁸ Once the state is recoupled to the law, in the second stage, conflicts-justice would allow a more detached assessment and description of state interests

44. See Kegel, *The Crisis*, *supra* note 6, at 177–78.

45. For a great description of the consequentialist particularistic underpinnings of state interest analysis, see Brilmayer, *supra* note 22, at 1288 (“In choosing which social values to pursue, a state is supposed to think in terms only of the needs of its own citizens and of costs and benefits incurred upon in its own territory. Judges deciding choice of law cases are not supposed to see their function as universalistic. If they were to maximize the global benefit according to the legislature’s definition of desirable states of affairs, they would apply local law to all cases that came before them. A consequentialist theory need not focus on local matters, as Currie’s approach did, even in a multistate context. Under a universalistic consequentialist theory, a state might adopt that substantive policy which it thinks is best for the world at large. This is not, however, what the modern choice of law theorists had in mind.”).

46. See Roosevelt III & Jones, *A Response to Brilmayer & Listwa*, *supra* note 23.

47. See *id.*

48. See *id.*

and an analysis of whether they may be worth condoning or not. Overall, Part III shows that this analytical decoupling and recoupling of state and law has valuable theoretical and methodological implications.

The second distinction lies in the standpoint from which conflicts-justice and material-justice theories consider any claims to justice. Material-justice takes what could be called a “transactional justice perspective” according to which claims to justice are considered from the point of view of plaintiffs and defendants in particular kinds of interactions.⁴⁹ Conflicts-justice references a more “systemic” standpoint, for example, that of refugees, debtors to transnational maintenance obligations, investors, travelers, states receiving immigrants, guest workers, etc.⁵⁰ Once we appreciate these two different standpoints, we can better understand why one of material-justice theorists’ central claims was that the law that grants recovery to a *tort victim* should apply,⁵¹ while conflicts-justice theorists argued that different (more or less compensatory) laws might apply to different types of torts, depending on the extent to which they can be insured, and the extent to which one wants to encourage freedom of movement and capital across borders.⁵² Part III ultimately argues that both the transactional and systemic standpoint should be taken into consideration in any conflict-of-laws decision. The decoupling and recoupling of the state from its law serve as the means to this combination of systemic and transactional justice elements. Part IV illustrates the relevance of this combination in two types of cases, one involving spousal support claims based on indigenous law and the other involving claims arising from tortious operations of multinational corporations.

This Article ultimately concludes that conflicts-justice theory comes very close to an early American material-justice perspective,

49. This is what prompts Louise Weinberg for example to conclude that “tort plaintiffs” should always be protected. See Weinberg, *supra* note 2, at 1668.

50. This is illustrated in the way in which Alexander Luederitz takes stock, in 1982, of the social transformations that conflicts-justice theory should be attuned to. See Alexander Luederitz, *Gerhard Kegel und das deutsche internationale Privatrecht*, 46 RABELS ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT [RABEL J. COMP. & INT’L PRIV. L.] 475, 482 (1982). The “clients” of Private International law have changed dramatically in the last 30 years: from a class-law of international traders, globetrotters and artists, Private International Law has become a law for everyone. On the happy side of this social transformation we see craftsmen from the Rhein region who now buy property in Spain and Florida; industrial workers who rent at least summer residences in these places; women who seek advice on marriage contracts before following an Emir down South. On the sad side of this social transformation we see refugees, German and others; people of different nationality bitterly fighting over the custody of their children; four and a half million foreign workers joined by their families which pose not only legal questions. *Id.*

51. See Weinberg, *supra* note 2, at 1668.

52. ALEXANDER LÜDERITZ, *INTERNATIONALES PRIVATRECHT* (2d ed. 1992).

that of David Cavers.⁵³ The main German conflicts-justice theorist Gerhard Kegel was unsure whether this could really be the conclusion.⁵⁴ Yet once all the weeds of the controversy are cleared, Cavers's attempt to reconcile material-justice and conflicts-justice theories appears convincing. Indeed, Kegel's successors including Klaus Schurig, Alex Flessner, and Alexander Luederitz, came close to proving it as well. Acknowledging the complementarity between material-justice and conflicts-justice theory has important implications. First, it explains why, despite the rhetoric of a theory war, both theories lead to the same decisions in many cases. Second, the complementarity of the theories should encourage more transatlantic dialogue and collaboration between courts and decision-makers in conflict of laws. Finally, conflict-of-laws scholarship should focus less on fighting the theory war and more on understanding the value or the limits of the complementarity of the two theories in different types of cases.

II. COMMON UNDERSTANDINGS

In order to get to some fundamental distinctions between the two schools of thought, one needs to clear considerable ground. This is because at a certain level of generality, unsurprisingly, both sides accuse each other of sacrificing justice. For example, Symeon Symeonides charged material-justice theorists with causing conflict of laws to lose its "innocence"⁵⁵ (understood by Louise Weinberg vaguely as neutrality in the process of choosing a law⁵⁶). To Symeonides, conflicts-justice rests on a perfectly valid foundation:

After all, conflicts exist because different societies adhere to different value judgments reflected in their respective laws as to how legal disputes should be resolved. As long as multistate disputes are resolved by means of choosing the law of one state over the other, such a choice is bound to satisfy one society and one party and aggrieve another. This being so, the choice of the applicable law

53. See generally Cavers, *A Critique*, *supra* note 10.

54. Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 624 (1979) (noting that while Cavers does not overlook "conflicts interests," "the conflicts interests are constantly mixed up with the substantive law interests, giving rise to an unravellable confusion.") [hereinafter Kegel, *Paternal Home*]. For a more detailed analysis of Cavers' theory as compared to conflicts-justice theory, see generally Gerhard Kegel, *Fundamental Approaches*, in 1 INT'L ENCYCLOPEDIA COMP. L. 39–45 (Kurt Lipstein ed., 3d ed. 1986) [hereinafter Kegel, *Fundamental Approaches*].

55. Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 45–46 (2001).

56. Weinberg, *supra* note 2, at 1660, 1663 ("Symeonides feels the tug of 'material-justice.' It is a powerful aspiration. But somewhat ruefully he confesses that we may have to be content with 'conflicts-justice.'").

cannot afford to be motivated by whether it will produce a “good” or “just” resolution of the actual dispute. Hence, PIL [Private International Law] should strive to achieve “conflicts justice,” that is ensure the application of the law of the proper state, but PIL cannot expect to achieve “material justice,” i.e. the same type and quality of justice as is pursued in fully domestic situations.⁵⁷

To Weinberg on the other hand, Symeonides’s justification seems confused:

No amount of “conflicts justice” can satisfy a resident that a court in her own state was right to deprive her of a claim or defense it would have made available to her had her opponent not resided elsewhere. Nor can anything explain to a nonresident who has come to the interested place of injury for its remedial law, why the place of injury, with its obvious governmental interest in applying its remedial law to her case, nevertheless arbitrarily withholds it from her, as if reserving a scarce commodity for its own residents.⁵⁸

Weinberg perceives Symeonides’s insistence on neutrality as his inner struggle for “the humane view that justice as a general rule *ought* to triumph.”⁵⁹ But, to Weinberg, being “satisfied with ‘conflicts-justice’” means being “willing to give up on justice.”⁶⁰ Weinberg rightly perceives Symeonides’s writings as an attempt to balance “the claims of reason, shared norms, and material-justice against the claims of ‘conflicts-justice,’ or, more particularly, neutrality.”⁶¹ But Weinberg asks “why should reason, and shared norms, and justice, have to be ‘balanced’ against any ideal, even neutrality?”⁶²

This contemporary exchange between Weinberg and Symeonides is largely a replay of the mid-twentieth century exchange between Brainerd Currie in the United States and Gerhard Kegel in Germany. In his analysis of the theoretical “crisis” in conflict of laws in the mid-twentieth century, Kegel outlined in detail Currie’s argument⁶³ that “[T]he traditional system of conflict-of-laws differs in its very essence from the theory of governmental interests. It fails to take policies into consideration and is therefore conceptualistic. It is without a rational basis, mindless, ruthless, arbitrary, hypnotic, mystic, intoxicating. It is an apparatus, a machine.”⁶⁴ In turn, Kegel considered Currie utterly disinterested in justice, such that “the differences between Currie’s

57. Symeonides argues that each theory allows the opposite theory to make inroads into it. My argument, by contrast is that the two theories have different, but complementary insights to offer in each conflict-of-laws case. Symeonides, *supra* note 4, at 3.

58. Weinberg, *supra* note 2, at 1667.

59. *Id.* at 1660.

60. *Id.* at 1663.

61. *Id.* at 1664.

62. *Id.*

63. Reproduced in Kegel, *The Crisis*, *supra* note 6, at 177–78.

64. *Id.* at 177 (citing Currie, *Comments*, *supra* note 34, at 1241; SELECTED ESSAYS, *supra* note 11, *passim*).

system and a dedicated search for justice in the field of conflict of laws remain profound.”⁶⁵

Here of course one’s understanding of “material-justice” and “conflicts-justice” is ultimately responsible for how much balancing of the two can be tolerated. If one associates conflicts-justice with a broad appeal to neutrality, predictability, and uniformity, it seems likely that these values can clash with the perceived “just” substantive result in an individual case, such that claiming both simultaneously would indeed appear like “babies crying for the moon.”⁶⁶ This broad way of understanding the two theories is responsible for the continuing perception that they are fundamentally different from each other. Yet this conclusion begs questions. It is important first to understand whether conflicts-justice is indeed all about neutrality, predictability, and uniformity. Also, it must be understood whether this is supposed to be achieved at all costs. It is also important to ascertain whether a conflicts-justice theory is indeed unable or unwilling to account for “state interests,” and whether its adoption of a general division between private and public law might be responsible for this. Similarly, it is important to ascertain whether conflicts-justice is indeed obsessed with “transcendental” notions of territorial and personal sovereignty such that Currie’s critique of Joseph Beale’s early twentieth-century universalism⁶⁷ applies to the more recent European conflicts-justice theories referenced in this Article. This first Part of the Article argues that the answers to these questions are far from clear and that conflicts-justice did, with very good reasons, pose the same questions in relationship to material-justice theories.

A. *Neutrality and Value Judgment*

Material-justice theorists often charge conflicts-justice theorists with hiding behind a façade of neutrality.⁶⁸ Ironically, although hardly ever mentioned in contemporary writings, this was precisely the charge that conflicts-justice theorists made against material-justice. To understand the overlap of insults, one needs to get a better grip on what each side understands neutrality to be.

1. Neutrality as a Façade

Material-justice theorists often assume that conflicts-justice theorists avoid the responsibility for the ultimate “substantive” result

65. *Id.* at 195.

66. Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 U. ILL. L. REV. 418, 420 (1943).

67. *See infra* Part II.C.

68. *See* Weinberg, *supra* note 2, at 1664.

of the case by claiming “neutrality” in the process of choosing between the laws in conflict. This charge however can be understood in one of two ways. On the one hand, the assumption may be that conflicts-justice theories assume a particular choice-of-law rule to be in some sense predetermined, inherently rational, “in the nature of things,” and therefore in no need of justification.⁶⁹ This, in turn, may be connected to the prevalent assumption that conflicts-justice theorists, like Joseph Beale, believe that a choice-of-law decision is universally valid because it is derived from universally acceptable theoretical precepts.⁷⁰ In the early twentieth century, Joseph Beale, whose theory shaped the First Restatement of Conflict of Laws,⁷¹ argued that in each transnational legal matter one would apply the law of the jurisdiction where a right vested.⁷² In turn, a right was presumed to have vested where the last act took place (where the goods were delivered, where the injury occurred, etc.).⁷³ The American conflicts revolution in the mid-twentieth century was focused on refuting Beale’s adoption of a purportedly neutral decision-making process based on universal concepts and theoretical propositions.⁷⁴

Yet when voiced against mid-twentieth century or contemporary European conflicts-justice theories, this charge misses the mark.⁷⁵ At

69. *Id.* at 1666–67 (“To the party who has been stripped of the forum’s protections and who has lost by virtue of abstractly chosen governance, the process will not necessarily look innocent.”).

70. For an analysis of Joseph Beale’s theory and its relationship to the universalist strand of thought in conflict-of-laws, see generally ROXANA BANU, NINETEENTH-CENTURY PERSPECTIVES ON PRIVATE INTERNATIONAL LAW 139–44 (2018).

71. See Ernest G. Lorenzen & Raymond J. Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555, 555 (1935).

72. 1 HENRY JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW § 1, 154 (1916).

73. For a useful description, see Ralf Michaels, *EU Law as Private International Law? Reconceptualizing the Country-of-Origin Principle as Vested-Rights Theory*, 2 J. PRIV. INT’L L. 195, 216 (2006) (“For Beale . . . vested rights and territoriality went hand in hand: rights could be acquired only under the law of the sovereign on whose territory the relevant act took place, and other sovereigns had to enforce the rights created by that sovereign.”).

74. See, e.g., Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Ernest Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

75. “This [the formalism of Beale’s vested rights theory] was not Europe’s heritage. Of course, there are superficial similarities between the first Restatement and classical European choice of law . . . But the similarity is superficial. Traditional European choice of law is paradigmatically different from the First Restatement. . . . When the American conflicts revolution set in, European choice of law had its revolution already behind it.” Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1612 (2008) [hereinafter Michaels, *Revolution*]. Because I am interested in the original arguments that laid the foundation of the variants of conflicts-justice and material-justice theory discussed in this paper, I leave to the side the question whether the charges made by Currie would apply to contemporary conflicts-justice perspectives. Since contemporary conflicts-justice theories may be the product of misunderstanding of

the time of Currie's writings, European conflicts-justice theories were meant precisely to prove that choice-of-law rules are the result of a very pragmatic balancing of interests (albeit different from the interests that material-justice identified), rather than from any universal concepts and theoretical assumptions. Mid-twentieth century and contemporary conflicts-justice theories are as far from Beale's theory as Currie's theory was. At the time of Currie's writings, European conflicts-justice theorists were especially clear in their belief that each jurisdiction takes full responsibility for its choice-of-law rules and decisions and understands them as its own expression of what justice requires in the transnational context.⁷⁶ Mid-twentieth century conflicts-justice theory departed from earlier universalistic theories of conflicts of laws both by denying any formal analytical precepts (such as the concept of a "vested" right) and by contesting the analogy between conflict of laws and public international law focused on state sovereignty.⁷⁷ Kegel argued that "each state has to insure the achievement of justice on its own No state will give in to another on important points in the absence of a comprehensive and satisfactory international or interstate agreement."⁷⁸ On the question of uniformity of results (i.e., each jurisdiction applying the same choice-of-law rules), Kegel admits that "even if for other reasons, namely, for considerations of justice rather than governmental interests, I share Currie's restraints."⁷⁹

It would therefore be a mistake to interpret conflicts-justice as a theory that avoids the responsibility of justifying its choice-of-law rules by analogizing it to Joseph Beale's early twentieth century theory. Conflicts-justice theorists of the second half of the twentieth century were legal pluralists through and through. For them, just as it was possible for states to have different—equally just—private laws, so they could have different—equally just—understandings of what justice requires in the transnational realm and what combination of private laws fulfills that vision of justice.⁸⁰ From a conflicts-justice perspective,

each state is absolutely free in the evaluation of conflict-of-laws interests and in how it devises its conflicts law maxims. What weight, if any, it assigns to the interest of the parties, of the broader community or to interests of order, is its

the original theories, this possibility cannot be excluded. See Currie, *Comments*, *supra* note 34.

76. SCHURIG, *supra* note 7, at 261.

77. See SCHURIG, *supra* note 7, at 65.

78. Kegel, *The Crisis*, *supra* note 6, at 187.

79. *Id.* at 188. Klaus Schurig has argued that the biggest misreading of conflicts-justice theories is to assume that their main focus was achieving "uniformity of results." See SCHURIG, *supra* note 7, at 19 n.32.

80. SCHURIG, *supra* note 7, at 67.

sovereign prerogative; favoring the application of the law of the forum or a particular substantive outcome . . . is entirely under its responsibility.⁸¹

Against those who would perceive this as unduly particularistic and not cosmopolitan enough, conflicts-justice theorists responded that this is merely “realistic,” not “chauvinistic.”⁸²

Not only is the assumption that conflicts-justice theory avoided the burden of justifying choice-of-law rules by portraying the decision-making process as neutral mistaken, but also conflicts-justice theorists assumed this charge better characterized Currie’s material-justice theory. They argued that Currie’s governmental interest analysis failed to explain why forum law would *justly* apply transnationally because it assumed that it was obvious, predetermined, and “in the nature of things” for the forum to apply its law if its policy is implicated.⁸³ Kegel had the following to say about Currie’s assumption of the “scope” of the application of a law in the transnational context:⁸⁴

If one thinks that a Massachusetts prohibition against wives going surety for their husbands applies only to “Massachusetts women”⁸⁵ or a restriction of a host driver’s liability to guest passengers does not serve the protection of the philanthropist but of domestic liability insurers (a strange but frequent American idea),⁸⁶ some conflicts notion is injected into these entirely neutral-formulated rules, which calls for explanation. It does not follow from the rules themselves. It cannot possibly emanate from them, any more than one can squeeze from interpretation (even constitution-conforming interpretation) whether they are constitutionally valid. Rather the pre- or superior law (though not a “super law” in Ehrenzweig’s sense⁸⁷) must decide on the basis of its own balance of interests whether a rule is applicable (PIL) or valid (constitutional law).⁸⁸

2. Neutrality as Respect

If neutrality is dubbed as a façade for lack of responsibility, the charge does not apply to conflicts-justice theories. But the charge of

81. *Id.*

82. *Id.* at 67, 95.

83. Schurig argued that a fundamental characteristic of interest analysis methodology is that it does not make explicit what policy considerations motivate particular choice-of-law decisions. *See* SCHURIG, *supra* note 7, at 298 (arguing that the governmental interest analysis manipulates a decision about the scope of the law into an analysis of the substance of the law and therefore fails to justify its choice-of-law decision).

84. Kegel, *Paternal Home*, *supra* note 54, at 622–23.

85. *Id.* (citing SELECTED ESSAYS, *supra* note 11, at 85).

86. *Id.* (citing *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969)).

87. *Id.* (citing Ehrenzweig, *Specific Principles of Transnational Private Law*, 125 RECUEIL DES COURS 170, 182, 186, 199, 207, 214, 232, 257 (1968)).

88. *Id.* (citing Kegel, *Paternal Home*, *supra* note 54, at 623).

neutrality could be understood in another way, namely as a refusal to take sides as to which law is “substantively” better.

For example, Weinberg made the argument in *Kelly v. Ford Motor Co.*⁸⁹ that conflicts-justice theory would force the forum to “discriminate irrationally between two classes of Pennsylvania’s decedents—those who could recover because the product that killed them at home in Pennsylvania was made in Pennsylvania, and those who could not because the product that killed them at home in Pennsylvania was sent into Pennsylvania.”⁹⁰ Weinberg thought this discrimination stems from conflicts-justice theory’s push for “neutrality” in choosing between the law of the forum (offering punitive damages for egregious fault in product liability cases) and the law of the place of manufacturing (offering no punitive damages in product liability cases).⁹¹ Similarly, when

the forum with defendant-favoring law is the joint-domicile, it should not flee from its own law to the law of the place of injury. To do so would be to discriminate between two similar classes of its resident defendants. It would be to strip the protections of its own law only from its defendants in cases where the injury occurred out of state, bestowing them only on defendants injured at home. It would also be to discriminate between two classes of its resident plaintiffs, furnishing relief only to those injured out of state, while withholding it from those injured at home.⁹²

Furthermore, Weinberg argues more broadly that it would be most implausible to insist on neutrality between victim and tortfeasor in a transnational tort case. According to her,

there can be no neutrality as between adjudged tortfeasor and victim. There is no legal, or indeed moral equivalence between them. . . . It therefore becomes necessary, if we are to think about a choice of tort law without becoming bogged down in irrelevancies, to suppress our emotional commitments to defendants who *are* being pushed to the wall on trumped-up claims.⁹³

This charge touches conflicts-justice closer to its core. The same legal pluralist standpoint that allowed conflicts-justice theory to depart from “uniformity of decisions” and embrace the responsibility of each decision-maker for its vision of transnational justice also made it impossible for conflicts-justice theorists to name favorites on substantive justice. “In the paternal home,” as Kegel ironically called classical conflicts-justice theory, “substantive rules are treated

89. *Kelly v. Ford Motor Co.*, 933 F. Supp. 465 (E.D. Pa. 1996).

90. Weinberg, *supra* note 2, at 1660.

91. *Id.*

92. *Id.* at 1666.

93. *Id.* at 1668.

equally. . . . That in one state rule *a* (exemption) but in another rule non-*a* (liability) obtains is presupposed by [private international law], but does not influence the choice of law.”⁹⁴ Substantive laws, therefore, “are not to be graded.”⁹⁵ Similarly, one cannot start from a preference for the interests of one or the other party: “one man’s meat is another man’s poison.”⁹⁶ To any particular—substantive—desired outcome of one party corresponds an opposite interest of the other party and a general interest in an objective decision-making principle.⁹⁷ It is easy to make a mockery of this insistence on neutrality as to the substance of the laws in conflict, but it is more instructive to understand what motivates conflicts-justice theorists to hold on to such a postulate of neutrality.

The first reason for its insistence on neutrality with respect to the substance of the laws is conflicts-justice theory’s alignment with moral skepticism and legal pluralism. Because of their legal pluralist commitments, conflicts-justice theorists argue that one cannot start from the premise of choosing the better law in terms of its content because

it is difficult to reach a clear evaluation. Is it better to drive on the right than the left (leaving aside that traffic regulations are part of the law of the place where the accident occurred)? Is unlimited strict liability better than limited? In the case of contracts, is the duty to compensate for mental suffering better than the absence of such a duty?⁹⁸

Furthermore, framing the choice-of-law analysis as a better law analysis ultimately leads to an unprincipled preference for the forum’s law “because one is accustomed to it. If, nevertheless one holds a foreign law to be the better law, it indicates a criticism of one’s own law. The same applies to foreign law if one’s own law is preferred as the better law. The situation is unfortunate.”⁹⁹

Conflicts-justice theorists ultimately concluded that, if there is no universally right answer to most questions of private law regulation and there is no universal standpoint from which to judge the soundness of the private law rules in conflict, then, as a starting point, they should be given an equally broad or narrow scope of application.¹⁰⁰ This comes out most clearly in Kegel’s repeated criticism of the application of

94. Kegel, *Paternal Home*, *supra* note 54, at 625.

95. *Id.* at 631.

96. Kegel, *The Crisis*, *supra* note 6, at 191.

97. SCHURIG, *supra* note 7, at 97.

98. Kegel, *Fundamental Approaches*, *supra* note 54, at 49.

99. *Id.*

100. *Id.* at 44 (“It is inadmissible, however, to allot a wider sphere of application to one substantive rule of private law than to another on the ground that one of them achieves a different result from the other.”).

material-justice theory in David Cavers's "imaginary cases."¹⁰¹ Cavers constructed various law-fact patterns involving a negligent injury by an employee of a non-profit organization caused to one of its members during a nature study.¹⁰² Cavers's imaginary cases ran on the hypothesis that Massachusetts exempted charities from tort liability, whereas New York law did not.¹⁰³ The American scholar David Cavers argued that New York law applies if either the place of injury is New York or if a charity incorporated in New York is involved.¹⁰⁴

If the suit is brought not in New York but in Massachusetts, Massachusetts law is probably applicable if the servant of a Massachusetts charity negligently causes an accident in New York. If the law-fact pattern is reversed, i.e. if the servant of a New York charity negligently causes an accident in Massachusetts, New York law is to be applied. In other words, Massachusetts law will apply the law of the state where the charity is incorporated.¹⁰⁵

Kegel assumed that the only reason New York law would apply in more circumstances than Massachusetts law is because of an *a priori* assumption that a law granting recovery to the victim is "substantively better."¹⁰⁶ But again, from whose standpoint would this law be better?¹⁰⁷

If there is no universal tiebreaker between legal policies belonging to different jurisdictions, maybe there is a universal tiebreaker between the interests of the parties. One of the main critiques of conflicts-justice theorists against Currie's theory was that his theory focused too much on state sovereignty and state interests, as opposed to individual interests.¹⁰⁸ One might therefore assume that conflicts-justice theorists would have favored an open balancing between parties' interests in compensation versus exemption from liability. Yet conflicts-justice theorists insist that the substantive interests of parties cannot be graded in the abstract either because they are derived from connections to different jurisdictions whose laws are presumed equally just in their own domain.¹⁰⁹ Conflicts-justice theorists would ask under what circumstances one could justly

101. See DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS*, ch. 2 (1965),

102. *Id.* at 103

103. DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS* 54–56, 67, 103–04 (1965), *cited in* Kegel, *Fundamental Approaches*, *supra* note 54, at 42.

104. *Id.*

105. *Id.*

106. Kegel, *Fundamental Approaches*, *supra* note 54, at 43–44 ("The better rules are to be applied. This does not mean the rules which are the better rules in a general sense, i.e. those which are better in substance but those which are better within the given law-fact pattern. This proposition is contradictory.")

107. For a useful description of the alignment of conflicts-justice theory with a certain strand of relativism, see SCHURIG, *supra* note 7, at 311.

108. See Kegel, *Fundamental Approaches*, *supra* note 54, at 32.

109. SCHURIG, *supra* note 7, at 97.

recognize an interest in compensation. Material-justice theorists, such as Weinberg, may believe this is always the case. But this is unsatisfactory from a conflicts-justice perspective. When laws conflict, the tortfeasor may have a legitimate interest (because of her connection with a law that exempts her from liability) in being exempt from liability, and the victim might have a legitimate interest in compensation (because of a similar connection with a law that allows for compensation). In other words, from a conflicts-justice perspective, not only is there no universal standpoint from which to judge whether the substance of one law or another is “better,” but there is no universal, abstract standpoint from which to judge whether the interest of one of the parties is more “warranted.”¹¹⁰ Here too, conflicts-justice theory refuses to pick winners and losers and assumes that nothing can be said—in the abstract—about the merits of a claim for compensation versus one for exemption from liability.¹¹¹

What is more, conflicts-justice theory assumes that by starting the analysis in conflict of laws from the interests of the parties in a particular substantive result, one brackets away the interests that are really particular to conflict of laws, namely the interests in the application of one law or another *as such*. The staple insight of conflicts-justice theory has been that individuals and communities have interests in the application of one law over another regardless of its content, although the interests in the application of a law *as such* may be derived from assumptions about the substantive interests underlying large categories of private law (torts, contracts, family law, etc.). Klaus Schurig, for example, argued that “*precisely because* inheritance law, marriage law, or the law determining capacity serve primarily the interests of individuals (substantively), they are assigned, in the interests of individuals [from a conflicts-justice perspective] to the law of the place of citizenship.”¹¹² The same logic would suggest that because strong community interests (in the publicity of real estate records) exist with respect to real estate law, the law of the place where the immovable is located should apply.¹¹³

110. Although conflicts-justice theorists insisted that one could not weigh, in the abstract, the substantive interests of the individuals, they thought that a choice, based on conflicts-justice considerations, could be made between the interests of different individuals in the application of a law as such. See, e.g., Kegel, *The Crisis*, *supra* note 6, at 244 (“If, as a German, I were to buy a bottle of Scotch whisky in a store in The Hague, the set of facts is actually connected with the Netherlands, Germany and Scotland. Nevertheless, Dutch law is obviously applicable. This is so because the strongest *interests* support the application of Dutch law (here: the paramount party interests of the seller and the interests of commerce).”).

111. Kegel, *Fundamental Approaches*, *supra* note 54, at 44 (“[W]hat is favorable for the buyer is unfavorable for the seller and *vice versa*. Therefore the same law must apply to both.”); see also SCHURIG, *supra* note 7, at 97.

112. SCHURIG, *supra* note 7, at 99.

113. *Id.*

With respect to torts, Schurig argued that tort law generally tries to balance the interest of the victim in compensation with the interest of the tortfeasor in limiting his/her liability but more broadly serves the interest of the community in setting out a “codex” of perceived just frameworks of interaction among individuals while balancing freedom of action and security from harm.¹¹⁴ For conflicts-justice theorists, this suggested that the community where the tort occurred would have an interest in the application of its law, but that this interest might be trumped by the interests of the individuals in conforming their behavior to their law of domicile when both the tortfeasor and the victim come from the same jurisdiction.¹¹⁵

Conflicts-justice theorists’ alignment with legal pluralism and their insistence on content-independent interests in the application of a law made it impossible for them to start the analytical process in conflict of laws with assumptions that one law is better than the other or that the victim’s interest in compensation is more warranted. But they agreed that the analytical process could end precisely with such an assumption. For example, conflicts-justice theorists argued that when the tortious act and injury occur in different jurisdictions, the content-independent interests of private individuals and those of the larger community point in multiple directions.¹¹⁶ More than one community can claim an interest in having individuals conform their behavior to their tort standards, and both the victim and the tortfeasor can claim an interest in being able to guide their behavior according to the standards in the jurisdiction where they acted or where they suffered injury. Material-justice could now serve as a tiebreaker and the law most favorable to the plaintiff should apply.¹¹⁷ At the end of the analysis, it was possible for conflicts-justice theorists to argue, ahead of some of the most *avant-garde* material-justice theories, that “sympathy for the victim is more warranted.”¹¹⁸

This suggests that conflicts-justice theorists’ insistence on neutrality must be understood as a sign of “respect for the foreign”¹¹⁹ and for the integrity of the analytical process under legal pluralist commitments, rather than an indifference in the outcome of the dispute. What matters for conflicts-justice theory is not only the

114. *Id.*

115. *Id.* at 99, 202–03, 207.

116. *Id.* at 207.

117. *Id.* at 101, 207; *see also* Kegel, *The Crisis*, *supra* note 6, at 246 (“A *substantive law solution* may only be considered when a conflicts approach is impossible, namely, when the interest of order in a “real” decision is weaker than the interests on which the conflicts rules are based, which proclaim the applicability of mutually contradictory substantive laws. Such a substantive law solution is conceivable in all cases where conflicting laws are present.”).

118. *Id.*; *see also* INTERNATIONALES, *supra* note 19, at 268.

119. SCHURIG, *supra* note 7, at 52 n.9.

outcome of the conclusion—here the application of the maximally compensatory law—but the analytical process by which one gets there. Only once one appreciates the equal worth of legal systems, the equal worth of parties' interests, and the equal validity of their claims, can one move on to determine whether because of the particular transnational context of their interactions, preferring one claim and one law is warranted.

B. *Formalism vs. Pragmatism*

Because the conflicts-justice/material-justice distinction is seen—with all the misunderstandings referenced above—as a conflict between “formal neutrality”¹²⁰ and open-ended value judgment, the conflict is often portrayed as an open war between formalists and realists. In reviewing Symeonides's work, Weinberg announces that:

My differences with Symeonides obviously have something to do with the old differences between realists and formalists. Realists are unembarrassed by justice. The more straightforward a court is about providing justice, the more commendable the court, as far as we realists are concerned. But to a formalist there is something vulgar, political—almost illicit—about justice. When justice triumphs, formalists cannot help casting about for some overlooked neutral principle which, if applied rigorously enough, would have prevented it.¹²¹

This kind of labeling was well known to conflicts-justice theorists. Yet Kegel noted that “if a pragmatist can be defined as a person who tests the validity of all concepts by their practical results, it would seem that the pragmatists prevail today.”¹²² To Kegel, it seemed that everybody was indeed a realist on both sides of the Atlantic, at least to the extent that both European and American scholars were focusing increasingly on individual cases decided by the courts and on “expositions of foreign legal systems.”¹²³

The American conflicts revolution, in its drastic departure from past theory, appeared more radical, more revolutionary, and less patient with unjustified assumptions of territorial or personal sovereignty, vested rights, etc. European mid-twentieth century conflicts-justice theory did not purport or even attempt to offer a blow to tradition. In fact—in the spirit of German romanticism—tradition was venerated as a repository of wisdom collected over many generations.¹²⁴ But mid-twentieth century conflicts-justice theorists thought they were unearthing the pragmatic interest analysis that lay

120. Weinberg, *supra* note 2, at 1668.

121. *Id.* at 1667.

122. Kegel, *Fundamental Approaches*, *supra* note 54, at 12.

123. *Id.* at 13.

124. SCHURIG, *supra* note 7, at 108; *see also* Michaels, *Revolution*, *supra* note 75, at 1611.

behind any choice-of-law rules which otherwise appeared to designate a particular law applicable in a formal, abstract way.¹²⁵ This was supposed to be precisely a rebuttal to Currie's assumption that classical conflict of laws theory encourages decision-makers to

feed the data into the machine, using certain standard procedures, and to write down as his decision the result that comes out of the machine. He is not supposed to question the wisdom, or soundness, or justice of the result, nor to think, or even talk, in terms of competing policies.¹²⁶

Mid-twentieth century conflicts-justice theory was supposed to show that each conflict of laws rule that comes out of the "conflict-of-laws machine" was a policy decision in favor of a particular balancing of substantive and non-substantive interests and one that belonged to each country individually.¹²⁷ Schurig, for example, explained that "all concepts are the result, the conclusion of a particular estimation of interests; they can "only be seeds if they were once fruit."¹²⁸ In other words, "these concepts and dogmatic elements save us from constantly starting from scratch; they are *relay stations of legal discovery through evaluations of interests* but they must always be understood as such and constantly questioned on this basis."¹²⁹ Ultimately, even "order itself is a political choice."¹³⁰

What is more, viewed from the other side of the Atlantic, it was Currie's deduction of a rule's transnational reach via statutory interpretation of legal policies that seemed formalistic. State interest analysis reasoning always appeared to announce a clear and easily ascertainable policy behind any particular legal provision. But Kegel remarked ironically that "Currie needed over thirty pages to ascertain the purpose of a North Carolina statute which precludes a purchase money mortgagee from obtaining a deficiency judgment against the mortgagor after foreclosure proceedings had failed to restore the full amount of the mortgage debt."¹³¹ He referred to Currie's occasional acknowledgement to be running "against a blank wall" when ascertaining the transnational reach of a rule, such as "in relation to an Illinois statute which denied an action for wrongful death when the death, as opposed to the accident itself, occurred in Illinois."¹³² Similarly, Kegel quoted Currie's striking acknowledgment that one could only "discern a definite state policy of favoring the liability

125. SCHURIG, *supra* note 7, at 280.

126. SELECTED ESSAYS, *supra* note 11, at 138.

127. For a description of the openness of the conflict-of-laws system and methodology, see SCHURIG, *supra* note 7, at 170–84.

128. SCHURIG, *supra* note 7, at 280.

129. *Id.* at 280.

130. *Id.*

131. Kegel, *The Crisis*, *supra* note 6, at 114.

132. *Id.*

insurance carrier” if the “insurance lobby foil an attempt to abolish the abatement rule by statute in the Arizona state legislature.”¹³³ Furthermore, Kegel believed that a central premise of state interest analysis showed most vividly how material-justice, rather than conflicts-justice, was operating with untested assumptions.¹³⁴ Currie’s main insight had been that a state would always have an interest in offering a benefit or a protection to its people.¹³⁵ But what, asks Kegel, does Currie mean by “the people of a state”?¹³⁶ Currie, as Kegel showed, referred indiscriminately to “locals,” “residents,” “citizens,” “domiciliaries,” and “resident domiciliaries.”¹³⁷ Here again, it seemed as if Currie was using a term in a rather abstract, confused, and potentially naive way. A theory that postulated an “interest” of the state in granting a benefit to its “constituents” would certainly have to determine what political or social links of an individual to a community would be sufficient to trigger such an interest of the state in granting her a benefit. Yet this was precisely the issue that Currie left almost completely untouched.

C. *Universalism vs. Particularism*

If conflicts-justice theory cannot be adequately described as formalistic because of any alignment with formal jurisprudence or any adoption of a formal postulate of neutrality, maybe it is seen as formalistic because of a perceived connection to universalistic theories in conflict of laws. Currie’s disavowal of conflicts-justice theories was often linked to his rejection of universalistic theories, which posited that all states should apply the same law in every conflict-of-laws case.¹³⁸ Currie was a strong critic of the postulate of uniformity of decisions because he assumed that in a “true conflict” each state will want to apply its own law to the detriment of the other state’s policy.¹³⁹ Conflicts-justice theory was thought to push for a “supranational law,”¹⁴⁰ striving to attain “international uniformity of results”¹⁴¹ in conflict of laws. Rules and principles derived from conflicts-justice were

133. *Id.* at 147.

134. *Id.* at 116 (“Difficulties arise, when, besides domestic citizens, *citizens of foreign states* are involved. Then it must be determined which party is favored by the rule of the domestic substantive law. Should this party be a citizen of the domestic state, then domestic law is to be applied, otherwise not, or in any case, not always.”).

135. SELECTED ESSAYS, *supra* note 11, at 85–86, 292, 322, 420, 503, 514, 703–05.

136. *Id.* at 116.

137. *Id.*

138. *See* SELECTED ESSAYS, *supra* note 11, at 590.

139. *See id.*

140. *See* Kegel, *The Crisis*, *supra* note 6, at 205.

141. *Id.* at 179; *see also* SELECTED ESSAYS, *supra* note 11, at 707–09 (explaining conflict of laws as applied to uniformity interests and the independent interests of the state).

viewed as formalistic because they were perceived as ultimately linked to an empty and naive universalistic desideratum.¹⁴² Currie considered conflicts-justice theories and Beale's vested rights theory as unduly burdened by universalistic precepts.¹⁴³ Any reference to territoriality or vested rights was considered formalistic to the extent it was linked to a belief that there were universal concepts and analytical categories through which to determine the applicable law.¹⁴⁴

European mid-twentieth century conflicts-justice theorists turned the tables around. They viewed the American conflicts revolution as a return to the universalistic theory of the past by premising itself on the notion of state sovereignty.¹⁴⁵ Currie associated the universalistic school of thought with dogmatic concepts and *a priori* assumptions that all states should reach the same result, even at the detriment of their internal policy.¹⁴⁶ European mid-twentieth century conflicts-justice theory associated universalistic theories with a school of thought that described conflict of laws—by analogy to public international law—as an area of law that distributed sovereign authority among states.¹⁴⁷ That, they thought, was precisely how Currie understood conflict of laws.¹⁴⁸ From either side of the aisle, their counterpart seemed regressive, moving conflict of laws backwards, rather than forwards.

Much of this can be explained by the intellectual historical context in which the American conflicts revolution and the European mid-twentieth century conflicts-justice theory were placed. On both sides of the Atlantic, past experiences looked different, so the lessons to be learned from them were also quite different. Europe had witnessed various excesses of a theory premised on state sovereignty, including the inability of the colonial powers to consider the law of the colonies equally worthy of application in their courts;¹⁴⁹ the Soviet Union's attempt to "nationalize" all private law matters, which allowed it to

142. See *Married Women's Contracts*, *supra* note 13, at 263–64 (discussing why uniform laws are often ineffective).

143. SELECTED ESSAYS, *supra* note 11, at 707–09.

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

145. See SELECTED ESSAYS, *supra* note 11, at 137–38.

146. See *id.*

147. For a detailed description of the European universalistic school of thought in conflict-of-laws, see generally BANU, *supra* note 70.

148. For a critique of Currie's assumption that you could distribute authority by reference to state interests, see Kegel, *The Crisis*, *supra* note 6, at 180 ("To be sure, the state, a political abstraction, has no interest in and of itself. But influential people within the state can and do have interests. They may be members of the *government*, since Currie speaks of "governmental" interests. Or they may be members of the state *legislatures* turning out the statutes and ordinances, since Currie mostly has in mind statutory law.").

149. See generally R.D. Kollwijn, *Conflicts of Western and Non-Western Law*, 4 INT'L L. Q. 307, 307–11 (1951) (discussing the interaction of laws in various colonies).

police any transnational endeavors of its constituents;¹⁵⁰ and the early twentieth century French attempts to assimilate immigrants through a wide application of its law.¹⁵¹ What really defined universalistic theory in the eyes of mid-twentieth century conflicts-justice theorists was an excessive and uncritical reliance on the notion of state sovereignty. In their eyes, the American conflicts revolution was carrying that forward.¹⁵² Currie's slippage in describing the class of individuals a state would aim to protect as "residents," "domiciliaries," "resident domiciliaries," and "citizens" signaled to European conflicts-justice theorists that American theorists had not given much thought at all to what sovereignty is supposed to mean.¹⁵³ This, however, had been a centuries-long debate in Europe, and the answers were far from clear or straightforward. In this respect American material-justice theories seemed remarkably formalistic and quite naive.

By contrast, the American conflicts revolution was reacting to Joseph Beale's theory, which argued that conflict of laws is the field which recognizes "vested rights" across borders.¹⁵⁴ According to Beale, a right vests at the place where the last element occurred.¹⁵⁵ Beale indeed believed this theory to be universally valid, despite his acknowledgment that "legal rights might be analyzed in almost as many ways as there are analysts."¹⁵⁶ The American conflicts revolution reacted against the use of any metaphysical notions of rights, vestedness, and territoriality and assumed that those notions were carried over from universalistic premises of finding universally valid answers to conflict-of-laws questions.

None of this critique touched mid-twentieth century European conflict-of-laws theory, however. Similar theories to Beale's had been rejected in Europe by the mid-1800s,¹⁵⁷ and continental Europeans were as shocked by Beale's formalism as Currie was.¹⁵⁸ Furthermore, after the first few decades of the twentieth century, European conflict-of-laws theory had been thoroughly premised on a "third school," an

150. Kegel, *Fundamental Approaches*, *supra* note 54, at 16–17 ("In the Soviet Union law is regarded as a political agent, as private international law is viewed as a mean of conducting foreign policy."). *See also id.* at 31 (Kegel's remark that a theory like Currie's would be "suitable for a totalitarian state, although it was certainly not so intended by Currie.").

151. For a description of the nationalist strand of thought in France in the first half of the 20th century, *see* BANU, *supra* note 70, at 95–97.

152. *See* Kegel, *The Crisis*, *supra* note 6.

153. *See id.* at 116.

154. *See infra* note 74.

155. BEALE, *supra* note 72, at 115.

156. *Id.*

157. For a comparison of Beale's theory to earlier "vested rights" European theories, *see generally* BANU, *supra* note 70, at 165–83.

158. *See* Kegel, *Fundamental Approaches*, *supra* note 54, at 10; SCHURIG, *supra* note 7, at 290.

intermediary position between universalism and particularism, such that the goal of decisional harmony was as relative to European conflicts-justice thinking as it was for American material-justice theory.¹⁵⁹

Mid-twentieth century conflicts-justice theorists were seeking “practical internationalism.”¹⁶⁰ They had become convinced that it was possible to combine an appreciation for legal pluralism and for peaceful coordination of law application in the transnational realm with an understanding that each state gives its own meaning to this fragile equilibrium. By contrast, they thought Currie had maintained the earliest universalistic premises and brought them to their natural conclusion.¹⁶¹ In the eyes of conflicts-justice theorists, Currie had embraced the understanding of conflict of laws as a field distributing state sovereignty and then concluded that since no court could be in the business of reconciling state sovereignty qua governmental interests, the forum should apply its law.¹⁶² For conflicts-justice theorists, since “the premise” of seeing conflict of laws as a field distributing sovereignty was wrong, there was no need to feel an inevitable pull to apply the law of the forum.¹⁶³ Conflicts-justice theorists agreed that no state could assume the role of universal trier of state sovereignty. But accepting this led to the freedom of balancing whatever interests and policies a national decision-maker thought were implicated in order to reach the “just” decision in conflict of laws.¹⁶⁴ Because conflicts-justice theorists did not understand conflict of laws as a conflict of sovereignty and because they assumed that each state had the responsibility to “make order in its own house,”¹⁶⁵ these theorists postulated a freedom of decision-makers to balance any relevant interests. This range of interests included, but was not limited to state interests.¹⁶⁶ For mid-twentieth century conflicts-justice theorists “to assume an ‘injury of state sovereignty’ because a state would *apply* the law of another—possibly even ‘against its will’—is absurd.”¹⁶⁷ Against Currie, conflicts-justice theorists argued that those who worry about whether one particular state *wants* its law applied

159. See SCHURIG, *supra* note 7, at 191 (arguing that for conflicts-justice theorists international decision harmony is “one goal among many”); see also Michaels, *Revolution*, *supra* note 75, at 1615.

160. Dimitrios Evrigenis, *Tendances doctrinales actuelles en Droit International Prive, Actuelles*, 118 RECUEIL DES COURS 313, 426 (1966), cited in Kegel, *Fundamental Approaches*, *supra* note 54, at 13.

161. SCHURIG, *supra* note 7, at 303.

162. *Id.* at 189.

163. *Id.* at 289.

164. *Id.* at 190, 192.

165. *Id.* at 261.

166. *Id.* at 269, 284.

167. *Id.* at 289.

lose sight of the fact that another state must decide if such law *ought* to be applied.¹⁶⁸

In the eyes of conflicts-justice theorists, it is at this point that material-justice had reached the limits of its “postulate of neutrality.”¹⁶⁹ After declaring itself innocent and unable to function as the tiebreaker between legal orders, it assumes precisely the role of a universal tiebreaker when it declares its own law applicable in most cases.¹⁷⁰ Surprisingly, conflicts-justice theory throws the charge of neutrality against material-justice, declares it a façade for the “imposition of the most aggressive legal order,”¹⁷¹ and derives all this from Currie’s alignment with the premises of the universalistic theory he purported to reject.¹⁷² By contrast, conflicts-justice theory seemed

from the beginning clear that one state’s own solution [to the conflict-of-laws problem] is relative, valid only for its “household,” while representing the result of striving for the most comprehensive “just” decision (according to views, which despite any attempt at objectivity, are necessarily subjective, meaning linked to the imagination of the legal community from which they emanate and which can inspire abroad only if it appears convincing.)¹⁷³

Currie’s charge that conflicts-justice theories are unduly universalistic highlights why it is important to not paint the conflicts-justice school of thought with overly broad brushstrokes. While Currie’s critique may have been warranted when leveled against Beale’s theory, it misses the mark when leveled against other conflicts-justice perspectives, including mid-twentieth century European ones.

D. *State Interests vs. Private Interests*

While conflicts-justice theorists rejected state interest analysis for its excessive focus on sovereignty, they also questioned the meaning one could give to state interests in a field that regulates relationships between individuals in the transnational realm. Currie assumed that any kind of skepticism of “state interests” is the result of a lack of acknowledgment of regulatory policy.¹⁷⁴ But the connection between the two is harder to draw than might be assumed. There are at least

168. *Id.*

169. *Id.* at 292.

170. *Id.* at 292–93 (noting that from the initial “respect for foreign legal orders,” “the starting leitmotiv” not much is left).

171. *Id.* at 295.

172. *Id.* at 293.

173. *Id.*

174. See *Married Women’s Contracts*, *supra* note 13, at 230 (“One of the reasons why we can tolerate a mechanical, deductive system of conflict of laws and the anomalies it produces is that frequently—and this is especially true of common law rules—the purpose and policy of the rule is obscured by the mists of antiquity, or is obsolete, or simply inconsequential.”).

three ways in which conflicts-justice theorists resist the temptation to think through conflict-of-laws questions via state interest analysis.

The first concern conflicts-justice theorists had with a material-justice theory premised on state interest analysis is that it tends to “depersonalify” conflict of laws. Kegel would often remark that while Currie seems focused on “state interests” he did not seem very interested in individual or community interests or any broader interests of everyone in order.¹⁷⁵ It mirrors the charge that a fellow material-justice theorist—David Cavers—made against Currie, namely that Currie’s methodology “refuses to consider the claims of human beings to justice unless [he] can fit them into [his] conception of state interests.”¹⁷⁶ The German conflicts-justice theorists saw in Currie’s theory an “argumentative masquerade” in that “in every case decisions about the actual interests of the individuals involved have to be conceptualized as decisions between public interests or state interests.”¹⁷⁷

Second, conflicts-justice theorists thought interest analysis idealized the state and failed to question the idyllic image of the state pursuing everybody’s best interest. Kegel wrote, “[t]o be sure, the state, a political abstraction, has no interest in and of itself. But influential people within the state can and do have interests.”¹⁷⁸ Against Currie’s imaginary legislature carefully crafting public policy in private law, Kegel offers the following example: “When the German Civil Code was being debated in the Reichstag, the delegates occupied themselves for hours with the almost ridiculous question of whether owners of the right of hunting should be saddled with the responsibility for compensating land owners for damage caused by hares!”¹⁷⁹

Finally, a related concern with the American material-justice theory was that it failed to understand that in matters of private law the state does not function as a litigant but rather as “a repository of justice”¹⁸⁰ of “law and order.”¹⁸¹ According to Kegel, it is better to think of the state as a “judge” aiming to appreciate whether the imposition of one law or another does justice to the parties or the broader communities.¹⁸² “Since the weal and woe, the power of the state is not at stake in private law, the state does not decide its own affairs, but

175. See Kegel, *The Crisis*, *supra* note 6, at 180 (“To the courts or the people in general Currie seems to give no credit as carriers of governmental interests.”) (emphasis in original).

176. David Cavers, *A Correspondence with Brainerd Currie, 1957–1958*, 34 *MERCER L. REV.* 471, 485 (1982) [hereinafter Cavers, *A Correspondence*].

177. FLESSNER, *supra* note 15, at 12.

178. Kegel, *The Crisis*, *supra* note 6, at 180.

179. *Id.* at 183.

180. See Kegel, *Fundamental Approaches*, *supra* note 54, at 48.

181. Kegel, *The Crisis*, *supra* note 6, at 182.

182. See *id.*

affairs of *others*.”¹⁸³ State interest analysis seemed to “place too much stress on the concept of sovereignty and neglect the difference between a state’s interests and the search for justice inherent in private law!”¹⁸⁴ There are two ways in which to understand this last critique against material-justice. One is to suppose that state interest analysis injects an artificiality of extracting “state interests” in order to ensure that its own law is maximally applied. The other way to understand this critique is to view it as an ideological difference on the question of the division between private and public law.

On the first understanding, conflicts-justice theorists were concerned that by attributing a “state interest” to any norm of private law, one was in essence forcing an assumption that the state is “hurt” whenever its law is not applied.¹⁸⁵ It envisioned the state, rather than the parties, as the actual litigant, which in turn made it impossible to think that a state would apply the law of another state when expressing a different view of “private justice.”¹⁸⁶ By contrast, Kegel notes that according to conflicts-justice it seemed obvious that:

[I]f under domestic law the widow takes one half of the estate while the rest goes to the children, it would be possible, in cases where there is a strong connection with a foreign state, *e.g.*, where the decedent was a foreigner or left behind realty located abroad, to apply foreign law and give the widow one fourth and the children three fourths of the estate.¹⁸⁷

It is tempting to argue that conflicts-justice theorists’ skepticism of “state interests” in private law is a mark of formalism and to link it again to the formalism versus pragmatism debate discussed above. But the distinction between seeing private law as a “instrument of state governance” as opposed to an expression of the background assumptions about just interactions between individuals is a significant theoretical debate still very much alive, not just across common law and civil law jurisdictions, but in the United States as well. A recent debate on the proper understanding of legal norms on unconscionability in contract might illustrate the point. Seana Shiffrin argued that rules on unconscionability express an interest of the state in not facilitating exploitation: “The motive may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action. Put metaphorically, on moral grounds, the state

183. *Id.*

184. *Id.* at 184.

185. *See id.* at 182–83 (“But the state does not suffer, it is not hurt, if in some cases as, for example, where foreign law is applied, a decision is reached which it does not consider to be in the best interest of justice.”).

186. *See id.*

187. *Id.* at 184.

refuses, for its own sake, to be a codependent.”¹⁸⁸ Nicolas Cornell usefully explains this attempt to inject a state interest in the explanation of unconscionability rules as related to “the search of nonpaternalist justifications as a means of escaping the charge of paternalism” in private law and also the appeal “to the state’s role as contract enforcer.”¹⁸⁹ The first strategy can also be seen in attempts to justify mandatory seatbelt requirements on the basis of reducing public healthcare expenditures, while the second can be seen in the Supreme Court’s rejection of racially restrictive covenants in *Shelley v. Kramer* on the premise that the court itself was prohibited from discriminating by the Fourteenth Amendment.¹⁹⁰

Framing unconscionability laws in this way certainly would resonate with material-justice theory premised on state interest analysis. This description would then lead to the familiar conundrum: Does the state want to protect only its own domiciliaries from unconscionable contracts and US domiciliaries traveling in cars everywhere or does it aim to protect all people? Conflicts-justice theory presumed that by framing all private law norms as expressions of state interest, the forum would feel an enormous initial pressure not to depart from its policy even in transnational circumstances and possibly not extend its protective policies to domiciliaries everywhere. But this translation of private law norms through the notion of state interest was by no means inevitable. Indeed, there is a whole host of alternative explanations for norms of unconscionability.¹⁹¹ In Cornell’s own alternative to the state-centered model, rules prohibiting enforcement of unconscionable contracts can be explained by the fact that the party claiming enforcement “lost the position—the standing—to complain because of her own misconduct.”¹⁹² This description of a private law norm explains why conflicts-justice theorists could claim that private law norms represent value judgments about just interactions between individuals,¹⁹³ that on their face these rules are neutral as to their transnational application,¹⁹⁴ and that no *a priori* conceptual

188. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 224 (2000).

189. Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1148 (2016).

190. *See id.*

191. *See* Emmanuel Voyiakis, *Unconscionability and the Value of Choice*, in UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE 79, 82–83 (Mel Kenny et al. eds., 2010).

192. Cornell, *supra* note 189, at 1149.

193. *See* Kegel, *The Crisis*, *supra* note 6, at 182 (“However, in all of these cases the issue is not the power of the state, *per se*, but rather the correct and proper ordering of relationships among private parties.”).

194. *See* ERNST RABEL, *THE CONFLICT-OF-LAWS* 103 (2d ed. 1958) (“Private law rules ordinarily do not direct which persons or movables they include. It is as mistaken

assumption can be made that the application of a foreign law (for example one which declares a particular kind of contract—say consumer contracts—unconscionable) causes *the state* an injustice.¹⁹⁵

At this point one might think that conflicts-justice theorists missed the point. The state could be taken out of the picture and one could still recognize a broader public interest of the community in protecting domiciliary contracting parties from unconscionable contracts entered into abroad or with foreign counterparties. The controversy would then dissolve into an ideological difference regarding the boundary between public and private law. This is what Kegel might have had in mind when arguing that “private law has thus a certain degree of independence from state control. The state gives its benevolent sanction to a *de facto* system of private law rather than bringing this system into existence by legislative fiat.”¹⁹⁶ How far he meant to push the private/public distinction beyond rejecting a focus on state sovereignty is not entirely clear since Kegel also acknowledged the “important influence” of “political convictions” in a wide range of private law matters.¹⁹⁷ He insisted only that:

[I]n all these cases [of private law rules influenced by political convictions] the issue is not the power of the state *per se* but rather the correct and proper ordering of relationships among private parties. *Justice*, not power, is at work. On the other hand, *e.g.*, anti-trust law, in so far as it does not secure the interests of private competitors, but the *public* interest in free competition in the private sector of the economy, presents an example of public law administration of the private right to buy and sell.¹⁹⁸

Regardless of how Kegel’s remarks should be understood on the private/public distinction, later conflicts-justice scholars saw no premise in the theory of conflicts-justice itself that would require a sharp distinction between private and public interests.¹⁹⁹ Klaus Schurig for example remarked, “Private International Law and Public International Law blend into each other just as much as private and

to apply such rules blindly to events all over the world as to presume them limited to merely domestic situations. They are simply neutral; the answer is not in them.”)

195. See Kegel, *The Crisis*, *supra* note 6, at 183 (“Therefore, the application of foreign private law does not run counter to the nature and identity of the state. On the contrary, the application of foreign private law does not even disturb the state: foreign private law represents only another answer to the question of *justice*.”).

196. *Id.* (“This is no doubt an exaggeration, but a necessary one if we are to underline the essential difference between public and private law.”).

197. See *id.* at 182.

198. *Id.* (alteration in original).

199. This disagreement among scholars subscribing to the same overarching theoretical perspective explains why the possibility for reconciliation argued for here will seem more or less persuasive to particular scholars in each camp. Every attempt to define a particular school of thought by some core analytical elements of course runs against internal disagreement about what those elements might be. I thank Margaret Martin for raising this point.

public national law do. There is no need for a division, for a sharp delimitation of borders.”²⁰⁰ He argued that the main problem conflicts-justice had with material-justice was its fixation on the state as an isolated interest bearer.²⁰¹ Instead, conflicts-justice assumed that “the state has an altruistic rather than egoistic interest in private law, concerning itself primarily with a *just* ordering of private life.”²⁰² By 1990, Alex Flessner concluded that conflicts-justice theory should and could fully embrace state interest analysis’s “significant contribution” of integrating “private and public interests in one theory.”²⁰³

III. REMAINING DISTINCTIONS AND RECONCILIATIONS

The previous Parts of this Article argued that the classical dichotomies through which the differences between material and conflicts-justice theories are evaluated are not particularly helpful. Any differences between the theories are not explained by general commitments to pragmatism, formalism, neutrality, universalism, or even a sharp divide between private and public law. In part because they are not linked to such opposing philosophical positions, the differences between the two theories are in fact complementary, rather than irreconcilable. In a remarkable study not yet translated into English, the German conflicts-justice theorist Klaus Schurig argued that the two theories are in fact much closer to each other than is commonly assumed.²⁰⁴ Schurig argued that despite American interest analysis scholars’ assertion that the scope of a national law “quite obviously,” “doubtless[ly],” “surely” is derived directly from the legislative policy,²⁰⁵ they too end up deriving choice-of-law norms *for* rather than *from* substantive norms.²⁰⁶ To that extent, Schurig concluded that “there is no difference between American interest analysis and classical conflict-of-laws theory.”²⁰⁷ Furthermore, Schurig argued that even the theory of the “better law” has no revolutionary insight to offer to classical conflicts-justice theory, as the latter contains a similar auxiliary choice principle when all other conflicts-justice interests point in different directions.²⁰⁸ Schurig therefore

200. SCHURIG, *supra* note 7, at 166.

201. *Id.* at 278.

202. Kegel, *The Crisis*, *supra* note 6, at 183.

203. FLESSNER, *supra* note 15, at 10.

204. SCHURIG, *supra* note 7, at 298–300.

205. *Id.* at 100 n.118.

206. *Id.* at 100.

207. *Id.* at 300.

208. *Id.* at 309 (finding that conflicts-justice theory’s auxiliary choice principle more honest because it clarifies that this appreciation of the “better law” is actually a “relative” assessment made by the forum and from its own perspective).

concluded that the main difference between material and conflicts-justice was not whether they both draw insights from the substance of the norms in conflict. This is undeniably true of both theories. Rather, Schurig thought the remaining differences lay in the fact that material-justice theorists did not make explicit what policy choices informed their decisions on the reach of a legal policy, that they fundamentally rejected the need for a set of choice-of-law rules, and that they assumed that it was impossible to weigh divergent state interests.²⁰⁹

This Part argues that those remaining differences are linked to two different analytical perspectives that theorists in either camp were interested in. It also argues that on both sides of the aisle, scholars have shown that these insights are not only reconcilable, but in fact complementary.

First, conflicts-justice theorists focused on different conceptions of law and on justice relativism, allowing them to constantly decouple and recouple the state from the law.²¹⁰ This, in turn, made it possible for conflicts-justice theorists, unlike material-justice theorists, to reconcile a postulate for equality of legal systems with a conceptual possibility of balancing interests and policies and of aggregating and disaggregating interests down from and up to a state-wide level. This was an important and helpful methodological insight, which guards from the danger of unduly limiting individual agency across borders.²¹¹ As illustrated in subpart D above, the material-justice scholar David Cavers combined these insights of conflicts-justice theory with material-justice's focus on regulatory policy.

Second, conflicts-justice focused on a higher-level standpoint from which to determine the justice of conflict-of-laws norms. This standpoint was generic, applicable to broad classes of individuals and communities, rather than to particular plaintiffs and defendants. It was also systemic, rather than transactional. It was meant to evaluate how the transnational existence of particular classes of individuals would be impacted by the application of one or the other's law as such, in other words, mainly independent of the content of the law (i.e., as the law of their state of citizenship, or the law of their place of domicile, or as the law where the contract was to be performed, etc.). By contrast, material-justice theorists evaluated the justice of conflict of laws from a microlevel (i.e., the decision in the individual case, the policies of the

209. *Id.* at 300.

210. *See* SCHURIG, *supra* note 7, at 52 (“This requires a renunciation of the archaic claim to justice by each legal order, an open willingness to accept its relativity. *To this extent* private international law presupposes a certain distancing of the state in relationship to its substantive law; this distancing shows itself in the *mere* willingness to allow the application of foreign law as an alternative to its own.”).

211. *Id.* at 180 (“To the *courts* or the *people* in general Currie seems to give no credit as carriers of governmental interests.”).

forum qua forum, the rights and liabilities of individuals in particular transactions, under individual norms, etc.) and from the point of view of the substantive result of applying one law or another (i.e., application of a norm because it grants or denies compensation, validates or invalidates a contract, etc.). From within the conflicts-justice camp, scholars showed how these perspectives could cross-reference and bleed into each other. Alexander Luederitz showed that a systemic perspective should be maintained even when focusing on the substantive result, rather than content-independent interests in the application of a law.²¹² Alex Flessner showed that a transactional perspective focused on the particular circumstances of the litigants should reference both content-dependent and content-independent interests in the application of a particular law.²¹³

A. *Coupling and Decoupling the State from the Law*

In his Hague Course evaluating the “crisis of conflict-of-laws” generated by the theory war, Kegel described the relationship between the state and its law in the private law domain in the following terms:

The state has an altruistic rather than egoistic interest in private law, concerning itself primarily with a just ordering of private life. In this respect even its domestic private law is not “its own” private law; it rather strives to seek the best and fairest solution for all men. Therefore, the application of foreign private law does not run counter to the nature and identity of the state. On the contrary, the application of foreign private law does not even disturb the state; foreign private law represents only another answer to the question of justice. No state has a monopoly on justice nor does it wish to ever acquire such a monopoly.²¹⁴

This excerpt illustrates the way in which Kegel, like all conflicts-justice theorists, appealed to a particular notion of private law (as a repository of local but potentially widely applicable justice principles) and a certain role of the state (in facilitating justice between individuals) in order to explain how a state might feel politically free but compelled by justice to apply a foreign law in particular circumstances. As discussed below, the notions of law and justice relativism that conflicts-justice theorists employed allowed those theorists to decouple and recouple the state from the law. This, in turn, allowed them to sustain a postulate of equality between legal systems²¹⁵ and to disaggregate state interests in order to increase individual agency across borders.

212. *See infra* p. 51.

213. FLESSNER, *supra* note 15, at 6.

214. Kegel, *The Crisis*, *supra* note 6, at 183.

215. While the postulate of equality required the application of foreign law under certain circumstances it was always possible to reject the application of foreign law

1. What is Law?

In his engagement with American material-justice theory, Alex Flessner observed that under the governmental interest analysis theory, any law, including private law, is seen as “an instrument of social control.”²¹⁶ Conflict of laws looks much like a conflict of political order.²¹⁷ The judge is inevitably pressed to apply the law of its jurisdiction even to transnational legal matters because she is considered legally and politically obligated to give effect to her jurisdiction’s legal policy only because she cannot discharge what is otherwise portrayed as a political function of reconciling state interests.²¹⁸

Conflicts-justice theorists understood this to be an overreliance on the connection between the state and the law. To be sure, as explained below, in voicing this critique, conflicts-justice theorists were by no means pressing for natural law. As quintessential legal pluralists, they could hardly insist that the law is untied to the community in which it is enacted. But recognizing this looser dependence of a norm on its particular socioeconomic and political context was different, in conflicts-justice theorists’ view, from asserting that the state or even the broader civil society have an interest in a wide-spread transnational application of its law. In fact, insisting on the dependence of norms on the broader socioeconomic and political context meant an *a priori* awareness of the limited scope of any norm. European conflicts-justice theorists thought it was important to create a certain level of separation of the state from the law in order to avoid the encouragement of totalitarian and oppressive regimes overly controlling individuals’ transnational lives. In stressing this danger, Kegel ironically pointed to a troubling similarity between American governmental interest analysis and the Soviet Union’s private international law theory according to which “law is viewed as a

through the “public policy exception” when foreign law was considered fundamentally unjust. Whether the justice standard by which foreign law is measured under the public policy exception is a national or universal one, remains unclear. What is clear however is that the postulate of formal equality between legal systems was always coupled with a technique by which to exclude legal norms that were considered fundamentally unjust. At a more fundamental level it is also important to understand that a postulate of equality doesn’t require deference. Ralf Michaels described the ethic that the postulate of equality generates as “an ethic of responsivity” which “can lead to a result that a conflict remains, just as in conflict among individuals the ethically required result is sometimes that the conflict remains. Responsivity does not merely equate deference. But responsivity makes rejection justifiable.” See Ralf Michaels, *Private International Law as an Ethic of Responsivity*, in DIVERSITY AND INTEGRATION IN PRIVATE INTERNATIONAL LAW (Veronica Ruiz Abou-Nigm & Maria Blanca Noodt Taquela eds., 2019) [hereinafter Michaels, *Private International Law as an Ethic of Responsivity*].

216. FLESSNER, *supra* note 15, at 5.

217. *Id.*

218. See SELECTED ESSAYS, *supra* note 11, at 357–58, 602, 604.

political agent, and private international law is viewed as a means of conducting foreign policy.”²¹⁹ Linking conflict-of-laws theory to an understanding of law as an instrument of social control risked unduly restricting individual agency across borders. But it also ran against three main insights of conflicts-justice theory.

First, conflicts-justice theorists insisted that individuals have content-independent interests in the application of a law. For them, individuals could feel “attached” to a particular law because of their attachment to the community that enacted it. This meant that there could be a noninstrumental, content-independent interest in the application of law, which was linked to a noninstrumental sense of political obligation.²²⁰ Gerhard Kegel described law as “lived” by people, almost as an element of affection and pride.²²¹ Individuals were thought to have an interest in being governed by a “familiar” law, one that they feel socially connected to, irrespective of its content. Justifying the application of a law through a noninstrumental notion of political obligation also explained, in Kegel’s view, why a state could apply the private law of another state that is not politically recognized by the forum.²²² By moving away from viewing conflict of laws as a conflict of political authority and employing a sociological understanding of law, conflicts-justice theorists argued that there is nothing problematic in applying a law that is “lived” within a community, though that community is not recognized politically as a state.²²³ This simultaneous decoupling of law from the state-centric political realm and recoupling in the day-to-day reality of interpersonal interaction displayed a certain ambivalence, which is characteristic of conflicts-justice theory. The decoupling of law from the state-centric political realm did not correlate to an embedding in *lex mercatoria*, or a lived law detached from a particular community. It was much more a detachment of the state from its own law, rather than a detachment of law from the state. This then meant that individuals could make claims to the application of the law of citizenship or domicile, not because the state “allowed” it but because these individuals felt attached (or were presumed attached) to a particular community

219. Kegel, *Fundamental Approaches*, *supra* note 54, at 17 (“The development of private international law will be influenced by the political fate of the world as a result of stagnation or of change. It will be less affected where the relationship concerned developed and developing countries, but perhaps more where socialist and non-socialist countries are involved, even if changes in the political climate in socialist countries are taken into consideration.”).

220. For a philosophical perspective that seems to mirror some insights of the conflicts-justice theorists, see generally Samuel Scheffler, *Membership and Political Obligation*, 26 J. POL. PHIL. 3 (2018).

221. INTERNATIONALES, *supra* note 19, at 23.

222. *Id.* at 10.

223. *Id.* at 10 (citing Cardozo in *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of N.Y.*, 170 N.E. 479, 481 (N.Y. 1930)).

(represented by the state).²²⁴ This is also why individuals could not make claims to a universal natural law or a law of the merchant directly (unless it was recognized or integrated under state law).

Second, conflicts-justice theorists were keen to emphasize that a decision-maker in conflict of laws ought to have in view many different policy considerations, beyond any “interest” of a state in having its law applied. If law is viewed as an instrument of social control, a state’s interest in having its law applied was of paramount importance. A different notion of the law was needed to support conflicts-justice theorists’ insistence that just because a state *wants* its law applied abroad does not mean that a different state will think such law *should* apply.²²⁵

Klaus Schurig argued that law is made up of a “rational” and an “imperative” element, and the two can come apart but will cross-reference each other.²²⁶ This helped Schurig draw two conclusions for conflicts-justice theory. On the one hand, this meant that every state would have to evaluate for itself whether a law should apply transnationally or not. Just because a foreign state wants to extend its law’s imperative element across borders does not mean that another state would have to accept its *will*.²²⁷ On the other hand, if the rational and the imperative elements cross-reference each other, incorporating the rational element or extending the imperative element to apply the foreign law in the forum’s court will be one and the same thing.²²⁸ It will also mean that even when a state extends a foreign law’s imperative element and thus renders foreign law applicable in domestic courts, it will at least in part do so because of its rational element.²²⁹ A state is responsible for making its own determination of the choice-of-law question and is further responsible to do so in light of the rational element of the law.²³⁰

Finally, conflicts-justice theorists had to explain the legal nature of conflict of laws itself, to the extent it focused on any considerations other than substantive justice. Alexander Luederitz tried to articulate a notion of the law that would explain why conflict of laws is still law and very consequential even if it does not *directly* determine the rights

224. See Kegel, *The Crisis*, *supra* note 6, at 186 (“In those affairs to which the private *party* has an intimate relationship such as personal, family and inheritance rights, it is natural to apply the law of that state with which the party is most closely linked.”).

225. This is not to say that a notion of the law that sees law as an instrument of social control couldn’t, with some nuances, accommodate the insights of conflicts-justice theory. My aim in this section is not to preclude this possibility, but rather to show what alternative notions of the law conflicts-justice theorists focused on.

226. SCHURIG, *supra* note 7, at 70.

227. *Id.* at 71.

228. *Id.* at 71–72.

229. *Id.*

230. *Id.* at 67, 71–72.

and liabilities of individuals.²³¹ Luederitz was aiming for a view that would counter the often-caricatured understanding of conflict of laws as merely “procedural,” having no interest in the actual outcome of the dispute, and no particular vision of justice.²³² Luederitz argued that private international law is often squeezed into an overly narrow view of law.²³³ If the normativity of a legal proposition depends on it granting a right or issuing a command, then the conflict-of-laws norm appears to have no normativity of its own independent of the substantive norm. Conflict of laws can then be relegated to a “helping” or “complementary” norm.²³⁴ Luederitz thought this notion of the law was too narrow.²³⁵ A broader notion of law suggests that law’s normativity depends on it changing the normative position of individuals, under which one could include granting rights and issuing commands, but also changing the legal status of individuals in a community (marriage, divorces, etc.).²³⁶ Under this broader notion of normativity, it becomes clear that “when a conflict-of-laws norm mandates the application of Swiss law as opposed to the law of the forum such norm causes wide-ranging changes in the normative position of individuals in relationship to each other.”²³⁷ By referencing a broader notion of normativity, Luederitz could explain that conflict-of-laws norms are deeply consequential by structuring particular patterns of just or unjust interactions of individuals in the transnational realm. The fact that they do so through the reference to other norms should not make their normative impact any less significant.

2. Justice Relativism

Once conflicts-justice theorists were able to describe conflict of laws’s normativity in a way that avoided seeing law (including conflict-of-laws rules) as an instrument of social control, they could argue for the possibility and desirability of a state applying the law of another state under certain circumstances. But they still had to explain, against American material-justice theorists, how a state would be inclined to apply the law of another state even if it deviates from its standards of justice. Material-justice theorists were not only puzzled by the fact that the judiciary (a legal organ of a particular state) could ever apply the law of a different state, but also by the fact that it would

231. See LÜDERITZ, *supra* note 52, at 29.

232. See *id.* at 6 (contesting the assumption that PrIL is “procedural” because this would disregard the fact that conflict of laws is inextricably linked with substantive law).

233. *Id.* at 29.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 29–30.

be required to do so even when it perceived the foreign law as unjust. The analytical process of governmental interest analysis made it relatively easy to measure the justice of foreign law by the procrustean bed of domestic law. If the judge of the forum was asked to determine whether a domestic regulatory policy should be extended to the transnational case, it would be relatively easy to come up with a positive answer. Part of this result is explained, argued conflicts-justice theorists, by an implicit bias towards domestic law.²³⁸ Material-justice theory seemed to derive a universal concept of material-justice from domestic views of justice. Furthermore, it created the mirage that this universalization of domestic standards of justice is not only explained by, but mandated by, the results of what is seen as a universal juridical method, namely statutory interpretation. Stated differently, material-justice theorists thought that if one applied the same juridical method used in substantive law adjudication—statutory interpretation—conflict of laws appeared like a classical branch of substantive domestic law, with any biases this might inject into the analytical process. An implicit assumption was that conflicts-justice theorists were thinking about conflict of laws differently than about substantive law because they were not attuned to this methodological unity. This charge shows a deep misunderstanding of mid-twentieth century German conflicts-justice theories.

Brainerd Currie famously stated that the same “method” of reaching a just decision in conflict of laws applies as in a domestic setting: statutory interpretation.²³⁹ This was meant to prevent any assumption that conflict of laws is in any way different from substantive law. A certain circularity is involved, however: Is conflict of laws in no way different from material law because the same method applies or does the same method apply because conflict of laws is not different in any way from material law? Mid-twentieth century German conflicts-justice theorists in fact had a coherent way of responding: there is in fact a methodological unity between conflict of laws and substantive law.²⁴⁰ For conflicts-justice theorists, by alignment with German interest jurisprudence, the method lay in ascertaining the different interests at stake and, if necessary,

238. See SCHURIG, *supra* note 7, at 311.

239. See SELECTED ESSAYS, *supra* note 11, at 380, 537, 627, 643, 705 n.46. For Kegel's discussion of Currie's focus on statutory interpretation, see Kegel, *The Crisis*, *supra* note 6, at 113–22.

240. INTERNATIONALES, *supra* note 19, at 50; see also Kegel, *The Crisis*, *supra* note 6, at 185 (“The state does nothing else than make decisions of conflicts-justice which do not differ basically from its decisions of substantive-law justice. The search for justice is the same.”); *id.* at 188 (“Justice, together with the interests which it regulates, cannot be divided into disconnected parts, that is, into a justice and interests in the area of substantive law and a justice and interests in conflicts law. The interests of conflicts law predominate as rule, but in exceptional cases the interests of substantive law prevail.”).

expressing a principled preference for one or several of them.²⁴¹ However—and this is how conflicts-justice theorists avoided Currie’s circular analysis and provided a powerful critique—the interests involved in a transnational private law matter may not be the same as in the national private law matter.²⁴² Both conflicts-justice and material-justice theorists (*contra* Currie) argued that material private law and conflicts law are united methodologically.²⁴³ However, conflicts-justice theorists believed that the interests to be taken into consideration in the conflict of laws analysis are different from the ones that are relevant in substantive private law.²⁴⁴ This was in no way different from the assumption that the interests taken into consideration in criminal law differ from the ones in administrative law, antitrust law, property law, etc.²⁴⁵

Therefore, despite common assumptions, both theories assumed a methodological unity in the way justice is achieved in substantive law and in conflict of laws. What distinguished the two theories was their position on the spectrum of moral realism versus moral relativism. The different ways in which conflicts-justice justifies value pluralism are interesting in themselves and justify further study. The goal in this Part, however, is simply to note three ways in which conflicts-justice theorists argued that material-justice theories fail to give adequate respect to the laws of other states. In so doing, they illustrate conflicts-justice theorists’ commitment to legal pluralism and justice relativism.

First, conflicts-justice theorists assumed that a particular universal social function—for example compensating victims of torts—can be satisfied in a variety of different ways, all equally acceptable (i.e., through the law of negligence, through tax contributions to a public fund, etc.).²⁴⁶ There is therefore no conceptual level at which we could designate one as better overall. For example, different conceptions of family might be equally valuable but answer questions about prohibited degrees of marriage or inheritance rates differently.²⁴⁷

241. *Id.*; see also SCHURIG, *supra* note 7, at 60 n.50 (discussing Kegel’s postulate of “unity in justice”).

242. SCHURIG, *supra* note 7, at 60.

243. *Id.* (arguing that there is in the end a unified concept of justice because both conflicts justice and material justice refer back to the interests of individuals and communities).

244. *Id.* at 59.

245. *Id.* at 59–60, 60 n.50 (citing Kegel).

246. See Kegel, *Paternal Home*, *supra* note 54, at 616 (“[T]here are many different rules governing the same subject, e.g. the number of testamentary witnesses. They govern in different states or subdivisions of a state, different personal groups (e.g. Christians, Jews, Moslems), at different times, at different levels (e.g. federal and state).”).

247. See Kegel, *The Crisis*, *supra* note 6, at 184.

Second, particular kinds of solutions offered through law are triggered by particular social conditions, such that one could not designate a lower or higher rate of compensation as “better” but as presumably optimal given the social conditions of the community it regulates.²⁴⁸ This also made it seem incoherent to suggest that applying a lower quantum of damage contravenes the “interest” of the forum.²⁴⁹

Third, different values, otherwise each worthy of respect and adherence, can provide for mutually incompatible courses of action. This is why Kegel remarkably concludes his survey of conflict of laws in 1985 with the proposition that the “development of private international law . . . depends on the extent to which the individual and enterprises are allowed a freedom of action” such that it will be affected “where socialist and non-socialist countries are involved.”²⁵⁰ In other words, in the abstract it would be impossible to suggest that a more communitarian, socialist system is better than an individualistic one. They may both, by some metric, be worthy of respect and adherence and yet recommend mutually incompatible courses of action.

3. Decoupling as a Means Rather than an End

The analytical steps described above allowed conflicts-justice theorists to achieve an *initial* decoupling or detachment of the state from the law. The reality of legal pluralism, they insisted,

presupposes a certain disavowal of a state’s absolute claim to justice, an open-stated willingness to acknowledge justice relativism. *To this extent* PrIL [Private International Law] presupposes a certain distancing of the state in relationship to its (private) law; this distancing is reflected in the willingness to apply foreign law *at all* as an alternative to its own.²⁵¹

By contrast, Currie was highly skeptical of any decoupling of the state from the law because he thought that any such assumption, however weak, would lead to an assumption that a state is indifferent as to which law is ultimately applied.²⁵² Material-justice assumed that a

248. Kegel, *Fundamental Approaches*, *supra* note 54, at 49 (“It is an advantage to be able to select the applicable law ‘blindly’, and it is a disadvantage to have to seek out the substantive rules of several ‘concerned states’, for it is often difficult to ascertain these rules and to assess their quality according to doubtful standards.”).

249. *Id.* at 49.

250. *Id.* at 72.

251. SCHURIG, *supra* note 7, at 52.

252. See SELECTED ESSAYS, *supra* note 11, at 443–43 (citing with approval Justice Holmes in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 535 (1928): “In my opinion the authority and only authority is the State and if that be so, the voice adopted by the State as its own should utter the last word.”).

concept of law that is somewhat detached from the state and an attempt to relativize justice, even in the “benign” ways described above, ultimately leads to a disinterest for the ultimate outcome of the dispute by virtue of a disinterest in which law is being “chosen.”²⁵³ Material-justice, in other words, assumes that an *a priori* openness to accept that different states should have an equal voice in the process by which a choice-of-law decision is reached translates into a mandate to accept those views themselves. Conflicts-justice wanted to walk the jurisprudential fine line of recognizing tolerance and legal pluralism even if ultimately choosing one’s own law.²⁵⁴ This is why Schurig insisted that the postulate of equality of legal systems and of tolerance for such legal pluralism “should not be understood to mean that it is irrelevant to the state which law is applied, but rather as a manifestation of ‘respect for the foreign.’”²⁵⁵ From a conflicts-justice perspective, legal pluralism and tolerance are “the theoretical bases of conflict-of-laws, but not a means through which to make conflict-of-laws decisions in individual cases.”²⁵⁶ It is rather a starting premise that “other legal systems are *generally* and under particular circumstances capable of providing legal solutions which conform to justice.”²⁵⁷

It is important to understand that a methodological decoupling of the state from the law has important instrumental values for conflicts-justice theory. It is not an end in itself. In particular, it is meant neither to push for natural law nor to suggest that ascertaining legal policies under the various laws would not be a worthwhile task.²⁵⁸ It is an

253. I borrow the term “benign relativism” from T.M. Scanlon, whose account I believe very much mirrors the intuitions of conflicts-justice theorists. See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 333–38 (1998). I connect T.M. Scanlon’s moral contractualism with the debates on justice in conflict of laws elsewhere in Banu, *A Moral Contractualist Perspective*, *supra* note 24.

254. This distinction is helpfully explained and illustrated in T.M. Scanlon, *The Difficulty of Tolerance*, in *TOLERATION: AN ELUSIVE VIRTUE* 226 (David Heyd ed., 1996). Ralf Michaels has referred to this analytical mode of private international law as an “ethic of responsibility.” See Michaels, *Private International Law as an Ethic of Responsibility*, *supra* note 215, at 9–11 (“One minimum ethical demand within private international law is to acknowledge this situation of the other as both different and similar to us. Such acknowledgment is denied both where difference is denied and where similarity is denied . . . Such a position creates the discipline’s proper attitude, which is one in which the possibility of deference to foreign law should be considered. But the attitude itself does not tell us when and how such deference should take place.”).

255. SCHURIG, *supra* note 7, at 52 n.9.

256. *Id.* at 53.

257. *Id.*

258. Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1858 (2015) (“to the extent [Currie’s critics] deny the domestic method’s ability to ascertain state policies, at least those of the forum state, these criticisms are unjustified . . . Ascertaining the *telos* or purpose of a law is more difficult in conflicts cases than in ordinary domestic cases, but it is both a surmountable and a worthy task.”).

analytical means to the end of fostering respect for different legal systems, their values, and their views of justice. It is further a means for injecting skepticism for the view that a law embodies the interests of an entire community. It invites us instead to disaggregate “state interests” in order to appreciate which individuals and groups are privileged and which are disadvantaged. This, in turn, would encourage individual agency across borders, for example, in order to evade oppressive regimes. Furthermore, conflicts-justice theorists thought that only an initial decoupling of law from the state would allow for pragmatism in balancing interests. Currie believed the opposite was true. Under his theory, it was the bulwark of pragmatism to keep the tight connection between the law and the state constantly on display and this, in turn, was anathema to any proposition of balancing state interests by the courts.²⁵⁹

B. Systemic vs. Transactional Justice

The different views about the connection between law and the state and about justice relativism led conflicts-justice and material-justice theorists, respectively, to focus on different standpoints from which to evaluate claims to justice. Because material-justice theorists saw the state as inextricably linked to its law, the focus of the theory was to explain whether in a particular case the forum can give up on its standard of justice, especially when doing so would negatively impact its domiciliaries. By contrast, because conflicts-justice theorists injected a certain distancing of the state from its law and focused on legal pluralism, the questions of justice posed by conflict of laws seemed more systemic. Conflicts-justice theorists would ask how the transnational lives of generic classes of individuals would be impacted by the application of one law or another either from a content-independent (i.e., because it made the ascertainment of the law more difficult, because it didn’t allow individuals to be perceived as equal members of a community, because they felt alienated from their community of origin or residence, etc.) or a content-dependent perspective (i.e., because consumers would not receive a benefit they were entitled to under the law of their domicile).

Yet it is important to unpack two different ways in which conflicts-justice theorists referenced systemic factors in their theory of justice. The first one is what conflicts-justice theorists often referred to as the interest of order.²⁶⁰ Conflicts-justice theorists pled for a system of conflict-of-laws rules and aimed to avoid an *ad hoc* decision-making

259. See SELECTED ESSAYS, *supra* note 11, at 357–58, 602–04.

260. See Kegel, *Paternal Home*, *supra* note 54, at 621 (“[I]nterests in a solution enforceable and compatible with international and other relevant decisions, interests in speedy and cheap judicial procedure (interests of order).”).

process. They resisted Currie's assumption that a system of rules would be incompatible with a sound conflict-of-laws methodology.²⁶¹ This systemic consideration has been overemphasized both by conflicts-justice theorists²⁶² and by material-justice theorists when describing conflicts-justice.²⁶³ This explains why Kermit Roosevelt, the reporter of the Third Restatement of Conflicts of Law, distinguishes between "systemic factors" and "right answer factors."²⁶⁴ Allegedly, the former deal with "the *form* of a choice-of-law system," and favor "rules" versus approaches, while the latter focus squarely on the "content" of the norms in conflict.²⁶⁵ Many may welcome the Draft Restatement's²⁶⁶ reconciliation of "systemic factors" and "right answer factors" through "rules that are sensitive to the policies of the relevant states."²⁶⁷ This is not meant to cast a cloud on the soundness of this reconciliation, or on its viability.²⁶⁸ It is merely meant to illustrate the lasting tradition of describing any "systemic" consideration in conflict of laws merely as a concern for order and predictability, and ultimately as a preference for rules.

This overassociation of systemic considerations with a rule-based system sells the insights of the conflicts-justice perspective short. The same thing can be said on the other side. Conflicts-justice theorists notoriously described material-justice theorists, and Brainerd Currie in particular, as simply disinterested in order, and often equated their predilection for looking at the policies of the laws as a symptom of their disinterest in order.²⁶⁹ This sells material-justice short. As David Cavers explained,²⁷⁰ and the Draft Third Restatement now materializes,²⁷¹ a concern for order and predictability can be combined with an interest in the policies of the laws in conflict.

261. See *id.* at 628 ("We all know that PIL, like all other areas of law and science, is "difficult." But that does not justify a legal author to identify only the problem. Rather he must work himself "through" to a rule (retain the old or create a new one), although he cannot be sure that he has seen all correctly. After all, there are others also.").

262. See FLESSNER, *supra* note 15, at 45, 66.

263. See Weinberg, *supra* note 2, at 1649–50.

264. Roosevelt III & Jones, *A Response to Brilmayer & Listwa*, *supra* note 23, at 301.

265. *Id.*

266. *Id.* at 301 n.44.

267. *Id.* at 301.

268. For such a critique, see Brilmayer & Listwa, *supra* note 22.

269. See, e.g., Kegel, *Paternal Home*, *supra* note 54, at 622 ("Entirely different looking is the attempt within the dream home to analyze substantive rules in order to determine their spatial scope. Here the focus is so narrowed from the start that legal security is excluded.").

270. David F. Cavers, Comment, *The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1971).

271. Roosevelt III & Jones, *A Response to Brilmayer & Listwa*, *supra* note 23, at 301 ("Far from abandoning those systemic considerations, then, the *Draft Restatement* promotes them better than the *Restatement (Second)* did or could.").

There is, however, a second systemic consideration that plays an important role in the conflicts-justice framework, and this can be best appreciated by revisiting the main analytical insights of the two theories. If the state was inextricably linked to, indeed “interested” in, the widespread application of its law, the main question conflict of laws was supposed to answer rested at a rather micro-level. The question was primarily whether the forum has an interest in the application of its law, for example, because it grants a remedy to its domiciliary. If so, the choice-of-law question is answered in favor of the application of forum law. This could be called a “transactional justice” framework. It is interested in whether or not the forum and its domiciliaries are being implicated in a particular transaction, and whether the application of the law of the forum would sustain their interests. It is primarily interested in whether or not, in this particular transaction, the forum can allow for its domiciliary to be denied a remedy when the law of the forum recognizes one.

By contrast, the conflicts-justice analysis starts at a higher level. It places all legal systems on an equal footing and grants equal recognition to them all as repositories of justice. It starts from the assumption that applying the forum’s law—even when it grants a remedy to the plaintiff and even when the plaintiff is a domiciliary or a citizen of the forum—could cause an injustice to the defendant or the community to which he/she belongs. In other words, it considers such a decision potentially wrong in a “systemic” way, from a generic standpoint of evaluation, which is not that of the individual plaintiff or defendant, or even of the individual communities affected in this case. And in turn, this wider “systemic” standpoint references both content-independent and content-dependent considerations.

The German conflicts-justice theorist Alexander Luederitz tried to show how conflicts-justice theory taps into this systemic analytical standpoint. Luederitz argued that content-independent interests in the application of a particular law can be classified, nonexhaustively, into three categories: an interest in the easy ascertainment of the law, an interest in integration into the community of one’s residence, and an interest in the continuation of a benefit or an emancipatory status.²⁷² For example, Luederitz spoke of a “systemic” interest of refugees in being seen as equal members of the community in their new state of residence, which transcends and even replaces any interest in a particular substantive outcome.²⁷³ Similarly, they might have an interest in the continuation of a benefit or a certain understanding of

272. Alexander Lüderitz, *Anknuepfung im Parateiinteresse*, in INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS: BEWAHRUNG ODER WENDE? FESTSCHRIFT FUER GERHARD KEGEL 31 (Alexander Lüderitz & Jochen Schroeder eds., 1977) [hereinafter Lüderitz, *Parteiinteresse*].

273. Lüderitz, *supra* note 50.

their status, even when moving to a new country. In certain aspects, they may have an interest in the continuing application of the law of their previous residence, at least temporarily, so as to not feel alienated from a culture they grew up in.²⁷⁴

Similarly, Luederitz rejected the conventional wisdom at the time that the right to adopt a legal name after marriage should be determined by the law of citizenship (under the assumption that an individual will feel most “attached” to this law and want such law to provide the answer to this “personal” matter).²⁷⁵ Instead, he argued that individuals should be allowed to choose the law of the other spouse or German law if it was the law of domicile of one of the spouses.²⁷⁶ In Luederitz’s view, this was motivated by a “systemic” consideration of allowing individuals to better integrate socially in the community in which they live by adopting the social mores of that community.²⁷⁷

Although conflicts-justice theorists were keen to emphasize that individuals may have content-independent interests in the application of a particular law, such interests were never fetishized within conflicts-justice theory. They never had a similar role to that of exclusionary reasons in a theory of a content-independent duty to obey the law.²⁷⁸ Because of their alignment with interest jurisprudence, mid-twentieth century German conflicts-justice theorists wanted to broaden, rather than restrict the spectrum of interests that decision-makers considered when analyzing transnational legal matters.²⁷⁹ This is why conflicts-justice theorists writing after Kegel, and Alexander Luederitz in particular, were keen to ascertain what should be done when content-independent reasons collide with one another or with content-dependent interests.²⁸⁰

For example, Luederitz showed how conflict-of-laws methodology should reflect the fact that in matters of parental authority of migrant workers over their children, the interest of the child in acculturation in the state of residence might collide with the interest of the parents in maintaining the traditions of the state of origin.²⁸¹ Furthermore, Luederitz was clear that a particular content-independent interest must be significant enough to outweigh a content-dependent interest

274. Lüderitz, *Parteiinteresse*, *supra* note 272, at 38–39.

275. *Id.* at 36–37.

276. *Id.*

277. *Id.* at 37 (At the same time, Lüderitz notes the difficulty that might result for individuals from the fact that different names would be referenced in the paperwork in the state of origin as opposed to the state of domicile.).

278. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 16–19 (2d ed. 2009).

279. It is not clear whether this is how Kegel understood it, but I believe this is how his successors further developed the theory. See in particular FLESSNER, *supra* note 15.

280. Lüderitz, *Parteiinteresse*, *supra* note 272, at 39–40.

281. *Id.* at 37, 38 (Lüderitz argues that in weighing these interests, one must try to minimize family conflicts).

in the application of a particular law.²⁸² When content-independent interests collide, content-dependent reasons could provide the tiebreaker.²⁸³ For example, in the famous line of cases in which individuals changed residence in an attempt to “shop” for a law that allowed them to divorce (contrary to the law of their state of nationality often built on Catholic norms), Luederitz argued that at a content-independent level there is a weak interest in the continuity of an acquired legal position and instead a much higher interest in the easy ascertainment of the law.²⁸⁴ The unequivocal interest in a particular substantive result—divorce—would clearly tilt the balance in favor of the law of the new residence.²⁸⁵ Similarly, Luederitz argued that no content-independent interest can be significant enough to outweigh the content-dependent interest in the protection of consumers or other classes of individuals with substantially weaker bargaining power.²⁸⁶

Conflicts-justice theorists’ focus on a systemic standpoint was not limited to content-independent considerations. This was made clear in the discussion on the applicable law in tort cases, the staple case of the American realist revolution in conflict of laws. Conflicts-justice theory started from the assumption that the law of the place where the tort was committed should govern all claims resulting from such tort.²⁸⁷ This was derived from the assumption that all individuals involved in the tort can most easily conform with this law and that the jurisdiction where the tort occurs has an interest in everybody engaging in tortious activity in its territory complying with its laws.²⁸⁸ However, conflicts-justice theorists acknowledged that when the tortious act and the injury occur in different states, the interests that seemed to coalesce in favor of the law of the same jurisdiction now point in different directions.²⁸⁹ Two different communities may assert an interest in

282. *Id.* at 40.

283. See Kegel, *The Crisis*, *supra* note 6, at 245 (“A choice between the interests of different persons in the application of different laws is normally *possible*. Where the interests which are usually determinative in tipping the scale prove to *counterbalance* one another, *other* interests have to be taken into consideration.”).

284. Lüderitz, *Parteiinteresse*, *supra* note 272, at 39, 40.

285. *Id.*

286. *Id.* at 49–50.

287. See, e.g., Kegel, *Paternal Home*, *supra* note 54, at 626.

288. See *id.* Note however, that there is nothing in conflicts-justice theory that would prevent us from reaching a different conclusion if one identifies different such systemic interests. See also Lüderitz, *Parteiinteresse*, *supra* note 272, at 36 (Alexander Lüderitz for example issues the following warning against Kegel’s estimation of an individual’s attachment to his/her law of citizenship: “A person who lives outside of her state of citizenship may still feel connected to her state of citizenship and the tradition associated with it but would have a hard time informing herself of and keeping up with legal developments in her state of citizenship. . . . It is significantly harder to inform yourself of the law at the place of citizenship than to simply submit to the law of domicile.”).

289. INTERNATIONALES, *supra* note 19, at 266–68.

regulating the tort. Similarly, the plaintiff could now assert an interest in conforming his/her behavior to the place where he acted (for example, because he can best appreciate what the standards of conduct are in that jurisdiction), while the victim could assert that he/she can best protect himself/herself according to the law of the place where she was injured, especially when this is also his/her place of domicile.²⁹⁰ In such a case, conflicts-justice theorists acknowledged that the analytical significance of such content-independent systemic interests ran out. Under these conditions, it was inevitable that a choice must be made by opting for one or the other substantive outcome.²⁹¹ One way of doing this was to adopt Weinberg's proposition that the victim should have been preferred.²⁹² As she put it, as a choice between preferring the tortfeasor and preferring the victim, one should choose the latter.²⁹³ This was, notably, precisely Kegel's conclusion.²⁹⁴ Another way, however, was to acknowledge that substantive considerations can also be cast in a systemic context. Alexander Luederitz, for example, argued that applying the maximally compensatory law across the board would inhibit freedom of movement, and that the significance of this consequence would depend on the kind of interpersonal interaction—and therefore the kind of potential tort—referenced.²⁹⁵ It would also depend, he argued, on the feasibility and cost of insurance against liability for particular types of torts.²⁹⁶

These observations are meant to strike a contrast between the disagreements conflicts-justice theorists actually had with a choice-of-law rule that asks for the application of the maximally compensatory law in tort and the ones that material-justice theorists assumed they had. The disagreement was not caused by any degree of formalism or rejecting open-ended value judgment. It also did not rest on a lack of acknowledgment of substantive legal policy. Nor did it stem from *a priori* assumptions about the private/public divide. Rather, methodologically, conflicts-justice asked decision-makers not to lose sight of the possibility that individuals may have content-independent interests in the application of a particular law and to explain how any interests in the application of a particular law can be conceived from a systemic, generic standpoint.

290. *Id.* at 268.

291. Kegel, *The Crisis*, *supra* note 6, at 245.

292. *See* Weinberg, *supra* note 2, at 1668 (rejecting the idea of neutrality as “spurious” in the context of tort cases, where the defendant is a tortfeasor who has caused injury and the plaintiff is the innocent victim).

293. *Id.*

294. *See* Kegel, *Paternal Home*, *supra* note 54, at 626 (explaining that no special deal can be made for the liable party, as local law governs liability to the foreign guest).

295. LÜDERITZ, *supra* note 52, at 139–140.

296. *Id.* at 139.

C. David Cavers's Reconciliation of Conflicts-Justice and Material-Justice

Thus far, this Article has shown that the disagreement between material and conflicts-justice is much less stark than has been assumed. It should therefore be less surprising that conflicts-justice theory had long proposed, even before US material-justice theorists, that in a torts case, the law of the common domicile of the parties should apply, even when the tort occurred in a different jurisdiction.²⁹⁷ Furthermore, as outlined above, when the injury and the tortious act occur in different jurisdictions, conflicts-justice theorists agreed with even the more *avant-garde* assumptions of material-justice theory, namely that one should apply the maximally compensatory rule. In these two sets of cases, conflicts-justice theorists assumed that content-independent interests in the application of law cluster in favor of a particular law (such as the law of the common domicile of the plaintiff and defendant) or point in different directions, and material-justice considerations can serve as a tiebreaker (i.e., applying the maximally compensatory law when the act and injury occur in different jurisdictions).

In cases in which the plaintiff and defendant were domiciled in different jurisdictions and the act and injury occurred in the same state, there was a remaining disagreement between conflicts-justice and material-justice. According to conflicts-justice theory, the law of the place of tort applied irrespective of its content, whereas for material-justice theorists this decision depended on whether the level of compensation under the law of the place of tort is lower or higher than under the law of the domicile of the tortfeasor. This is precisely the scenario in which conflicts-justice theorists were concerned that a choice-of-law principle that focused on the substance of the law would inevitably be biased towards the law of the forum. According to their legal pluralist commitments, there seemed to be no principled way to prefer the interest in compensation of the plaintiff against the interest of the defendant in avoiding liability, just as there is no way of judging between the respective interests of the two states of domicile in granting or denying compensation.

The American material-justice theorist David Cavers showed that in this residual set of cases there was a way of choosing between the various laws in conflict based on their substance, and that this was in

297. See Peter Hay, *European Conflicts Law After the American Revolution – Comparative Notes*, 2015 U. ILL. L. REV. 2053, 2056 n.11 (2015) (referencing the practice of Germany during war time to apply German law in cases where torts were committed against Germans by Germans while abroad).

fact informed by conflicts-justice theory.²⁹⁸ In his view, conflicts-justice theory had the distinct advantage of being able to inform a decision-maker when it might be abusive to apply the law of the forum.²⁹⁹ This, he thought, was the staple insight of conflicts-justice theory.³⁰⁰ But unlike Kegel, he believed the answer to the distinct question posed by conflicts-justice theory must be answered through a combination of material and conflicts-justice propositions.³⁰¹ In particular, Cavers appreciated precisely the three core insights of conflicts-justice that were discussed in this Article: respect for legal pluralism, a loosening of the relationship between the state and the law, and the focus on a systemic standpoint from which to evaluate the justice of conflict-of-laws norms.³⁰² By 1970 Cavers had become the defender of a position that integrated these insights into material-justice by showing that neither of them required an ignorance of the substance of the laws in conflict.³⁰³

First, he argued that conflicts-justice theorists' main concept of justice should be understood as an appeal to a principled way of choosing between the laws.³⁰⁴ This was entirely compatible with a focus on the substance of the laws in conflict.

A more appealing contention is that parties' rights and duties should not be determined by happenstance, by circumstances that are fortuitous or unrelated to the laws and interests in controversy. Even more obvious, though sometimes disguised, is the injustice of favouring one party because he resides or does business in the forum whereas the other party is an outsider. "Conflicts-justice" requires that the grounds of the choice be just.³⁰⁵

Second, a theory of justice in conflict of laws could focus on regulatory policies while accepting a certain distancing between the state and the law.³⁰⁶

298. David F. Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360 (1971) [hereinafter Cavers, *Conflicts Justice*].

299. David F. Cavers, *A Critique of the Choice-of-Law Process: Addendum 1972*, 17 HARV. INT'L L.J. 651, 656 (1976) [hereinafter Cavers, *Addendum*].

300. David F. Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS 75, 102 (1970) ("Conflicts-justice" requires that the grounds of choice between laws be just.") [hereinafter Cavers, *American Perspective*].

301. Cavers, *A Critique*, *supra* note 10, at 188–90 (1933) (Such a combination "would require an equally complete depiction of these facts [as in conflicts-justice theory], but to determine what their effect upon the choice of the competing laws should be, would necessitate their careful appraisal with this end in view . . . It is difficult to see how the facts so selected could be properly appraised except in relation to the provisions of the laws whose application is at issue.").

302. See Cavers, *Conflicts Justice*, *supra* note **Error! Bookmark not defined.**

303. See Cavers, *Addendum*, *supra* note 299.

304. *Id.* at 656.

305. Cavers, *American Perspective*, *supra* note 300, at 102.

306. *Id.* at 148–49 (suggesting that such distance would deter forum shopping or wrongfully prejudicing one party).

Accordingly, a rational, functional approach to choice-of-law would, I submit, lead to an examination of the laws' purposes. This does not mean that the realization of the goals of the forum's private law must be maximized to the degree that may often be appropriate with respect to public law, and I agree with Professor Kegel that one must guard against a tendency manifest in conflicts theories to "place too much stress on the concept of sovereignty" and to undervalue the importance of "conflicts-justice" in private law.³⁰⁷

Finally, Cavers argued that focusing on a systemic standpoint of analysis could be fully reconciled with a focus on regulatory policies.³⁰⁸

Though he [Kegel] seems to concede the logical possibility of decisions deriving "a basis for the spatial application of private law rules" from the goals of private law, this would require taking "into consideration the individual substantive rules of individual states". This, however, he sees as conflicting with the "basic structure of private international law", the rules of which "embrace large groups of private law rules of all states". So they have, but must they do so always? May not the rules of choice of law, though general in application, apply to the consequences of a process that involves the analysis of the purposes of the individual substantive rules in conflict?³⁰⁹

Overall, Cavers thought that conflicts-justice's insistence on a systemic point of view, on equal regard for different legal systems and individuals, and material-justice's focus on regulatory policies could be reconciled in his principles of preference.³¹⁰ He believed that his principles of preference aligned precisely with conflicts-justice's main insights, such that

a court proposing it [a principle of preference] not be seeking a special advantage for its own state or a particular interest represented in the controversy but was proposing a position that the court was prepared to adhere to even though, in the next case involving it, the balance of advantage might move in the opposite direction.³¹¹

What Cavers understood to be the central goal of conflicts-justice was the avoidance of blatant discrimination between citizens and foreigners and between the values of the forum and those of a foreign

307. *Id.* (quoting Kegel, *supra* note 6, at 198–99).

308. *Id.* at 149.

309. *Id.* (quoting Kegel, *supra* note 6, at 184).

310. See Cavers, *American Perspective*, *supra* note 300, at 154 (describing an example of one such principle: "[W]here, as to a particular issue, the law of the state of injury had a *higher* standard of conduct or of financial protection than the law of the actor's conduct or his home, the law of the place of injury should prevail, given its responsibility to provide for the 'general security' of the health and safety of people and property within its bounds. However, when the state of injury's standards were *lower*, those standards should prevail as against the higher standards of the other interested states, given the former state's concern to establish the maximum limits of liability for people within it.").

311. Cavers, *American Perspective*, *supra* note 300, at 153.

jurisdiction.³¹² However, he thought that such equality had to be substantive, rather than formal—in other words informed by the substance of the laws in conflict.³¹³ In his view, a combination of material and conflicts-justice would focus on a just transnational distribution of compensatory burdens given particular kinds of links between the litigating parties and the jurisdictions whose laws provide or mitigate such burdens.³¹⁴ This comes out in the following example Cavers provided as an illustration of the significance of conflicts-justice reasoning in conflict of laws:

Consider the case of a visiting scholar from, say, Korea who, while in the United States, fell the victim of a defective product given to him in California but sold extensively in Korea as well as in the United States. I should consider it incompatible with conflicts justice to invoke Korean law [assuming it required proof of negligence] to deny him the protection of the strict liability law accorded the inhabitants of the state whose hospitality he was enjoying. The standards of product liability prevailing in his home community may be appropriate to conditions in that society, but surely the protective standards prevailing in the state where he was stricken, which the defendant has accepted, should not be withheld from the foreign plaintiff, and the defendant given the benefit of a windfall, because this one victim happened to be a stranger to the market in which the defendant's defective wares were sold.³¹⁵

Cavers considered this way of thinking as entirely compatible with conflicts-justice.³¹⁶ If indeed conflicts-justice was open to an evaluation of the substance of the rules in conflict, and its key insights were to insist on the equality of legal systems and individuals and on the adoption of a wider, systemic point of view, Cavers could happily

312. See generally Cavers, *Addendum*, *supra* note 299, at 654–56.

313. Cavers, *A Critique*, *supra* note 10, at 178 (“The court is not idly choosing a law; it is deciding a controversy. How can it choose wisely without considering how that choice will affect that controversy?”).

314. See generally Cavers, *Addendum*, *supra* note 299, at 654–56 (describing the questions posed by conflict-of-laws thus: “Under what circumstances is it fair to the parties that one be advantaged and the other disadvantaged? Given a desire to allocate legislative authority among states in a reasonable fashion, taking account of the law-fact pattern and the basic objectives of the laws involved, what preferences will yield a result to which a rational judge or legislature could subscribe, regardless of whether, in a particular case, it advances his own country's law or interest? A reference having this foundation can properly be viewed as principled.”).

315. Cavers, *American Perspective*, *supra* note 300, at 195. For an example of his concern with distributions of burdens and benefits given different links to the law see *id.* at 233 (“By selecting the state of the seller's ‘habitual residence’, the rule may render applicable a law for the protection of buyers that does not exist in the buyer's own state or, by selecting the state where the buyer's branch is located, the rule may bring into play a law for the protection of sellers not existing in the seller's own state. In either case, the transaction would be invalidated for questionable cause. Moreover, the point where, in the course of a given correspondence, the chain comes to an end and ‘an order’ is ‘received’ may be quite fortuitous, to use the adjective that is worked so hard in choice of law.”).

316. See *id.*

declare himself simultaneously a conflicts-justice and a material-justice scholar.³¹⁷ In a 1976 addendum to his original 1933 article, he wrote:

What is important to recognize is that the court is not simply choosing between results as it might do in a domestic case in which, say, conflicting interpretations of the forum's own rules are advanced. In a choice-of-law case, the judicial process is more complex. To quote from the 1933 article, the court is "appraising those results in the light of the facts which . . . link (the) event or transaction [giving rise to the issue] to one [proffered rule of] law or the other." (Emphasis supplied.) This appraisal is to be made "from the standpoint of justice between the litigating individuals or of . . . broader considerations of social policy which conflicting laws may evoke." Any link, i.e., any contact, is to be evaluated "in proportion to the significance of the action or circumstance constituting [that contact] when related to the controversy and the solutions to it which the competing laws propound." This process I consider to be a search for "Conflicts justice." To use a term introduced by Dr. Gerhard Kegel that I have happily converted to my own use.³¹⁸

With these insights in mind, in 1971, Cavers returned to the tort scenarios that at first sight seemed to divide conflicts and material-justice theories.³¹⁹ In these types of cases, the parties are domiciled in different jurisdictions and the tortious act and injury occurred in the same jurisdiction. Using *Cipolla v. Shaposka* as an illustration,³²⁰ Cavers wanted to show how material-justice and conflicts-justice considerations in fact work in tandem to provide the proper way of analysis of this residual type of tort cases.³²¹ His note to the article helpfully summarizes its scope:

I joined in a symposium discussing *Cipolla v. Shaposka* in which a divided Pennsylvania Supreme Court, quoting, inter alia, my principles of preference, applied the Delaware guest statute to deny the liability of a Delaware host for negligently injuring his Pennsylvania guest in Delaware . . . In supporting this decision, I criticized a series of cases in which, contrary to the principles of preference I had proposed, out-of-state plaintiffs were given the benefit of their own state's more generous laws (often by their own courts) for injuries caused by stay-at-home defendants. In disregarding the laws of the latter's home states, these courts had failed to recognize a duty to achieve "conflicts-justice." This conclusion, I noted, might be open to debate if the out-of-state defendant had come from the more generous state and had been held to its standard for injuries inflicted in the plaintiff's home state.³²²

317. Cavers, *Addendum*, *supra* note 299.

318. *Id.* at 653 (quoting Cavers, *A Critique*, *supra* note 10, at 192).

319. *Id.*

320. *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970).

321. See generally *id.*; Cavers, *American Perspective*, *supra* note 300.

322. *Id.* at 191.

In his article “*Cipolla* and Conflicts Justice,” Cavers praised the court for having resisted the urge to apply its own law only because it wanted to grant recovery to its domiciliary.³²³ Like Kegel, Cavers believed this urge, manifested in the dissenting opinion, was a carryover of the “better law theory” which, in some interpretations, encouraged courts to opt for the law they considered more enlightened.³²⁴ Cavers agreed with Kegel that this theory would simply lead to the unprincipled application of forum law.³²⁵ Rehearsing Kegel’s concerns, Cavers wrote: “One may grant that the Pennsylvania law is superior, but question the desirability of substituting this exercise in comparative law for a principled approach to choice-of-law problems.”³²⁶ Instead, a principled approach in this case, writes Cavers about the majority opinion, “has displayed a proper concern for territoriality in the choice-of-law process. It has advanced the search for “conflicts-justice.”³²⁷ But with these remarks Cavers, unlike Kegel, did not mean to suggest that one should simply apply *lex loci delicti* (the law of the place of the tort) irrespective of its content.³²⁸ Unlike Kegel, but in his view entirely consistent with conflicts-justice theory, Cavers argued that the choice-of-law decision depends on whether the law of the place of tort provides for lower or higher liability than the place of domicile of the defendant.³²⁹ Consistent with conflicts-justice theory, Cavers argued that a principle must be found which does not discriminate between different legal systems and individuals and which rests on “a broader base than an *ad hoc* weighing of contacts.”³³⁰ However, “the court has to evaluate the position of the two parties with reference to the two states’ conflicting rules since the forum must prefer one state’s rule to that of the other.”³³¹ This too would have been consistent with conflicts-justice’s insistence to disaggregate claims to

323. See Cavers, *Conflicts Justice*, *supra* note **Error! Bookmark not defined.**, at 360.

324. *Id.* at 361 n.6.

325. *Id.* at 361 n.4. It is important to note that Cavers believed that the application of the law of the forum is not always unprincipled, but rather only in the case in which it is applied only because it provides a benefit to a domiciliary. For example, in criticizing the court’s reliance in *Tjepkema v. Kenney* on *Kilberg v. Northeast Airlines* in order to apply forum law to provide compensation to the resident plaintiff, Cavers argues that the court “disregarded the fact that in *Kilberg*, though the defendant held to New York’s higher measure of wrongful death damages was a Massachusetts corporation, its airline was operating out of New York State where the ill-fated trip to Massachusetts had begun and where the decedent New Yorker had purchased his airline ticket. In *Tjepkema*, there seems to have been nothing to link the defendant to New York State other than the citizenship of the accident victim.” *Id.* at 363.

326. *Id.* at 361.

327. *Id.* at 360.

328. *See id.*

329. *Id.* at 362.

330. *Id.*

331. *Id.*

state sovereignty and instead focus on the interests of individuals and communities and its stated openness to incorporate the values underlying private law norms in the determination of the applicable law. This led Cavers to propose the following principle: “A principle enabling a state to protect people within its bounds from exposure to greater financial hazards than those to which their own laws would subject them when that exposure was created by the claims of (unrelated) out-of-state visitors that are predicated on the claimants’ own laws.”³³²

This blend between conflicts-justice and material-justice considerations led Cavers to conclude that a stay-at-home defendant could complain of “conflicts injustice” if he is held to the higher standard of liability under the law of the visiting plaintiff’s place of domicile.³³³ On the other hand, “a defendant may complain of the harshness of his own state’s rules when he is subjected to them in a case involving extraterritorial conduct or consequences. However, he can seldom complain that he has thereby been denied ‘conflicts-justice.’”³³⁴

This was Cavers’s way of reconciling what he perceived as the three most important insights of conflicts-justice theory with material-justice’s focus on regulatory policy. First, Cavers too was a legal pluralist and believed it was important to stress the equality of different legal systems and their respective laws. Embracing legal pluralism meant that a principle requiring the application of the forum’s law only if it serves the interests of its domiciliary would be unacceptable.³³⁵ Cavers agreed with Kegel that such a principle would be an excess caused by focusing too much on state sovereignty and on an abstract comparison of the “merits” of the laws in conflict.³³⁶ But Cavers stressed, rightly, that a principle of equality would not require an exclusive focus on content-independent interests in the application of a particular law.³³⁷

Second, like Kegel, Cavers was keen to stress that state interests cannot function as procrustean beds for individual and community interests.³³⁸ He challenged Currie for being unable to “fit” the interests of foreigners and nondomiciliaries under the analytical concept of the “interests of the forum state.”³³⁹ To the extent the indiscriminate focus

332. *Id.*

333. *Id.* at 372.

334. *Id.*

335. Cavers, *American Perspective*, *supra* note 300, at 149.

336. *Id.*

337. *Id.*

338. *See* Cavers, *A Correspondence*, *supra* note 176.

339. *Id.*; *see also* Cavers, *American Perspective*, *supra* note 300, at 102. Cavers attempts to understand how conflicts-justice theory can inform principles of conflict of laws that focus on individuals as opposed to states. As a general matter he considers a

on state interests was generated by an absolute blending of private and public law, Cavers agreed with Kegel that it was useful to draw some, though in his view minor, distinctions.³⁴⁰ None of this required an absolute focus on content-independent interests in the application of a particular law. Instead, what it required, in Cavers's view, was a shift in the main question conflict of laws is supposed to ask.³⁴¹ Instead of asking under what circumstances the forum could sacrifice its interests to apply a foreign law, one should ask "under what circumstances [meaning in which law/fact combination] is it fair to the parties that one be advantaged and the other disadvantaged?"³⁴²

Third, Cavers agreed with Kegel that the decision-making process in conflict of laws has to refer to a broader standpoint than the *ad hoc* weighing of contacts and policies in individual cases.³⁴³ Such a process would be unprincipled and unmanageable. In his course at the Hague Academy of International Law, Cavers "confess[ed]" for having "indulged" in the optimism that, being told what general considerations to balance, judges would synthesize [them] "into a workable, coherent body of rules and principles."³⁴⁴ Again, none of this required focusing only on content-independent interests in the application of a law. At the most systemic level, taking account of the substantive of the laws in conflict, the aim of conflict-of-laws justice would be the principled allocation of burdens (including compensatory burdens) and benefits given the different patterns of contact of individuals with different jurisdictions. In his last article, Cavers concludes that at the broadest level consistent with conflicts-justice, the question is "[u]nder what circumstances should we prefer the more protective law?"³⁴⁵

focus on parties' reasonable expectation to the application of a particular law as approaching "the fictitious in many situations, especially in the domain of tort law. Moreover, parties' expectations may conflict. Plainly the claim to justice of the parties must rest on a broader base." Here, Cavers fails to acknowledge the broader interests that conflicts-justice theorists identified as grounding claims to the application of a law irrespective of its content (interests in acculturation, in the stability of acquired privileges, in the easy ascertainment of the law, etc.). Cavers, however, identifies the central concern of conflicts-justice theory with a focus on regulatory policy as one of discrimination between nationals and foreigners. "Even more obvious, though sometimes disguised, is the injustice of favoring one party because he resides or does business in the forum whereas the other party is an outsider. 'Conflicts-justice' requires that the grounds of choice between laws be just." *Id.*

340. Cavers, *American Perspective*, *supra* note 300, at 148–49.

341. *Id.*

342. Cavers, *Addendum*, *supra* note 299, at 656.

343. Cavers, *American Perspective*, *supra* note 300, at 362.

344. *Id.* at 151.

345. Cavers, *Addendum*, *supra* note 299, at 656.

IV. TWO ILLUSTRATIONS

Cavers's reconciliation of conflicts and material-justice is only partial. It aims to explain how material-justice can be altered in light of conflicts-justice considerations, without losing its focus on the substance of the laws in conflict.³⁴⁶ Overall, he remains skeptical of appeals to the interest of individuals in the application of a law as such, in part because he does not seem to acknowledge conflicts-justice theorists' articulation of such interests.³⁴⁷ Cavers therefore does not appear to acknowledge the central commitment of conflicts-justice theory to surface both content-dependent and content-independent interests in the application of a law.³⁴⁸ However, the two types of interests are equally, concomitantly, and sometimes incoherently articulated in one and the same case. An important dimension of conflicts-justice theory should be to highlight the relevance of different types of interests and explain how they might be evaluated in any particular case. This remains the reconciliation that conflicts-justice theorists, rather than Cavers, had in mind. Recall that Luederitz as well as Flessner argued that one must evaluate, in each set of cases, whether the content-independent reasons individuals might have are strong enough to outweigh any relevant content-dependent reasons.³⁴⁹ To see why this insight remains valuable for conflict-of-laws theory, it is helpful to consider two recent cases in which content-dependent and content-independent reasons are referenced simultaneously.

*Beaver v. Hill*³⁵⁰ is a family law case involving child and spousal support. Mr. Hill, a wealthy Indigenous co-owner of the largest cigarette company on the Six Nations reserve, challenged the application of Canadian family law statutes and asserted the application of the family maintenance laws of the Haudenosaunee.³⁵¹ Ms. Beaver, on the other hand, pointed out that she did not consider herself and her son to be culturally Haudenosaunee.³⁵² To support her cultural affiliation to the Canadian non-Indigenous community, the wife emphasized that she and her son did not have a clan, an Indigenous name from a Clan Mother, or a Long House that they attended on a regular basis.³⁵³ Both spouses claimed that they would

346. *See id.*

347. *See* Cavers, *American Perspective*, *supra* note 300, at 102 (arguing that justifications based on individuals' expectations in the application of a law as such "can approach and even attain the fictitious in many situations, especially in the domain of tort law.").

348. *See id.*

349. *See generally* FLESSNER, *supra* note 15; LÜDERITZ, *supra* note 52.

350. *Beaver v. Hill*, [2017] ONSC 7245 (Can.); *Beaver v. Hill*, [2018] ONCA 816 (Can.).

351. *Beaver v. Hill*, [2017] ONSC ¶ 23 (Can.).

352. *Id.* ¶ 24.

353. *Id.*

feel culturally alienated by their respective communities if their laws did not apply to govern their claims.³⁵⁴ Interestingly, because the case is at a very early stage, these asserted interests in the application of the law are made before any discovery about the exact content of Indigenous laws on maintenance obligations.³⁵⁵ Since the extent of the substantive conflict between Canadian non-Indigenous and Indigenous laws is not yet ascertained, the interests in the application of a particular law are precisely the content-independent type that conflicts-justice theorists had in mind.

Both the Ontario Superior Court and the Ontario Court of Appeals struggled to understand the nature of such claims. The superior court assumed that the husband's assertions of an interest in the application of a "familiar" law are mere tactics to avoid substantial maintenance responsibilities.³⁵⁶ Content-independent reasons would appear to be, in Cavers's terminology, "fictitious" assertions to avoid the application of a law that is substantively unfavorable to the respective individual.³⁵⁷ Furthermore, the court, in large part because of a constitutional law question, struggled to determine whether a content-independent interest in the application of a law can properly be understood as an assertion of an individual interest (in the application of a law as such) or of a collective interest in self-determination.³⁵⁸ In other words, it struggled to understand how any claim of attachment to a particular community or culture could be understood in the context of a private law claim, precisely the question that conflict-of-laws justice theorists aimed to address.³⁵⁹ Therefore, the Court of Appeals had nothing to say about the scope of the interest in the application of a law as such, how it may be possible to reconcile content-independent interests in the application of a law, or, on the assumption that the two laws conflict, how to reconcile content-independent with content-dependent interests in the application of a law.³⁶⁰

Conflicts-justice theory could offer a series of insights in this type of case. First, although Gerhard Kegel grounded a possible content-independent interest in the application of a law on the sense of belonging of an individual to a community, his successors picked up on

354. *Id.* ¶¶ 23, 24.

355. *See generally id.* (containing no mention of the content of the Indigenous laws Respondent wishes to apply).

356. *See id.* at 135 (discussing the court's weighing of potential harms to each party, specifically the vulnerability of the Applicant to the Respondent's whims if Canadian family law is not applied).

357. *See Cavers, American Perspective, supra* note 300, at 102.

358. *Beaver v. Hill*, [2017] ONSC ¶ 99 (Can.) ("The respondent's attempt to describe his claim as being purely individual to him does not in my view make sense given that aboriginal rights derive from practices, customs and traditions that are integral to the distinctive culture of the collective *community*.").

359. *See id.*

360. *See generally id.*

the indeterminacy and fluctuating nature of any sense of cultural and communal affiliation.³⁶¹ Luederitz argued that it would be impossible to understand whether an individual would feel a greater sense of belonging to the community in which one is born, as opposed to the community in which one lives, temporarily or for a longer period of time.³⁶² Furthermore, political, cultural, or social affiliations to a particular community would not ground an interest in the application of the law of citizenship or domicile in all kinds of private law cases.³⁶³ Second, Luederitz argued that more fine-grained and pragmatic content-independent interests are relevant “party interests” within conflicts-justice theory, rather than the incommensurable appeals to different social, cultural or political affiliations to different communities.³⁶⁴ For child support obligations, for example, Luederitz argued that what is at stake in the application of the law of domicile of the child (rather than of the father as the maintenance debtor) is not so much the acculturation of the child, but rather her adaptation to the consumer needs and behavior in the community in which the child lives.³⁶⁵ This is a mixed content-dependent and content-independent interest, which has in view securing a decent living standard for the child in the community of her residence as well as her social integration in this community. The interest of the father in adapting to the labor standards and living expenses in his state of domicile can be taken into account by adjusting the level of his maintenance obligations to take into consideration those local standards.³⁶⁶ This again, is a mixed content-dependent and content independent interest, which mirrors the same considerations as those of the interest of the child. Furthermore, noted Luederitz, there appears to be no content-independent interest in having the law of the father’s domicile applied in circumstances in which that law imposes a shorter maintenance obligation than the law of the child’s domicile (for example, eighteen as opposed to twenty-one years).³⁶⁷

Next consider the range of cases which mirror *Kiobel v. Royal Dutch Petroleum Co.*³⁶⁸ This type of case usually involves a parent corporation incorporated in a highly developed state whose subsidiary commits a tort in a developing country, oftentimes in the course of investment operations conducted in that country. The individuals and Indigenous communities affected by the tort will often attempt to sue the parent corporation in the country of its headquarters and request

361. Lüderitz, *Parteiinteresse*, *supra* note 272.

362. *Id.* at 35, 36–38.

363. *Id.* at 40.

364. *Id.*

365. *Id.* at 43–45.

366. *Id.* at 43.

367. *Id.*

368. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

the application of that law (which generally requires a higher quantum of damages and provides for a higher standard of care).³⁶⁹ How should this interest in the application of the law of the parent corporation's headquarters be understood, aside from reflecting an interest in compensation? Oftentimes these individuals and Indigenous communities appeal to a sense of unfairness resulting from the different standard that corporations are judged by when operating in their own jurisdictions as opposed to operating abroad.³⁷⁰ They reflect a plea for equal treatment and recognition³⁷¹ akin to conflicts-justice theorists' insistence on interests being recognized as an equal member of a particular community. Conflicts-justice theorists assumed that this community would be the community of one's domicile, but these types of cases illustrate that in circumstances of a strong imbalance of power and weak political representation, individuals may voice an interest in being treated like an American plaintiff in relationship to American companies.³⁷² But at the intersection of conflicts and material-justice, one would understand that this appeal to equality is not content-neutral. This was precisely Cavers's insight. The Indigenous community in Nigeria, for example, appeals to a principle of equal respect and concern, given that US law would provide for a higher damage quantum, the possibility of discovery, etc. This is precisely the case that Cavers focused on when exploring the convergence of conflicts and material-justice theory.³⁷³ His view was that we cannot give full meaning to the interests of the individuals in tort cases without appreciating the differences in the substance of the laws.³⁷⁴ Cavers agreed with conflicts-justice theorists that the jurisdiction where the tort occurs has an interest in regulating torts occurring in its jurisdiction but thought that this interest prevailed only when it awarded higher compensation than the one awarded under the law of the out-of-state tortfeasor.³⁷⁵ When the latter law allowed for higher compensation, Cavers assumed that the jurisdiction

369. See, e.g., *id.* (Although these cases are often based on subject matter jurisdiction, I believe they are best understood as choice-of-law cases, rather than jurisdiction cases because the main reason why plaintiffs request US courts to assume jurisdiction is so that they could ensure that US law is applied).

370. See Upendra Baxi, *Mass Disasters, Multinational Enterprise Liability, and Private International Law in*, 276 RECUEIL DES COURS 297, 385–88 (2000).

371. See Ivana Isailovic, *Reframing the Kiobel Case: Political Recognition and State Jurisdiction*, 38 SUFFOLK TRANSNAT'L L. REV. 1 (2015).

372. See Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss et al. eds., 2011) (analyzing a Supreme Court decision dealing with claims by foreign plaintiffs against a corporation accused of price fixing on the basis that this price fixing had an effect on the US market, though these foreign plaintiffs did not suffer as a result).

373. See Cavers, *American Perspective*, *supra* note 300.

374. *Id.* at 362.

375. *Id.* at 372.

where the tort occurs would not necessarily have an interest in imposing its law and that the tortfeasor could not complain of “conflicts injustice” since the law of her domicile was not picked in order to unfairly benefit the victim.³⁷⁶ The tortfeasor was not being unduly discriminated or targeted in deciding to impose a burden on him, which is provided for under the law of her place of domicile.³⁷⁷ Yet at this stage in the analysis, conflicts-justice theorist Alexander Luederitz offered an important further insight motivated by the systemic framework of analysis typical of conflicts-justice theorists. Luederitz argued a choice-of-law rule that applies the maximally compensatory law on individuals and corporations’ tortious behavior abroad might inhibit freedom of movement and capital, which would not necessarily benefit local communities.³⁷⁸ Luederitz argues that in deciding whether to apply the law with the higher compensation level, one would have to differentiate between different kinds of torts emanating from different kinds of activities (with higher or lower social costs and benefits) and more or less easily insurable.³⁷⁹ It is at this stage that the system-wide thinking focused on the sociology of transnational movement of people and capital that informed conflicts-justice theory combines with the transactional thinking of material-justice focused on particular regulatory and individual interests.

V. CONCLUSION

Material-justice and conflicts-justice theories have long been understood as fundamentally different from each other. This Article has argued that this perception had been the result of a deep misunderstanding of the commitments of conflicts-justice theory, at least as they were articulated by German scholars in the second half of the twentieth century. This misunderstanding was caused by broad readings of the two theories along divergent philosophical perspectives of pragmatism, realism, universalism, and so on. This Article has shown that these readings do not adequately capture the main insights of the two theories and do not help us understand the differences and similarities between them. This misunderstanding has also been caused by broad characterizations of conflicts-justice theories without any anchoring in the scholarship of particular writers or schools of thought. Instead, this Article has focused on a particular and largely ignored academic exchange, namely that occurring between American

376. *Id.*

377. *Id.*

378. LÜDERITZ, *supra* note 52, at 139.

379. *Id.*

material-justice theorists and German conflicts-justice theorists in the second half of the twentieth century.

This Article argued that the main differences between the two theories can be explained by two broader theoretical commitments of conflicts-justice. First, conflicts-justice theorists focused on different conceptions of law, which would support their commitments to legal pluralism and justice relativism and would allow for a disaggregation and weighing of interests. Second, conflicts-justice theorists evaluated the justice of choice-of-law norms from a more systemic, generic standpoint of analysis. Contrary to conventional accounts of the relationship between material-justice and conflicts-justice, this Article showed that the respective insights of the two theories are not only reconcilable but have a complementary role in setting out a unified account of justice in conflict of laws. By resurfacing the lesser-known work of material-justice scholar David Cavers and of conflicts-justice theorists Klaus Schurig, Alexander Luederitz, and Alex Flessner, this Article showed that on both sides of the aisle, there have been attempts to show precisely what this reconciliation might look like. All of these scholars showed how conflicts-justice theorists' commitments to legal pluralism, justice relativism, and systemic justice considerations can be integrated into a framework of analysis that focuses on the policies of the laws in conflict.

Acknowledging this complementarity of conflicts-justice and material-justice theory is meant to bridge the divide that many think characterize American and European conflict-of-laws scholarship. It encourages a deeper transatlantic collaboration between decision-makers in conflict of laws and the development of a further strand of scholarship, which would examine the potential of bringing the real insights of the two theories to bear in each conflict-of-laws case.