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International Issues in Common Law Choice of Law: American Conflicts Teaching Exits the Middle Ages

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Prologue: A Fact-Based Fantasy

In the year 1274, Sir Hugh LaPape, knight, vassal, and retainer of his liege lord, Edward the First of England, stood on a hill outside the city of Florence, Italy, and wept. Four years before, Sir Hugh had set off for the Holy Land at the call of his king,[1] leaving behind him a beautiful palace with tall towers, shining in the morning sun. Now he surveyed the remains of that palace, a pile of rubble, in growing anger. Although a vassal of the English king, Sir Hugh had some years before removed himself from England to Florence, Italy, where he became attached to the Guelphs, a party that was disputing control of the city with the rival Ghibbelines. The Guelphs were grateful for Sir Hugh's assistance and, after the Ghibbelines were driven away, ceded him land outside the city walls on which he constructed his palace. While Sir Hugh was at the Crusades, the Ghibbilines threatened to retake Florence and the Guelphs razed the palace to the ground to prevent its tall towers from being used as vantage points to guide the fire of bombards against the city.

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1. Edward the First began this crusade in 1270 before he became king. He ascended to the throne in 1272 and returned to England in 1274 to rule. He reigned until 1307.

Not happy with this course of events but accepting the unpleasant reality before him, Sir Hugh returned to London where in 1275 he filed suit against certain Florentine merchants living there on the then-prevalent theory that citizens of a city or state could be sued for injuries caused by their municipal government. The merchants defended by arguing that they could not be called to account in England for acts done in Florence because that was wholly a matter for Florentine law. In 1281, the King's Council ruled for the merchants, stating:

> *. . . [I]t is not the custom of England that anyone answer in the Kingdom of England for any trespass made in a region outside. . . . [Therefore,] the aforesaid merchants do go without a day. And the aforesaid Hugh to take nothing by his complaint; and to be in mercy. . . .* [2]

Thus, the court concluded that it had neither judicial nor prescriptive jurisdiction to try in England any case that arose abroad.

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The lack of utility of the principle enunciated in *LaPape* became evident to the English courts almost immediately upon its promulgation. Human affairs necessarily transcend national territorial boundaries; yet activities abroad often have important effects at home. In recognition of this incontrovertible fact, British courts came to accept as "non-transversable"[3]—not subject to contradiction—an allegation that the situs of a case was laid in England, no matter where the cause of action actually arose, at least when the case involved contracts made abroad to be performed in England or contracts made in England to be

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2. Hugh LaPape v. Merchants of Florence Living in London, 46 SELDEN SOCIETY REPORTS: SELECT CASES CONCERNING THE LAW MERCHANT, A.D. 1239-1633, Vol. II, 34, 38-39 (London, Hubert Hall ed., 1930). The result is based, in part, on principles of absolute territorial sovereignty and reflects an application of what some 700 years later came to be called the "vested rights" theory of choice of law. Elliott Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-85 (1944). In addition, judicial jurisdiction failed because the requirement that a "jury" of persons already knowledgeable about the case at bar be drawn from the shire made it impossible to convene a qualified jury to try causes of action that originated abroad. William C. Bolland, *Introduction, in* 39 SELDEN SOCIETY REPORTS: YEAR BOOKS OF EDWARD II, 7 EDWARD II, A.D. 1313-14, at xii-xiii (London, William C. Bolland ed., 1992). Furthermore, because to begin a suit the parties were physically brought before the court by the sheriff (the shire reeve), the court's jurisdiction was limited by the sheriff's authority, and the sheriff's authority extended only to the borders of the shire. *See* Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 41-42 (1978).

3. See Anon., Y.B. 48 Ed. III Hil. pl. 6, *cited in* WILLIAM S. HOLDSWORTH, V A HISTORY OF ENGLISH LAW 118. *See* Dowdale's Case (1606), 6 Co. Rep. 46 (b), 77 ER 323.

performed abroad.[4] This fictional means of avoiding the strict territoriality limitations on jurisdiction to prescribe created considerable concern in some English courts until the early seventeenth century.[5]

It was not until some five hundred years later that Lord Mansfield ruled that the authority of the British sovereign in his or her own courts permitted judges to select any law they chose to resolve the rights of the parties before them. The act of choosing was itself an exercise of British sovereignty.[6]

The idea that sovereign power is limited by territorial boundaries is deeply rooted in Anglo-American law. Even before the rise of the territorial state as the archetypical political unit in the international community, England, as an island nation, assumed that its exercise of authority was limited by the naturally defined territorial boundaries that divided and protected it from the remainder of the world. It is not, therefore, surprising that assumed territorial limitations on sovereign power were fundamental in the common law, even before the rise of territorial states on the European continent and in Southeast Asia.[7] England's geographical condition, together with the natural tribal and territorial propensities of the human animal, created a strong psychological climate to support the presumption stated in *La Pape* that the efficacy of legal rules is limited to the territory of the sovereign within whose boundaries relevant events occur or where relevant persons or things are present.[8] This territorial presumption accompanied the common law to the United States to become the cornerstone of the United States system of judicial and prescriptive jurisdiction.[9]

Given this background of strict territoriality in the United States common law heritage, it is perhaps not surprising that

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4. *See* HOLDSWORTH, *supra* note 3, at 117-19.

5. *Id.* at 118-20. Similar modifications were made with respect to the jury system when borough courts might impanel a jury composed one half of foreigners, or when a commercial transaction had a foreign source. *Id.* at 104.

6. Holman v. Johnson, 1 Cowp. 341, 343 (1775). *Accord* Reich v. Purcell, 432 P. 2d 727, 729 (1967) (Traynor, J.).

7. *See* Hessel E. Yntema, *The Comity Doctrine,* 65 MICH. L. REV. 1, 18-28 (1966); Harold Maier & Thomas McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law,* 39 AM. J. COMP. L. 249, 260 (1991); *Cf.* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law,* 1991 SUP. CT. REV. 179, 208 (1992).

8. *See generally,* Peter Nygh, *The Territorial Origins of English Law,* 2 TASMANIAN L. REV. 28 (1968).

9. Pennoyer v. Neff, 95 U.S. 714, 722 (1878); *see* State v. Knight, 1 N.C. (Tay.) 1413 (1799); People v. Merrill, 2 Parker's Crim. 590, 596 (N.Y. 1855), *rev'd* 14 N.Y. 74 (1856).

conflict of laws courses in the United States tend to omit discussion or consideration of international choice of law matters. However, when one considers the preeminent position of the United States as a world economic power, the constant interchange of goods, labor, capital, and human beings across United States borders with other states, and the high degree of interdependence between the United States economy and that of the world in general, it is indeed surprising that more attention is not paid in the general course in conflict of laws to cases and models drawn from abroad as well as from the interstate system closer to home.[10] One reason for this may be that conflicts scholarship in the United States had for some time assumed that the same techniques for choice of law that were useful for interstate cases were also appropriately applied to cases whose facts invoked international considerations.[11] Therefore, little attention has been directed specifically at problems involving multistate issues when the states in question are different nations, instead of different states in the United States.

A civil law lawyer would find it strange that a group of serious academics would even consider asking the question whether international conflict of laws issues should be addressed in a course in conflicts of laws. Throughout most of the world, what United States law schools call conflict of laws is known as "private international law" and deals exclusively with international issues. It is a paradox that academics in the United States, a state whose federal structure makes it almost impossible to practice law effectively without some understanding of conflict of laws issues, should have virtually ignored, for so long, the private international legal aspects of the field.

Each of the five scholars who have contributed to this written symposium have emphasized a different aspect of international conflict of laws that could usefully be considered for inclusion in a general conflict of laws course in United States law schools. Mr. Harold Burman, Executive Director of the U.S. Department of State's Advisory Committee on Private International Law, identifies the many newly important private international legal issues that necessarily face lawyers in modern law practice. He argues that American law graduates are inadequately prepared to deal with these matters and that courses in conflict of laws must

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10. Professor Friedrich K. Juenger characterizes this situation as the result of a "tension between sovereignty and mobility." *See* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 3 (1993).

11. Elliott Cheatham & Harold Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 42 (1968); *see* Armand B. Du Bois, *The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions*, 17 MINN. L. REV. 361, 380 (1932).

make room to consider the important changes that have taken place in the world's legal environment during the last forty years. Professor Linda Silberman offers, among other insights, an illuminating comparison of jurisdictional rules in the European Community with those in United States law. Professor William Reynolds discusses the important developments in international family law matters and asks why these subjects are not part of conflict of laws courses. Professor Patrick Borchers examines the relationship between party autonomy in law or forum selection in international contracts and how decisions on these issues have changed United States law on these same matters. Professor Friedrich Juenger discusses the development of a *lex mercatoria*, a law governing business transactions whose development is divorced from the authority of any particular sovereign state.

These articles are designed not to answer questions, but, rather, to raise them. Searching for answers must necessarily be part of law professors' continuing efforts to make the discipline of conflict of laws relevant both to law school students who will practice law well into the twenty-first century and to ourselves who, as conscientious scholars and teachers, will continue to explore the nuances and vagaries of conflict of laws in the classroom and on the printed page.