THE TRADITIONAL VIEW OF PUBLIC POLICY AND ORDRE PUBLIC IN PRIVATE INTERNATIONAL LAW

I. INTRODUCTION

Public policy and ordre public are judicially administered exceptions to the usual commitment of individual nations to recognize and give effect to foreign law in circumstances deemed appropriate by the forum. Cases involving foreign facts may have legal repercussions in more than one country and nations have evolved rules to determine, in cases of conflicting law, which law is to govern. This world-wide process of analysis and resolution is the substance of private international law. The commitment to enforce duly acquired foreign rights is subject everywhere, however, to a reserved power of the forum to reject application of laws perceived to be injurious or harmful. The extent to which this reservation has been employed and the principal functions it performs are the subject of this Note.

Formal definition of public policy is elusive, which has led to occasional misapplications of public policy as a ground of decision. However, courts generally are indisposed to reliance on public policy and eschew its frequent use. The common law history of public policy is to be contrasted with the statutory origin of ordre public, although both doctrines serve similar purposes, i.e., to prevent vindication in the forum of rights secured under invidious foreign edicts. Following a discussion of the origins of public policy and ordre public, traditional applications of the doctrines are discussed in the context of exclusion of repugnant foreign law, justice in individual cases, and choice of law.

II. ORIGINS OF PUBLIC POLICY AND ORDRE PUBLIC

The conflict of laws doctrines of public policy and ordre public are mandated by exigent forces of local morality and social order. In practice, public policy reflects a common law origin whereas ordre public is identified with civil law and has a statutory source. The concept of public policy was recognized in English law as early as the fifteenth century. By the eighteenth century, public policy

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1 "Both Private International Law and Conflict of Laws have become well settled technical terms. . . . Most English and American writers employ the terms synonymously." A. Nussbaum, Principles of Private International Law 9 (1943). But see Wortley, Private International Law, 94 Recueil Des Cours (Hague Academy of International Law) 93-94 (II-1958).

2 See Knight, Public Policy in English Law, 38 L.Q. Rev. 207 (1922).
was employed in the manner it is meant today: to denote the reserved power of a court to refuse a claim or cause of action in the absence of precedent or statute. Initial definitions of public policy focused on rejection of acts or causes of action held "immoral or illegal," "injurious to the interests of the public," or "productive of evil to the church and the community." Subsequent attempts to delineate the bounds of public policy were equally imprecise. The legal realists have in the end prevailed and it is now generally accepted that public policy is defined by the use courts find for it.

The amorphous quality of public policy and its potential for abuse by result-oriented courts have long been recognized by the judiciary, which has urged caution in deciding cases upon public policy grounds. Judge Burrough's remarks in 1824 are famous on that account. "I protest arguing too strongly upon public policy. It is a very unruly horse and once you get astride it, you never know where it will carry you." Similar exhortations to temperance are found throughout Anglo-American legal literature. Not all judges were alarmed at the unruliness of the public policy doctrine, however, and there gradually accrued a diverse body of fact situations subject to the public policy exception. In the early twentieth century, the sentiment was expressed among English judges that expansion of the heads of public policy should be halted. The duty of a court was said to be to "expound but not to expand" this area of the law.

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3 Precedent may play a part in a court's deliberations in rejecting a claim on public policy grounds when closely-related claims have been rejected previously as violative of public policy. But a court is not bound by public policy precedent as it is when common law or statutory construction is at issue. There are certain traditional uses of public policy that approach common law and have become rules of law separate from their public policy inception. See D. Lloyd, Public Policy 115-17 (1953).

4 Knight, supra note 2, at 209-10.


6 Husserl, Public Policy and Ordre Public, 25 Va. L. Rev. 37,41 (1938); see also Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Yale L.J. 1087, 1091-92 (1956).

7 See Winfield, Public Policy in the English Common Law, 42 Harv. L. Rev. 76 (1929).


9 E.g., Pauelsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 1016 (1956).


11 See Fender v. St. John-Mildmay [1938] A.C. 1, in which Lord Atkin wrote: "[T]he doctrine [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." Id. at 12. Also interesting is the spirited discussion among the judges
tirely thereafter, but an evident result is the significant jurisdictional review usually accorded public policy decisions.\(^{12}\)

Public policy in modern English law is employed differently in domestic as compared to conflicts cases.\(^{13}\) In cases with litigants or facts involving foreign legal systems, invocation of public policy is not limited to purposes established by precedent as it is domestically. Public policy's international form consists of the forum's reserved right to set aside conflicts rules in order to reach a decision more compatible with justice or morality as locally conceived. In domestic cases, there is no conflict of laws to be resolved, but merely a discrepancy between the current state of the municipal law and the perception of the court of what the law ought to be. This important difference sharply divides the two forms of public policy.\(^{14}\) The clash in an international context is between the social policy of the forum and the agreement made binding upon a party as a result of a private transaction under foreign law. Where the foreign law creates an obligation repugnant or pernicious to local policy, the court in its discretion may choose to reject it despite forum conflicts rules. Nevertheless, the forum's conflicts rules calling for application of foreign law are not to be cast aside simply because the agreement, if made in the forum, would be unenforceable.\(^{15}\) For example, a contract is not

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\(^{13}\) See Kahn-Freund, supra note 3, at 111-14, treats this topic in a chapter on the creative function of the judge in public policy and divides the opposing camps into "narrow" and "broad" view positions. Proponents of the narrow view argue that the true constraint on judges in creating new heads of public policy is not a juridical stricture as such, but the historic fact that all the proper heads of public policy already have been discovered. The narrow view does acknowledge discretion in cases of unique or changed circumstances. The broad view holds that there remains an open field in which a court can make new discoveries regardless of precedent. This view emphasizes the variability of social concerns on which public policy ultimately is founded. In summary, Lloyd argues that a "far more rigid classificatory system than either French or English law can here provide would be imperative before there would be any prospect of its constituting an effective fetter on judicial discretion." Id. at 114. In substance, Lloyd prefers the broad view, combining flexibility with as much certainty or predictability as possible.

\(^{14}\) See Kahn-Freund, supra note 3, at 73; see also Cheatham, American Theories of Conflict of Laws: Their Role and Utility, 58 HARV. L. REV. 361, 371 (1945); Holder, Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law, 17 INT'L & COMP. L. Q. 926, (1968); But see Katzenbach, supra note 6, at 1088 n.10.

\(^{15}\) Kahn-Freund, supra note 3, at 41. See, e.g., Addison v. Brown [1954] 2 All E.R. 213, where an agreement valid by California law but otherwise void as contrary to English public policy (because of its intention to exclude the jurisdiction of an English court) was
valid in English domestic law without consideration, but a contract without consideration is valid and enforceable in England if governed by Italian law, which it would be if the contract were made in Italy.18

In the United States, public policy can serve as the basis for judicial decision in intrastate, interstate, and international contexts.17 Intrastate public policy is analogous to English domestic public policy and concerns the use of the doctrine in a unified legal system where conflicts do not occur. Courts have invoked interstate public policy to refuse vindication of rights acquired in sister states as if those rights were based on foreign country rules.18 However, analytically these applications of public policy are not identical.19 Interstate and international cases are distinguishable in that all states of the United States share a constitutional and political heritage immeasurably stronger than between any two countries.20 Due to the full faith and credit clause,21 upheld in England. The proposition that a right not found in English law could be enforceable in England has been troubling to some analysts. In Yntema, The Historic Bases of Private International Law, 2 AMER. J. COMP. L. 294 (1953), the author asks how it is "possible to derive from X what is not X . . . ." Id. at 316.

18 Kahn-Freund, supra note 3, at 41.
17 "No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971).

As among states of the United States, it is particularly desirable that one State should entertain in its courts actions based on facts occurring in a sister State. Differences in policy among States of the United States are likely to be of a minor nature and the common interest of the States in the enforcement of rights without regard to State lines is particularly great. Id. Comment (c). "The modern cases indicate that courts of a state of the United States frequently will enforce a judgment rendered in a foreign nation although they would have refused to entertain suit on the original claim on grounds of public policy." Id. § 117, Comment (c).

19 Cheatham, supra note 14, at 394. See also Ehrenzweig, Interstate and International Conflicts of Law: A Plea for Segregation, 41 MINN. L. REV. 717, 723 (1957); Goodrich, Foreign Facts and Local Fancies, 25 VA. L. REV. 26, 35 (1938) (author argues that the best solution is to bury public policy in regard to its intra-United States use.); Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws, 49 YALE L.J. 1027, 1052-53 (1940); and Paulsen & Sovern, supra note 9, at 1015-16.
21 U.S. CONST. art. I, § 8. The Congress is vested with the power to regulate commerce with foreign nations, to define and punish piracy and felonies committed on the high seas, and to penalize offenses against the law of nations. Certain areas of private international law have been wholly pre-empted by the federal government. The outstanding example is
American courts are compelled to treat sister state conflicts more like domestic cases than international cases and on the whole have less discretion to exclude sister state law where the federal framework intervenes. The combination of a federal constitutional system and a growing trend of state coordination through model codes and uniform acts make a court's analysis of an interstate conflicts decision less useful in an international context than in the past.\textsuperscript{22} Despite the structural complexity of American conflicts law,\textsuperscript{23} United States courts are reluctant to rely on public policy and like their English counterparts are not disposed to its free or unfettered use.

The characteristic feature of public policy in Anglo-American conflicts law is the restraint with which it is employed.\textsuperscript{24} Public policy occupies a unique position in the law as a vague body of moral and legal precepts, which have successfully resisted statutory formulation or judicial definition.\textsuperscript{25} The indefiniteness and flexibility of public policy contributes to a tension between its role as a ground of last resort for decisions, and the demands for a regularized common law conflicts jurisprudence, which is just and predictable in its disposition of interjurisdictional disputes.

A. **Ordre Public in France**

*Ordre public* is the civil law analogue to public policy, but not

\textsuperscript{22} We cannot sensibly measure the veto of conflicts public policy by domestic standards as applied to domestic events." Katzenbach, supra note 6, at 1156. The substantial interest in uniform state laws is documented by the activities of the National Conference of Commissioners on Uniform State Laws. More than 200 uniform acts are now in circulation, of which an average state has adopted thirty.

\textsuperscript{23} For an English view of the American system, see O. KAHN-FREUND, THE GROWTH OF INTERNATIONALISM IN ENGLISH PRIVATE INTERNATIONAL LAW 13 (1960). The author states:

Where, as in the United States today and in many Continental countries in the past, the typical conflicts situation is not 'international', but 'interstate,' or 'inter-provincial' the tendency towards the *lex fori* is usually weaker: it requires a greater mental effort for an English judge to apply French law than for a New York judge to apply the law of New Jersey.

\textit{Id.}

\textsuperscript{24} Graveson, in Kahn-Freund, supra note 13, at 69. \textit{See also} A. EHRENZWEIG & E. JAYME, 3 PRIVATE INTERNATIONAL LAW 41 n.16 (1977) (English courts seem even less inclined to resort to public policy than American courts).

\textsuperscript{25} Winfield, supra note 7, at 91.
Ordre public interne is the result of positive legislative action and functions in French law as a general standard by which courts have a limited judicial discretion to impugn transactions offensive to public order. It is also applied to fact situations falling under certain imperative statutory requirements, the operation of which cannot be excluded by private agreement.

Although the principles of ordre public interne were well known when French law was codified, private international law was in its infancy. Hence, the development of ordre public externe is dominated by judicial and juristic interpretations, not by statutory construction. The driving force behind development of ordre public externe is the same as that which motivates public policy: no country can afford to open its tribunals to the legislatures of the world without reserving for its judges the power to reject foreign law that is harmful to the forum. How often and by what standards courts are to reach the conclusion that foreign law is harmful remains a central question. "The limits of external public order are very uncertain, linked as that conception is with such indeterminate notions as the maintenance of social order or public security." These notions are indeterminate because the needs of social order and public security are continually changing, not because French law is incomplete or badly reasoned.

For any country's conflict of laws rules, the goal is flexibility of application combined with predictability of results. To that end, ordre public externe is to be invoked in only two classes of cases: where the foreign rule is contrary to the morals of civilized society; or where the foreign law threatens the character of French

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28 Katzenbach, supra note 6, at 1088 n.9.
26 Two reasons are offered for the omission of conflicts laws in 1804, when Napoleon ordered the codification of French law. First, the field was very unsettled and second, the Civil Code was primarily an internal affair and was not a conflicts oriented effort. See D. Lloyd, supra note 3, at 76; and Delaume, The French Civil Code and Conflict of Laws: One Hundred and Fifty Years After, 24 Geo. Wash. L. Rev. 499, (1956).
25 D. Lloyd, supra note 3, at 76.
21 Katzenbach, supra note 6. The author states: "To stabilize human relations and to fulfill felt expectations is a purpose of conflicts as well as internal law." Id. at 1101.
civilization. These categories are vague and in themselves appear to allow a court much freedom to rely on *ordre public.* As the doctrine developed, however, French courts withdrew from arbitrary or creative applications of *ordre public* even though in particular cases it is the court's role to determine whether an agreement is unenforceable. To an Anglo-American, French law seems more scholarly than professional, less a matter of argument than of finding the right answer. The French approach abhors inconsistency and seeks to apply *ordre public* as a rational, integrated doctrinal element of French law. This is not necessarily a mechanical application of the law as it is, delimiting all interpretation and development, but it is a juridical commitment to the path of greatest legal certainty in evaluating whether to apply *ordre public.* Particularly in *ordre public externe,* where legislative direction is lacking, French courts have refused indiscriminate application of the doctrine.

The method of a French court in determining whether *ordre public externe* would nullify a contract, for example, is not whether the contract is valid by French law, but whether it must be rejected as opposed to *ordre public* after being found valid by the law under which it was made. Similarly, the Anglo-American court is not concerned that it has no legislative guidance on the point or even that the contract is invalid by forum law. Both systems recognize the relativity principle and require that harmful consequences in the forum must outweigh the foreign acquired rights of a party before local policy can be allowed to supersede foreign law.

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33 D. Lloyd, *supra* note 3, at 78.
34 "[I]t remains obvious that no clear guide can be found to the principles which will induce a court to say in individual cases that there is or is not a distinctive policy which operates to exclude a foreign rule which would otherwise be applicable." D. Lloyd, *supra* note 3, at 80.
36 D. Lloyd, *supra* note 3, at 149.
38 D. Lloyd, *supra* note 3, at 149.
39 Id. at 118.
40 Id. at 76.
41 The practice of requiring an identity between domestic and foreign law before foreign law will be applied is criticized as "localism without purpose" by Paulsen and Sovern, who acknowledge that it does go on in interstate conflicts cases in the United States, but also that it is to be condemned because it deprives a deserving claimant of compensation without the gain of any sensible objective of the forum. Paulsen & Sovern, *supra* note 9, at 971.

The "relativity principle" is the idea, rarely reduced to precise statutory language, that
B. *Ordre Public in Germany*

*Ordre public* is a part of German law by statute, as Germany is also a civil law country. When German law was codified at the end of the nineteenth century, the doctrine of *ordre public* was incorporated automatically. The German statute is directed toward non-German laws and excludes their application whenever they would be contrary to good morals or would work against the policy of German law. On its face, the German Code permits a court "to refuse to apply a foreign law which differ[s] from the parallel German rule even though the foreign rule were applicable by the ordinary rule of conflict." In practice, however, as with similar doctrines in the United States, England, and France, German *ordre public* traditionally has been given a restrictive interpretation. What the German courts have to do, in the words of the *Reichsgericht*, is to determine whether the "disparity between the respective political or social views that have given rise to the relevant foreign law and the conflicting German law are so great that to apply the foreign law would undermine the foundations of German political or economic life." Historically, only a very few laws have been found to threaten the foundations of German life, and although no definite standard is fixed by the "threat

"[t]he exclusion of foreign law for reasons of public policy does not go farther than is necessary in the public interest." M. *Wolff*, *supra* note 5, at 182. "Localism without purpose" and the relativity principle are in fact the same concept and involve two premises. The first is that it is not necessarily true that all the consequences of the application of an objectionable foreign law are intrinsically objectionable. Not all the effects of a validly-created foreign law are automatically to be considered offensive to public policy. The second premise is that substitution of *lex fori* for an otherwise applicable foreign law should be restricted as much as possible. "If the foreign law normally applicable contains a rule *X* which is unobjectionable, but which is subject to an exception *Y*, and if *Y* is contrary to . . . public policy, its exclusion does not entail the application of . . . [forum] law but that of the foreign main rule *X." M. *Wolff*, *supra* note 5, at 182-83. A concise statement of the relativity rule is offered by Kahn-Freund: "[T]he strength of a public policy argument must in each case be directly proportional to the intensity of the link which connects the facts of the case with this country. . . ." Kahn-Freund, *supra* note 13, at 58.

42 *Bürgerliches Gesetzbuch* art. 30 (W. Ger.).

43 Kahn-Freund says of article 30: "Here we have a statutory formulation of the principle of 'relativity' which, I think, is also part of English law, i.e., the rule that what matters is not the content of the foreign law in the abstract but the result to which its application would lead in *specie.*" Kahn-Freund, *supra* note 13, at 43.


45 *Husserl*, *supra* note 6, at 57 (German courts have been restrained in their use of *ordre public* under the guidance of the *Reichsgericht* and have fully realized the anomalous character of *ordre public*).

to German life" formula, it has proved effective in curbing the exercise of wide discretion by judges in favor of German law. The German concept of ordre public is not premised on the idea of an integration with ordinary jurisprudence, as is the case in France. Rather, it is viewed as an anomaly in conflicts law and hence relegated to a minimal role. The final result is that German courts approach invocation of ordre public with caution.

C. Summary

The form of ordre public generally differs from public policy in that it is embodied by statute in the rules of civil law countries. As a practical matter, however, French courts derive little specific guidance from the ordre public statute, which was concerned originally with violations of the moral and political order of France itself and not the exclusion of those injurious foreign laws against which it now can be invoked. Prior decisions and opinions facilitate interpretation of the ordre public statute and provide a background against which a judge can view a current dispute. Ordre public is employed in France with a view toward maintaining a balanced conflicts jurisprudence to work in concert with domestic French attitudes on morality and political order. The fundamentally protective role of public policy is shared by ordre public in Germany and France, although German courts are closer to Anglo-American practice in their general reluctance to rely on ordre public. Likewise, they consider its use a departure from ordinary conflicts jurisprudence.

III. PUBLIC POLICY AND THE SOURCES OF PRIVATE INTERNATIONAL LAW

Although court decisions involving public policy are relatively rare, especially in countries with legal systems following Anglo-American or German lines, conflicts of law do arise and public

47 A. KUHN, supra note 4, at 42.
48 Husserl, supra note 6, at 57.
49 The basic concepts of public policy in Anglo-American law are shared by ordre public in Western Europe in that both permit rejection of foreign laws restrictive of personal liberty, freedom to contract, and freedom to acquire and dispose of property. These parallel purposes of public policy and ordre public are recognized widely and writers in the field of private international law employ the terms interchangeably when discussing the role and universality of forum reservations against lending the state's authority to repugnant laws or transactions. See generally Kahn-Freund, supra note 13.
50 M. WOLFF, supra note 5, at 180.
policy does frustrate the smooth functioning of private international law. Every nation participating in international commerce admits to its courts some foreign based claims and rejects others. The question of why the courts of one country should recognize or give effect to laws made elsewhere has intrigued and confounded jurists and jurisprudes for more than four centuries. Unfortunately, the answer is not much clearer now than when the ancient Romans demonstrated their disrespect for foreign laws by ignoring conflicts and declaring that only Roman law was applicable to Roman citizens. Roman arrogance declined with the empire and when modern sovereign nations arose the relations of trade and commerce among them inevitably generated conflicts of law. To regularize and perhaps eventually to unify contradictory laws, a European university-based legal community sought to establish the true governing principles of private international law more than 500 years ago. These scholars did not look to the decisions of courts, but instead proposed to derive by inference and induction the principles of international law from pure scholastic inquiry. The statutists are now understood to have failed in their endeavor because individual judges do not allude to academic pronouncement when resolving conflicts cases. Modern conflicts analysis begins in the nineteenth century when Story, Savigny, and Mancini sought to clarify the principles

51 Katzenbach clarifies the sometimes confusing phrases employed in conflicts analysis: When a court applies the rules and principles found in the statutes on judicial decisions of another sovereign, it can be said that the court is either enforcing foreign law, enforcing a right created by foreign law, or enforcing a right created by its own law which is 'as nearly homologous as possible to that arising' under the foreign law. All we are doing is using different symbols to describe similar judicial behavior.

Katzenbach, supra note 6, at 1095-96 (citations omitted).

52 The conflicts use of public policy, or in continental terminology, 'ordre public,' is a world-wide phenomenon. Significantly enough, there is, in 'international private law,' scarcely a rule so common as the reservation that, in appropriate cases, the foreign law will be abandoned and recourse had to the lex fori.

Nussbaum, supra note 19, at 1028.

53 M. WOLFF, supra note 5, at 21.

54 Id. at 20. Katzenbach, supra note 6, at 1112. See generally Bodenheimer, supra note 30, at 52.


56 M. WOLFF, supra note 5, at 33.
of operation of private international law. Story, an American, relied on a common law approach, guided by a few basic maxims borrowed from the Dutch. Story argued that sovereignty underlay the powers accorded a nation in contemporary international relations. In Story's opinion, the nature of sovereignty encompassed complete and absolute control over the internal affairs of a country. He considered foreign interference, even to the extent of recognizing foreign law, as violative of sovereignty. Nevertheless, states do admit causes of action founded on foreign edicts and in this practice Story recognized the operation of "comity," a form of international mutual self-interest and utility. He was optimistic that comity could be a unifying force to overcome the strictures of sovereignty, which produced an isolationist territorial outlook and consequent arbitrary exclusion of foreign law. Subsequent developments of nationalism and positivism have vitiated Story's theory and comity is now diminished in form to a voluntary undertaking, indicative of, at best, international good faith. Story's fundamentally international outlook led him to view exceptions to his comity idea as vestigal and destined to recede in significance as nations grew jurisprudentially closer together. Story considered public policy to be one of these exceptions. In respect to public policy, Story's analysis is limited. He treated the concept as an unusual feature of private international law, which would decline in importance as states gradually grew accustomed to resolving conflicts according to a universal standard.

58 Id. § 29.
59 Id. §§ 18, 32.
60 Id. § 22.
61 Id. §§ 35, 36. The contribution of Story to conflicts law is examined in Lorenzen, Story's Commentaries on the Conflict of Laws—One Hundred Years After, 48 Harv. L. Rev. 15 (1934). However, Story's contribution has been disputed in respect to the introduction of the idea of comity to American conflicts law theory. See K. H. Nadelmann, Joseph Story's Contribution to American Conflicts Law: A Comment, in Conflict of Laws: International and Interstate 21 (1972).
62 J. Story, supra note 57, § 645.
63 Katzenbach argues that Story's "comity" idea remains viable.
   One aspect of, or approach to, conflicts theory, therefore, remains Story's comity—deference to the laws of another state. From this orientation conflicts principles, like rules of international law, are rules governing the exercise of sovereign power, rules of sovereign self-restraint. They have as their objective the inducement of a reciprocal self-restraint by others.
Katzenbach, supra note 57, at 1103.
64 Id. at 1106.
Savigny, a German jurist, proposed that extraterritorial effect of municipal law was not based on comity, as Story understood it, but on the compelling forces of business and commerce, which generated disputes that needed to be resolved expeditiously and efficiently. Savigny likened the deference to foreign acquired rights to the manner in which intranational problems are handled, diminishing the need for Story's comity idea. His work in this sense advanced a step beyond Story and toward current understanding of public policy. However, Savigny denied its continuing role in international law and was uncomfortable with any theory of conflicts that accorded public policy permanent status. Savigny maintained that exclusion of foreign law is an exception to private international law and should be vigorously discouraged.

Mancini, an Italian political theorist, opposed Story and Savigny on the role of public policy in private international law. Mancini maintained that there are separate sets of rules created for the protection of public order, and that they apply to whomever is within the territory of the state, regardless of the person's national law. Mancini concentrated particularly, however, on a "nationality" idea, which meant that a person's national law should prevail over local or domicilary law in matters of status and capacity, family relations, and succession. When national law and local law conflict, Mancini, unlike Story and Savigny, considered that the public policy exception was available to a forum whenever national law was offensive to the local law. Countries influenced by Mancini tend toward more liberal appeals to public policy than Germany or Anglo-America, which follow the views of Savigny and Story. France is prominent among major modern nations in its adherence to Mancini's ideas and it has accepted ordre public as a tenet of its conflicts law rather than as an exception to ordinary conflicts rules.

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66 Id. at 72; see also Bodenheimer, supra note 30, at 53.
67 Id. at 70.
68 M. Wolff, supra note 5, at 35, 169. See also Katzenbach, supra note 6, at 1090 n.14.
69 Husserl, supra note 6, at 57.
70 Bodenheimer, supra note 30, at 57.
71 K. H. Nadelmann, supra note 61, at 49.
72 M. Wolff, supra note 5, at 39.
73 Bodenheimer, supra note 30, at 58.
74 M. Wolff, supra note 5, at 169-70. See also Bodenheimer, supra note 30, at 59. There is
Public policy has persisted as an element of private international law despite juristic objections to its illogical qualities, which interrupt the uniform functioning of rules of international conflicts resolution. There is a consensus among legal writers that national interests will sometimes be held to supersede rights acquired in a foreign jurisdiction. Reservations against obnoxious, barbaric, burdensome or unjust laws or judgments are universal, although there is no consensus as to a practical technique for proving that a foreign law is abhorrent to the sensibilities of the forum. The progress toward an international common law supposed by Story, and the fatally anomalistic character of ordre public assumed by Savigny, simply have not developed to prevent a forum from referring to its own law whenever it chooses. Constraints on public policy and ordre public originate within the forum; they are not imposed from without. Private international law is not enforceable except at the forum by the forum's conflicts rules, and it is commonly understood that public policy can intervene to reject a claim. "While its definition is vague, at least in the sense that public policy has a history and is universally recognized, it is not completely arbitrary and impossible to analyze, although it lacks status as positive law outside civil law countries.

IV. DISGUISED USES OF PUBLIC POLICY

Analysis of public policy in Anglo-American law is made especially difficult by the variety of characterization and qualification devices to which a court may turn in the alternative to exclude foreign law. These include the procedure versus substance distinction, use of domicile to determine personal law, the territorial nature of penal law, and crystallization of public policy decisions into rules of law independent of their public policy origins. These devices enable an Anglo-American court to avoid
an open and blunt use of public policy in fact situations where application of *ordre public* would be unavoidable.\(^2\)

A widely acknowledged rule of conflicts law is that questions of procedure are governed exclusively by forum rules.\(^3\) The principal argument for this rule is that no court is the master of foreign procedure, nor is the bar skilled in it, given the variety of the world's legal systems.\(^4\) The basis of the rule is a general agreement that any other solution would be inexpedient. Anglo-American courts, both to avoid foreign law and to forego reliance on public policy grounds to reject foreign law, find the procedural versus substantive distinction wonderfully supple,\(^5\) and deftly extend or withdraw procedural characterization as they understand the facts in each case to allow.\(^6\) Such practices by the courts do not go without criticism.\(^7\)

The territorial nature of criminal law is well settled, and foreign penal statutes will not be enforced.\(^8\) Cases turning on this point

\(^2\) [I]n French law public order and good morals are regarded as conceptions susceptible of philosophic justification and which pervade the whole field of the law and constitute or should constitute a systematic body or doctrine. In English law on the other hand, public policy is treated as a haphazard rule the basis of which has never really been explored; further it is regarded as to some extent in conflict with rather than an integral part of the law, and is invoked sporadically without regard to any coherent pattern or principle.

D. Lloyd, *supra* note 3, at 149. See also M. Wollff, *supra* note 5, at 177.


\(^4\) J. Westlake, *supra* note 5, at § 341.

\(^5\) A. Kuhn, *supra* note 44, at 76-114. See Colocassides, *The Exclusion of Foreign Law*, 3 I.C.L.Q. 479 (1954), where the author presents the rather extreme view that the judge is the ad hoc supreme arbiter of the extent to which substantive matters will be characterized as procedural in order to bring about a public policy decision. *Id.* at 479.

\(^6\) Examples of rules held to be procedural include statutes of limitations, certain aspects of damages, conversion of foreign money, the rules governing creation of a receivership, rules of evidence, and of proper parties to the action, set-off, and counterclaims. See V. Dicey & J. Morris, *Conflict of Laws* 1099-1123 (9th ed. 1973); Restatement (Second) of Conflict of Laws § 122, Comment a (1971).


have involved expropriation without compensation,\textsuperscript{89} indefinite deprivations of a property interest,\textsuperscript{90} criminal penalties associated with revenue laws,\textsuperscript{91} and of course criminal law in its customary sense.\textsuperscript{92} Thus, characterizing a foreign law as penal precludes application of rights acquired under that law and opens the way for the forum court to apply local law.\textsuperscript{93} Although it is well settled that criminal laws are strictly territorial, no standard for defining a foreign law's penal or criminal status has appeared. Apparently, courts have wide discretion in the area.\textsuperscript{94}

A third exclusionary technique derives from Anglo-American conflicts rules requiring issues of status, such as marriage, divorce, and legitimacy to be controlled by \textit{lex domicilia}.\textsuperscript{95} In contrast, French law (as Mancini argued) often requires that the court look first to the national law of a party in order to discover applicable law.\textsuperscript{96} If that law is found to allow a polygamous marriage, for example, the court must rely on \textit{ordre public} and exclude the foreign law. This initial deference to foreign based rights in matters of status generates a great deal of international litigation and represents a large number of \textit{ordre public} cases.\textsuperscript{97} In a nation of immigrants, such as the United States, the overall likelihood of

\textsuperscript{89} See, e.g., Banco de Vizcaya v. Don Alfonso de Borbon y Austria, [1935] 1.K.B. 140, 144; and Frankfurter v. Exner, [1947] 1 Ch. 629, 636.
\textsuperscript{90} Re Langley's Settlement, [1962] Ch. 541.
\textsuperscript{92} See V. Dicey & J. Morris, supra note 86, at 75-84; 2 J. Moore, A Digest of International Law 236 (1906); and Mann, Foreign Penal Laws and the English Conflict of Laws, 42 Transact. Grotius Soc'y 133 (1957).
\textsuperscript{93} M. Wolff, supra note 5, at 171-73.
\textsuperscript{94} An American case presenting all the arguments for and against application of foreign penal laws while illustrating the degree of judicial discretion is Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918). A subsidiary concern in penal cases is involvement of the court in public international law. It is thought that if forum courts are opened to prosecutions for crimes committed abroad, there is a more serious violation of the forum's sovereignty than if the forum merely has agreed to extradite persons indicted for serious crimes. Anglo-American criminal law incorporates procedural safeguards related to venue and evidence that are defeated by forum enforcement of foreign criminal laws. See P. North, supra note 55, at 137, and 1 Oppenheimer, International Law § 144A (8th ed. 1955) as to infringements of sovereignty.
\textsuperscript{95} Kahn-Freund, supra note 13, at 45.
\textsuperscript{96} D. Lloyd, supra note 3, at 80.
\textsuperscript{97} Nussbaum states: Anglo-American law as to capacity, marital status, inheritance and other "personal" relations is principally determined by the domicile of the parties, while under continental learning such law is determined by their nationality. Since law suits are usually conducted in the domicile of the defendant, there is much less opportunity, under the domicile rule, for the application of foreign law.
Nussbaum, supra note 19, at 1029.
litigation is decreased by applying the law of the party’s domicile, since domicile is much easier to acquire than citizenship. At the same time, United States courts are spared the diplomatically awkward task of declaring the law of some other country as contrary to public policy, and thus barbaric or uncivilized and unworthy of enforcement in America.

Although not truly a device for excluding foreign law in individual cases, the common law, through “mechanical application of the principle of precedent,” gradually crystallizes decisions invoking public policy and finds in them independent rules of law that have lost their connection to public policy origins. In a system where one case can make law, it is easy to see how this can come about. If courts merely cite the rule of “X v. Y” without looking further into the grounds of that decision, the rule of X v. Y gradually comes to be authority apart from consideration of public policy that prompted its making. Civil law courts in contrast, must reassert ordre public as common law courts cite statutes, and in that process re-examine their commitment to ordre public.

Court decisions involving procedural characterization, penal laws, personal status, or “mechanical precedent” rarely give explicit treatment to public policy. Yet, the lex fori tendencies that move a court to exclude foreign law through characterization and related forum biased conflict rules result in the same outcome as invocation of public policy. Foreign law is rejected and parties before the court may receive imperfect justice as well as a sense of frustration if unable to predict whether foreign or domestic law will apply in like cases. Civil law courts are compelled by their system to a more open and forthright ordre public defense of forum interests, a result often interpreted to mean that ordre public enjoys a larger role in civil law conflicts than public policy. Despite these contrasting approaches to conflicts, however, contracts held void by French courts as d’ordre public
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are quite similar to contracts not enforceable in Anglo-American courts on public policy, procedural, or penal grounds.\textsuperscript{102}

V. FUNCTIONS OF PUBLIC POLICY IN PRIVATE INTERNATIONAL LAW

Public policy in private international law functions to reject foreign laws repugnant to the forum’s sense of morality and decency, to prevent injustice in the special circumstances of the parties before the court, and to affect choice of law.\textsuperscript{103} The earliest and most enduring use of public policy is to reject morally repugnant law.\textsuperscript{104} An agreement for prostitution,\textsuperscript{105} property in a slave,\textsuperscript{106} and an incestuous marriage\textsuperscript{107} have been held to be arrangements voidable on moral grounds. Although this type of public policy lends itself to invalidation of obviously reprehensible transactions, it is the form of public policy most infrequently invoked.\textsuperscript{108} The cases that define it are relatively old (primarily from the eighteenth century), and deal principally with slavery and with protection of forum sexual standards.\textsuperscript{109} The moral repugnancy use of public policy has declined for three reasons: (1) standards of sexual morality change over time and acts once forbidden are now acceptable; (2) courts have become more sensitive in labeling the laws of another country as uncivilized and inhumane; and (3) laws proscribing human degradation and servitude are now universal. Despite the rarity of moral repugnancy cases in modern legal practice, there is no doubt that this function of public policy remains viable. No legal system can afford to risk opening itself to enforcement of all foreign acquired rights in a world where

\textsuperscript{102} G. DELAUME, TRANSNATIONAL CONTRACTS, Booklet 5, at § 4.07 (Apr. 1980) (A careful reading of the footnotes is more revealing of similarities between French and Anglo-American contracts cases than the text itself); see also D. LLOYD, supra note 3, at 6.

\textsuperscript{103} This list is meant to be neither exhaustive nor conclusory, since the functions of public policy in private international law are not firmly settled. See, e.g., R. GRAVESON, supra note 74, at 167-69. Graveson lists: (a) international relations, (b) trading with the enemy, (c) contracts in restraint of trade, and (d) liability for permanent maintenance of children, as categories of cases where public policy is most often invoked.

\textsuperscript{104} Holder, supra note 14, at 949.


\textsuperscript{107} Cheni v. Cheni [1963] 2 W.L.R. 17.

\textsuperscript{108} P. NORTH, supra note 55, at 154, lists as examples disqualification of foreign acquired rights or laws arising from slavery, excommunication, heresy, infamy, civil death, popish recusancy, and nonconformity.
political freedoms and personal liberty are merely abstract ideas to a large part of the world's population.\textsuperscript{110}

A second discernible function of public policy is to prevent injustice in the special circumstances of the parties before the court. The problem here is not the repugnancy of an otherwise applicable foreign law, but rather the harsh effect of its application as called for by the conflicts rules of the forum. United States cases illustrating this use of public policy are few.\textsuperscript{111} English judges, especially in personal status cases, have reserved for themselves a "residual discretion" to avoid an unjust or unconscionable result.\textsuperscript{112} This reserve of discretion has been criticized as contrary to both principles of international law and the authority represented by earlier cases.\textsuperscript{113} Nonetheless, English courts that insist upon invoking this privilege have received support in the legal literature.\textsuperscript{114} Critics of "residual discretion" assert that when parties to a contract decide on its terms, they do not have in mind to submit to any discretion other than that embodied in the contract. Only the known rules for formation of a contract can guide parties to an agreement; frustration of their efforts is to be discouraged, although it might be argued that a residual discretion approach, which emphasizes a particular hardship on a party rather than principle, is preferable to a general reservation.\textsuperscript{115}

\textsuperscript{110} P. North, \textit{supra} note 55, at 152, 154; A. Kuhn, \textit{supra} note 44, at 34; J. Story, \textit{supra} note 57, at § 25. In Nussbaum, \textit{supra} note 19, at 1049, the author is particularly concerned with foreign law that takes unfair advantage of the forum's willingness to hear cases based on foreign laws. In the most basic sense, private international law is founded on rules of trust and an implicit obligation of reciprocal fair treatment, which can be destroyed if violated too often.

\textsuperscript{111} Paulsen and Sovern come to the conclusion that the defense of public policy may be raised in a conflicts case when the provisions of the foreign law are pernicious or in sharp contrast to those of the forum. They rely on the authority of Cavers and Rabel, and admit that they were unable to discover any American cases that employ public policy in exactly this way. Nonetheless, they express the hope that the public policy idea can be used to achieve justice in a particular case if strict limitations are observed. Paulsen & Sovern, \textit{supra} note 9, at 1008, 1016.

\textsuperscript{112} V. Dicey & J. Morris, \textit{supra} note 86, at 74; see also Qureshi v. Qureshi [1972] Fam. 173, 199: "The Court already has adequate power to refuse to recognize the legal rule of the domicile where it would cause injustice in a particular case." (Opinion of Sir J. Simon).

\textsuperscript{113} V. Dicey & J. Morris, \textit{supra} note 86, at 75.

\textsuperscript{114} Bodenheimer \textit{supra} note 30, at 64. Nygh states:

\begin{quote}
[Public policy is no longer seen as a defined concept [which Story and Savigny proposed] which, at least in theory, rigorously excludes the effects in England of certain obnoxious foreign institutions, but as a subtle weapon available to the courts to do substantial justice in individual cases, and especially to safeguard the rights of litigants under the \textit{lex fori} from the too harsh application of conflictual rules.
\end{quote}


\textsuperscript{115} \textit{Id}.
Although United States courts have decided few cases demonstrating the injustice function, the power of United States courts to prevent injustice in the special circumstances of the parties before the court is perhaps exercised more subtly in a general approach to the law, emphasizing justice in particular cases through the hidden public policy devices discussed above. French courts, although the evidence is inconclusive, also seem prepared to abandon their conflicts rules to apply foreign law in cases where "no coercive principle would seem apparent upon grounds of morals or the social order."

Choice of law is a third function of public policy. Rather than modifying or changing an otherwise applicable conflicts rule, the court may utilize public policy to reject the choice of law made by its own rules. The usual effect of the choice of law function is to reject foreign law and assert "the forum's right to have its law applied to the transaction because of the forum's relationship to it." In other words, public policy as choice of law serves to focus forum conflict rules more sharply in a particular case than initially intended by the framers of those rules. The effect is to make specific what had been a general rule of conflicts without installing a permanently modified rule. The usual case is where the court simply finds it intolerable that forum law should not apply. One example is a contract made abroad and governed by foreign law under regular conflicts rules, but which involves a contractual obligation to supply goods to an enemy nation in wartime. Another example is a contract to pay a bribe that was not an unlawful agreement in the country where the bribe was to be paid. Thus, the most significant factor influencing a court's choice of law decision is the relativity principle, i.e., the strength of a public policy argument must in each case be proportional to the intensity of the link connecting the facts of the case with the forum. In principle, a neutral court is not to invoke its own

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110 Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 YALE L.J. 736 (1924), Lorenzen states: "Their aim [the courts'] has been to render a just decision under the circumstances of the particular case . . . ." Id. at 763.
111 A. KUHN, supra note 44, at 41.
113 Paulsen & Sovern, supra note 9, at 980.
115 Kahn-Freund, supra note 13, at 40.
118 See generally materials accompanying note 41 supra.
public policy to reject a claim involving little or no contact with the facts of the case.\textsuperscript{125} There is to be a weighing of forum interest as expressed by policy against the relationship of the case to the forum.\textsuperscript{126} Other examples of contracts held void by English courts on public policy grounds illustrating the choice of law function include contracts in restraint of trade,\textsuperscript{127} corrupt and collusive arrangements for a divorce,\textsuperscript{128} and champertous contracts.\textsuperscript{129}

A more recent development, particularly in American conflicts law, is the "government interest analysis" proposed by Professor Brainerd Currie.\textsuperscript{130} Government interest analysis rejects the "vested rights" or territorial approach of the First Restatement of the Law of Conflict of Laws as too rigid and rule-bound.\textsuperscript{131} The Second Restatement, which constituted an attempt to provide flexible conflicts rules, fell under criticism that it erred in the direction of promoting uncertainty instead of flexibility. In response to these failed efforts to prescribe definite rules, Currie argued that all choice-of-law rulemaking should be abandoned.\textsuperscript{132} In place of the unsuccessful Restatement approaches, he submitted a substitute method involving a forum court’s scrutiny of the

\textsuperscript{125} Nussbaum states:
In general however, a foreign law which in itself is repugnant to the forum will be accorded recognition where the repercussion of that law upon the forum is remote and unharmful. . . . Only an actual, strong, and adverse interest of the forum will prompt the court to refuse the application of the foreign law that would govern under general conflict of laws rules. This is the doctrine of the "relativity" of public policy or "ordre public."

Nussbaum, supra note 19, at 1030-31.

\textsuperscript{126} The forum bias of the English rules is extensive. See V. Dicey & J. Morris, supra note 86. "The validity or invalidity of a contract must be determined in accordance with English law, independently of the law of any foreign country whatever, if and in so far as the application of foreign law would be opposed to the public policy of English law. . . ." Id. at 748.


\textsuperscript{128} Hope v. Hope, 44 Eng. Rep. 572 (Ch. 1857).


\textsuperscript{130} See Currie, Notes on Methods and Objectives in the Conflict of Laws, Duke L. Rev. 171 (1959); Comments on Babcock v. Jackson, 63 Colum. L. Rev. 1233 (1963), reprinted in B. Currie, Selected Essays on the Conflict of Laws (1963). Not all scholars agree that Currie originated government interest analysis. "Although Professor Currie does not purport to have originated the theory that choice-of-law rules should rationally advance the policies or interests of the several states (or of the nations in the world community), his works have fired the imagination of conflicts scholars and attracted the support of respected judges and courts, thus producing what has been described as a 'revolution' in the practice of this field of law" (citations omitted). Ruiz, Interest-Oriented Analysis in International Conflict of Laws: The American Experience, 23 Netherlands Int'l L. Rev. 7, 14 (1976).


\textsuperscript{132} Currie, Notes on Methods and Objectives in the Conflict of Laws, Duke L. Rev. 171, 177 (1959).
particular issue (policy) before the court as treated in the foreign jurisdiction. If a competing interest is determined by the forum court to be expressed by the foreign law, the forum court must apply the foreign law only when the forum has no interest in the application of its own policy. There is to be a weighing of policies, and if the forum policy has any weight at all, the scales tip in the forum's direction. "Under interest analysis in order to determine whether there is a true policy conflict one must examine the policies supporting the supposedly conflicting rules."

Although governmental interest analysis has been well received, particularly as a result of its facility for identifying and disposing of "false conflicts" cases (those in which the forum has no interest), this method is subject to three criticisms. First, Currie was writing and analyzing with the conflicts of inter-United States problems in mind and the constraints placed upon American states by the article four privileges and immunities clause and the equal protection clause. International law has no analogous restraints on the actions of individual nations that wish to pursue their interests to the detriment of orderly conflicts resolution. Government interest analysis has a distinct bias toward the forum, and internationally this bias would be magnified to unacceptable proportions.

Second, some United States courts have claimed an "interest" for government interest analysis purposes simply in dispensing justice, in cases where no interest otherwise exists. This practice can give rise to another set of complications. If its use became widespread, it would obviate the utility of interest analysis in identifying false conflicts. There would always be some interest, since any court is charged with dispensing justice.

A third and related problem is that if finding an interest in doing "justice" appears only in some cases, "an entirely new methodology must be created to identify the cases it does and

134 Id.
136 "The States of the Union are significantly restrained in the pursuit of their respective interest. . . ." Currie, Notes on Methods and Objectives in the Conflicts of Laws, DUKE L. REV. 176, 178 (1959).
137 J. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 85 (1980) (citing Griggs v. Riley, 489 S.W.2d 469 (1972)).
those in which it does not. The methodology is obviously not interest analysis, so interest analysis has failed to solve the problem it set out to solve. As a solution, one commentator has proposed that the “dispenser of justice” interest be asserted only when it rises to the level of public policy. The merit of this solution seems limited, however, when the record of inconsistency and misunderstanding of public policy is reviewed. It is not likely that courts would find their choice-of-law decisions made easier by relying on public policy to guide their determination if they employed an interest analysis approach to conflicts.

It has been suggested that the courts’ rejection of foreign law on policy grounds in anticipation of adverse forum effects is a departure from ordinary choice of law deliberations. In invoking public policy, courts are not assessing the relationship of the parties to the forum, or the governmental interest as such. The court’s concerns reduce to an analysis of the obnoxious effect to be anticipated at the forum. The court thus chooses without regard to the parties’ choice of law and sets an outer limit on the discretion accorded to parties to a contract. The object of a court is a delicately balanced tension holding parochialism in check by respect for foreign law and concern for regularized conflicts rules.

A special class of cases exhibiting the choice of law function of public policy involves agreements in restraint of trade. The United States is unique in having an edict of the force and reach of the Sherman Antitrust Act. In cases brought under this act, United States courts must set aside their territorially based conflicts rules and extend jurisdiction beyond the usual boundaries of United States law. The Sherman Act authorizes prosecution for actions conducted wholly outside the United States, even when they are legal where performed. Many countries regard enforcement of the act as an unwarranted interference with their internal affairs, particularly when compliance violates that country’s na-

138 Id. at 86.
139 Id.
140 Paulsen and Sovern roundly criticize the choice of law function of public policy, but are careful to note that most of the cases rejecting foreign law on public policy grounds involved important forum connections and were not simply expressions of forum parochialism. Paulsen & Sovern, supra note 9, at 980.
141 The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976), applies to trade and commerce conducted abroad if the conduct alleged to be an unreasonable restraint on trade has even a small effect on domestic commerce. See Katzenbach, supra note 6, at 1149-50.
To some extent, United States courts have responded to foreign protest and have begun to take into account the degree of conflict with foreign law in antitrust actions involving United States companies operating abroad. The extent and duration of this ameliorative effort is not clear, however, and there remains a question of to what degree American commitment to competition and free markets can be impressed, or should be impressed, upon foreign states.

The primary role of public policy and ordre public is to negate the effect of foreign legislation or judicial judgment. No country elects to restrain entirely its courts from decisions on public policy grounds. Indeed, public policy provides for a flexible response to unforeseen consequences of forum recognition of foreign acquired rights. Completely automatic operation of conflicts rules produces mechanical, unjust, and disquieting results in cases where a court may be able, on the facts of a particular case, to fashion a more equitable outcome. Public policy is a normative feature of legal systems. It is a necessary exception in unusual conflicts cases where the court perceives dangerous intrusion of morally repugnant law, injustice in special circumstances, or facts so closely tied to the forum that the court is compelled to apply local law.

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145 See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) (Adams, J. concurring at 1302). Judge Adams' opinion illustrates the problem of the foreign reach of antitrust law:

It is only when foreign law requires conduct inconsistent with that mandated by the Sherman Act that problems of international comity become significant. And even in such circumstances, it is recognized that extraterritorial jurisdiction may be asserted if the relevant factors, some of which are enumerated in the majority opinion, weigh in favor of the exercise of jurisdiction.

Id. at 1302 (emphasis in original).

146 Kahn-Freund, supra note 13, at 57.


A court in a multistate case must undertake a process of analysis that is inherently more complex than that faced in a purely domestic case; to a greater or lesser degree, the court must take into account the rule of foreign legal orders. Accordingly, the areas of possible doubt and ambiguity are larger. For these reasons, one who expects to achieve results in multistate cases that are as satisfying in terms of standards of justice and of party acceptability as those reached in purely domestic cases is doomed to disappointment. Perhaps the most satisfactory solution would be to render choice of law unnecessary by establishing supra-
VI. SUMMARY AND CONCLUSION

One writer, unable to determine factors that might reliably account for public policy decisions in the future or in the past, stated that the cases can be explained only in relation to the broadest of democratic values.\textsuperscript{48} Another analyst figuratively shrugged and said of the predictability of the judicial invocation of public policy, "you never can tell."\textsuperscript{49} Despite its inscrutability and resistance to formal definition, public policy has a legal history susceptible to analysis. From a domestic inception employed principally to void morally repugnant agreements in England and to protect the social order in France, public policy and \textit{ordre public} later found their way into decisions involving foreign laws that forum courts would not accept. Although civil law countries tend to embrace \textit{ordre public} as an integral part of a regular system of conflicts, Anglo-American jurisprudence has been less rigorous in defining the role to be played by public policy. In part, this contrast might be explained by the influence of three founders of modern conflicts law, each of whom espoused a slightly different view of the place for public policy in an ideal system of law dedicated to resolving conflicts between the prescriptions of individual sovereign nations. Generally and traditionally, however, rejection of foreign acquired rights on public policy grounds is neither arbitrary nor incautious, as it is utilized only under self-imposed conditions of restraint. Differences between \textit{ordre public} and public policy are more structural than substantive. Due to a traditional antipathy toward invocation of public policy, Anglo-American courts avail themselves of procedure and characterization conflicts devices, which lead to results obtainable in a civil law system only by a forthright application of \textit{ordre public}. The results of public policy as a ground of decision serve the functions of protecting the forum from laws pernicious or immoral, preventing injustice in individual cases by the mechanical application of conflicts rules, and aiding the court in choosing to apply forum law in cases with strong local contacts.

Public policy and \textit{ordre public} burden a forum court with great responsibility to exercise restraint and prudence in rejecting national rules administered by supra-national agencies. This solution engenders its own difficulties and is unlikely for historical and political reasons.

\textit{Id.} at 42.

\textsuperscript{48} Holder, supra note 14, at 951.

foreign acquired rights. The effect of such a rejection is to criticize a foreign law as unacceptable because of its moral attitude, its threat to social order, or some other fundamental defect rendering it unworthy of enforcement in a civilized country. The system of private international law operates to a great degree on faith and a commitment to fair and just consideration of foreign law. Reciprocal application of public policy is a danger to this system of mutual enforcement and should be avoided. There is no reply, however, to a nation that does not hold to a few basic legal precepts of conflicts law. These include, for instance, the notion that contracts are made to be performed and that property rights inure to individual persons in certain inviolable ways surmountable only by due process of law. These precepts cannot be discarded or set aside by capricious invocation of public policy without risk to the system of private international law as a whole.

Kent Murphy