confessing to an emptiness in much of the efforts of the civilization of which we are all in some degree products. Moreover, the future will decide whether Fuller is to have, in a sense, the last laugh on his critics. Very tentatively and guardedly Fuller in the present work suggests at least by implication[41] that the internal morality of law operates to a degree as an extra-constitutional "due process" clause, which would necessarily operate universally, not only in countries like Australia with rigid constitutions but whose constitutions contain no "due process" clause, but also in countries like England with no rigid constitution at all.[42] We in Australia should not be in the least surprised if a court was to refuse to apply a legislative enactment on the ground that it was obscure, because we would not think of this as a striking down of the statute or as raising a problem of the law's morality.[43] But if a New South Wales court were to proceed from here to strike down the Damage by Aircraft Act[44] on the ground that because it imposed a strict liability it was commanding the impossible,[45] this would be cataclysmic. If this sort of development, kept within even the most modest bounds, were actually to occur Fuller's work would have carried out exactly the function which he considers the highest achievement of the law professor: the making of an incremental contribution to the development of the law enterprise by detecting and confirming the direction of a strand in its quest for a better achievement of its dimly descried goals.[46] One finds it exceedingly difficult to envisage the possibility of such a development. This would greatly increase one's discomfiture if it actually occurred, more particularly if the court were to deny the sharply innovatory character of such a holding by arguments from necessity of the kind which appear in *The Morality of Law.*

W. L. MORISON.*

Selected Essays on the Conflict of Laws, by Brainerd Currie, Professor of Law, Duke University, Durham, N.C., Duke University Press, 1963. x and 761 pp. ($15.00).

The Center for Advanced Study in the Behavioral Sciences at Palo Alto is an institution that excites envy in the mind of every Australian academic. University teachers may spend some time there, with insignificant teaching obligations, among selected, stimulating colleagues and with ample opportunity for reflection. Naturally enough, the work of those who have had the opportunity to work there bears eloquent testimony to the value of the programme.

The reviewer met Brainerd Currie at the University of Chicago imme-

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[41] See, e.g., the comparison between legislation which fails to measure up to the minimum standards of the internal morality of law and void contracts in *The Morality of Law*, 39. There is, however, a warning in his statement that courts can be expected to do no more in this matter than "save us from the abyss" (44).

[42] See Fuller's caustic criticism of A. V. Dicey's views of parliamentary sovereignty in England at 115-17.

[43] *Contra* Fuller, who would regard this as a failure of the legislature in its reciprocating duty to the citizens. Consider 64.

[44] No. 46 of 1952 (N.S.W.).

[45] Fuller considers the difficulties which laws imposing strict liability raise for the internal morality of law at 70-79.

[46] See *The Law in Quest of Itself* (1940), e.g., the comparison between the growth of the law and the telling and retelling of a story at many hands (7-10). Of the legal scholar he says, "Is it his duty to anticipate the future by giving legal form to emergent ethical values, or is he only a kind of intellectual scavenger whose function it is to clean up the conceptual debris?" (14).

* D.Phil. (Oxon.), B.A., LL.B. (Sydney), Professor of Law in the University of Sydney.

diately after his return from Palo Alto. At that time the reviewer's response to Professor Currie's views was one of almost total rejection. Indeed this would be the normal response of anyone schooled in the traditional concepts of conflict of laws. For Currie criticizes not merely the particular rules of conflict of laws but also its basic methodology. In this collection of fourteen essays, Currie is principally concerned with choice-of-law problems. Expressed in its simplest form his argument is that a court, faced with the problem of deciding whether a foreign law or its own law should be applied, should approach the question as a problem of interpretation. What is the scope of the foreign law? Was it intended that that law should apply in this situation? The same questions should be asked in relation to the law of the forum. Currie argues that if this is done many apparent "conflict" problems will disappear because there will be no real conflict between the interests of the respective states. However, where there is a genuine conflict of interests in that the laws of two or more states, properly interpreted, are applicable to the situation and require different results, Currie would argue that a court is ill-equipped to make the political decision involved in choosing which law is to apply. In such a dilemma the court ought to apply the *lex fori.*

In a recent review F. A. Mann castigated Currie's thesis in the following terms:

> The *idee fixe* that the application of foreign law and the process of selecting the most appropriate foreign legal system must at all costs be avoided can hardly be carried to greater lengths. It can only be hoped that jurists accustomed to and trained in deciding inter-State or internal conflict cases will be less pained by an approach which other observers may be inclined to describe as frivolous.[1]

This criticism is far from just. For Currie contemplates that choice-of-law rules may be derived from a thoughtful interpretation of the relevant laws of the forum or may be expressly prescribed by legislation or treaty. Indeed, this is the natural and necessary complement to his basic argument. At this stage it would be interesting to speculate on the role of the judiciary implicit in Mann's criticism. The fairer explanation, fairer to both Currie and Mann, would be to admit that legislatures in the United States have demonstrated a willingness to prescribe choice-of-law rules which has not been matched by British or Australian legislatures. It is this social fact, rather than any theoretical deficiency, which must cause an English or Australian observer to pause before accepting Currie's basic thesis.

The concise statement of Currie's argument which is given above hardly does justice to his more sophisticated formulation of it. Nevertheless, it should be sufficient to demonstrate that acceptance of Currie's thesis would render every existing standard text on conflict of laws valueless. Indeed, because of the infinite variety of conflicts situations which Currie's analysis contemplates it is doubtful whether a new text on conflicts would ever be feasible. As Currie himself writes:

> It is no accident that years of study tend thus to result in miscellany. Under analysis the subject tends to come apart, and systematic comprehensive treatment recedes as a practical possibility. For some of us it will never be possible at least in anything like the traditional form.[2]

This book, therefore, consists of a selection of essays in which Currie elaborates his theory by discussing its application to particular problems. Some of the essays involve a general defence of his theoretical position (for

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[1] F. A. Mann, "Book Review" (1964) 80 *L.Q.R.* 589 at 591.
[2] At vii.

example, Chapters Four and Twelve), and a reader unfamiliar with Currie's work might be well-advised to consult these first. Where Currie discusses particular problems his essays are less interesting to a foreign observer although these discussions do illustrate the practical application of his theory. Of course, some of the essays (Chapters Ten and Eleven) are of no interest to Australian readers because they are concerned with American constitutional provisions which have no direct counterpart in Australia.[3]

Within the United States the impact of Currie's work has been enormous. Because of this book he was recently named the first recipient of the Triennial Coif Award and the book itself was described as "demonstrating creativeness and scholarship of the highest degree". But even within the United States there are critics who search for more order and predictability than Currie's analysis promises. In family, property and business matters the certainty engendered by definite, if somewhat arbitrary, rules might be more important than the ideal justice theoretically obtainable by Currie's analysis. Moreover, this reviewer will always look askance at a system which ties choice-of-law rules to jurisdiction rules. It should be fairly easy to have a dispute tried in any fair forum. Once that is conceded, it is obvious that there may be many situations in which the forum will be a "disinterested third state" (that is, a state which has so slight a relationship to the facts giving rise to the dispute that it would clearly be inappropriate to apply the law of that state). One of the weakest points of Currie's argument is his solution of the problem of the "disinterested third state" and his principal solution, an extension of the doctrine of *forum non conveniens*, is a solution that many will find unacceptable because the considerations which ought to determine whether a forum is a convenient forum to try the dispute (for example, location of witnesses; likelihood of a fair hearing and an effective judgment) will be different from the considerations which determine whether it is appropriate to apply the *lex fori* to the merits of the dispute.

Possibly the most difficult task for an Australian reviewer is to assess the importance of Currie's work for Australia. Years of reflection and teaching have led the reviewer to accept a substantial part of Currie's analysis and students at Sydney have been invited to consider the traditional rules in the light of it. The experiment has proved surprisingly effective. Even those students who have concluded that Currie's views are unlikely to win judicial acceptance within the immediate future have developed, at least, a keener appreciation of the sense and nonsense behind the traditional rules.

There are two particular fields in which Currie's analysis makes a positive contribution which no writer on conflicts can afford to ignore. These are (1) the process of statutory interpretation and (2) full faith and credit.

On the whole Australian courts have not distinguished themselves in their interpretation of statutes in conflicts situations. There has been a tendency to import a simple territorial limitation into the statute[4] or to interpret the statute in accordance with the ordinary principles of conflict of laws.[5] Frequently there is considerable doubt whether the resulting decision demonstrates an intelligent appreciation of the policies embodied in the legislation.

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[3] They are concerned with the American constitutional requirements on "privileges and immunities" and "equal protection". The nearest Australian equivalent is s.117 of the Constitution. On this, see W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (3 ed. 1962) at 138ff.

[4] As in *In the Estate of Hancock* (1962) 80 W.N. (N.S.W.) 56.

[5] As in the judgment of Walsh, J. in *Kay's Leasing Corporation Pty. Ltd.* v. *Fletcher* (1964) 81 W.N. (Part 2) N.S.W. 155 at 157.

For example, in *Kay's Leasing Corporation Pty. Ltd.* v. *Fletcher*[6] it is at least possible that the New South Wales Parliament intended s.26 and s.31 of the Hire-purchase Agreements Act, 1941-1957 (N.S.W.) to apply whenever the hirer was a resident of New South Wales. There is general agreement that it is unreasonable to expect Parliament to prescribe in advance how every statute is to apply in conflicts situations. This is one area where a little judicial law-making is essential to the proper administration of justice. But basic philosophies necessarily influence the process of interpretation and it is probable that Currie would have reached a different conclusion from those reached by the Supreme Court of New South Wales or the High Court on the application of the New South Wales statute.

The essays on full faith and credit (Chapters Five and Six) are particularly important to Australia. Although Currie's attitude to full faith and credit reflects his general philosophical position it would be possible to reject the latter and still accept most of the former. Considering both the paucity of Australian authority and the certainty that full faith and credit issues will arise more frequently, and in a more complex form, in Australia in the years to come, it is essential that we glean what we can from the American experience. The position taken by Professor Sykes, of Queensland, would require a New South Wales court to apply the law of another State when that State was the appropriate State to determine the issue according to "the common law of conflicts as it exists in the six States, unaffected by any statute-made conflictual principle created by any one of them which departs from any of it".[7] Pushed to its ultimate, such an argument would severely limit any attempts by the courts, or perhaps even the legislature, of New South Wales, to improve the existing, and often unsatisfactory, rules of conflicts. The American experience at least indicates some ways in which Australia can avoid such an uninspired result.

This is not a book to be read over-night. The essays develop an argument with cumbrous detail and at inordinate length. Currie does not write with the lucid acerbity of Walter Wheeler Cook. But it is always more difficult to be positive and constructive than to be, as Cook undoubtedly was, negative and destructive. This much must be said. Whether or not the arguments advanced in this book provoke a complete and general revision of conflict of laws theory it is clear that the book itself represents the most searching analysis of traditional methodology to be published in the last thirty years.

D. J. MacDOUGALL*

Ombudsmen, by Geoffrey Sawer, Professor of Law, Australian National University, Melbourne, Melbourne University Press, 1964. 42 pp. (5/6 in Australia).

The literature devoted to description and explanation of the functions of the world's various Ombudsmen (so far confined to Scandinavia and New Zealand) is now becoming quite extensive. It is generally accepted in the reports, books and articles on the subject that the size and complexities of government administration are such that the processes of the Parliaments

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[6] (1964) 38 A.L.J.R. 335 (High Court); (1964) 81 W.N. (Part 2) (N.S.W.) 155 (Supreme Court of N.S.W.).

[7] E. I. Sykes, "Full Faith and Credit—Further Reflections" (1954) 6 *Res Judicatae* 353 at 364.

* LL.B. (Melb.), J.D. (Chicago), Senior Lecturer in Law, University of Sydney.