

The Recognition and Enforcement of Foreign Law: *The Antelope's* Penal Law Exception[†]

I. Introduction

In 1825, Chief Justice Marshall held in *The Antelope* that “(t)he courts of no country execute the penal laws of another.”¹ Since then, United States Courts have painstakingly crafted a variety of definitions of the word “penal” in order to help determine when and when not they should apply foreign laws or execute foreign judgments which conceivably might be characterized as “penal.” Much of their hairsplitting analysis might have been avoided if American judges and commentators had looked behind Marshall’s phrase to see its foundations in law and policy.

After reviewing the accepted wisdom about *The Antelope's* penal law exception, this article looks at the exception in context. Drawing upon the cases argued by counsel, the article argues that Marshall did not frame the exception with any unelaborated definition of “penal law” in mind. Rather, Marshall sought to restrain the courts from infringing upon another state’s sovereign authority, especially when what was at issue was a state’s right to benefit by the execution of its public law.

II. Accepted Wisdom about *The Antelope*

American commentators have failed to alert the courts to the origins of

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†This article, though largely historical, was generated for a modern and practical enterprise: the work of The International Law Association (American Branch) Committee on the Recognition and Enforcement of Foreign Public Law, on which the author serves.

1. 23 U.S. (10 Wheat.) 66, 123 (1825) [hereinafter cited as “*The Antelope*”].

The Antelope's penal law exception because they have assumed, incorrectly, that Marshall more or less plucked the term out of thin air. The academic error goes back to an otherwise commendable article by Professor Leflar.² In fairness to Leflar, it must be noted that his article treated the origins of the rule only in scholarly *dictum*.

Leflar's central aim was to make and substantiate his basic and often-cited proposition that it was a mistake for judges to extend Marshall's penal law exception to "new sets of facts to which the reason for the rule, assuming that there is a reason for it, has no relation."³ Leflar willingly accepted the application of the rule to truly criminal laws, but one-by-one he showed how non-criminal extensions of the rule, e.g. to wrongful death acts, exemplary damages on tort claims, personal liability upon officers, directors and shareholders for corporate debts, usury laws, and tax claims, were not justified by what he thought the only two good justifications for the penal law exception: local public policy and *forum non conveniens*.⁴ Fundamentally, Leflar preferred those decided cases which followed *Huntington v. Atrill*,⁵ and restricted "the definition of 'penal' to the particular conflict of laws point in issue, and in effect says that the statute or other rule of law is 'penal in the international sense' only if it prescribes punishment at the instance of the state or its representatives for violation of the criminal law as such."⁶ Leflar's article is by now somewhat dated, not only by a new half century's case law, but also by his then justifiable assumption that states could not or would not provide for extraterritorial personal jurisdiction. Without long-arm statutes, when foreign states refused to apply a state's law in non-criminal cases, a potential defendant could avoid the application of a state's "penal" laws simply by leaving its territory.⁷ Extradition, available for criminal offenses, was of course then and now unavailable for the prosecution of civil cases.⁸

It was only in passing, early on in his article, that Leflar described the origins of *The Antelope's* rule:

American cases searching for authority to support their exclusion seldom go back further than Chief Justice Marshall's part of a sentence in *The Antelope*: "The Courts of no country execute the penal laws of another. . . ." Indeed, there is not much to be found further back. There were two earlier cases in which English courts refused to give effect to statutes of nations at war with England taking away the property of Englishmen because of their nationality, the English

2. Leflar, "Extrastate Enforcement of Penal and Governmental Claims," 46 HARV. L. REV. 193 (1932) [hereinafter cited as "Leflar"].

3. *Id.*, at 196.

4. *Id.*, at 206-225.

5. 146 U.S. 657 (1892).

6. Leflar, *supra* note 2, at 204.

7. *Id.*, at 193, 200-201.

8. *Id.*, at 200-201.

courts saying quite correctly and with an altogether inescapable nationalist attitude that they must refuse to enforce such foreign penal statutes. Of course they could as well have spoken of local public policy, and have reached the same result as surely. When Chief Justice Marshall wrote his oft-repeated eleven words in 1825, he did not refer to the earlier cases, nor to any other reason or authority; nor did he define his word "penal." Insofar as "penal" is a synonym for "criminal," and that would seem to be the sense in which the word was used, citation of authority was needless. In the common law it had long been understood that acts were punished as crimes only by the state or nation whose laws were violated.⁹

As is explored below, Leflar's paragraph on the origins of the penal law exception in American law left a great deal to be desired. Nonetheless, Leflar's notions have become the accepted wisdom. Thomas Stoel cited Leflar and wrote "Marshall gave no explanation of his remark and American courts since have almost all been content to quote Marshall and seek no further."¹⁰ Professor Kutner cited Leflar and Stoel for his proposition that the penal law exception was "of doubtful origin."¹¹ The Scoles & Hay hornbook on conflict of laws cited to Leflar for "what must be regarded as the best analysis of the American origins of [the] rule" and averred that Marshall's statement was "perhaps dictum even in the case in which it was made."¹² While all these commentators are right in saying that the penal law exception should not be applied, as it so often is, mechanically and unthinkingly, they do not do justice to Marshall. Actually, the scholarly criticisms of the mechanical application of the penal law exception are buttressed by the original, though now seemingly forgotten, foundations of Marshall's holding in *The Antelope*.

III. *The Antelope* in Context

Leflar's article mentioned "two earlier cases" which refused to enforce foreign statutes penalizing Englishmen because of their nationality.¹³ His reference was to *Folliott v. Ogden*,¹⁴ and to *Wolff v. Oxholm*,¹⁵ cases involving American and Danish confiscation statutes. As the commentators repeat, Marshall neither cited these cases nor any others for his exception. A reading of the entire reported case of *The Antelope*, however, indicates that the Supreme Court had not been looking at the confiscatory statute cases mentioned by Leflar. Rather, Marshall had been directed by counsel to quite a number of English and American cases concerning the slave trade.

9. *Id.*, at 195.

10. Stoel, "The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States," 16 INT'L & COMP. L. Q. 663, 665 (1967).

11. Kutner, *Judicial Identification of "Penal Laws" in the Conflict of Laws*, 31 OKLA. L. REV. 590 (1978).

12. E. F. Scoles & P. Hay, *Conflict of Laws* 943 (1982).

13. Leflar, *supra* note 2, at 195.

14. 1 H.Bl. 123 (1789), *aff'd* Ogden v. Folliott, 3 T.R. 720 (1790), 4 Bro. P.C. 111 (1792).

15. 6 M. & S. 99 (1817).

The vital issue in *The Antelope* was whether slaves aboard vessels seized on the high seas by United States warships should be returned to Spanish and Portuguese slave traders. Mr. Key, counsel for the United States, argued that the slave trade "is now condemned by the general consent of nations, who have publicly and solemnly declared it to be unjust, inhuman, and illegal."¹⁶ Mr. Berrien for Spain and Portugal thought that neither slavery nor the slave trade were yet illegal and that as a slave-holding nation, it was unbecoming of the United States "to assume to themselves the character of censors of the morals of the world."¹⁷ For the slave trade substitute torture and one finds a modern parallel to this debate when comparing *Filartiga v. Pena-Irala*¹⁸ to *Hanoch Tel-Oren v. Libyan Arab Republic*.¹⁹ To substantiate their opinions in *The Antelope*, opposing counsel cited, *inter alia*, *The Amedie*, *The Fortuna*, *The Donna Marianna*, *The Louis*, *Madrado v. Willes*, *La Jeune Eugenie*, *The Diana*, and *Butts v. Pen*.²⁰ Never did counsel cite, insofar as the report of the case records, Leflar's *Folliott v. Ogden* or *Wolff v. Oxholm*.

The penal law exception arose in *The Antelope* decision after Marshall had concluded that though slavery and the slave trade might violate the law of nature, they did not offend the positive law of nations.²¹ Counsel for the United States had argued that Spain and Portugal were nations which had made formal declarations against the slave trade.²² Could the United States enforce a prohibition against the slave trade against nationals of countries on record as opposing that trade? Marshall answered no: "[a]s no nation can prescribe a rule for others, none can make a law of nations."²³

Could, though, it be said that the United States was not making or enforcing a rule of the law of nations but simply recognizing and enforcing Spanish and Portuguese law? No again: "the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade cannot exist."²⁴ Then follows the famous line: "[t]he courts of no country execute the penal laws of another."²⁵

Though Marshall did not cite it at this place in his decision, *The Louis* was the case referred to at this stage of the argument by both counsel for the United States and that for Spain and Portugal.²⁶ In *The Louis* Sir William

16. 23 U.S. (10 Wheat.) 66, 76-77.

17. *Id.*, at 86.

18. 630 F.2d 876 (2d Cir. 1980).

19. 726 F.2d 774 (D.C. Cir. 1984).

20. *The Antelope*, *supra* note 1, at 70-114.

21. *Id.*, at 114-122.

22. *Id.*, at 79-80.

23. *Id.*, at 122.

24. *Id.*, at 122-123.

25. *Id.*, at 123.

26. *Id.*, at 79-80, 98-99.

Scott reversed a lower court's condemnation of a French ship engaged in the slave trade.²⁷ Respecting the recognition and enforcement of foreign public law the crucial passage is:

It is pressed as a difficulty, what is to be done, if a French ship laden with slaves for a French port is brought in? I answer without hesitation, restore the possession which has been unlawfully divested: —rescind the illegal act done by your own subject; and leave the foreigner to the justice of his own country. What evil follows? If the laws of France do not prohibit, you admit that condemnation cannot take place in a British Court. But if the law of France be what you contend, what would have followed upon its arrival at Martinique, the port whither it was bound? That all the penalties of the French law would have been immediately thundered upon it. If your case be true, there will be no failure of justice. Why is the British judge to intrude himself *in subsidium juris*, when everything requisite will be performed in the French Court in a legal and effectual manner? Why is the British judge, professing, as he does, to apply the French law, to assume cognisance for the mere purpose of directing that the penalties shall go to the British Crown and its subjects, which that law has appropriated to the French Crown and its subjects, thereby combining, in one act of this usurped authority, an aggression upon French property as well as upon French jurisdiction?²⁸

Scott's opinion in *The Louis* provides background that helps make Marshall's penal law exception in *The Antelope* explicable. The objection to applying foreign law condemning the vessel rested not, as in Leflar's two confiscation cases, on a public policy protection of local citizens, but in a reluctance to infringe upon the sovereign authority of the foreign state. What established the infringement in both *The Louis* and *The Antelope* was that the adjudicating state was also the confiscating state. Scott explicitly objected to a result where "the penalties shall go to the British Crown and its subjects."²⁹

Marshall's "oft-repeated eleven words,"³⁰ make very good sense when they are read in context against counsels' arguments in *The Antelope* and Scott's opinion in *The Louis*. The penal law exception as framed in *The Antelope* had little or nothing to do with Leflar's suggested precedents protecting local citizens. Rather, Marshall in *The Antelope* based his exception on slave trading cases which called for a deference to the jurisdiction of foreign sovereigns. Such deference echoed *The Schooner Exchange* where Marshall underlined the "perfect equality and absolute independence of sovereigns."³¹ In *The Antelope* Spain and Portugal appeared, as had France in *The Schooner Exchange*, to contest the jurisdiction of the United States. Marshall refused to allow the U.S. to use foreign law as a justification for

27. 2 Dods. 210, 165 Eng. Reports 1464 (1817).

28. *Id.*, at 1479.

29. *Id.*

30. Leflar, *supra* note 2, at 195.

31. 11 U.S. (7 Cranch, 116, 137) (1812).

confiscating the slaves aboard the Spanish and Portugese vessels. To do so would plainly offend Spain and Portugal. Following *The Louis*, Marshall left the public benefit of any confiscation to the foreign state.

IV. Conclusion

There is, therefore, less difficulty than Leflar and others have supposed in reconciling *The Antelope* with the other principal United States case on the penal law exception to the recognition and enforcement of foreign public laws. *Huntington v. Attrill*,³² held that in English and American law "penal law" was meant only to encompass cases involving "punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon."³³ Thus, "[t]he question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."³⁴ *Huntington's* emphasis upon the public versus private character of the act is quite consistent with *The Antelope*. In *The Antelope* it was the public benefit of the remedy, confiscation, that was the crucial element in the decision not to recognize and enforce the foreign statute.

32. 146 U.S. 657 (1892).

33. *Id.*, at 667.

34. *Id.*, at 673-74.