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CHARACTERIZATION, IDENTIFICATION OF THE PROBLEM AREA, AND THE POLICY-CENTERED CONFLICT OF LAWS: AN EXERCISE IN JUDICIAL METHOD

*Robert Allen Sedler**

I. INTRODUCTION: JUDICIAL METHOD AND THE POLICY- CENTERED CONFLICT OF LAWS

It has now become standard practice to analyze problems of the conflict of laws in terms of the distinction between the "traditional" and "modern" approaches to the choice of law process.¹ The traditional approach, of course, is the system of jurisdiction-selecting rules, based on the vested rights theory of the conflict of laws and embodied in the First Restatement. Although that approach continues to find favor with a number of courts,² it is said to be "generally discredited" among academic commentators.³ The great debate today in the academic world is over which of the "modern" approaches should be followed. This, in turn, breaks down to a debate between the advocates of a "modern rules approach," as set forth in the Restatement Second,⁴ and the advocates of a variety of what may be called "policy-centered approaches," and still further, between the policy-centered advocates themselves, concerning the merits of their respective solutions. The academic debate has carried over into judicial decisions rendered by those courts that are searching for a "modern approach."⁵

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¹ See the organization of the most recent casebook in the field, R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* (1968).

² See the justification set forth in *Friday v. Smoot*, — Del. —, —, 211 A.2d 594, 596-97 (1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966).

³ See B. CURRIE, *SELECTED ESSAYS IN THE CONFLICT OF LAWS* 6 (1963), referring to the vested rights theory. He observes that Walter Wheeler Cook discredited it "as thoroughly as the intellect of one man can ever discredit the intellectual product of another."

⁴ See Reese, *Conflict of Laws and the Restatement Second*, 28 *LAW & CONTEMP. PROB.* 679 (1963), setting forth the rationale for the Restatement Second. Professor Ehrenzweig has vigorously contended that a Restatement is inappropriate for conflict of laws. See, e.g., Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 *U. PA. L. REV.* 1230 (1965).

⁵ See, e.g., the majority and dissenting opinions in *Miller v. Miller*, 22 *N.Y.2d* 12, 237 *N.E.2d* 877, 290 *N.Y.S.2d* 734 (1968) and *Conklin v. Horner*, 38 *Wis.2d* 468, 157 *N.W.2d* 579 (1968).

It is my submission, which has been developed more fully elsewhere,⁶ that too much emphasis has been placed upon particular academic approaches, and that insufficient attention has been given to the operation of the judicial process in conflicts cases and the role of the courts in establishing a body of conflicts law through judicial decision. I have contended that the courts have been remiss in failing to apply the principles of judicial method to the solution of conflicts problems and in failing to accept the responsibility for developing the "law" of the conflict of laws. Instead they have accepted an "externally imposed" system of solution to conflicts problems and, for the most part, have tried to decide cases within the framework of that system.⁷ I have discussed what I think to have been the cause of this phenomenon elsewhere,⁸ and will not repeat it here. Suffice it to say that the present "law" of the conflict of laws has not been the result of judicial decisions in particular cases and the development of precedents and principles for future application. Judicial method has not been applied to the conflict of laws.

In terms of approach, I advocate what I call judicial method and the policy-centered conflict of laws. To explain precisely what I mean by this approach let me back up a bit in order to distinguish not between "traditional" and "modern" approaches, but between a "rules approach" and my conception of the policy-centered conflict of laws. The traditional approach consisted of a "few simple rules,"⁹ with the function of the court being to locate the correct rule and to apply it "objectively" to all cases coming within its scope. For example, if the case were one of "tort," the rule was that the law of the "place of the wrong," defined as the state where the last event necessary to make the actor liable occurred, governed all matters of "substance."¹⁰ The court was not to consider the fact-law pattern of the particular case, the content of the differing laws, the social and economic policies of the concerned states and their "interest" in having their laws applied, but was merely to locate the "correct rule" and apply it.

⁶ Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27 (1967).

⁷ The system, however, contains enough manipulative techniques within it to enable a court willing to employ them to achieve the substantive result that it wants. See the discussion in Hancock, *Three Approaches to the Choice of Law Problem*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 365, 366 (K. Nadelman, A. Von Mehren & J. Hazard eds. 1961) [hereinafter cited as XXTH CENTURY] and Sedler, *supra* note 6, at 48-53.

⁸ Sedler, *supra* note 6, at 53-57.

⁹ Reese, *supra* note 4, at 680.

¹⁰ RESTATEMENT OF CONFLICT OF LAWS §§ 377, 378 (1934).

It is this approach that is now "discredited" in the academic world. New restaters have substantially completed a Restatement Second, and they do not hesitate to enumerate the deficiencies of the predecessor work and its underlying theory.¹¹ *But in terms of methodology and the function of the court in developing norms of conflicts of law, the "modern approach" of the Restatement Second differs hardly at all.* As with the First Restatement, it represents an externally established system of rules applicable to the solution of all conflicts problems. The rules have been changed,¹² and some limited consideration may be given to the policies behind the differing substantive laws,¹³ but it is still the function of the court in a conflicts case to locate the "correct rule" and to apply it "objectively."¹⁴ The distinction between the Restatement First and the Restatement Second, then, is but a distinction between different rules and at most a distinction between different kinds of "rules approaches."

The policy-centered conflict of laws, however, rejects a system of rules as the solution to conflicts problems. Instead it looks to the fact-law pattern of a particular case and asks whether, in light of the relevant social and economic policies of the concerned states and considerations of fairness to the parties, the law of the forum should be displaced and the law of another state employed as a model for the rule of decision in that case.¹⁵ It has its genesis in the attacks mounted on the vested rights theory and the First Restatement by Lorenzen,¹⁶ Yntema,¹⁷ and most especially, Walter Wheeler Cook.¹⁸

¹¹ Reese, *supra* note 4, at 679-80.

¹² The major change is that they are no longer made to depend upon a single contact point, but are often localizing rules, looking to the state of the most significant relationship. *See, e.g.,* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 145, 188 (Prop. Off. Draft 1968) [hereinafter cited as RESTATEMENT (SECOND)]. *See also* RESTATEMENT (SECOND), Introductory Note to ch. 7.

¹³ *See* the discussion in Sedler, *supra* note 6, at 61-63.

¹⁴ It is interesting to note that the drafters approach problems from the perspective of the "disinterested third state." *See* Reese, *supra* note 4, at 692-93; *cf.* Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

¹⁵ The concept of foreign law being brought over as a model for the rule of decision in the particular case was a part of the local law theory of the nature of the conflict of laws as developed by Walter Wheeler Cook. *See* Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 469 (1924). It was also a part of Learned Hand's "highly homologous right" theory. *See, e.g.,* Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934). *See also* Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950).

¹⁶ *See, e.g.,* Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

¹⁷ *See, e.g.,* Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

¹⁸ *See* W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* chs. 1-3 (1942).

While it does not contain a specific method of solution, it brings within its scope the approaches of modern commentators such as Ehrenzweig,¹⁹ Currie,²⁰ Cavers,²¹ Leflar,²² and Weintraub,²³ all of whom, while they disagree—often heatedly—on the specific approach to be followed, place emphasis on considerations of policy and fairness and on the necessity of case by case adjudication. This, in my opinion, furnishes enough of a common ground to serve as a source for a *judicial approach* to the solution of conflicts problems.

This approach envisions the courts themselves assuming the responsibility for the establishment of a body of conflicts law based on precedents and principles developed in the decision of particular cases. These decisions on what law would be applied, or more accurately, whether the law of the forum should be displaced,²⁴ would be made with reference to the particular fact-law pattern before the court and would be based upon a consideration of the policies behind the differing laws, the interests of the concerned states in implementing those policies and what result would be fair to the parties. The precedents and principles developed in those decisions would serve as a guide to the solution of questions presented in future cases. In time a body of conflicts decisional law would emerge in each jurisdiction.²⁵ While the views of academic commentators concerning the proper solution of conflicts problems should and could be considered by the

¹⁹ Although Professor Ehrenzweig's remarkable and prolific scholarship has resulted in two treatises, A. EHRENZWEIG, *CONFLICT OF LAWS* (1962) and *PRIVATE INTERNATIONAL LAW* (1967), it is his numerous articles that develop his thesis most fully. See, e.g., Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules,"* 49 CALIF. L. REV. 240 (1961) and *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965).

²⁰ His thesis is set forth in the articles collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

²¹ Professor Cavers was one of the early critics of the traditional approach. See Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173 (1933). After a number of years of reflection his views have been set forth in D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

²² See, e.g., the following articles by Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267 (1966); *More on Choice-Influencing Considerations,* 54 CALIF. L. REV. 1584 (1966); *True "False Conflicts,"* 48 B.U.L. REV. 164 (1968).

²³ See, e.g., the following articles by Weintraub, *A Method for Solving Conflicts Problems—Torts,* 48 CORNELL L.Q. 215 (1963); *Choice of Law in Contract,* 54 IOWA L. REV. 399 (1968); *The Impact of a Functional Analysis Upon the "Pervasive Problems" of the Conflict of Laws,* 15 U.C.L.A.L. REV. 817 (1968).

²⁴ We are proceeding on the assumption that the basic law is the law of the forum, which will not be displaced absent valid reasons for such displacement. See note 37 *infra* and accompanying text.

²⁵ It must be remembered that relatively few conflicts cases come before most state courts, and that many of these cases involve the same fact-law pattern. But this is no different from the situation prevailing in other areas of law that are not extensively litigated.

courts, as in any other case, the courts would not see themselves as being "compelled" to adopt the approach favored by a particular commentator.²⁶ It would be the function of the courts to render decisions on the displacement of the law of the forum, which would then serve as the basis of a judicially-established conflict of laws.²⁷ While I shall refer to this in the remainder of the writing as the policy-centered approach; it must be understood that judicial method is its primary component, and the concentration will be on the role of the courts in developing a body of conflicts law and on the processes by which this is done.

The underlying rationale of this approach relates to the reasons why the forum court displaces its law in *any* case. Why should the forum ever put aside its own law with which it is intimately familiar and that reflects its reasoned judgment (or that of its legislature) on matters of policy, fairness and the like, and in its stead apply the law of another state? Recognizing as we now do that the objective of uniformity of decision irrespective of the forum in which suit is brought²⁸ is illusory and unobtainable,²⁹ it may be asked whether, in the nature of things, there is any objection to the forum's applying its own law in *all* cases coming before it? What would happen if the courts, as they originally did in England,³⁰ would simply ignore the foreign element and decide the case according to the substantive law of the forum? Would this produce injustice or be violative of the interests of other states in the legal order?³¹

²⁶ In all fairness the policy-centered theorists have not contended that the courts should accept their approach as the ultimate solution to all conflicts problems. There is a significant difference between developing a theory that one hopes courts will follow—as to some extent every commentator does when he writes—and setting forth an ultimate solution, as I think the drafters of the first Restatement—and perhaps the drafters of the Restatement Second—were trying to do. For a disclaimer of intent see B. CURRIE, *supra* note 20, at 585.

²⁷ Professor Cavers proposed the development of a body of conflicts law based on judicial decision, Cavers, *supra* note 21. In re-reading that article, I find that many of the points I have made with respect to the judicial function were also made by Professor Cavers in 1933. However, the experience of the thirty-odd years that have passed since the publication of Professor Cavers' article now makes it possible to go beyond his limited proposal of that time. See the discussion in Sedler, *supra* note 6, at 87 n.270.

²⁸ This is the justification that has been advanced for the "rules approach," both traditional and modern. See H. GOODRICH, *CONFLICT OF LAWS* 4-5 (4th ed. E. Scoles 1964).

²⁹ See the discussion in Sedler, *supra* note 6, at 46-53.

³⁰ For a discussion of the development of the conflict of laws in England see Sack, *Conflict of Laws in the History of English Law*, 3 *LAW: A CENTURY OF PROGRESS 1835-1935*, at 342 (1937), reprinted in *ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON CONFLICTS OF LAWS* 1 (1956). See also A. DICEY, *CONFLICT OF LAWS* 5 (6th ed. J. Morris 1949).

³¹ The "state" is the relevant political entity for conflicts purposes. It may be defined as a geographical portion of the earth's surface having an independent system of law,

The answer, of course, is that it would *in some cases*. Even if the concept of transient jurisdiction were eliminated and jurisdiction were limited to a *forum conveniens*,³² the application of the forum's law in every case coming before it could not be justified.³³ There will be cases in which the application of the forum's law would be clearly unfair in that it would defeat the legitimate expectations of the parties or would be violative of the interests of other states that, in the circumstances, are entitled to recognition.³⁴

If this is the reason for the displacement for the law of the forum, is it not sound to approach the choice of law problem with reference to the underlying reason and to try to answer the question contained therein: in the fact-law pattern presented in the particular case, should the law of the forum be displaced in order to protect the legitimate expectations of the parties or to give proper recognition to the interests of another state? The soundness of this approach is all the more manifest since this kind of question, *i.e.* a question of choice of law, is presented in *relatively few cases coming before the court, i.e. cases often involving identical or similar fact-law patterns*.³⁵ We have gone about the business of finding solutions for conflicts problems in a com-

and includes, therefore, component parts of a federal system, such as an "American state." See RESTATEMENT (SECOND) § 3 and the comment thereto.

³² Ehrenzweig, *Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

³³ See the discussion in Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340, 350-52 (1965).

³⁴ It must be remembered that among the policy-centered theorists, there is disagreement on just what is meant by interest and how relevant interest should be in the choice of law decision. See the discussion in D. CAVERS, *supra* note 21, at 98-102. But all would agree that interest—however defined—has some relevance.

³⁵ My research into torts conflicts cases in Kentucky has revealed that every case coming before the Kentucky Court of Appeals between 1950 and 1967—the last conflicts case prior to 1950 was decided in 1940—involved the identical fact-law pattern, in which two residents of Kentucky, which does not have a guest statute, were involved in an accident in a state which did. In 1968 a case came before the court involving two residents from a guest statute (and spousal immunity) state who were injured in an accident in Kentucky. Research into torts conflicts cases coming before the courts of the neighboring state of Indiana has disclosed that the last one coming before the supreme court was decided in 1946 and the last one coming before an intermediate appellate court was decided in 1953. For a discussion of the paucity of Indiana cases see *Watts v. Pioneer Corn Co.*, 342 F.2d 617, 620 (7th Cir. 1965); *Witherspoon v. Salm*, — Ind. App. —, 237 N.E.2d 116 (1968), *rev'd on other grounds*, — Ind. —, 243 N.E.2d 876 (1969). In *Abendschein v. Farrell*, 11 Mich. App. 662, 667, 162 N.W.2d 165, 167 (1968), the court of appeals discovered that the last "torts conflicts" case decided by the Michigan Supreme Court was decided in 1939, and considered itself bound by that case to apply the law of the place of wrong, although it observed that the case was not based on any authority which remains viable today. When the case reached the supreme court, however, the place of the wrong rule was retained. *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969).

pletely dysfunctional way and in a way contrary to the common law method of judicial decision that is employed in other cases. We have adopted an externally imposed system of *a priori* rules (or a comprehensive approach) and have tried to fit the problem in the particular case within the framework of those rules (or the methodology of the approach). Instead, we should be looking to the kinds of conflicts problems that come before the courts for decision and should be making the decisions with reference to those problems and those cases, thereby developing precedents and principles to be applied to future problems and future cases.

It is submitted, therefore, that the reason *why* a court displaces its own law furnishes guidance on *how* it should go about the matter. If it displaces its own law because it is necessary to do so in a particular case in view of considerations of fairness to the parties or recognition of the interests of other states, the decision concerning such displacement should be made on a case by case basis and should be made with reference to those very considerations. Hence, the concept of judicial method and the policy-centered conflict of laws has developed.

The four propositions on which this concept is based have been discussed at length elsewhere³⁶ and may be summarized as follows:

One: The basic law is the law of the forum, and that law will not be displaced absent valid reasons for such displacement. The significance of this proposition lies primarily in the matter of proof of foreign law, and it directs the court to apply the forum's law in all cases unless the party wishing to rely on foreign law proves the content of such law and shows that it differs from the substantive law of the forum.³⁷

Two: There is only a conflict of laws when the result, were the case to be heard in the courts of the state whose law is sought to be used as a model, would be different from the result that would be reached under the substantive law of the forum. This proposition is in no way connected with the "renvoi," since the matter of renvoi in the strict sense arises only when a court is committed to a "rules" approach and the conflicts rules of the forum and another state differ.³⁸ The contention is that if the basic law is that of the forum, there is

³⁶ Sedler, *supra* note 6, at 87-107.

³⁷ Compare the results in *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir. 1956) with *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725 (1951). See also B. CURRIE, *supra* note 20, ch. 1.

³⁸ See generally G. STUMBERG, *CONFLICT OF LAWS* 10 n.27 (3d ed. 1963) and the references therein.

generally no utility in "creating a choice of law issue," and this is what the court would be doing when, if the case were to be brought in the state the law of which is sought to be used as a model, the courts of that state would decide the case in accordance with the substantive law of the forum. There is substantial and distinguished authority in disagreement with this viewpoint,³⁹ and it is not necessary to consider this contention in the context of the present writing.

Three: The decision concerning the displacement of the forum's law should be made only with reference to the fact-law pattern presented in the particular case. This proposition lies at the heart of judicial method, and its adoption would mark a significant departure from the behavior patterns of most courts in conflicts cases. Generally the issue is framed in broad terms, such as "what law governs liability for tort," which is contrary to the way the issue is framed in most non-conflicts cases. My submission is that the issue should be framed in light of the fact-law pattern there presented, identifying the relevant factors and pointing out the conflict between the substantive laws of the concerned states. In the *Babcock v. Jackson*⁴⁰ situation, for example, the issue should be stated as follows: "When two residents of New York, which does not have a guest statute, are involved in an automobile accident in Ontario, which does have such a statute, should the law of the forum be displaced and the law of the state of injury applied to the question of guest-host liability?" The court's consideration then would be limited to that precise issue. It would not be necessary for the court to consider what law would govern liability for the publication of a libel or the commission of a battery, or what law would apply in a suit between a resident and a non-resident, because those issues are not involved in that case. Nor is it necessary that the court adopt a rule or principle that can automatically be applied in those other cases. When—and if—they do arise, the matter can be decided at that time, and in rendering its decision the court can consider the precedential value of the present case. Some courts are now framing issues in this manner and limiting their decision to the issue presented in the particular case.⁴¹ This is in accordance with the way issues are framed in non-conflicts cases and may betoken a return to judicial method in conflicts cases as well.

³⁹ See D. CAVERS, *supra* note 21, at 105-07; A. EHRENZWEIG, *CONFLICT OF LAWS* 336 (1962); cf. Von Mehren, *The Renvoi and Its Relation to Various Approaches to the Choice-of-Law Problem*, in *XXTH CENTURY* 380, 389-94.

⁴⁰ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁴¹ See, e.g., *Wessling v. Paris*, 417 S.W.2d 259 (Ky. Ct. App. 1967); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

Four: The law of the forum should be displaced only when considerations of fairness to the parties and proper recognition of the interests of another state so require. This proposition does not furnish any guide to the court's decision in a particular case and is not intended to do so. The courts must, as Judge Roger Traynor has said, "painstakingly evolve pragmatic exceptions to the local law."⁴² What this proposition does is merely to restate the justification for the displacement of the forum's law and to direct the court to make its decision realistically and with reference to considerations of fairness and policy.

The important question is what role the courts will play in providing the norms for decisions in conflicts cases. A court that continues to apply the "traditional" rules approach of the First Restatement, or one that uncritically applies the "modern" rules approach of the Restatement Second is abdicating judicial responsibility for the establishment of those norms. I believe that more and more courts are moving in the direction of the policy-centered approach, which under my definition includes the use of judicial method, to resolve conflicts issues. These courts are developing a body of conflicts law based upon considerations of policy and fairness and are doing so in the context of decisions made with reference to the fact-law pattern of the particular case.⁴³ They are carefully considering the views of academic commentators and the solutions proposed by the Restatements, but at the same time are making it clear that they are developing the law through their own decisions rather than by accepting an "externally-imposed solution of universal application."⁴⁴ They are applying judicial method to the policy-centered conflict of laws.

No court, however, is ever operating with an entirely clean slate, nor should it ignore what has gone before. Cases have been decided previously, principles and rules have been developed, ideas have been expounded—in short, for better or worse, there has been exper-

⁴² Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 667 (1959). It is accurate to say that Professor Ehrenzweig's "true rule" approach is also based on the development of "exceptions to the local law." See the statement of Professor Ehrenzweig in E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 478-79 (1964).

⁴³ I consider *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), to be the best example.

⁴⁴ For a personally painful example of the rejection of the views of an academic commentator see *Arnett v. Thompson*, 443 S.W.2d 109, 113 (Ky. 1968). I consider the decision in that case to be a good illustration of how the court, while considering various views, develops its judicial conclusion on how conflicts problems are best resolved.

ience in the solution of conflicts problems. This experience must be understood, if for no other reason, than to enable the court to avoid the perpetuation of past mistakes. At a minimum, past decisions must be considered in order to determine whether they are still good law. More importantly, the court should ask whether the experience of the past—its ideas, its concepts, its methodology—may still be significant or relevant to its present approach. Although the court may be abandoning the traditional approach as a method of solution to conflicts problems, perhaps some of its elements may be carried over or transformed and thereby achieve new utility.⁴⁵

It is the purpose of this writing to analyze the essential basis of the traditional approach, classification, or as it was more generally called, *characterization*, and to consider that process as it relates to judicial decision under the policy-centered approach. It is my thesis that while the process of characterization itself is inconsistent with the policy-centered approach, the concept⁴⁶ of characterization can be transformed into the concept of identification of the problem area, which has great utility in assisting a court to arrive at sound decisions based upon considerations of policy fairness. The concept of identification of the problem area introduces a new element into conflicts methodology, which has not been associated with "policy-based" solutions.⁴⁷ It will be my objective (and perhaps my burden) to demonstrate the utility of this new element. Since it is based upon the traditional process of characterization, it may be that the experience of the courts with that process in the past may have present-day relevance. In any event, it is necessary to consider the operation of characterization under the traditional approach in order to show the relationship of that concept to the concept of identification of the problem area. Before doing so, however, characterization as an aid to problem-solving generally and in the non-legal context, as well as the place of characterization in the legal system apart from its use in the traditional approach to the conflict of laws shall be considered.

⁴⁵ But see Weintraub, *The Impact of a Functional Analysis upon the "Pervasive Problems" of the Conflict of Laws*, 15 U.C.L.A.L. REV. 817 (1968), in which the author contends that the utility of the functional approach is demonstrated precisely because it eliminates problems resulting from the use of traditional methodology.

⁴⁶ For a discussion of the meaning of the "concept," see notes 57-65 *infra* and accompanying text.

⁴⁷ Classification has been considered inconsistent with functional and result-selective approaches. See Hancock, *Three Approaches to the Choice of Law Problem: The Classificatory, The Functional and the Result-Selective*, in XXTH CENTURY 365. See also Weintraub, *supra* note 45, at 818-20.

II. CHARACTERIZATION AND PROBLEM-SOLVING: ABSTRACTION, CONCEPTS AND CATEGORIES

A question of the conflict of laws, as any question presented to a court for decision, requires an exercise of judgment on the part of the person making that decision, that is, on the part of the judge. In considering how courts, or more realistically judges, make judgments, we can begin by asking how any person makes a judgment. The important question is *what* does he judge, and the answer is that he judges the *characteristics* of the object of the judgment.⁴⁸ The particular characteristics that he will judge depend on the question that has been asked of him. He may be asked to judge some specified attribute such as size; *e.g.*, is one fish larger than the other. This is a one-dimensional judgment, since only one characteristic of the object of the judgment, the size of the fish, is being judged. He is judging the *perceptual* characteristics of the object, that is, what he perceives directly through the use of his senses. This is an "easy" judgment, because there has been good preparation of the subject—he is asked to judge one aspect of the object, which he can directly perceive—and good control of the stimulus variables—the two fish can be placed side by side or one on top of the other. Moreover, both fish can be measured in standard physical units, and both fish can be presented repeatedly to the judge. A sensory judgment, in which the judge is judging only the perceptual characteristics of the object, is obviously a fairly easy kind to make.

A second class of judgments is when the subject judges the *affective* characteristics of the object. This kind of judgment is based on the judge's likes and dislikes and on his reaction to the object; *e.g.*, "I don't like artichokes," "she is beautiful." It is said that affective judgments are "the most primitive, effortless form of reaction to the environment."⁴⁹ This class of judgments is completely subjective because it depends on the response of the particular judge to the object of the judgment.

The most difficult kind of judgment is a judgment of the abstract or *conceptual* characteristics of the object because such a judgment requires that the object be considered in relation to something else

⁴⁸ D. JOHNSON, *THE PSYCHOLOGY OF THOUGHT AND JUDGMENT* 287 (1955). Most of the material that follows is taken from this basic text. It is the belief of the present writer that when one is a layman in a field, he should limit his consideration to works of that sort and should not attempt to become involved in the refinements of viewpoint among experts in that field.

⁴⁹ *Id.* at 288.

and without regard to its perceptual or affective characteristics. The classic example of an abstract judgment is the cataloguing of a new book in a library. The judgment of the cataloguer is directed only toward the abstract characteristics of the book and the relation of those characteristics to an equally abstract classification system. In terms of the judgment the cataloguer must make, it does not matter whether the book is large or small or whether or not he "likes" it. In order to make the judgment called for, the cataloguer must have knowledge of the thing in relation to which the object is being judged; *i.e.* the classification system, as well as knowledge and understanding of the object's abstract characteristics. He must relate the abstract characteristics of the book to the basis of his abstract classification system. The mental or intellectual operations directed toward abstract judgments are more difficult simply because the thinker has more to do.⁵⁰ It is abstract judgments, of course, that a court must make whenever dealing with a legal problem.

The essence of making abstract judgments relates to *words*. We must develop words that describe the abstract characteristics of the object and that can be used to relate the object to something else. An abstract judgment is expressed in words of a qualitatively different kind from those used to express perceptual or affective judgments. When viewed from the verbal perspective, the process of abstraction becomes a matter of *leaving characteristics out*, of relating the object being described to other objects that have some of the same characteristics, but that have other characteristics as well.⁵¹ By emphasizing the same characteristics and leaving out the ones that are different, we develop a *general term* to describe a class of objects, and it is this general term that makes communication and thought about that class of objects possible.⁵² Suppose that in a village there are four "structures" called Alpha, Beta, Gamma and Delta. In each structure there

⁵⁰ As the author observes:

Abstracting a trait such as sociability from a jumble of past and present impressions that occurred in heterogeneous contexts, and differentiating this trait from cheerfulness, talkativeness, intelligence, and aggressiveness, is more involved, requires more thought control, than isolating length from width and color, or feeling tone from objective dimensions. There are more possibilities for interference because things are similar and dissimilar in respect to so many abstract properties, one of which may be about as prominent as another. It seems likely, therefore, that most people have to work harder at abstract judgments, with less rewarding consequences, other things being equal. The set that controls thought is organized with more effort, and more effort is required for maintenance and resistance to interference.

Id. at 289.

⁵¹ S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 167-68 (1949).

⁵² *Id.* at 168-70.

are people "living," that is, they sleep there, take most meals there, keep their possessions there and the like. Each structure is different in the sense, if no other, that each is comprised of different atoms and molecules, but it is likely that there will be perceptual differences as well; *e.g.*, Alpha structure has a crack in the window. As long as these are the only four structures in the village used for "living" the words Alpha, Beta, Gamma and Delta are sufficient for communication. But if there is a question of building a new structure for "living," such as when another family moves into the village, a new word is necessary, since each of the existing words has too specific a meaning, referring to a structure located at a particular place and occupied by particular persons. It is necessary to develop a word at a higher level of abstraction that means something which has certain characteristics in common with Alpha, Beta, Gamma and Delta, but yet is not limited to the particular structure to which each of those words refers. By ignoring perceptual differences such as size, color and so on, and by concentrating on common characteristics such as the fact that all of the structures are used for habitation by particular persons, we can come up with the word "house," which describes Alpha, Beta, Gamma and Delta, but which also describes any other structures used for habitation by particular persons. Having such a word, we are not only able to communicate about houses, but to think about houses unlimited by specific structures called Alpha, Beta, Gamma and Delta.⁵³

There are a number of verbal levels of abstraction. At each level more and more characteristics are omitted, but a relation is found between the different objects described by the general term, because all share certain characteristics. Hayakawa's "Abstraction Ladder"⁵⁴ uses the example of Bessie the cow. When we say that Bessie is a "cow," we are selecting the similarities between Bessie and other animals of like size, functions and habits, but ignoring the differences that enable us on a lower level of abstraction to call a particular cow "Bessie."⁵⁵ The more characteristics of Bessie we leave out, the higher the level of abstraction that we can employ. If we classify Bessie as "livestock," we are referring only to those characteristics that she has in common with pigs, chickens and the like, thereby leaving out more about the "real" Bessie than when we refer to her as a "cow." So long as we are willing

⁵³ *Id.*

⁵⁴ *Id.* at 169.

⁵⁵ In the abstraction ladder "Bessie" is at the third level. Below that is the cow we perceive and the cow known to science. *Id.*

to leave out characteristics, we can abstract at higher and higher levels. Bessie, therefore, can also be classified as "farm assets," or "asset" or "wealth," where our frame of reference is Bessie's economic utility. If our frame of reference is Bessie's place in the animal kingdom, we could refer to her as "mammal," vertebrate," and so on. It should be clear by now that the process of abstracting, of leaving characteristics out, is an "indispensable convenience" to thought and judgment.⁵⁶

It is through the process of abstraction—and it is here that the verbal aspect is most significant—that we develop *concepts*.⁵⁷ Psychologists relate concepts to ideas and differentiation. A concept refers to the *general idea*,⁵⁸ and a person acquires the concept of something when he can either define it, or what is more likely, differentiate it from something else. A child has developed the concept of "dog" when he can distinguish a dog from a variety of objects that are not "dogs," even though he cannot verbalize a definition of "dog."⁵⁹ In developing that concept he has necessarily gone through the process of abstracting the common characteristics of certain specific animals, and whenever he sees one of those animals, he thinks of it as a "dog." He relates the black dog to the white dog rather than to the black cat, because the characteristics giving rise to the concept of "dog" in his mind—of which color is not one—are common both to the black dog and the white dog, but not to the cat. He can think about "dogs," because he has developed the concept of "dog" in that he can differentiate dogs from other animals that do not possess the characteristics of "dogs."

The obvious utility of concepts is that they divide things up. They organize the world of unaccountable objects, events and ideas into a relatively small number of *categories*.⁶⁰ New things are put into familiar categories, and the effect of previous learning is transferred to them.⁶¹ It is only through concepts that the human organism may operate in the world of thought, and it is "man's will to conceive which impresses order on a confused intellectual environment."⁶² It

⁵⁶ *Id.* at 168-70.

⁵⁷ See the discussion in S. LANGER, *PHILOSOPHY IN A NEW KEY* 71-72 (3d ed. 1967).

⁵⁸ D. JOHNSON, *supra* note 48, at 133.

⁵⁹ *Id.*

⁶⁰ *Id.* at 133-34.

⁶¹ *Id.* at 134.

⁶² *Id.* at 234. The "will to conceive" must be distinguished from the "will to perceive." As the author observes: "Just as a man, with powerful perceptual apparatus, may be endowed with a 'will to perceive,' so may he, since he possesses an extraordinary capacity for abstraction, be endowed with a will to conceive." *Id.* at 233-34.

is said, therefore, that "if there were no natural tendency to divide up the world into concepts, the human organism would soon invent one, because the labor-saving value of a system of concepts is enormous, and any moderately useful system will be continuously reinforced."⁶³

The discussion of concepts should be readily understandable to the lawyer, who is continually abstracting and putting new things into familiar categories. All rules of law are based on abstraction, and these rules are combined into "general groupings or categories that reflect factual and functional similarities and doctrinal continuities."⁶⁴ As has been observed:

For the legal order as for human activity generally, appropriate use of abstraction economizes on time and energy. Through concepts and generalizations the human mind frees itself for creative thought and analysis, and experience is rendered transmissible. Thus, in law as in other human affairs, abstraction and system ensure a certain stability, economy, coherency and continuity.⁶⁵

Following the concept in the "hierarchy of thought" is the *principle*. A principle is a concept in the sense that events can be classified as falling or not falling within it. More importantly, a principle states a relationship between concepts, and therefore, can be used to arrive at new conclusions or deductions or to guide new activities.⁶⁶ Principles of law frequently serve this purpose. It is a principle of law that "where there is a right, the law will supply a remedy" (*ubi ius, ibi remedium*). "Right" and "remedy" are both concepts, representing the differences between "interests entitled to legal protection" and "the method by which such protection is afforded." The principle, "where there is a right, the law will supply a remedy," states a relationship between those concepts and enables us to proceed a step further in our thinking about them.

While concepts and principles by themselves do not solve problems, they can provide the tools for the solution of many problems.⁶⁷ Suppose that *B* insults *A*, and that *A* then sues *B* to recover damages for the insult. The court must first ask whether there is a "right" to be free from insults at the hands of another. It considers the other kind of interests it has recognized as constituting a "right" and decides whether the interest in question has enough of the same characteristics so that it should be included in the concept. If it decides that there

⁶³ *Id.* at 234.

⁶⁴ A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 437 (1965).

⁶⁵ *Id.*

⁶⁶ D. JOHNSON, *supra* note 48, at 237.

⁶⁷ *Id.* at 238.

is a "right" here, it can apply the principle of "where there is a right, the law will supply a remedy," and may conclude that damages is an appropriate remedy by which the right can be protected.

As pointed out previously, concepts divide things up into *categories*. Through the process of *classification* we put new facts, new situations and so forth into established categories. These categories are likely to be organized in a hierarchy of levels of abstraction, the best example of which would be a taxonomic system.⁶⁸ The system is "given," and the new data is "up for judgment" in order that it can be fitted into the system. So when a zoologist classifies a new specimen, for example, "he matches the pattern facing him with the pattern of his taxonomic system to see where, in his judgment, it fits."⁶⁹ Each category in our "thought system" is expressed by a word, which *connotes* what that category means to us.⁷⁰ It is on the basis of the connotative meaning of our different categories that we decide whether particular data is to be placed in one category or another. Data—a fact, object, event or the like—has no name and belongs to no category until we put it into one, and the particular category into which we put it will depend on the purpose of the classification.⁷¹ The botanist will classify a tomato as a "fruit," because a tomato has the characteristics that he ascribes to the word "fruit" in the classification system that *he* uses, a system that he has established to meet the purposes of botanical classification. In view of those purposes, the botanist has concluded that he is more concerned about the similarities between tomatoes and let us say, apples, than he is about the differences. But the supermarket proprietor who has established categories of "fruits" and "vegetables" excludes tomatoes from his category of "fruit," because the connotative meaning of the word "fruit" to himself and his customers excludes the characteristics of a tomato. This demonstrates very clearly the proposition that the meaning of a word can only be described with reference to the context in which it is being used.⁷² To the botanist "tomato" means "fruit," while to the supermarket proprietor it means "vegetable." Both meanings are "correct" when the context in which the word is being used and the different purposes of the classification systems of the botanist and the supermarket proprietor are considered. As we explore the process of classification of

⁶⁸ *Id.* at 134.

⁶⁹ *Id.* at 312.

⁷⁰ See generally S. HAYAKAWA, *supra* note 51, at 58-59 (discussion of "connotation").

⁷¹ *Id.* at 209-11.

⁷² See the discussion of the "One Word, One Meaning Fallacy" and the "Ignoring of Contexts," *id.* at 60-64.

data into categories, we must be aware that there is no "natural" or "fixed" classification, and that the category into which particular data will be put cannot be separated from the purpose of the classification. *Classification occurs only in context.*⁷³

Whenever a judgment must be made about data, it is very important to consider the number of categories into which the data may be put. The nature of the judgment we are called upon to make may limit the number of categories. Suppose that a jury is told to return a verdict of "guilty" or "innocent." The direction calls for a two-category judgment, and the accused cannot be found to be "too guilty" to be "guilty" or "too innocent" to be "innocent."⁷⁴ On the other hand, a jury called upon to return a verdict in a homicide case is usually asked to make a "judgment in several heterogeneous categories,"⁷⁵ such as when it is directed to determine whether the accused is guilty of first degree murder, guilty of second degree murder, guilty of voluntary manslaughter, or innocent of all charges. To go a step further, the classification system of the librarian or zoologist calls for "judgment in several related categories,"⁷⁶ but here too, the number of categories is limited notwithstanding that such judgments are multi-dimensional in that the objects of the judgment are classified in several dimensions at once. At the furthest end of the spectrum is an undefined classification system with an unlimited number of categories and the opportunity to create new ones. A moment's reflection will indicate that the categories of the law belong to this kind of system.

The purpose of the foregoing discussion has been to demonstrate the function of the *category* in the judgmental process. A problem to be solved represents data about which a judgment must be made. Unless the problem⁷⁷ is a simple one calling for a perceptual judgment or involves a personal response so that an affective judgment will suffice, we can solve the problem only by the use of concepts and principles—the "stuff" of which an abstract judgment is made. Concepts enable us to divide the totality of data into a number of categories, and when we are confronted with new data, such as a problem, we

⁷³ A good example of this point for legal purposes is the distinction between substance and procedure, which is drawn in at least three situations, each of which raises different policy considerations. See the discussion in Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. REV. 813, 817-20 (1962). See also W. COOK, *supra* note 18, at 163-65.

⁷⁴ D. JOHNSON, *supra* note 48, at 326.

⁷⁵ *Id.* at 327.

⁷⁶ *Id.* at 328.

⁷⁷ As to the nature of a "problem," see *id.* at 63-64.

attempt to classify that data into familiar categories, thereby transferring to it the effects of previous learning.

The legal term most frequently used to describe the classification of data into categories is *characterization*, and we will now consider how characterization operates in the legal system. But it is important to remember that the process of classifying is in no way peculiar to the solution of legal problems. Any problem calling for an abstract judgment necessarily involves the use of classification and an understanding of concepts and principles.

III. CHARACTERIZATION IN THE LEGAL SYSTEM

What we call a "legal judgment"; *i.e.* the kind of judgment made by lawyers and judicial officials, generally has as its object what may best be described as a fact situation. We judge the characteristics of a given set of facts to determine what legal consequences are to be attached to it. In other words, a fact situation represents a "problem to be solved" by the exercise of a legal judgment.

The particular kind of judgment that we make about the fact situation will depend upon the reason why that fact situation has been presented to us for judgment. When a client consults a lawyer about making a will, for example, the lawyer views the fact situation with reference to the kind of will that, in light of those facts, he should draw up for the client. The nature of the client's relationship with his wife would be viewed in the context of the judgment about what kind of will the client should have, given the nature of the relationship. The nature of the relationship would be viewed differently if a different judgment were called for, such as whether the client could obtain a divorce.

Let us approach the matter from the standpoint of a judge looking at the fact situation in a case coming before him for decision. The ultimate question for decision is which party shall prevail, and on this question the judge makes what is called a *general judgment*. However, the general judgment will usually depend on the judgments that he makes about specific questions that are raised by the fact situation, or more accurately, by different parts of the situation. For example, some of the facts indicate that the suit may have been filed after the applicable limitation period has expired.⁷⁸ The judge will consider that question first, and if he answers it in the affirmative, he has thereby

⁷⁸ As a practical matter, the indicating facts are raised by the opposing party.

answered the basic question and solved the problem: the defendant prevails (basic question), because the plaintiff's claim is barred by limitation (specific question). In any event, what the judge is doing, concerning both the specific questions and the general judgment, is *characterizing the fact situation*, as a whole or in regard to particular parts, and placing the facts into "categories of legal thought."

These categories of legal thought, as all categories, represent concepts, and it is such concepts and principles⁷⁹ that aid the judge in arriving at his solution to the problem. As pointed out previously, the legal classification system is comprised of an unlimited number of categories and contains within it the opportunity to create new ones. While some attempts at scientific classification have been made,⁸⁰ and in civil law regimes a formal classification is necessarily embodied in the codes,⁸¹ in terms of problem-solving, the only relevant classification system is that which exists in the mind of the individual judge.⁸² And as between the different categories, even in a formalized classification system, "the lines are dim, and there is much gray between the black and the white."⁸³ So when we are talking about a legal classification system, we are talking about "no more than a logical or traditional ordering of the concepts, principles and rules of the legal system into divisions and subdivisions of the law."⁸⁴ Moreover, the categories are expressed in words, and, as we shall see, the connotative meaning of the word describing the category may be very significant.

The first step in "legal characterization" is probably to place the fact situation into one or more of the branches or areas that are used to divide up the category "law." We classify law in a number of ways depending on our frame of reference. If the classification is on the basis of governmental purpose, we distinguish between public law and private law and also between civil and criminal. These generic areas are further subdivided into more specific ones such as "constitutional law," "tort," "contract" and the like. The characterization of the fact situation into one of these areas of law is an automatic process,

⁷⁹ A rule of law may best be defined as a narrow principle stating the relationship between legal concepts. What we call principles of law, in contradistinction to rules, differ only in degree of specificity when viewed from this perspective.

⁸⁰ See generally Pound, *Classification of Law*, 37 HARV. L. REV. 933 (1924).

⁸¹ See F. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 142-45 (1955).

⁸² For an interesting discussion of judicial classification see Lederman, *Classification in Private International Law*, 29 CAN. B. REV. 3, 5-9 (1951).

⁸³ Harper, *Torts, Contracts, Property, Status, Characterization, and The Conflict of Laws*, 59 COLUM. L. REV. 440, 441 (1959).

⁸⁴ R. GRAVESON, *THE CONFLICT OF LAWS* 38 (5th ed. 1965).

often performed unconsciously, like breathing, and like breathing, "one only becomes conscious of it when exceptional circumstances make it difficult."⁸⁵

Be that as it may, the fact situation has been subsumed into a particular legal category contained in the judge's classification system. Once this process has been performed, it becomes easier to take the fact situation apart, and against the background of the category, to identify the "legally relevant facts." Suppose that the case involves a suit by *A* against *B* to recover damages resulting from *B*'s failure to deliver a ton of flour, as he allegedly promised to do. This fact situation would be characterized as giving rise to a problem in that area of law which we call "contract." The category "contract" brings into play certain associated responses and directs the judge toward those concepts and principles that may be employed to solve "contract" problems. By placing the fact situation into that category the judge is able to transfer the effects of past learning to the present problem.⁸⁶ He will also be able to identify the "legally relevant facts" in light of the concepts and principles applicable to the solution of "contract" problems. For example, in determining whether the defendant is liable to the plaintiff for failing to deliver the flour, the defendant's financial worth is not relevant, because the "contract rules" do not differentiate on that basis. But the defendant's wealth may have been a very significant factor in inducing the plaintiff to enter into the agreement in the first place and to bring suit when it was not performed.⁸⁷ It is likewise not relevant in most contract cases that the defendant's failure to perform was "without fault," whereas this fact is very relevant in most "tort" cases. In other words, having focused on the general area of law that will provide the basis of solution to the problem, that is, on the "law of contract," the judge can select from the total factual situation those specific facts that are relevant to the concepts and principles that have been developed for the solution of a "contracts" problem. The process of automatic and almost instinctive characterization of fact situations into areas of law is understood by every lawyer and judge, and is something that is performed many times each day.

This kind of characterization must be distinguished from the

⁸⁵ A. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 62 (1940).

⁸⁶ See note 61 *supra*.

⁸⁷ See the discussion in R. GRAVESON, *supra* note 84, at 39. If the plaintiff were suing to recover for the commission of an intentional tort, the defendant's wealth would be legally relevant, since it is a factor to be considered in assessing punitive damages.

conscious and deliberate characterization of the fact situation into areas of law, which, in certain circumstances, must be done. In the days of formulary pleading, for example, it was necessary to consciously place every fact situation into one of the areas of law corresponding to the recognized forms of action. The lawyer had to think in terms of whether the fact situation gave rise to a case of "trespass" or "assumpsit" and the like before he could bring his suit at all.⁸⁸ The same thing must still be done in those states that operate under consolidated pleading.⁸⁹ Apart from pleading, there are some circumstances in which the *result* will depend on the area of law into which the fact situation is characterized. Suppose that a statute provides: "In an action arising on contract, any other cause of action also arising on contract, may be asserted as a counterclaim." In a suit to recover payment for merchandise, the defendant asserts a counterclaim arising out of a fact situation in which the plaintiff allegedly converted the defendant's property and resold it, retaining the proceeds. In order to determine whether the counterclaim is proper, the court must ask whether the counterclaim involves that area of law categorized as "contract," since the legislature has defined the criteria for filing counterclaims with reference to that concept.⁹⁰ Most "rules of law" and "legal principles" are not expressed at this high a level of abstraction, but the "rule" that provides the solution to the problem at hand is, and the judge must make a conscious characterization in order to apply it.

Another example of conscious characterization might be the case when a passenger sues a carrier to recover damages resulting from an accident during the course of the journey. Suit is brought three years after the accident, and the statute of limitations provides that "suits arising out of a contract shall be brought within five years from the date of the wrong, and suits arising out of a tort shall be brought within two years." In order to make a judgment on the particular question—is the claim barred by limitation—it is necessary to characterize the fact situation as either presenting a claim of "contract" or of "tort," and this characterization will be dispositive of the result.⁹¹ Conscious characterization must also be made not infrequently be-

⁸⁸ "The process of classification of English municipal law was historically far more important than it is today; for formerly different rights had to be vindicated in different courts of common law or equity, and the forms of action presented a formidable and relentless incentive to litigants to follow the traditional and procedural classifications of English law." *Id.* at 38.

⁸⁹ For a recent attempt to use the form of action to influence the choice of law determination see *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964), and the discussion notes 293-95 *infra* and accompanying text.

⁹⁰ See *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929).

⁹¹ See *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959).

tween "substantive law" and "procedure". A court may be authorized to promulgate "rules of procedure," and it may be necessary to determine, for example, whether a rule requiring the physical examination of the plaintiff in a personal injury action is a "rule of procedure" so that it falls within the court's competence.⁹² So too, it is a "principle of law" that "procedural" legislation may be made retroactive to events occurring before its enactment, but that legislation affecting "substantive rights" is prospective only. Is legislation changing the burden of proof on the issue of contributory negligence "procedural" or "substantive" when it is sought to be applied to a case arising before its enactment, but coming to trial subsequently?⁹³ In these examples the data to be characterized is, strictly speaking, a rule of law rather than a fact situation, but the process works the same way, and the category into which the rule is put will be dispositive of the result.

We have thus far been talking about characterization into area of law categories. However, the process of characterization is performed whenever the court subsumes any data into a particular category of legal thought. Suppose that there are different rules of succession for "movable" and "immovable" property.⁹⁴ This kind of characterization is necessary, because the appropriate rule of law is framed with reference to the categories, and once the characterization is made, the solution to the legal problem—who inherits the mortgage—follows. We are also characterizing in the sense of subsuming a fact situation into a legal category (here the term "concept" is probably more familiar to us) whenever we must determine whether there was a "contract" or a "marriage," and indeed, we are characterizing whenever we apply the "law," which is necessarily based on concepts and principles, to a particular fact situation.⁹⁵

Until now we have purposely refrained from any discussion of

⁹² See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1940).

⁹³ See *Easterling Lumber Co. v. Pierce*, 235 U.S. 380 (1914).

⁹⁴ Note that this is an example of a problem calling for the exercise of a two-category judgment. See note 74 *supra*.

⁹⁵ Rules of law as we know them are precepts of human conduct employed as a means of social control in a politically mature community. They must deal with such non-legal realities or facts as persons, things, conduct and states of mind. They operate by discriminating between different kinds of persons and things, different kinds of conduct and states of mind, for purposes of defining the entitlement of the persons concerned to certain legal rights, privileges, powers or immunities. Laws then must contain notional categories of facts in order to define or establish these classes of them for legal purposes. . . .

The process of applying law to fact then depends on deciding which of these neutral and non-legal facts are appropriate to the legal categories or classes of facts defined in advance in our rules of law. . . . This process is frequently called the subsumption of real facts under laws.

Lederman, *supra* note 82, at 5.

how this process of characterization is performed, except to observe that it is often done unconsciously in those circumstances in which deliberate characterization is not required. Let us consider the example of the suit against the carrier in which the suit will be barred by limitation if it is characterized as involving a "tort," but will be allowed if it is characterized as involving a "contract." The fact situation that the judge is characterizing represents "data to be judged," and as we have seen, *data has no name and belongs to no category until it is put into one.*⁹⁶ Just as the data "tomato" can be classified as a "fruit" or a "vegetable" depending on the purpose of the classification,⁹⁷ so too, a passenger's claim against the carrier for personal injuries could be classified as a "tort" (we apply the category of "tort" to unlawful conduct resulting in personal injury) or as a "contract" (the injury occurred as a result of a contractual undertaking between the parties). There is equal "logic" or "justification" for either classification, and in fact such claims have been "characterized as 'contract' for some purposes and 'tort' for others."⁹⁸ In other words, although the question is so framed that the answer depends on the category into which the fact situation is characterized, there is no scientific or analytical way to choose between the categories. We cannot solve the problem except with reference to the *context* in which the characterization is to be made. We must consider the *purpose* for which the distinction between "contract" and "tort" was drawn in the statute and ask whether, in view of that purpose, a suit for personal injuries by a passenger against a carrier *more nearly corresponds* to a suit on "contract" or a suit for a "tort."⁹⁹ The necessity for "characterization in context" is considered elementary by the psychologist or the semanticist,¹⁰⁰ and we are now realizing that this is true for legal thinking as well and that the meaning of a legal term can be determined only in reference to the context in which that term is being used.¹⁰¹

In order to illustrate this point, we may have been placing undue emphasis on those relatively few situations in which conscious charac-

⁹⁶ See note 71 *supra*.

⁹⁷ See notes 71-73 *supra* and accompanying text.

⁹⁸ See the discussion in Ehrenzweig, *Characterization in the Conflict of Laws: An Unwelcome Addition to American Doctrine*, in XXTH CENTURY 395, 398.

⁹⁹ Since the statute of limitations for tort actions is generally shorter than that for contracts, and since the great majority of tort cases involve claims for personal injuries, it is reasonable to conclude that the legislature intended the shorter statute to apply in personal injury suits against the carrier, and the courts have so held. See, e.g., *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959).

¹⁰⁰ See particularly the discussion in S. HAYAKAWA, *supra* note 51, at 209-10.

¹⁰¹ See Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959).

terization must be made, because the dispositive rules are framed in terms of different areas of law. The more relevant characterization is that which is performed unconsciously at the outset of a case, when the judge places the fact situation into one or more of the areas of law that comprise his classification system. In the ordinary domestic case, *it will make no observable difference whether the judge puts the fact situation into one category or another.* The norms for the decision of that case will be found in the forum's statutory and decisional law, and it may be assumed that somehow the judge will locate the "correct" statutory provisions and judicial precedents (if for no other reason than that the lawyers will cite them to him). His characterization will probably affect only his initial search for the applicable law,¹⁰² and in our suit by the passenger against the carrier, he may find the relevant law indexed under "contract" or under "tort," probably under both, and equally probably under the heading of "contracts of carriage: personal injuries." This does not mean that his characterization of the problem as one of "tort" or of "contract" may not affect his analysis of what facts are relevant and what rules of law are applicable, or influence his decision in a number of subtle and nonobservable ways.¹⁰³ But the characterization itself will not be determinative of the result, and in view of other factors influencing his decision, will probably not be of great significance. Therefore, in the purely domestic case we may discount the importance of the judge's characterization of the fact situation into a particular area of law, except when dispositive rules have been framed on that basis. When the case contains a foreign element, however, it has been a different matter altogether.

IV. CHARACTERIZATION IN THE CONFLICTS OF LAWS

A problem of the conflict of laws arises whenever a case contains a foreign element, that is, whenever some or all of the legally significant facts occurred in a jurisdiction other than that in which the suit is brought and/or all the parties are not residents of the forum state. The legal order, it is said, is decentralized among a plurality of sovereign or autonomous authorities, each asserting jurisdiction within a defined territory.¹⁰⁴ But since people do not live their lives within

¹⁰² It would seem that even in a civil law system the location of the correct code provision would not be dependent upon the judge's characterization.

¹⁰³ Particularly in view of the associated responses that the stimulus of the different area of law categories brings into play, as we shall discuss subsequently.

¹⁰⁴ Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953).

defined territories, disputes will invariably arise involving the territory or people of two or more legal systems, and at that time "the legal order tries to integrate the diversity of laws of which it is composed."¹⁰⁵ The traditional approach toward "integrating that diversity" was based upon "jurisdiction-selecting" rules, and *these rules were framed with reference to different categories or areas of law*. Thus matters of tort were determined by the law of the place of the wrong,¹⁰⁶ while matters of contract were determined by the law of the place of contracting,¹⁰⁷ matters of property by the law of the situs,¹⁰⁸ and the like.¹⁰⁹ This meant that the fact situation had to be subsumed into a particular *category* before the appropriate "jurisdiction-selecting" rule could be applied.¹¹⁰ In order for the system to work, then, characterization became a *conscious need*,¹¹¹ and the traditional approach has been described as one "which seeks to apply the established choice of law rules to a particular case (involving a complex of facts and domestic laws) by the process of classification or characterization."¹¹²

The characterization of the facts into a particular category, the first step under the traditional approach, was called "characterization of the principal question," and like characterization in the domestic case, would often be performed "automatically and unconsciously."¹¹³ When difficult questions arose, however, the courts became aware of the conscious need to characterize, and we may consider some of the problems that arose occurred with respect to characterization of the principal question.

The leading case, which apparently sparked recognition of the process, involved the Maltese widow who claimed a "poor spouse's share" in her husband's Algerian land.¹¹⁴ Under Maltese law such a claim was recognized, but it was not under French-Algerian law.

¹⁰⁵ *Id.*

¹⁰⁶ RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

¹⁰⁷ *Id.* § 311.

¹⁰⁸ *Id.* § 208.

¹⁰⁹ The sub-rules of the Restatement, on the whole, deal with how the particular place is to be defined and with what particular questions are embraced by the general rule.

¹¹⁰ See G. CHESHIRE, PRIVATE INTERNATIONAL LAW 40-41 (7th ed. 1965); Harper, *supra* note 83, at 446.

¹¹¹ Ehrenzweig, *supra* note 98, at 406.

¹¹² Hancock, *supra* note 47, at 367.

¹¹³ See the discussion in G. CHESHIRE, *supra* note 110, at 41; Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 S. CAL. L. REV. 221, 225 (1941).

¹¹⁴ Anton v. Bartolo, 18 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 1171 (1891).

Nevertheless, the Algerian court allowed the claim. It has been explained that this case demonstrates the process of characterization. If the court had characterized the principal question as one of matrimonial property, the choice of law rule would look to the personal law of the parties, which under both French-Algerian and Maltese concepts was the law of their nationality.¹¹⁵ Whereas, if the principal question were characterized as one of succession to immovables, French-Algerian law, as the law of the situs, would apply. The decision to allow the claim meant that the court had characterized the principal question as one of matrimonial property rather than succession to immovables.¹¹⁶ Professor Ehrenzweig says that this is a "mere rephrasing of the result rather than a reasoned argument," and that "the case could have easily been explained without resort to characterization, as one limiting the forum rules which govern forum property, to nationals of the forum state."¹¹⁷ In the same vein the result has been explained as being in accord with the common policy of both states to afford some financial protection for widows and that the court chose the line of reasoning that gave effect to that policy.¹¹⁸ Of course, either characterization is just as "logical" as the other, and even a proponent of characterization such as Professor Robertson admits that this is so.¹¹⁹ His explanation is that the question was characterized as one of matrimonial property by both the internal law of Malta and France, and that the case held that insofar as French law was concerned, it was characterized as matrimonial property for conflicts purposes as well. As we have pointed out previously, data is unclassified until a classification is made and the particular classification that is made will depend on the purpose in classifying. The case does demonstrate how analytical characterization could be employed with reference to the result that the court desired to achieve.¹²⁰

A similar problem of characterization as marriage-succession would

115 Cf. *In re Annesley* [1926] Chan. 692.

116 The French commentator, Bartin, used this case as the first example in his classic article on characterization. Bartin, *De l'impossibilité d'arriver à la suppression définitive des conflits de lois*, 24 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 225 (1897).

117 A. EHRENZWEIG, *supra* note 39, at 330-31.

118 Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027, 1031-34 (1949).

119 A. ROBERTSON, *supra* note 85, at 159-62. He contends that both states characterized the question as one of matrimonial property.

120 See the discussion in Hancock, *supra* note 47, at 366. Disingenuous characterization was a very effective manipulative technique by which the forum could achieve the application of its own law. Sedler, *supra* note 6, at 49-50.

arise when the issue was whether a will was revoked by a subsequent marriage (if characterized as marriage, it would be governed by the personal law of the decedent at the time of marriage,¹²¹ but if characterized as succession, it would be governed by the personal law of the decedent at the time of death as to movables and by the law of the situs as to immovables), or when it was whether a widow was required to elect between dower and rights under a will concerning land located elsewhere (if characterized as marriage, or more accurately, marital property, it would be governed by the personal law, but if characterized as succession, it would be governed by the law of the situs).¹²² A problem of characterization of the principal question would also be presented when a decedent had made a gift causa mortis of movable property. If the principal question were characterized as one of movable property, the choice of law rule would look to the situs of the property at the time of the transfer, but if it were characterized as one of succession, the law of the decedent's domicile at the time of death would govern.¹²³

The contract-tort characterization has been presented in suits by a passenger against a carrier to recover for personal injuries and in actions for breach of contract to marry. In the suit against the carrier, if the principal question were characterized as one of contract, the law of the place of making would govern whereas if it were characterized as one of tort, it would be the law of the place of injury.¹²⁴ In the action for breach of a contract to marry, the choice was between the law of the place where the contract was made (contract) and the law of the place where the defendant committed the wrong, *e.g.*, the place where the marriage was to take place or where the defendant repudiated (tort).¹²⁵ A contract-property characterization problem would occur when a contract to transfer land was made in a state other than the situs, and the issue was whether the law of the place of contracting(contract) or the law of the situs (property) would govern.¹²⁶ When the transferor and transferee were husband and wife and the substantive issue was the capacity of one to make the transfer to the other, the charac-

¹²¹ Note that under the law of many continental states this was the law of nationality as opposed to the law of the domicile.

¹²² See the discussion in A. ROBERTSON, *supra* note 85, at 219-20.

¹²³ See the discussion in G. CHESHIRE, *supra* note 110, at 45. See also A. ROBERTSON, *supra* note 85, at 185, in which the position is taken that gifts causa mortis should "form a category of their own with their own choice of law rule."

¹²⁴ See the discussion in Ehrenzweig, *supra* note 98, at 397-98.

¹²⁵ See generally A. ROBERTSON, *supra* note 85, at 76-78; Harper, *supra* note 83, at 441.

¹²⁶ See the discussion in A. ROBERTSON, *supra* note 85, at 217-19.

terization problem could be framed in terms of family law-contract-property.¹²⁷

As we have said, the rules of the traditional approach were framed with reference to different areas of law, so that once the principal question was characterized, a particular choice of law rule necessarily followed, such as "matters of tort are determined by the law of the place of the wrong." Most of the choice of law rules did not themselves require further characterization, but some did in that the facts had to be subsumed under a particular category other than area of law ones. For example, one of the rules was that "the formalities of marriage are determined by the law of the place of celebration and the substantive validity is determined by the law of the marital domicile."¹²⁸ Suppose that under the law of the state of celebration parental consent is not required, but it is required under the law of the marital domicile. If parental consent is characterized as a formality the marriage is valid, but if it is characterized as a matter going to substantive validity, the marriage is not.¹²⁹ The same kind of problem would be involved when the choice of law rule was that a will would be valid if it complied with the form prescribed by the state of execution, although substantive validity was to be determined by the law governing succession. Did the matter of a holographic will, for example, go to formal or substantive validity?¹³⁰ In all of these cases, the characterization, that is, the subsuming of the factual situation under the concept of "form" or "substance," would determine the result. In a sense, this involved the same kind of characterization that occurs whenever the court subsumes a fact situation under a legal concept, but here it was complicated by the question of whether the characterization was to be determined by the law of the forum or the law of the other state, as we shall discuss shortly.

The third possible step would be characterization of the connecting factor or "contact point." Since each rule looked to a particular place, such as the place of the wrong, it would be necessary in a

¹²⁷ Compare *Swank v. Hufnagle*, 111 Ind. 453, 12 N.E. 303 (1897) with *Polson v. Stewart*, 167 Mass. 211, 45 N.E. 737 (1897) and *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902). See notes 355-61 *infra* and accompanying text.

¹²⁸ See RESTATEMENT OF CONFLICT OF LAWS §§ 121, 132 (1934).

¹²⁹ Compare *Ogden v. Ogden*, [1908] P. 46 (C.A.) with *Simonin v. Mallac*, 164 Eng. Rep. 917 (Prob. 1860). See also J. FALCONBRIDGE, *CONFLICT OF LAWS* 74-86 (2d ed. 1954); A. ROBERTSON, *supra* note 85, at 239-45; Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743, 756-58 (1941).

¹³⁰ See J. FALCONBRIDGE, *supra* note 129, at 90-94; A. ROBERTSON, *supra* note 85, at 234-38.

particular case to determine what that place was. The classic example is the characterization of the place of the wrong in tort cases when the wrongful act occurred in one state and the harm resulting from that act occurred in another.¹³¹ It is interesting to note that in this country the place of the wrong was characterized as the place where the harm occurred while in a number of European countries it was the place where the actor acted.¹³² Similarly, there would be a question concerning the place of contracting when the purported offer and acceptance took place by mail or over the telephone.¹³³

The three steps outlined above were referred to as "primary characterization." It was sometimes considered a two-stage rather than a three-stage process, with application of the choice of law rule and characterization of the contact point being considered a single stage.¹³⁴ Once the "governing jurisdiction" was selected, the next step was to determine *how much* of its law was to be applied, and this was referred to as "secondary characterization."¹³⁵ This would often involve characterization of a rule of law, either one of the forum or of the locus¹³⁶ or both. For example, since one of the rules was that "the law of the forum governs matters of procedure,"¹³⁷ it was necessary to determine whether a particular rule of the forum was a matter of "procedure," in which case it would be applied, or whether a rule of the locus was one of "procedure," in which case it would not.¹³⁸ Secondary characterization might also involve the question of whether a rule

¹³¹ See the discussion and examples in Harper, *supra* note 83, at 442-45.

¹³² RESTATEMENT OF CONFLICT OF LAWS § 377 (1934) and the discussion in Alabama Great S.R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892). Compare the tort rule of the Italian Civil Code, Art. 25, in McCusker, *The Italian Rules of the Conflict of Laws*, 25 TUL. L. REV. 70, 81-82 (1950) with the Greek Civil Code, Art. 26, in Nicoletopoulos, *Private International Law in the New Greek Civil Code*, 23 TUL. L. REV. 452 (1949).

¹³³ See Linn v. Employers Reins. Corp., 392 Pa. 58, 139 A.2d 638 (1958).

¹³⁴ See A. ROBERTSON, *supra* note 85, at 19-22.

¹³⁵ *Id.* at 118-19.

¹³⁶ "Locus" means the state whose law was chosen to govern under the appropriate choice of law rule.

¹³⁷ RESTATEMENT OF CONFLICT OF LAWS § 585 (1934).

¹³⁸ See the discussion in Beckett, *The Question of Classification ("Qualification") in Private International Law*, 15 BRIT. Y. B. INT'L. LAW 46, 66-71 (1934). In *Marrie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883), the forum concluded that its statute of frauds was substantive and that the statute of the locus was procedural. Therefore, it disallowed the defense and enforced a contract that was invalid under both the law of the forum and the law of the locus. The matter of characterizing the statute of frauds is discussed in Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311 (1923).

of the locus was applicable extraterritorially.¹³⁹ The lines between "primary" and "secondary" characterization were not always clear,¹⁴⁰ but for our purposes¹⁴¹ we may generally consider secondary characterization as involving "delimitation of the proper law."¹⁴² The function of primary characterization, then, was to locate the appropriate jurisdiction the law of which was to govern, while the function of secondary characterization was to define how much of the law of that jurisdiction was to be applied.¹⁴³

The characterization that took place under the traditional approach was necessarily analytical since that approach was based on "logic" and represented an attempt to find an "objective solution" for all conflicts problems.¹⁴⁴ But, as with most elements of the traditional approach, there was disagreement on how the logic should operate. This gave rise to conflicts of characterization and the problem of how those conflicts were to be resolved. Let us consider briefly how such conflicts would arise and what problems would then be presented. Suppose that a contract of carriage was entered into in State *A* and an accident happened during the course of the journey in State *B*. Under the substantive law of State *A*, the carrier would not be liable; under the substantive law of State *B*, however, it would be liable. Suit is brought in State *A*. State *A* must first characterize the principal question, and it characterizes suits by a passenger against a carrier to recover for personal injuries as "tort." The "tort" choice of law rule looks to the place of injury, State *B*. But if State *B* characterizes the principal question as one of "contract," the applicable choice of law rule would look to the place of contracting, State *A*. In the above example State *A* and State *B* have the same choice of law rules, but the differing characterization of the principal question would cause each to apply a different choice of law rule in that case. Since each state is looking to the other, the problem of the *renvoi* is presented, which most American courts resolved by "rejecting the

¹³⁹ See the discussion in Beckett, *supra* note 138, at 72-75.

¹⁴⁰ And it was a matter of some dispute whether the distinction should be drawn at all. For a suggested approach see Lederman, *supra* note 82, at 3, 168, 174-75.

¹⁴¹ Which are only to explain the workings of traditional characterization.

¹⁴² A. ROBERTSON, *supra* note 85, at 118.

¹⁴³ As a practical matter this states the approach advocated by Robertson. Compare the approach advocated by J. FALCONBRIDGE, *supra* note 129, at 50-53 with Lederman, *supra* note 82.

¹⁴⁴ See the discussion in A. EHRENZWEIG, *supra* note 39, at 330-31; Nussbaum, Book Review, 40 COLUM. L. REV. 1461, 1464-66 (1940).

renvoi" and applying the substantive law of the locus.¹⁴⁵ If, on the other hand, State *A* characterized the principal question as one of "contract" and State *B* characterized it as one of "tort," the question would be whether characterization was to be determined by State *A* law or State *B* law, and the resolution of this problem might depend on whether suit was brought in State *A* or State *B*.¹⁴⁶

The same problem could arise with respect to characterization of the contact point. Suppose in the above example that the negligent act of the carrier occurred in State *A* and the injury occurred in State *B*. Let us also assume that both states characterize the principal question as one of tort and apply the tort choice of law rule that the law of the place of the wrong governs. It is necessary for the forum to characterize the place of the wrong, because the elements of the tort, *i.e.* the act and the injury, occurred in different states. If State *A* characterizes the place of the wrong as the place where the harm occurred and State *B* characterizes it as the place where the wrongful act occurred, there is again a conflict of characterization.

Conflicts of secondary characterization would not arise until after the forum had decided that the substantive law of another state should apply. Here the question would be whether a rule of the locus should be applied by the forum, and the conflict would arise because the forum and the locus disagreed on the applicability of that rule to a case containing a foreign element. Suppose, for example, that the forum characterizes the rules represented by the statute of frauds as "substantive." This would mean not only that it would not apply its own statute of frauds, but that it would decide the statute of frauds issue solely with reference to the statute of the locus. The locus, however, characterizes its statute of frauds as "procedural,"¹⁴⁷ thus making it inapplicable except when suit is brought there. The question is whether the forum will apply the statute of frauds of the locus notwithstanding the characterization of the statute by the locus as "procedural."¹⁴⁸

¹⁴⁵ See RESTATEMENT OF CONFLICT OF LAWS § 7(b) (1934); 1 J. BEALE, CONFLICT OF LAWS 55-58 (1935).

¹⁴⁶ See notes 155-57 *infra* and accompanying text.

¹⁴⁷ In determining how a statute was characterized by the locus, the forum often failed to consider whether the characterization had been made for local law purposes or for conflicts purposes. See, *e.g.*, *Anderson v. State Farm Mut. Auto Ins. Co.*, 222 Minn. 428, 24 N.W.2d 836 (1946).

¹⁴⁸ The Restatement position was that it should not, even if the forum's own statute were characterized as substantive. See *Marrie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883); RESTATEMENT OF CONFLICT OF LAWS § 334, comment b, at 412 (1934).

The solution to these problems of characterization was considered to revolve around two related questions: (1) what was the source of the "concepts of characterization;" (2) was characterization to be determined by the law of the forum or the law of the locus. A number of writers took the position that the forum should generally apply its own legal concepts to the process of characterization.¹⁴⁹ This was justified on the ground that otherwise the forum would lose its control over the choice of law determination. If, for example, the forum's conflicts rule was that the law of the place of the wrong governed matters of tort liability, and some other state's law determined what the place of wrong was, the forum's purpose in selecting the place of the wrong rule might be subverted.¹⁵⁰

But while the forum applied its own concepts, categories for conflicts purposes were necessarily broader than those employed for local law purposes to encompass foreign institutions unknown to the forum.¹⁵¹ Thus, the concept of "contract," for example, would include consensual transactions that were binding and enforceable under a foreign legal system, although the same consensual transaction would not be considered a contract under the law of the forum, *e.g.*, when the forum would require a technical consideration, but the locus would not.¹⁵² So too, the category of "property" would include community property, although that institution was not recognized in the forum.¹⁵³ And the notion of what was a "penal law" for internal law purposes might not be the same when the issue was whether a foreign law would be refused enforcement on the ground that it was "penal."¹⁵⁴

The source of the concepts of characterization, then, was the *conflicts law of the forum*,¹⁵⁵ and just as each state had its own system of conflicts law, it had to work out its own system of categories for conflicts purposes.¹⁵⁶ Although these categories were considered international there still could be, as we have seen, a difference between the international categories of the forum and those of the locus, so

¹⁴⁹ See the discussion in G. CHESHIRE, *supra* note 110, at 42; Cormack, *supra* note 113, at 226-31; Harper, *supra* note 83, at 442; Lederman, *supra* note 82, at 23-29.

¹⁵⁰ Harper, *supra* note 83, at 442.

¹⁵¹ See the discussion in A. ROBERTSON, *supra* note 85, at 89-91.

¹⁵² See the discussion in Lederman, *supra* note 82, at 25-26.

¹⁵³ See the discussion in G. CHESHIRE, *supra* note 110, at 42-43.

¹⁵⁴ See the discussion in Harper, *supra* note 83, at 750.

¹⁵⁵ For a discussion of the meaning of conflicts law of the forum as it is related to characterization, see J. FALCONBRIDGE, *supra* note 129, at 70 and Husserl, *The Foreign Fact Element in the Conflict of Laws*, 26 VA. L. REV. 243, 259-62, 453, 455-57 (1940). See also 1 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 53-66 (2d ed. 1958).

¹⁵⁶ See the discussion of categories in A. ROBERTSON, *supra* note 85, at 83-91.

the more important question, both with respect to primary and secondary characterization, was whether it should be determined by the law of the forum or the law of the locus. There appeared to be general agreement among the commentators that matters of primary characterization should be determined by the forum since the forum has to "control" the choice of law determination.¹⁵⁷ But concerning secondary characterization, some commentators argued that this should be decided in accordance with the law of the locus, since it involved the applicability of locus law,¹⁵⁸ while others took the position that the characterization of the locus should be considered, but that here too, the forum had to make the final determination.¹⁵⁹ This is perhaps an oversimplification of the differing views, but it does illustrate the kinds of questions that arose under traditional characterization and the opinions of how they should be resolved.¹⁶⁰

The practical utility of the process of characterization was a matter of some dispute, even during the zenith of the traditional approach.¹⁶¹ It was contended that characterization was merely "synonymous with selection of the proper law," and that a court did *not* arrive at its decision by classifying the issue to "reveal the appropriate conflict rule which, on the application of a specific connecting factor, will result in the selection of the proper law to be applied."¹⁶² It was also pointed out that, in practice, conflicts of characterization were relatively few and that a court would not make decisions on the basis of "over-refined doctrines."¹⁶³ Another viewpoint was that characterization "merely veiled the processes whereby results are reached," and that the court would characterize in such a way as to reach the result

¹⁵⁷ R. GRAVESON, *CONFLICT OF LAWS* 41, 49, 54 (2d ed. 1965); A. ROBERTSON, *supra* note 85, at 157-58; Lorenzen, *supra* note 129, at 761; *cf.* J. FALCONBRIDGE, *supra* note 129, at 58-72.

¹⁵⁸ G. CHESHIRE, *supra* note 110, at 48-49; A. ROBERTSON, *supra* note 85, at 130-34.

¹⁵⁹ Beckett, *supra* note 138, at 72-75; Lorenzen, *supra* note 129, at 758-61.

¹⁶⁰ Another aspect of traditional characterization was characterization of the preliminary question, which essentially involved the reference to foreign law to determine factual questions, *e.g.*, did a person claiming to be the wife of the decedent have that status under the law of another state. *See generally* A. ROBERTSON, *supra* note 85, at 135-57; Gotlieb, *The Incidental Question in Anglo-American Conflict of Laws*, 33 CAN. B. REV. 523 (1955). The matter is currently treated under the heading of "foreign law as datum." Ehrenzweig, *Local and Moral Data in the Conflict of Laws: Terra Incognita*, 16 BUFF. L. REV. 55 (1966); Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47 (1965). The relevancy of the "incidental question" to identification of the problem area is discussed in notes 359-60 *infra* and accompanying text.

¹⁶¹ Professor Ehrenzweig has contended that American courts did not become concerned with the doctrine until fairly late in its history. Ehrenzweig, *supra* note 98, at 395-96.

¹⁶² Bland, *Classification Re-Classified*, 6 INT. & COMP. L.Q. 10, 27 (1957).

¹⁶³ Nussbaum, *supra* note 144, at 1471.

that it considered desirable.¹⁶⁴ Certainly we are aware of the use of "disingenuous characterization" to achieve the application of the forum's law,¹⁶⁵ and as pointed out previously,¹⁶⁶ from an analytical standpoint most fact situations, rules of law and the like could just as well be put in one category as another. And of course, insofar as characterization was considered to be the basis of the traditional approach,¹⁶⁷ it was subject to criticism on that ground as the deficiencies of that approach became more evident. The death-knell was sounded by Professor Ehrenzweig, who observed that: "With the substitution for overgeneralized pseudo-rules, of a catalogue of specific and policy-based exceptions from the *lex fori*, the technique of characterization will have lost both its promise and its threat, as well as its principal merit as a 'fascinating intellectual exercise.'" ¹⁶⁸

It is obvious that the premises upon which the traditional characterization process rested are totally inapplicable to a policy-centered approach. In the absence of jurisdiction-selecting rules for each category of law, there is no need to "characterize the principal question" in order to locate the relevant "choice of law rule."¹⁶⁹ Since the court under a policy-centered approach would no longer be applying "rules," there is no occasion to characterize concepts contained within a rule, such as "formality" and "substantial validity."¹⁷⁰ Nor would it focus on a particular conceptual place such as the "place of the wrong," thereby avoiding problems of characterization of the contact point. The abandonment of a rules approach also avoids conflicts of primary characterization and the resulting *renvoi* problem.¹⁷¹

The kind of questions involved in "conflicts of secondary characterization" remain, since they involve delimitation of the chosen law, and arise whenever the forum has decided that its law should be displaced. But under a policy-centered approach their solution will not be dependent upon how a rule of law or particular property is

¹⁶⁴ Morse, *supra* note 118, at 1029.

¹⁶⁵ See note 120 *supra*.

¹⁶⁶ See the discussion notes 117-20 *supra* and accompanying text.

¹⁶⁷ See the discussion notes 106-12 *supra* and accompanying text.

¹⁶⁸ Ehrenzweig, *supra* note 98, at 408.

¹⁶⁹ It is interesting to note that characterization is still required under the modern rules approach of the Restatement Second. See RESTATEMENT (SECOND) § 7.

¹⁷⁰ Apart from the subsumption of facts under concepts that takes place in any legal situation.

¹⁷¹ See RESTATEMENT (SECOND) § 7 and particularly the comments thereto. See the discussion in Weintraub, *The Impact of a Functional Analysis upon the "Pervasive Problems" of the Conflict of Laws*, 15 U.C.L.A.L. REV. 817, 828-33 (1968) and the discussion notes 38, 39 *supra* and accompanying text. Again it is interesting to note that the problem of the *renvoi* remains under the modern rules approach.

"characterized." The analytical "substance-procedure" dichotomy does not represent a functionally sound solution to the question of how much of the law of the locus should be carried over, and the courts are moving to the position that matters materially affecting the outcome will be determined by the law of the locus, whether analytically "substantive" or "procedural," except where the incorporation of locus "procedural" law would be impractical or would violate a strong procedural policy of the forum.¹⁷² The "movable-immovable" distinction, which could be considered as involving both primary and secondary characterization, is relevant only insofar as it determines what portion of the law of the situs may be applicable. If the courts take the position that the law of the situs should control the disposition of property situate there¹⁷³—and there is a trend away from the strict application of the situs rule¹⁷⁴—the only relevant consideration is what disposition the situs would have made. There need be no concern with whether the forum or the situs decides how the property should be classified.¹⁷⁵

Therefore, it is clear that the process of characterization, as it was employed under the traditional approach, becomes totally irrelevant to the policy-centered conflict of laws.

V. THE PROCESS OF CHARACTERIZATION TRANSFORMED: IDENTIFICATION OF THE PROBLEM AREA AND THE POLICY-CENTERED CONFLICT OF LAWS

It should not be surprising that the basis of the traditional approach to the solution of conflicts problems revolved around classification. A conflicts case, as has been observed, is merely a case to which a foreign element has been added.¹⁷⁶ A case involving a contract made

¹⁷² Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. REV. 813, 821-25 (1962).

¹⁷³ See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 215-22, 254a (Tent. Draft No. 5, 1959).

¹⁷⁴ See, e.g., Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 N.Y.U.L. REV. 1126 (1960); Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws*, 20 STAN. L. REV. 1 (1967); Weintraub, *An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 CORNELL L.Q. 1 (1966).

¹⁷⁵ See W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 305-10 (1942). Likewise questions of escheat should not depend on whether the situs of the property treats the government as an heir, as in *Estate of Maldonado*, [1954] P. 223, 248, 251. For a discussion of the devolution of property to adopted children see Ehrenzweig, *supra* note 98, at 402-03.

¹⁷⁶ Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L.Q. 570, 590 (1936).

between people of different states, for example, is still a case involving a contract, and the only additional task imposed upon the court is to determine the significance that will be given to the presence of the foreign element.¹⁷⁷ Because there is the tendency to compartmentalize, and because classification is "indispensable to thought,"¹⁷⁸ it would be expected that the "jurisdiction-selecting" rules developed under the traditional approach would be framed with reference to the different areas of law recognized in domestic cases. Thus there were conflicts rules for tort, contract, property and the like, and the classification performed unconsciously and automatically in the domestic case became a conscious necessity in the foreign one in order to locate the correct "jurisdiction-selecting" rule.

Under a policy-centered approach, of course, this kind of conscious and formalized classification-characterization is no longer necessary. But what about classification itself? Since the judges classify the domestic case into different areas of law, whether consciously or unconsciously, there is no reason to believe they will act any differently when confronted with a case containing a foreign element. If this is so, and since classification, in theory at least, was result-determinative under the traditional approach, it is important to consider whether decisions in conflicts cases may *still* be affected by the fact that the judge will necessarily classify cases into areas of law.

I think that the answer is in the affirmative, and this brings us to the matter of the *set*. A set may be defined as a readiness to make a specified response to a specified stimulus, so that when the stimulus is received, certain responses are selected from the repertoire of available responses rather than others.¹⁷⁹ A set may be established experimentally, such as telling a person that he will hear a telephone ring with the result that he is likely to interpret a ringing sound as a telephone, although it is in fact a doorbell.¹⁸⁰ More to the point is the significance of the set for problem-solving. It is clear that the set with which a person approaches a problem may influence the solution at which he eventually arrives. The responses produced during problem-solving are not random, and something like a set makes some responses more probable than others. A set, then, involves the correlation

¹⁷⁷ Previously referred to elsewhere as a threshold question and the observation made that: "While the threshold question may ultimately be dispositive of the case, the court is, nonetheless, anxious to get on with a determination on the merits." Sedler, *supra* note 6, at 54.

¹⁷⁸ See the discussion notes 70-75 *supra* and accompanying text.

¹⁷⁹ D. JOHNSON, *supra* note 48, at 65.

¹⁸⁰ *Id.* at 73.

between preparation and response. This correlation has been demonstrated experimentally and is equally applicable to the solution of complex problems, such as those requiring an abstract judgment.¹⁸¹

The first thing we do when we are confronted with a problem is to "look the situation over."¹⁸² The data representing the problem is organized and perhaps classified. The problem then becomes structured, and the structure of the problem becomes the effective environment within which productive thought will operate. The thinker will respond to the problem situation as *he* has organized it,¹⁸³ and this organization is likely to result in a set toward some aspects of the problem to the exclusion of others. To the extent that the thinker has established a set, he has defined the goal response, and this "search model" acts as a center, facilitating the production of responses close to the center and inhibiting deviate responses.¹⁸⁴

When a lawyer or a judge looks at a problem, I would suggest that probably his initial reaction is to classify the problem into one or more of the areas of law that comprise his classification system, *e.g.*, this client has a contract problem, this is a tort case. In so doing he has put the problem—the data—into a category, *and this category may establish a set that will influence his solution to the problem.* Under the traditional approach to the solution of conflicts problems the set-response pattern was formalized, and was the basis of this "classificatory approach."¹⁸⁵ The first step in solving the problem—the preparation—was placing the problem into a category, and the set created by the category produced a response that in theory was determinative of the result. If, for example, the judge placed the problem into the category "tort," the response (produced by the stimulus "tort") was to invoke the "rule" that the law of the place of the wrong governed. Whereas if he had placed the problem into the category "contract," the response would be to invoke the "rule" that the law of the place of contracting governed. The set "tort" produced the "tort response"—law of the place of the wrong.

With the abandonment of jurisdiction-selecting rules, the stimulus will not produce a response framed in terms of "rules," but it may produce other responses that will influence the choice of law decision. If I am right in my view that classification necessarily takes place,

181 *Id.* at 157-58.

182 *Id.* at 159-60.

183 *Id.* at 160.

184 *Id.* at 188.

185 *See* note 112 *supra*.

consciously or unconsciously, the effect of such classification upon the ultimate choice of law decision must be considered. The classification is a part of the judge's organization of the problem, and through the ordinary psychological processes of thought and judgment, is likely to establish a set. This set in turn will produce certain responses to the exclusion of others, which may influence the judge's solution to the problem.

Let me now relate this to judicial method and the policy-centered conflict of laws. Since my position is that the courts must develop a body of conflicts law based upon considerations of policy and fairness through decisions in individual cases, I must be concerned with *how* judges will arrive at those decisions. Any decision is influenced by the set with which the thinker approaches the problem he must resolve. If I am right in my view that judges and lawyers do classify problems into areas of law, I must take as my starting point the set that results from such classification and how this set may produce certain responses that will influence the choice-of-law determination.

I will explore this process from the perspective of a judge committed to a policy-centered approach for the solution of conflicts problems.¹⁸⁶ When a conflicts problem¹⁸⁷ comes before this judge for decision, he will use his classification system, consciously or unconsciously, to identify the problem as one of "tort" or "contract" or the like just as he would in a domestic case. Under the traditional approach, this would be called "characterization of the principal question," so in order to avoid confusion and also to describe it more realistically, I will call this "process identification of the problem area." The categories of tort, contract, and the like, as any categories, are concepts and have symbolic meaning to the thinker.¹⁸⁸ The symbolic meaning may be considered a set, which produces associated responses. Since the frame of reference of our judge is one of policy, these responses will relate to the *policies and purposes* embodied in that area of law we call tort or contract. In terms of policies and purposes, the words contract and tort—their connotative meanings¹⁸⁹—conjure up different things. When we think of tort, we think of affording compensa-

¹⁸⁶ The policy-centered approach may be called the judge's frame of reference. As to the proper definition of frame of reference and the distinction between frame of reference and set, see D. JOHNSON, *supra* note 48, at 109-10, 314-17.

¹⁸⁷ I use the term "problem" rather than "case" to emphasize that a conflicts question frequently arises only with respect to a particular issue or issues in a case.

¹⁸⁸ For a discussion of symbolism see S. LANGER, *PHILOSOPHY IN A NEW KEY* 284-86 (3d ed. 1957).

¹⁸⁹ For a discussion of connotative meaning see S. HAYAKAWA, *supra* note 51, at 58-60.

tion to injured persons and of inhibiting socially undesirable conduct, the policies of compensation and deterrence.¹⁹⁰ When we think of contract, we think of the policy of protecting the legitimate expectations of the parties and of insuring stability in commercial transactions. When we think of property, we think of protection of acquired interests, and so on. I would submit that the judge must be aware of how his thinking may be influenced by the set that has resulted from his identification of the problem area. To the extent that identification of the problem area is articulated and understood, the policies to be implemented by the different areas of law will be sharply focused, and those that are relevant will come to the fore. The judge who sees the problem as one of tort will be emphasizing different policies than the judge who sees it as one of contract. In any event, we must recognize the different responses that result from the sets that different identifications of the problem area will produce. To me this is sufficient reason to justify the conscious articulation of identification of the problem area by courts committed to the policy-centered approach.

But I think there is an even more important reason, which relates to the effect of the set in the choice of law context. Whether as a vestige of the traditional jurisdiction-selective approach, or as part of our territorial bias,¹⁹¹ or perhaps from a tendency to relate areas of law to particular geographical quotients, the set resulting from identification of the problem area may produce the response that the law of a particular state should apply. If the judge sees the problem as one of tort, this "tort set" may produce the response that the law of the state where the harm occurred or where the wrongful act was done should govern. If he sees the problem as one of "property," he may be influenced toward the law of the situs, especially where immovable property is involved.¹⁹² If the problem is one of "family law," that stimulus may produce the response of "law of the domicile." This "localization factor" will be stronger in some areas of law than in others, but it is always potentially present. This is all the more reason for the judge to precisely identify and articulate the problem area that he considers to be involved.

I want to take this aspect of identification a step further and relate it to the methodology that I think should be followed. I think that this stimulus-response pattern may be functionally sound in that it may

¹⁹⁰ For a discussion of the characteristics of a tort see W. PROSSER, *LAW OF TORTS* 4-7 (3d ed. 1964).

¹⁹¹ See the discussion in D. CAVERS, *supra* note 21, at 134-36.

¹⁹² It is customary to refer to the "land taboo." See, e.g., HANCOCK, *supra* note 174.

lead the judge to the state that, based upon considerations of policy and fairness, would *apparently* have an interest in having its law applied to resolve that kind of problem. In the case of a "tort" problem, for example, the state where the injury or wrongful act occurred seemingly would have an interest in having its law applied. Likewise the domicile of the concerned party in the case of a "family law" problem or the situs in a "property" problem seemingly would have such an interest. That does not mean that another state may not be interested as well, but at least we have come up with a seemingly interested state, and perhaps our choice of law inquiry should begin there.

I call this state the *state of primary reference*, the state that under a policy-centered approach would seemingly have an interest in having its law applied to the issue in question. In other words, based upon his identification of the problem area, the judge may be led to state the law and policy that he should consider first. It is at this point that the difference between characterization of the principal question under the traditional approach and identification of the problem area under the policy-centered approach presents itself most significantly. Under the traditional approach the set resulting from the classification produced an automatic response, the application of a particular choice of law rule. The law of the state chosen under the jurisdiction-selecting rule governed, and that was the end of the matter. Under the policy-centered approach, of course, there is no notion of governing law. Identification of the problem area may lead the judge to the state of primary reference, and its law is consulted first because it is the state that seemingly would have an interest in having its law applied to resolve the issue. But no choice of law rule follows from identification of the problem area and localization of the state of primary reference. Depending on the result that would occur if the law of that state were applied, the policies and interests of other states may have to be considered, and the court may end up applying the law of a state other than the state of primary reference. Identification and localization, then, serve as a guide to the solution of conflicts problems rather than as the solution itself. But, as I will try to demonstrate, this guide is very useful in helping the court to arrive at sound solutions.

To recapitulate, under the policy-centered approach, as I have defined it, a judge faced with the necessity of deciding a conflicts case¹⁹³

¹⁹³ Note that under our view a conflicts case arises only when the state, the application of whose law is urged by one of the parties, would apply its own law

should proceed as follows. He should first identify the problem area that he believes to be presented by the issue on which there are differing laws. This is accomplished by a consideration of the kinds of policies reflected by the laws in question and whether they are properly denominated as tort policies or contract policies or the like. The number of potential categories is limitless, and the particular label he puts on the problem area is not important. What is important is that the precise policies be identified and that the set with which the judge is approaching the problem be made clear. Identification of the problem area may lead the judge to a state of primary reference. He would first look to the law of that state, and depending on what that law is and the effect of its application, he may be able to resolve the choice of law question. But that inquiry may indicate that the policies and interests of other states may have to be considered as well. If so, a decision must be made concerning which interest will be preferred and which law should be applied in the fact-law pattern of the particular case.

My thesis is that proper identification of the problem area will help the court to achieve sound results in conflicts cases based upon considerations of policy and fairness. In the remainder of the writing I hope to demonstrate the utility of this methodology.

VI. IDENTIFICATION OF THE PROBLEM AREA UNDER A POLICY-CENTERED APPROACH: THE ANATOMY OF JUDICIAL DECISION

I propose to illustrate the matter of identification of the problem area and its relation to judicial decision by a consideration of three kinds of identification situations. The first is the situation in which recovery is sought for the commission of a tort, but where the precise issue on which there is a conflict may involve a problem area other than that which we call tort. The second situation revolves around disputes over consensual arrangements in which the issue to be resolved may depend upon considerations other than those associated with enforcing such arrangements. The third concerns property cases in which considerations other than those associated with that area of law called property may be involved. For want of any better nomenclature, we will call these situations "tort-something," "contract-something" and "property-something." Although there is perhaps a descending order of significance, all the situations will illustrate, perhaps in different ways, the thesis.

if the case arose there rather than look to the law of the forum. See the discussion notes 38-39 *supra* and accompanying text.

A. Tort-Something

It is sometimes said that the "revolution" in conflicts law has been limited to "tort cases,"¹⁹⁴ that is, cases in which the plaintiff is suing to recover damages for the commission of a tort. The effect of the "revolution" has been either to apply the law of a state other than that where the injury occurred, usually the law of the state where both the plaintiff and the defendant reside, or when the law of the state of injury is still applied, it is on grounds other than the mere fact that the injury occurred there. The case that "started the revolution" is generally considered to be *Grant v. McAuliffe*,¹⁹⁵ in which the California Supreme Court, in a suit between a California plaintiff and the estate of a deceased Californian arising out of an automobile accident occurring in Arizona, refused to apply the Arizona rule that tort actions did not survive the death of the tortfeasor. The California court did not abandon the traditional approach in that case, conceding that the law of the place of injury should govern questions of tort liability. It justified the application of California law on two grounds. First, it held that whether a cause of action survived the death of the tortfeasor was a matter of "procedure," to be determined by the law of the forum. Secondly, it characterized the principal question as one of "decedents' estates," so that the applicable choice of law rule looked to the decedent's domicile at the time of death, which again was California. Policy-centered commentators, while approving the decision, explain the court's action as manipulating the machine to achieve a "desirable result,"¹⁹⁶ and Justice Traynor, who wrote the opinion, seemingly admitted that this is what was done.¹⁹⁷ Certainly whether a cause of action survives would not be a matter of procedure, even under the traditional substance-procedure dichotomy, let alone under the outcome-determinative test.¹⁹⁸ But let us take a closer look at the court's "characterization of the principal question," and ask whether the court was really being so "manipulative" in treating the problem as one of "decedents' estates."

The issue on which there was a conflict of laws arose because of the fact that the tortfeasor was dead. The defense asserted was one of immunity, and the legally significant fact giving rise to the claim of immunity was that of death. This being so, the policy behind the

¹⁹⁴ Ehrenzweig, *A Counterrevolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 383-84 (1966).

¹⁹⁵ 41 Cal. 2d 859, 264 P.2d 944 (1953).

¹⁹⁶ See, e.g., B. CURRIE, *supra* note 3, at 138-40; A. EHRENZWEIG, *supra* note 39, at 332.

¹⁹⁷ Traynor, *supra* note 42, at 670 n.35.

¹⁹⁸ Sedler, *supra* note 172, at 837.

immunity provided by Arizona law must have something to do with death: the fact of death causes Arizona to depart from the policy reflected in its tort law that a person injured by the wrongful act of another is entitled to compensation. The legitimate policy represented by such a rule¹⁹⁹ would seem to be one of protecting the heirs and beneficiaries of the deceased tortfeasor from suffering a reduction in their estate because of the acts of the decedent during his lifetime.²⁰⁰ This policy has nothing to do with any policy to be implemented by that area of law we call "tort," and indeed is directly antithetical to the "tort" policies of compensation and deterrence. It has everything to do with the policies to be implemented by that area of law we call decedents' estates, most particularly the policy that upon a person's death his property pass to those designated by him, or in default of such designation, to his heirs. In other words the *problem area* presented by a no-survival rule is not one of tort at all since the policies justifying the immunity are not tort policies, but policies relating to the distribution of estates of decedents.²⁰¹

We now return to the matter of the set. The judge who views a no-survival rule as involving a tort question approaches the issue with the "tort set," and the stimulus of this set may impel him, considering our territorial bias, to look to the law of the state of injury because it is assumed that the state of injury has an interest in applying its law to the tort that has occurred there. But if he does not view the rule as presenting a tort problem, the impetus to look to the law of the state of injury is not the same. If he realizes that the policy objectives to be achieved by a no-survival rule are policies relating to the distribution of decedents' estates, he approaches the question with a different set, and a set that may cause him to look to the law of the decedent's domicile since we generally believe that the law of the decedent's domicile should determine the distribution of his personal estate.²⁰² Depending on how the judge identifies the problem area, consciously or unconsciously, a different set may be created, and that set may influence his choice of law decision.

¹⁹⁹ Under interest analysis the court must identify the legitimate policy of the state whose law is in question. This may or may not be the same as the real reason why the law is as it is. See the discussion in B. CURRIE, *supra* note 3, at 143-44.

²⁰⁰ *Id.* at 144.

²⁰¹ Whereas a rule limiting the amount of damages recoverable in the case of wrongful death, for example, would be said to represent a tort policy, it is applicable to all defendants and is an attempt to allocate losses resulting from the commission of a tort.

²⁰² See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 306 (Tent. Draft No. 5, 1959).

In terms of interest analysis, *Grant* is explained as a false conflict on the ground that Arizona had no interest in the distribution of the estate of a California decedent, who, it was assumed, left no property to be administered in Arizona.²⁰³ But the reason why Arizona had no interest relates to the policy behind its no-survival rule, a policy having nothing to do with tort, but with the distribution of decedents' estates. So, when the California court characterized the principal question as one of decedents' estates, it was on functionally sound ground. A judge committed to a policy-centered approach would identify the problem area presented by this issue as one of decedents' estates, and the state of primary reference would be the decedent's domicile, which is the *only* state interested in giving him this kind of immunity.²⁰⁴ In *Grant* that state was California, the forum, and under its law the immunity was not given. Since the only state interested in immunizing the defendant did not do so, he was not entitled to assert the defense.

Let me relate this approach somewhat further to the matter of judicial method. In identifying the problem area as one of decedents' estates, looking to the law of the decedent's domicile as the state of primary reference, and concluding that if that state does not grant immunity the defense should not be recognized, the court has enunciated a principle—the defense of immunity will not be recognized if immunity is not given under the law of the decedent's domicile—and has also established a precedent to be applied in future cases. The application of the precedent will mean that whenever the decedent is domiciled in a non-immunity state, the cause of action will survive his death. Under the precedent and its rationale the only relevant contact point becomes the domicile of the decedent, and it does not matter where the plaintiff was domiciled or where the accident occurred.²⁰⁵

The same result would obtain if suit had been brought in Arizona. The Arizona court, identifying the problem area as one of decedents' estates, would look to California as the state of primary reference and see that California did not grant immunity. Since Arizona rather than California was the forum, the Arizona court would have to consider its own policy as well in order to determine whether it had any interest in applying that policy to the particular case. The only contact that Arizona had with the transaction was the fact that the accident

²⁰³ B. CURRIE, *supra* note 3, at 144-46; D. CAVERS, *supra* note 21, at 89.

²⁰⁴ This would be true even if he left property elsewhere, assuming that succession to such property would be determined by the law of the domicile.

²⁰⁵ For a discussion of the development of a precedent with reference to the relevant contact point see Sedler, *supra* note 6, at 116-17.

occurred there. This would give rise to a "tort interest" on the part of Arizona, but the issue has nothing to do with tort policy, and by definition, Arizona would have no interest in applying its law to allow the defense of immunity.²⁰⁶ The lack of interest on the part of Arizona appears most clearly when the problem is properly identified as one of decedents' estates rather than tort, and *Grant*, in my opinion, demonstrates how the methodology proposed can assist the court in reaching a sound result.

When the above analysis is applied to other "false conflict" cases in the tort area, it will reveal that in most of these cases the issue on which a conflict of laws existed *was not a tort issue at all*. Rather the laws of the different states conflicted on the issue of a claim of *immunity*, and the policy behind the granting of immunity was not a tort policy, but a policy directly antithetical to the tort policies of compensation and deterrence. In this category I would put the cases involving the defenses of family immunity, charitable immunity and guest statutes, in other words, practically all of the leading "false conflict" cases.²⁰⁷

Let us first consider family immunity.²⁰⁸ Since the basis for the claim of immunity is the family relationship, the legally significant fact—like the death of the tortfeasor in *Grant*—is that the parties to the lawsuit are related to each other. This would suggest that the policies to be furthered by the grant of immunity have something to do with that relationship, and two quite different and inconsistent "relationship justifications" have been advanced. The traditional justification was that to allow intra-family tort suits would disrupt family harmony and embitter one family member against the other. This justification might have some validity when applied to suits for the commission of intentional torts (although it would seem that the filing of the lawsuit would be good indication that family harmony was irreparably damaged already), but, of course, this is not what the cases involve. They involve automobile accidents in which one member of the family is injured while the automobile is being operated by another. Here the justification for barring the suits is not that family harmony will be disrupted, but the family is "too harmonious" in that they will collude against the liability insurer.²⁰⁹ It is not necessary

²⁰⁶ See *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968).

²⁰⁷ An exception to this pattern, involving policies that are clearly tort, is *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957).

²⁰⁸ This refers to immunity between spouses and between one family member and another.

²⁰⁹ See the discussion in *Hastings v. Hastings*, 33 N.J. 247, 252-53, 163 A.2d 147, 150

to debate at this juncture whether insurance considerations are or are not a part of the law of torts.²¹⁰ The point is that the reason for allowing the defense relates to the fact that there is likely to be liability insurance, and the defense is allowed to prevent collusion between the family members against the insurer. This reason, like that of preventing the disruption of family harmony, is directly antithetical to the policies of compensation and deterrence expressed in the tort law of any state.

Obviously the policy to be furthered by the defense of charitable immunity is an anti-tort policy. Tort policies are sacrificed in order to promote a charitable association policy that the assets of the charity not be diverted to pay tort claims or the premiums on liability insurance. The same is true of guest statutes. While the reason ostensibly advanced for the enactment of guest statutes is that they prevent claims by ungrateful guests against their hosts—which could be called a tort policy of allocating responsibility for accidents—it is now recognized that the primary purpose of these statutes is to prevent collusion between the host and the guest against the insurer.²¹¹ As with the defense of family immunity, tort policies of compensation and deterrence yield to the policy of protecting the insurer against collusive suits.

To say that in these kinds of cases the problem area relates to family law or insurance or charitable associations and not to "tort" simply means that the policies to be implemented by the granting of the immunity in question are not tort policies, but policies relating to other areas of law. Once this is recognized the set created by the concept tort will recede, and the relevant set will be that created by the concept of family, insurance, charity, and the like. At a minimum, the judge will not be unconsciously influenced toward the application of the law of the place of injury because of the interest of that state in applying its "tort law" to an accident occurring there. More importantly, with identification of the problem area a conscious and articulated process, once the court identifies the problem area in

(1960). When the marital domicile is a community property state, and the proceeds of tort recovery belong to the community, this would furnish an additional basis for spousal immunity, although, of course, not for immunity between other family members. Thus, in *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), the California court concluded that as a matter of California substantive law, intra-family immunity would be abolished, although at that time spousal immunity was retained.

²¹⁰ See generally W. PROSSER, *supra* note 190, at 568-77.

²¹¹ Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595, 599-600 (1960).

cases such as these it will look toward the state seemingly interested in dealing with questions relating to the family, the charity and the insurance relationship. When the problem area is identified as one of family law, the state of primary reference obviously would be the family domicile. As to charitable associations, it would be the state or states where the charity carried on its activities. In the case of automobile liability insurance this would be the state where the vehicle is permanently kept, since such insurance is assigned and rates determined with reference to the residence of the insured.²¹²

Since the defenses of family immunity, charitable immunity and guest relationship are grounded in policies other than those to be advanced by that area of law we call tort and are in fact directly antithetical to those policies, the state of injury has no interest in granting that kind of immunity. This issue does not involve a tort problem, and the state of primary reference—the state having an interest in granting the immunity claimed—is elsewhere. The law of that state should be consulted first, and if immunity is not given by the law of that state, there is no reason to allow the defense.

Many of the false conflict cases present a situation in which two residents from a non-immunity state are involved in an accident in an immunity state. In some of the earlier cases such as *Haumschild v. Continental Casualty Co.*,²¹³ and *Emery v. Emery*,²¹⁴ in which forum family members were involved in an accident in a state that recognized family immunity, the court characterized the principal question as one of family law and applied its own law to allow the suit.²¹⁵ It may have seemed that the courts in those cases were promulgating a new rule based on a more realistic characterization of the principal question, and this is the rule of the Restatement Second, namely that family immunity is determined by the law of the family domicile.²¹⁶

²¹² Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 567-69 (1961). It should be noted, as Professor Morris demonstrates, that the existence of a guest statute as such, does not have actuarial significance. Rates will be affected only by the incidence of guest-host claims, and if there is a pattern of travel from a guest statute state into a non-guest statute state, loss experience will reflect this fact. *Id.* at 574-77. See also A. EHRENZWEIG, *supra* note 39, at 580-81.

²¹³ 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

²¹⁴ 45 Cal.2d 421, 289 P.2d 218 (1955).

²¹⁵ For Professor Currie's view of such classification see B. CURRIE, *supra* note 3, at 641-43.

²¹⁶ The original draft stated that the matter was determined by the law of the domicile. The proposed official draft, however, qualifies this by saying that it is determined by the law of the state of the most significant relationship, which will usually be the state of the parties' domicile.

While any "rule" as such must be rejected under a policy-centered approach, the premise of the "new rule" recognizes that the problem area is not one of tort. The later "family immunity" cases have looked to the marital domicile (which is also the forum) to allow the suit, emphasizing that the policy considerations in such a case are those relating to family relationships and liability insurance.²¹⁷ In the comparatively rare case when suit is brought in the state of injury, that court, recognizing that it has no interest in applying its immunity policy solely on the ground that the accident occurred there, is likely to look to the family domicile and allow the suit.²¹⁸ The now classic case of *Babcock v. Jackson*²¹⁹ presented the situation of parties from a non-immunity state being involved in an accident in a state recognizing guest-host immunity. In such a situation courts that are committed to a policy-centered approach look to the law of the defendant's residence, and since it does not provide immunity, refuse to allow the defense, most times emphasizing that the primary purpose of a guest statute is to protect the automobile liability insurer.²²⁰

In *Kaufman v. American Youth Hostels*²²¹ the New York court applied the place of the wrong rule to deny recovery to a New York plaintiff injured by a New York charitable association in Oregon, which at that time retained charitable immunity. Presumably today New York would apply its own law and reject the defense,²²² but the

²¹⁷ See, e.g., *Armstrong v. Armstrong*, 441 P.2d 699 (Alas. 1968); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963). It is only where the forum is committed to a traditional rules approach that the law of the state of injury will be applied to deny recovery. See *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963).

²¹⁸ See *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968).

²¹⁹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

²²⁰ See *Wessling v. Paris*, 417 S.W.2d 259 (Ky. Ct. App. 1967); *Kopp v. Rehtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966); *Clark v. Clark*, 107 N.H. 317, 222 A.2d 205 (1966); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *Woodward v. Stewart*, — R.I. —, 243 A.2d 917 (1968), *cert. dismissed*, 393 U.S. 957 (1968); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). Some courts reach the same result under the state of the most significant relationship test. See, e.g., *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969). Again, only a court committed to the traditional rules approach will apply the law of the state of injury to deny recovery. See *White v. King*, 244 Md. 348, 223 A.2d 763 (1966). See also *Fuller v. Greenup*, 267 Cal. App. 2d 10, 72 Cal. Rptr. 531 (Ct. App. 1968), in which a disinterested third state looked to the law of the parties' common residence to allow recovery.

²²¹ 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958), *aff'd and modified mem.*, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959). The memorandum opinion of the Court of Appeals allowed the immunity defense to stand without discussing the choice of law question.

²²² In *Blum v. American Youth Hostels, Inc.*, 40 Misc. 2d 1056, 244 N.Y.S.2d 351 (Sup. Ct. 1963), the court held that *Babcock* changed the rule of law upon which the

decision in that case sheds light on the importance of proper identification of the problem area. The court applied the "tort rule" automatically because the case was one in which the plaintiff was suing to recover damages for the commission of a tort. If it had focused on the precise issue—should a charitable association be liable for its torts—it might have avoided the "tort set" and considered alternatives to the application of the "tort rule."²²³

In a number of these cases the court, while refusing to apply the law of the place of injury on the immunity issue, says that the law of the state of injury should be applied on the "tort issues" of whether the defendant's conduct was negligent and the like.²²⁴ There never appears, however, to be conflict of laws on these issues. As a practical matter all states have the same general rules concerning negligence, and it is only when one state has attempted to regulate the matter by statute; *e.g.*, when one state has a comparative negligence statute, that a conflict may occur.²²⁵ This is all the more reason why the court must precisely identify the problem area. Assuming that the law of the place of injury would be applied on "tort" questions, applying the law of another state on the immunity question merely represents the use of the technique recognized in continental conflicts law that is called *dépeçage*.²²⁶ Depending on the policies and interests involved the laws of different states may be chosen to govern different issues in the litigation,²²⁷ and the situations discussed above have been explained on this basis.²²⁸ Proper identification of the problem area, then, may enable the court to apply the law of the state of injury on the "tort" issues²²⁹ without doing so on the issues that do not constitute "tort problems."

decision in *Kaufman* was based. On appeal the decision was affirmed on the ground that Oregon no longer recognized charitable immunity. 21 App. Div. 2d 683, 250 N.Y.S.2d 522 (1964).

²²³ Thus, in *Brown v. Church of Holy Name*, — R.I. —, 252 A.2d 176 (1969), in which a Rhode Island resident drowned while participating in an outing conducted in Massachusetts by a Rhode Island church the defense of charitable immunity, which was recognized by Massachusetts but not by Rhode Island, was disallowed. Professor Ehrenzweig's "enterprise liability" approach arrives at the same conclusion, namely that if a charity is not entitled to immunity under its own law, it should not be entitled to claim immunity anywhere. A EHRENZWEIG, *supra* note 39, at 583-84.

²²⁴ See, *e.g.*, *Babcock v. Jackson*, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963); *Woodward v. Stewart*, — R.I. —, —, 243 A.2d 917, 923 (1968); *Thompson v. Thompson*, 105 N.H. 86, 89, 193 A.2d 439, 441 (1963).

²²⁵ See *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968).

²²⁶ See generally *Wilde, Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329 (1968).

²²⁷ *Id.* at 345-48.

²²⁸ *Id.* at 349-54, 356-62.

²²⁹ Of course, it still may decide that the law of the state of injury should not apply on the tort question. See *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968). Where

The failure to properly identify the problem area may explain the confusion of the New York courts in the "guest statute cases" in which New York parties are involved in an accident in a guest statute state. In *Babcock*, the parties were on a week-end trip to Ontario and were to return to New York. In *Dym v. Gordon*²³⁰ two New York students, who had not known each other previously, met in Colorado and formed the guest-host relationship there. The accident occurred on a trip from one point in Colorado to another and involved a second vehicle. In *Macey v. Rozbicki*²³¹ the parties were sisters who had a summer home in Ontario. While they were staying there they decided to take a brief trip, during which the one-car accident occurred. In *Babcock* the court applied New York law on the issue of host-guest immunity and allowed the suit. In *Dym* the court, seemingly adopting the "state of the most significant relationship rule" of the Restatement Second, and interpreting that rule with reference to factual contacts, applied Colorado law to deny recovery. In *Macey*, however, the court found that New York was the state of the most significant relationship. But in all of these cases the plaintiffs and defendants were New Yorkers temporarily out of the state, the automobiles were insured in New York, and the recovery would have been met from the proceeds of the insurance.²³²

The court treated all of these cases as involving a tort question. But if the primary reason for guest statutes today is to protect the host's automobile liability insurer against collusive suits, then under my approach the problem area should be identified as one of "insurance," and the state of primary reference should be the state where the automobile was insured. In these cases that would have been New York, the forum. It is clear from a reading of *Dym* that the court was not thinking in insurance terms, but in terms of tort, thereby creating a "tort set," which may have predisposed it to look to the law of the state of injury. Since the factual contacts with that state were great, perhaps the predisposition was enough to cause the court—

two parties from the same state are involved in an automobile accident in another state, it is reasonable for their home state to conclude, on the basis of interest analysis, that its law should apply in all respects. It is not necessary to pursue that question in the context of the present writing.

²³⁰ 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

²³¹ 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

²³² In *DuBois v. Siewert*, 57 Misc. 2d 881, 293 N.Y.S.2d 802 (Sup. Ct. 1968), the parties were New York residents attending the same college in Ohio. They went to New York for the weekend in the defendant's automobile, and the accident occurred in Ohio on the return trip. The court decided that all the qualitative contacts were in New York, which had the paramount interest.

which did not want to be "provincial"²³³— to come down in favor of Colorado law. Whereas if the court, after its initial survey of the problem, had treated it differently and operated with the set "automobile liability insurance," it may have been more disposed to apply New York law. More importantly, if it had consciously considered the policies behind the granting of immunity and precisely identified the problem area as one of automobile liability insurance, under my approach, it would have looked to the state where the vehicle was permanently kept as the state of primary reference. This state was New York, the forum, which also had a strong interest in applying its law to allow recovery to its injured plaintiff. As will be demonstrated, when the state of primary reference is the forum, the forum is not likely to displace its law. It is submitted that if the court had identified the problem as one of automobile liability insurance, it would have recognized it as being indistinguishable from *Babcock*. The fact that the court approached the solution of the problem with the "tort set" may have influenced its decision if, as we contend, the tort set creates a tendency, given our territorial bias, to look to the place of injury.

Dym may be complicated by another factor. It involved a two car accident, and the majority of the court found an additional purpose of the Colorado statute to be to give preference to the non-negligent driver and his passengers over the passenger in the vehicle of the negligent driver. Ignoring the fact that the driver of the other vehicle was a resident of Kansas and that no other suits arising out of the accident appeared to have been filed, the court properly could take the position that Colorado, as the place of injury, did have an interest in having its guest statute applied to implement its tort policy of creating a preference in the allocation of the assets of the negligent driver. But even if this were so, the most that could be said is that there was a conflict of interests: New York's policy of protecting the injured passenger and holding the host fully liable conflicts with Colorado's policy of giving preference to the non-negligent driver and his passengers.²³⁴ The court resolved that conflict in favor of the policy of the state where the accident occurred, and its resolution of the conflict in this manner may also have been influenced by the "tort set" with which it approached the problem.²³⁵

In all three cases—*Babcock*, *Dym* and *Macey*—the plaintiffs and

²³³ 16 N.Y.2d at 126, 209 N.E.2d at 795-96, 262 N.Y.S.2d at 468.

²³⁴ Compare *D. CAVERS*, supra note 21, at 293-312 with *Sedler*, supra note 6, at 74-77 concerning the *Dym* case.

²³⁵ See *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968), in which the New York court applied its own tort policy in preference to the tort policy of the state of injury.

defendants in the litigation were New Yorkers, and the automobiles were insured in New York, which has compulsory insurance.²³⁶ In all cases recovery would have been from the proceeds of insurance taken out on a New York vehicle for the benefit of an injured New York plaintiff.²³⁷ It is difficult to see why the question of recovery for personal injuries suffered by a New York guest due to the negligence of a New York host should have been decided differently in any of these cases. Perhaps the answer may be that the court viewed the problem as one of tort rather than automobile liability insurance and that the tort set made it disposed to apply the law of the state of injury in the one case having "greater" factual contacts with that state.

That the problem involved is one of automobile liability insurance was recently recognized by the New York Court of Appeals in *Tooker v. Lopez*,²³⁸ in which the court effectively overruled *Dym*. There the passenger and the driver were New York domiciliaries attending college in Michigan. The vehicle was insured in New York. The accident occurred on a trip from the college to another point in Michigan, which is a guest statute state. In a four to three decision the court applied New York law on the issue of guest-host immunity.

The majority rejected the finding of the court in *Dym* that a purpose of the Colorado guest statute was to assure priority in the assets of the driver to the non-negligent third party, observing that such a conclusion "overlooks not only the statutory history but the fact that the statute permits recovery by guests who can establish that the accident was due to the gross negligence of the driver."²³⁹ Since a guest could recover in those circumstances, the assurance of priority could not be deemed to be a purpose of the statute. The court went on to state:

The only justification for discrimination between injured guests which can withstand logical as well as constitutional scrutiny . . . is that the legitimate purpose of the statute—prevention of fraudulent claims against local insurers or the protection of local automobile owners—is furthered by increasing the guest's burden of proof. This purpose can never be vindicated when the insurer is a New York carrier and the defendant is sued in the courts of this State. Under such circumstances, the jurisdiction enacting such

²³⁶ N.Y. VEH. & TRAF. LAWS §§ 310-21 (McKinney 1960).

²³⁷ Cases in which the guest would recover in excess of the policy limits should be rather rare.

²³⁸ 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

²³⁹ *Id.* at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524.

a guest statute has absolutely no interest in the application of its law.²⁴⁰

The court also noted that the New York compulsory insurance law made no distinction between guests, pedestrians or other insured parties. By treating the problem as one of automobile liability insurance the New York court makes it clear that the state of injury can have no interest in applying its immunity policy in favor of a non-resident defendant and insurer.

In summary, when the defense asserted is one of immunity, under my approach we would not identify the problem area as tort, but would identify it with reference to the policy behind the granting of immunity; *i.e.* as a problem of decedents' estates, charitable associations, family law, automobile liability insurance, and the like. The state of primary reference following such identification would be the state seemingly having an interest in implementing such a policy; *e.g.*, the state of the decedent's domicile, the state where the charity carried on its activities,²⁴¹ the state of the family domicile, the state where the automobile is insured. The law of that state would be consulted first, and if it did not grant the immunity, the defense would not be recognized since it is the only state having an interest in doing so.

We have thus far dealt only with the situation in which two parties from a non-immunity state are involved in an accident in an immunity state. Let us now consider the other fact-law patterns that could arise in the immunity problem, as evidenced by the following table.²⁴²

Case	Residence of Plaintiff	Residence of Defendant ²⁴³	Place of Injury	Forum
1.	Immunity	Immunity	Non-Immunity	Immunity
2.	Immunity	Immunity	Non-Immunity	Non-Immunity
3.	Immunity	Non-Immunity	Immunity	Non-Immunity
4.	Immunity	Non-Immunity	Immunity	Immunity
5.	Immunity	Non-Immunity	Non-Immunity	Non-Immunity
6.	Immunity	Non-Immunity	Non-Immunity	Immunity
7.	Non-Immunity	Immunity	Non-Immunity	Non-Immunity
8.	Non-Immunity	Immunity	Non-Immunity	Immunity
9.	Non-Immunity	Immunity	Immunity	Immunity
10.	Non-Immunity	Immunity	Immunity	Non-Immunity

²⁴⁰ *Id.*

²⁴¹ We will be assuming in these examples that the charity carries on its activities only in one state. Where it carries on its activities in more than one state, the law of each state where it is acting would have to be consulted.

²⁴² The table is borrowed from Professor Currie. B. CURRIE, *supra* note 3, at 84. We will not be concerned with the possibility that the suit might be brought in a "disinterested third state."

²⁴³ This also refers to the marital domicile and the place where a charity is carrying

We will assume that all courts have decided our example case as suggested, and we will relate that fact to the matter of judicial method in dealing with the cases set forth in the table. The example case would be as follows:

Non-Immunity	Non-Immunity	Immunity	Decided the same way in either forum
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In the example case the court looked to the law of the defendant's residence as the state of primary reference, because it was the only state interested in granting the immunity claimed and held that if immunity were not granted under the law of that state, the defense would not be recognized. The precedent would be applicable in all cases involving a defendant from a non-immunity state, in our table cases three, four, five and six.²⁴⁴ By the same token it is clear that the precedent alone will not provide the basis for decision in cases one, two, seven, eight, nine and ten since these cases involve a defendant from an immunity state. The approach taken in the example case, however, may furnish a starting point, and some of the grounds of decision may also be relevant here. What is certain is that a court need not develop a rule that will be applied *a priori* to the solution of all the cases, and as will be demonstrated, different courts may come up with different decisions, equally defensible, depending upon their analysis of their own interests and those of the other state and of what will be a fair result between the parties.

Cases one and two are similar to the example case in that both parties are residents of the same state and the accident occurred in another state. But in terms of interest analysis there is an important difference. When two residents from a non-immunity state are involved in an accident in an immunity state a false conflict is presented because the

on its activities. The place where the defendant resides is the place where his vehicle is insured.

²⁴⁴ In terms of interest analysis, cases No. 3 and 4 may be called the "unprovided for case." The plaintiff's home state and the state of injury would have an interest in allowing him to recover, but their law is to the contrary. The defendant's home state would have an interest in immunizing him, but its law is to the contrary. See the discussion in B. CURRIE, *supra* note 3, at 152-53. In cases No. 5 and 6 the state of injury has an interest in applying its law to allow the plaintiff injured there to recover. All states, moreover, have a general policy of allowing injured plaintiffs to recover. In our examples the state of the plaintiff's residence makes an exception to this general policy in order to implement non-tort policies that it considers to be more important. But since that policy would be limited to its own defendants, it can have no objection to its plaintiff's recovering where the defendant's home state does not immunize him. See also Sedler, *supra* note 6, at 115-17.

state of injury has no interest in applying its immunity policy in favor of a defendant whose home state does not immunize him. But when two residents from an immunity state are involved in an accident in a non-immunity state, the state of injury does have an interest in applying its own law for the benefit of the non-resident plaintiff. He may have incurred medical and hospital expenses there, and resident creditors may not receive payment unless he is able to obtain a tort recovery.²⁴⁵ Moreover, all states have an interest in providing recovery for a person injured there as part of its policy of extending protection to people who are within its borders.²⁴⁶ Thus in cases one and two the immunity policy of the state of the defendant's residence conflicts with the tort policy of the state of injury notwithstanding that the plaintiff and defendant are residents of the same state.

Identifying the problem area as one of family law, insurance law or the like causes the court, whether in the immunity or non-immunity state, to look to the immunity state as the state of primary reference. When the immunity state is the forum (case one), it is likely to apply its own law. Freed from the "tort set" it will see its own immunity policy in sharp focus. Its policy is to recognize such immunity in order to implement policies applicable to the family, insurance, charitable activities and the like, and it has a strong interest in doing so. Moreover, it would be the state primarily concerned with compensating the injured plaintiff since the social consequences of his injury will be felt there. But its law does not compensate him because other policies have been deemed, usually by the legislature, to be more important. The judgment on the proper balance of interests is equally applicable when the accident occurs in another state, and if the forum protects the defendant or the insurer or the charity in a domestic case, it will do so in the foreign one as well. Notions of the "better rule" and "principles of preference" are not persuasive to a court assessing the interests of its own state in the application of its law and policy. Thus, when two residents of an immunity state are involved in an accident in a non-immunity state, and suit is brought "at home" (case one), it may be expected that the forum will apply its own law and recognize the defense.²⁴⁷

²⁴⁵ See the discussion in B. CURRIE, *supra* note 3, at 366.

²⁴⁶ See the discussion in D. CAVERS, *supra* note 21, at 143-45.

²⁴⁷ See *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966) (spousal); *Witherspoon v. Salm*, — Ind. App. —, 237 N.E.2d 116 (1968) *rev'd on other grounds*, — Ind. —, 243 N.E.2d 876 (1969) (guest statute); *Fuerste v. Bemis*, — Iowa —, 156 N.W.2d 831 (1968) (same); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966) (spousal); *Lederle v. United Services Auto. Ass'n*, 394 S.W.2d 31 (Tex. Civ. App. 1965) (same). See also Mertz

The more important question, as a practical matter, is what the court of the non-immunity state will do if suit is brought there (case two) since that court will have jurisdiction under its non-resident motorist or non-resident tortfeasors act. The plaintiff, assuming that the court of his home state would apply its law to allow the defense, would bring suit in the state of injury hoping that it will decide to apply its own law. Identifying the problem area as one of family law, insurance law or the like will cause that court to look to the law of the defendant's residence as the state of primary reference, and when it does so it will see that under that law immunity is provided. The crucial difference between traditional characterization and identification of the problem area, however, is that no choice of law rule follows from identification of the problem area. The law of the state of primary reference is not necessarily applied. As we have pointed out, when the forum is the state of primary reference it is likely to apply its own law. But when it is not, the forum must consider its own policies and interests and ask whether, in light of those policies and interests and in fairness to the parties, its law should be displaced and the law of the state of primary reference applied.

It is on this point that courts and commentators committed to a policy-centered approach have differed.²⁴⁸ The analysis of the problem that I have proposed leads to an apparent conflict between the family, insurance, or charitable policies of the state of primary reference that result in immunity, and the tort policy of the state of injury in providing compensation to those injured within its borders. The state of injury may properly decide to apply its own law to further its tort policies, which it believes to be sufficiently involved in the particular case.²⁴⁹ Having identified the problem area raised by the precise issue as one other than tort, and therefore, being free of the "tort set,"

v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936), in which the court achieved the same result by holding that it was against its public policy to apply the law of the state of injury, which allowed suits between spouses. It is only where the forum is committed to the traditional rules approach and will not use the public policy escape hatch that it will apply the law of the state of injury to allow the suit. See *Friday v. Smoot*, — Del. —, 211 A.2d 594 (1965) (guest); *Holder v. Holder*, 384 P.2d 663 (Okla. 1962) (spousal); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964) (spousal). Compare *DeFoor v. Lematta*, 249 Ore. 116, 437 P.2d 107 (1968), in which the forum applied its tort policy limiting recovery in a suit between two of its residents arising from an accident occurring in a state that did not limit recovery.

²⁴⁸ For a discussion of differing views see Sedler, *supra* note 6, at 121-23.

²⁴⁹ As some courts have done. See *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968) (spousal and guest statute); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) (guest statute); cf. *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).

the court may evaluate those interests in a different light. This is what was done by the New Hampshire court in *Johnson v. Johnson*,²⁵⁰ which involved an accident between Massachusetts spouses in New Hampshire. Massachusetts recognizes spousal immunity; New Hampshire does not. New Hampshire had previously decided our example case and applied New Hampshire law to a suit between New Hampshire spouses involved in an accident in Massachusetts.²⁵¹ Recognizing the differences between the two situations,²⁵² and conceding a conflict of interests between Massachusetts and New Hampshire, the court, nonetheless, applied Massachusetts law on this issue. Its conclusion was that the purposes of the relevant and applicable New Hampshire laws would not be so seriously impaired by denying the Massachusetts plaintiff the right to sue her husband in New Hampshire.²⁵³ It also pointed out that the vehicle was insured in Massachusetts and that the application of New Hampshire law would expose the insurer to a greater risk than it would have anticipated under Massachusetts law.²⁵⁴

What the court did was to recognize that it was dealing with an insurance problem, and it made the insurance considerations dispositive of the result. The response created by the "insurance set" is to look to the state where the vehicle is insured, particularly when the plaintiff is also a resident of that state. Realistically, the forum's interest in allowing recovery by the injured out-of-state plaintiff is minimal. In this day and age he will get back home and will not become a public charge in the forum.²⁵⁵ It is also not functionally sound to base a choice of law decision on the need to protect the recovery of domestic medical creditors.²⁵⁶ It is true, of course, that the fact that the plaintiff was injured there is constitutionally sufficient to justify the forum's application of its own law.²⁵⁷ But that is not the end of the matter. In a federal system it is vitally necessary that each state recognize the interests of other states and try to accommodate those

²⁵⁰ 107 N.H. 30, 216 A.2d 781 (1966).

²⁵¹ *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963).

²⁵² See the discussion notes 242-43 *supra* and accompanying text.

²⁵³ 107 N.H. at 32, 216 A.2d at 783.

²⁵⁴ As a practical matter this is questionable. See the discussion in *Morris*, *supra* note 212, at 574-77. The point is that Massachusetts is interested in applying its immunity policy to a Massachusetts insurance relationship.

²⁵⁵ Compare the situation existing at an earlier period with respect to injured workmen who were temporarily present in the forum, as reflected in *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

²⁵⁶ See the discussion in *Sedler*, *supra* note 6, at 124-25.

²⁵⁷ *Carroll v. Lanza*, 349 U.S. 408 (1955).

interests, at least when its own are not significantly impaired thereby.²⁵⁸ While choice of law symmetry is not being advocated, it does seem that when a court applies its own law to two of its residents involved in an automobile accident in another state recognition and accommodation of state interests should require that it apply the law of the other state when two residents of that state are involved in an automobile accident in the forum. In *Johnson* the New Hampshire court was unwilling to deny Massachusetts the same control over Massachusetts residents involved in a New Hampshire accident that it claimed over New Hampshire residents involved in a Massachusetts accident, and so it displaced its own law on the issue of spousal immunity.²⁵⁹

In such a case I believe that proper identification of the problem area becomes very significant. By recognizing that the basis of the claimed immunity relates to considerations of automobile liability insurance the court focuses its attention on the precise policies and interests involved.²⁶⁰ It may then see its own interest in implementing its tort policy in a very different light. At least it is articulating the policies it sees to be involved and the premises on which it is proceeding. It will not be unconsciously influenced by a "tort set" toward the application of the law of the place of injury. Of course, it may conclude, after a careful analysis of policies and interests, that its own interest is sufficiently involved so that its law should not be displaced, and such a conclusion is defensible. The point is that it must recognize what it is doing and why it is doing so. It must properly evaluate the immunity policies of the state of the parties' common residence against its own tort policies. Having done so, if it decides to prefer its own interest, it cannot be faulted.

By the same token, proper identification of the problem area may demonstrate that even though the case involves a suit between family members for personal injuries arising out of an automobile accident, the precise issue on which there is a conflict of laws may *not* involve the kind of problem that would make the state of the family domicile

²⁵⁸ For a discussion of "The Task of Accommodating Conflicting State Laws" see D. CAVERS, *supra* note 21, at 120-24. This idea is also reflected in Professor Currie's "more moderate and restrained interpretation" approach. See the discussion in B. CURRIE, *supra* note 3, at 186.

²⁵⁹ See also *Conklin v. Horner*, 38 Wis. 2d 468, 486, 157 N.W.2d 579, 588 (1968) (dissenting opinion by Hallow, C.J.); *cf.* the discussion in D. CAVERS, *supra* note 21, at 177-80.

²⁶⁰ Professor Ehrenzweig's position is that the "true rule" in all cases involving tort liability is based upon considerations of insurability. See generally A. EHRENZWEIG, *supra* note 39, at 568-93.

the state of primary reference. Suppose that spouses from an immunity state are involved in a two-car accident in a non-immunity state. The driver of the other vehicle is a resident of the non-immunity state. He is sued by the injured wife, and he seeks to join the admittedly-negligent husband as a third party defendant in order to obtain contribution from him. Joinder is permitted under the law of the state of injury, but would not be permitted under the law of the spouses' home state, since one spouse is substantively excused from liability to the other. Here the issue involves considerations relating to how losses should be distributed among parties responsible for an accident and the policies to be implemented by that area of law we call "tort." There is a conflict between the interest of the state of the spouses' residence in immunizing its resident and insurer and the interest of the state of injury in allowing contribution to its resident and its insurer, but it is a conflict due to conflicting tort policies relating to allocation of accident losses. Identifying the problem area in this way may cause the court to look to the state of injury as the state of primary reference, and when that state is the forum, it may be expected that it will apply its own law and allow joinder.²⁶¹ But if that court carelessly identifies the problem area as one of family law or the like, it may automatically apply the law of the state of domicile without considering its own interest in implementing its tort policies, and this has, in fact, happened.²⁶² Precise identification of the problem area prevents either the automatic application of the law of the state of injury or the state of the parties' common residence, and will cause the court to focus on the policies and interests involved in each issue on which there is a conflict of laws.

Cases seven and eight present the clearest examples of a true conflict of interests. The state of injury has a strong interest in applying its tort policy of allowing recovery in favor of its resident who was injured there. But the state of the defendant's residence has the same interests in applying its immunity policy irrespective of where the

²⁶¹ See *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); cf. *LaChance v. Service Trucking Co.*, 215 F. Supp. 162 (D. Md. 1963). In *Urhammer v. Olson*, 39 Wis. 2d 447, 159 N.W.2d 688 (1968), a Minnesota wife brought suit against a Wisconsin defendant and his insurer to recover damages arising out of an accident in Wisconsin. The Wisconsin defendant impleaded the plaintiff's husband and the husband's insurer. (Wisconsin permits a direct action against the insurer.) The insurance policy contained a family exclusion clause, which was valid under the law of Minnesota, a family immunity state, but not under Wisconsin law. The court treated this as an insurance question rather than one of "tort," and applying Minnesota law, sustained the defense.

²⁶² *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

accident occurred and where the injured plaintiff resided. The interests conflict, and the conflict cannot be avoided by a "more moderate and restrained interpretation of the policies or interests of one of the states."²⁶³ When suit is brought in the state of injury (case seven) the forum, although identifying the problem area as one of insurance, family law, etc., and first looking to the state of the defendant's residence, would see that the immunity policy of that state conflicted with its tort policy of allowing recovery. Since its own resident was injured within its borders it cannot help but decide to prefer its tort policy, and it is certainly not unfair to subject the defendant and his insurer to the forum's law when he caused the injury there.²⁶⁴ The same reasoning would dictate that if suit were brought in the immunity state (case eight), that state would apply its own law, but this case will not arise since the plaintiff will bring suit in his home state, obtaining jurisdiction under the non-resident motorist or non-resident tortfeasors act.

In the above situation the tort policy of the state of injury conflicted with the immunity policy of the defendant's home state, and the interest of the state of injury in implementing that policy was such that it clearly would be expected to prefer that interest. The tort policy of the state of injury would also be significant when it conflicted with the immunity policy of the defendant's home state in a suit involving an intentional tort. Suppose we are in New Hampshire, which, as we saw, applied the law of the marital domicile in a suit between two Massachusetts spouses involved in an automobile accident in New Hampshire. The same spouses come back to New Hampshire, except that this time the husband beats the wife unmercifully, throws her unconscious form into the automobile and returns at break-neck speed to Massachusetts. The wife then brings suit in New Hampshire to recover for her injuries, obtaining jurisdiction under the non-resident tortfeasors act. The husband asserts the defense of spousal immunity. The New Hampshire court would recognize that here the problem area is truly one of family law and that the policy behind the Massachusetts rule of spousal immunity would be to maintain family harmony (whether this is a sound or realistic policy is for Massachusetts to decide). Although the New Hampshire court, following its identification of the problem area, would first look to Massachusetts law, it is, of course, not bound to apply it.²⁶⁵ Looking to its own policy and in-

²⁶³ See the discussion in Sedler, *supra* note 6, at 118.

²⁶⁴ *Id.* at 119-20.

²⁶⁵ *Cf.* RESTATEMENT (SECOND) § 169.

terest it would see that what is involved is an admonitory tort—it is obviously trying to deter such conduct by allowing civil recovery, including punitive damages²⁶⁶—and the strong interests of the place of acting in applying its law to govern admonitory torts cannot be doubted.²⁶⁷ It would be expected that New Hampshire would apply its own law here, and the result is in no way inconsistent with New Hampshire's decision to apply Massachusetts law in the automobile accident case. In that case New Hampshire did not see its tort policy as being significant; here, since an admonitory tort is involved, it is, and New Hampshire would prefer its own policy.

Cases nine and ten, in terms of interest analysis, also involve a true conflict. The immunity state is interested in immunizing its defendant who acted there; the non-immunity state is interested in compensating its plaintiff notwithstanding that the injury occurred elsewhere. If each state followed the rationale of cases seven and eight, it should apply its own law. Of course, case ten could only arise if defendant were personally served in the non-immunity state. Let us assume that he is. Since the injury occurred in the immunity state and defendant is a resident of that state, despite the interest of the non-immunity state in applying its own law, there is a question of whether it could *constitutionally* do so. This much of the territorial principle seemingly remains, that a state may not apply its law solely on the ground that the plaintiff is a resident of that state. If defendant did nothing in forum, the causing of an injury to the forum's resident in another state would not be a sufficient constitutional contact to justify the forum's applying its own law.²⁶⁸

Suppose, however, that defendant had by pre-arrangement come into the forum to take plaintiff to his home state and was to take him back to the forum. Although the accident occurred elsewhere, it would now seem that the forum has sufficient factual contacts to enable it to apply its own law, and in view of its interest, it is likely to do so.²⁶⁹ This example indicates that it is not always possible to neatly

²⁶⁶ "Since battery usually is a matter of the worst kind of intentions, it is a tort which frequently justifies punitive damages." W. PROSSER, *supra* note 190, at 94.

²⁶⁷ See generally Ehrenzweig, *The Place of Acting in Intentional Multistate Torts*, 36 MINN. L. REV. 1 (1951).

²⁶⁸ See the discussion in Sedler, *supra* note 6, at 127-28.

²⁶⁹ See *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968), where this result was reached. In *Abendschein v. Farrell*, 11 Mich. App. 662, 162 N.W.2d 165 (1968), the plaintiffs were New York residents and the defendant was a resident of Michigan. The trip originated in New York, and the accident occurred in Ontario, while the parties were en route to Michigan. Ontario and Michigan had guest statutes; New York did not.

categorize fact-law patterns, and for this reason it is important to remember that the court is only making a decision concerning what law should be applied in the fact-law pattern of the particular case.

If we may summarize this important aspect of "tort-something" identification of the problem area, the immunity that a defendant in a tort suit asserts will usually involve non-tort or anti-tort policies and considerations—the preservation of family harmony, the prevention of collusive suits against an insurer, the protection of the assets of a charitable association or a decedent's estate. Once the court identifies the problem area in this way it will look first to the state seemingly having an interest in providing such immunity, which we call the state of primary reference. If that state does not give the immunity claimed, there is no reason for any other state to do so, and the defense of immunity should be rejected. This principle covers the example case and cases three, four, five and six. When the defendant who has committed the tort in a non-immunity state is a resident of an immunity state, his home state, the state of primary reference on the issue of immunity, may be expected to apply its own law if suit is brought there (cases one, eight and nine).²⁷⁰ However, if this is to be expected, the plaintiff is likely to bring suit in the non-immunity state, where jurisdiction will exist (in case 2 and 7) under the non-resident motorist or non-resident tortfeasors act. When the plaintiff is a resident of the non-immunity state (case seven) it will certainly reject the defense, concluding that the compensatory policy reflected in its tort law should

If suit had been brought in New York, the New York court would be expected to apply its own law. Suit, however, was brought in Michigan (so that this becomes case No. 9). The majority took the position that New York law should govern as the state of the most significant relationship, but felt compelled to apply the law of the state of injury. The dissenting judge took the position that the court was free to depart from the state of injury rule. His view on whether New York or Michigan law should apply was that this depended on whether the legislature intended that the statute was to be applicable extraterritorially. If so, he believed that Michigan should apply its own law. The issue was rendered moot when the supreme court continued its adherence to the place of the wrong rule. *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969).

²⁷⁰ In a situation such as this a court is likely to follow Professor Currie's view that it cannot and should not balance competing state interests. See B. CURRIE, *supra* note 3, at 181-82. Nor is the court of the immunity state likely to be persuaded that it should displace its law because the law of the other state represents the better rule. See the discussion in *Fuerste v. Bemis*, — Iowa —, —, 156 N.W.2d 831, 834-35 (1968). When courts have talked in terms of the better rule, as in *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968), coincidentally the better rule has been its own. See also *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968), in which a federal court in Wisconsin assumed that the Wisconsin courts would not refuse to apply that state's limitation on damages recoverable for wrongful death in favor of a Wisconsin defendant against an Ohio plaintiff on the ground that Ohio's no limitation rule was the better rule.

prevail over the immunity policy of the other state. When the plaintiff is a resident of the immunity state (case two) the non-immunity forum will have to decide whether its compensatory policy is sufficiently involved that it should refuse to recognize the immunity policy of the state of the parties' common residence. From the standpoint of judicial method and the policy-centered conflict of laws, it does not matter how the court resolves that question. So long as it focuses on the precise policies and interests involved, it has made a valid decision.

A court approaching conflicts questions in this way can also distinguish between the automobile accident case and the case involving an admonitory tort, and between a "tort problem" such as contribution from a spousal defendant and the problem of immunity between the spouses *inter se*. Each case can be decided with reference to the fact-law pattern presented and in light of considerations of policy and fairness to the parties. By focusing on the precise problem area involved the court will avoid the "tort set" and will not be unconsciously influenced toward automatically applying the law of the state of injury to a non-tort problem.

We may now consider some other aspects of "tort-something" identification, and in these situations the identification of the problem area may well be determinative of the result on the choice of law issue. Suppose that Ontario spouses are involved in a two-car automobile accident in California, and the injured wife brings suit in California against the driver of the other vehicle. It is admitted that the husband was negligent in the operation of his vehicle. Under California law the negligence of the husband is imputed to the wife in a suit against the third party; that is not so under Ontario law. On the surface the issue of imputed negligence would seem to pose a tort question: is the passenger barred from recovery against a third party because of the driver's negligence? When the policy behind the California rule is considered, however, it is clear that this policy is not one of tort but a policy relating to the fact that California is a community property state. Under California law as it existed at the time of *Bruton v. Villoria*,²⁷¹ in which this problem was presented, the proceeds of a recovery for personal injuries suffered by the wife would belong to the community. This being so, as the court observed: "The sole reason for the rule which imputes the negligence to the wife in cases such as the one at bar is that the husband, having a community interest in the recovery, should not be permitted to benefit from his own wrong."²⁷² The court also pointed out

²⁷¹ 138 Cal. App. 2d 642, 292 P.2d 638 (Dist. Ct. App. 1956).

²⁷² *Id.* at 644, 292 P.2d at 640.

that the rule was not applicable when the proceeds would not be community property, such as when the parties were not married at the time of the accident or the husband had subsequently died. Having identified the problem area as one of community property, it looked to the marital domicile, Ontario (which under the approach we are suggesting would be the state of primary reference), and saw that under Ontario law the husband's negligence was not imputed. There was obviously no countervailing policy of California requiring imputation—since the reason for the California rule had nothing to do with its tort policy²⁷³—and the defense was rejected. A realistic identification of the problem area was determinative of the result, and the court did not automatically apply the law of the state of injury to a “seemingly tort question” that did not involve tort policies at all.

The converse of this situation was presented in *Choate v. Ransom*,²⁷⁴ in which Idaho spouses were involved in a two-car accident in Nevada. Idaho was a community property state, and under Idaho law the proceeds of the wife's recovery would belong to the community. Nevada was also a community property state, but under Nevada law the proceeds would not be community property, and so spousal negligence was not imputed. Identifying the problem area as one of community property the Nevada court looked to Idaho law to determine the issue, observing that, “Whether contributory negligence is or is not imputable must, then, depend in each case upon the nature of the recovery as community or separate property.”²⁷⁵ The court did not consider whether it had any interest in applying its tort policy of compensating accident victims there, in all probability because of the rather clear “community property set” with which it approached the question. Since Idaho spouses were involved, and Idaho did not want the husband to “profit by his own wrong,” Nevada would respect Idaho's policy on what it considered to be a community property problem.²⁷⁶

²⁷³ Whereas a rule to the effect that the contributory negligence of the driver would be imputed to the passenger in all cases would reflect a tort policy, e.g., the passenger has a responsibility for his own safety, which is implemented by imputing the driver's contributory negligence to him.

²⁷⁴ 74 Nev. 100, 323 P.2d 700 (1958).

²⁷⁵ *Id.* at 104, 323 P.2d at 702.

²⁷⁶ Commentators tend to disagree with the result in *Choate*. Professor Ehrenzweig contends that the basic law of the forum should not be displaced “in favor of the obsolescent imputation rule prevailing elsewhere.” A. EHRENZWEIG, *supra* note 39, at 652-53. Professor Hancock argues that the state of injury should apply its own law, refusing to impute contributory negligence, and at the same time apply its law holding that the proceeds are the wife's separate property. Hancock, *Three Approaches to the Choice-of-Law Problem: The Classificatory, The Functional and the Result-Selecting*, in XXTH CENTURY 365, 374-78. But this is not what the marital domicile wants. It wants

The "tort-something" identification has also been result-determinative in suits by an employee, who is covered by workmen's compensation, against a third party tortfeasor. Although the employee's common law action against his immediate employer is generally abolished, a number of states still allow the common law action against a third party tortfeasor. The conflicts problem arises when the employment relationship and the accident are connected with different states, the laws of which differ on the question of a common law action against a third party tortfeasor. In *Wilson v. Faull*²⁷⁷ the plaintiff, whose immediate employer was the sub-contractor, brought suit against the general contractor for injuries caused by the negligent erection of a scaffold. Plaintiff was a resident of New Jersey, and his employer carried workmen's compensation insurance for his benefit under the New Jersey act. Defendant was repairing a building in Pennsylvania and had sub-contracted with the plaintiff's employer for part of the repairs. Plaintiff, who had been hired by his employer in New Jersey, was sent to do the sub-contracting job in Pennsylvania, where the accident occurred. Defendant carried workmen's compensation insurance covering the plaintiff under the Pennsylvania act. After the accident plaintiff obtained workmen's compensation from his employer in New Jersey, and then instituted the common law action in New Jersey, where defendant resided. The laws of Pennsylvania and New Jersey differed on the liability of the general contractor to employees of the sub-contractor. Under Pennsylvania law the general contractor had to take out workmen's compensation for employees of the sub-contractor but was immune from a common law action. Under New Jersey law the general contractor did not incur workmen's compensation liability to employees of a sub-contractor when, as here, the sub-contractor had taken out workmen's compensation insurance for them, but the general contractor was liable in a common law action.

The New Jersey court refused to allow the suit. It specifically stated that it would not base its decision on characterization, that is, it would not make the choice of law on the basis of tort, contract, or employment relation conflict of laws principles.²⁷⁸ Certainly it did

the recovery to be treated as community property (for what it considers valid family purposes), and for this reason wants negligence to be imputed. If the state of injury sees no real interest in implementing its tort policy (if it does, it will apply its own law), it should respect the community property policy of the parties' home state. See also *Reeves v. Schulmeier*, 303 F.2d 802 (5th Cir. 1962), where spouses from a noncommunity jurisdiction were involved in an accident in a community state. It was held that the rule of the state of injury requiring spousal joinder was inapplicable, since the reason for the rule was that the proceeds of the recovery belonged to the community.

²⁷⁷ 27 N.J. 105, 141 A.2d 768 (1958).

²⁷⁸ *Id.* at 115-16, 141 A.2d at 774.

not engage in analytical characterization to determine whether the principal question was one of tort, workmen's compensation or the like and then apply a particular choice of law "rule." But, it is submitted, the court *did* identify the problem area as one of workmen's compensation and based its decision on what may be called workmen's compensation policies. In so doing, it looked to the law of the state where the defendant carried workmen's compensation insurance for the plaintiff's benefit, which was Pennsylvania. Throughout the opinion it talked in terms of workmen's compensation policies, such as the need to provide a prompt and practical compensation remedy for an injured employee. The court concluded that "the person who provides that compensation in an interested state has a definite liability which is predictable with some degree of accuracy and is granted an immunity from an employee's suit for damages which does not disappear whenever his enterprise chances to cross state lines and the suit is brought in another state."²⁷⁹

While the court did not characterize, it did identify. It identified the problem area as one of workmen's compensation—emphasizing the policies applicable to that area of law—and looked to the state where the defendant had taken out workmen's compensation insurance for the plaintiff's benefit as the state of primary reference. It saw that that state immunized the employer from a common law action and did not find countervailing New Jersey policies sufficiently strong to justify the refusal to apply that law. Although New Jersey would allow greater recovery against a general contractor under the circumstances than did Pennsylvania, the fact remains that the plaintiff did recover workmen's compensation and presumably his subsistence needs would be met. More importantly, the court was also concerned with fairness to the defendant, and since he had taken out workmen's compensation insurance for the plaintiff's benefit in Pennsylvania, he was entitled to rely on Pennsylvania law to give him immunity from a common law action. In the view of the New Jersey court, the application of Pennsylvania law

reflects the basic philosophy underlying the adoption of workmen's compensation acts by the several states as the exclusive remedy for industrial accidents, and the reasoning applies with equal force when an injured employee of a subcontractor brings a common law negligence action in the state of contract or employment relation against a general contractor, who under the compensation law of the state of injury is substituted for the immediate employer for compensation purposes.²⁸⁰

²⁷⁹ *Id.* at 124, 141 A.2d at 779.

²⁸⁰ *Id.* at 119-21, 141 A.2d at 774-78. See *Howe v. Diversified Builders, Inc.*, 262 Cal.

In *Elston v. Industrial Life Co.*,²⁸¹ Pennsylvania "returned the compliment." A Pennsylvania resident working in New Jersey was injured there while operating a fork-lift truck purchased from a Pennsylvania corporation. He obtained workmen's compensation benefits from his employer under the New Jersey act, and then brought suit against the manufacturer, which was permitted under New Jersey law. Suit was brought in Pennsylvania,²⁸² and the manufacturer sought to join the employer as a third party defendant. This was not permitted by New Jersey law, but Pennsylvania allowed joinder of an employer who had paid workmen's compensation, limiting his liability for contribution to the extent of his liability for workmen's compensation. Thus, Pennsylvania's tort policy of allocating losses between joint tortfeasors was to allow limited contribution against the employer, and it had an interest in applying that policy in favor of a Pennsylvania manufacturer sought to be held liable for a defective product manufactured and sold there.

It also treated the problem area as one of workmen's compensation and looked to the law of the state where the employer carried compensation for the employee's benefit, here New Jersey. In deferring to that state's interest the court stated:

In the instant case, however, Industrial seeks to have the Pennsylvania rule, one reflecting an accommodation developed to meet the needs of our workmen's compensation programs, interjected into litigation arising out of a New Jersey work-injury. Were Industrial to prevail, the Pennsylvania policy of permitting contribution would be imposed upon the New Jersey program of workmen's compensation. Pennsylvania, thus, would interject a limitation on the manner by which New Jersey could determine to meet the social costs of its industrial accidents. Such an approach, in our view, would be unsound. The extent to which the New Jersey program of workmen's compensation should assimilate the equities underlying contribution is a determination more appropriately to be made by that state.²⁸³

App. 2d 741, 69 Cal. Rptr. 56 (Ct. App. 1968); cf. *Davis v. Morrison-Knudsen Co.*, 289 F. Supp. 835 (D. Ore. 1968), where the employer elected not to come under the Oregon statute. Under Oregon law this meant that a common law action could be maintained. The employee worked in both Oregon and Idaho, and the injury occurred in Idaho. The employer was covered under the Idaho act, and the employee received benefits there. In this situation the court held that Oregon law was applicable and allowed the suit.

²⁸¹ 420 Pa. 97, 216 A.2d 318 (1966).

²⁸² Since the employee was not covered under the Pennsylvania act, his suit against the manufacturer in Pennsylvania would be treated as an ordinary tort action. If New Jersey law had prohibited such a suit, a different question would have been presented.

²⁸³ 420 Pa. at 108, 216 A.2d at 324.

Although in the above cases the injury also occurred in the state whose law was applied, the basis of the reference to that state was the fact that it was there that the defendant had taken out workmen's compensation insurance for the benefit of the injured workman. When the problem area is identified in this manner, the law of that state would apply, even though the injury may have occurred in another state.²⁸⁴ In these cases the courts have uniformly identified the problem area as one of workmen's compensation and have looked to the law of the state where the defendant has taken out workmen's compensation insurance covering the particular plaintiff.²⁸⁵ It is precisely because they have identified the problem area in this way that they have strived to implement the policies reflected in the workmen's compensation law of that state and have not found countervailing considerations justifying the application of the law of another state, including their own.

A final aspect of "tort-something" identification is the matter of tort or contract. Under the traditional approach this area provided extensive opportunity for what has been called "disingenuous characterization";²⁸⁶ that is, the court, in order to avoid the application of the place of the wrong rule, would characterize the principal question as one of contract so as to apply the law of the forum under the guise of the "place of contracting" rule. The classic example is *Levy v. Daniels U-Drive Auto Renting Co.*,²⁸⁷ in which a Connecticut auto-rental agency rented an automobile to a Connecticut driver, who was involved in an accident in Massachusetts in which his Connecticut passenger was injured.²⁸⁸ Under Connecticut law the lessor of an automobile was vicariously liable for the harm caused by the lessee; this was not so under Massachusetts law. Since the tort occurred in Massachusetts and since the Connecticut court did not question—and still does not²⁸⁹—the rule that "matters of tort are governed by the law of the place of the wrong," it needed another way to bring about the applica-

²⁸⁴ See *Tab Constr. Co. v. Eighth Judicial Dist. Court*, 83 Nev. 364, 432 P.2d 90 (1967); *Hudnall v. S. & W. Constr. Co.*, 451 S.W.2d 858 (Tenn. Ct. App. 1969).

²⁸⁵ In *Davis v. Morrison-Knudsen Co.*, 289 F. Supp. 835 (D. Ore. 1968), the defendant had the option of taking out workmen's compensation for the plaintiff under the Oregon law or being subject to a common law tort action. He did not have this option under Idaho law. Since the bulk of the plaintiff's work was done in Oregon, there was no unfairness in subjecting him to what was, in effect, the Oregon workmen's compensation rule.

²⁸⁶ B. CURRIE, *supra* note 3, at 181.

²⁸⁷ 108 Conn. 333, 143 A. 163 (1928). See B. CURRIE, *supra* note 3, at 181; D. CAVERS, *supra* note 21, at 173 n. 50; A. EHRENZWEIG, *supra* note 39, at 313.

²⁸⁸ It is interesting to note that the residence of the plaintiff is nowhere discussed in the opinion. It appears, however, that it was Connecticut.

²⁸⁹ See *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966).

tion of Connecticut law, which it apparently wanted to do. By characterizing the principal question as one of "contract," it could apply Connecticut law as the law of the place where the contract was made. This it did, holding that as a matter of law, the injured party was the third party beneficiary of the contract between the lessor and the lessee.

The result obviously is a very sound one. The case presents a false conflict since Massachusetts had no interest in applying its law to deny recovery to a Connecticut victim against a Connecticut auto-rental agency, which was cognizant of Connecticut law, and which, if it had insured against liability, would have insured with reference to the Connecticut requirement.²⁹⁰ If the court had been committed to a policy-centered approach, it would have found no difficulty in holding that the statute, reflecting tort policies of compensation and deterrence,²⁹¹ was applicable to the accident occurring in Massachusetts.²⁹² Clearly the problem area presented by such a case has nothing to do with contractual policies. It relates to vicarious liability for the commission of a tort, and if anything, would inhibit contractual relationships.

The "tort-contract" question has also been involved in suits against carriers for personal injuries arising under a "contract of carriage." Under the traditional approach the contract characterization, of course, would result in the application of the law of the place where the contract was entered into rather than the law of the place where the injury occurred. In the early case of *Dyke v. Erie R.R.*,²⁹³ the New York court used this device to avoid the application of the law of the state of injury, which limited the amount recoverable against the carrier. In more recent times the New York courts and others, however, have been unwilling to treat such a suit as presenting a "contract" problem.²⁹⁴ But they

²⁹⁰ For a discussion of the case from this aspect see A. EHRENZWEIG, *supra* note 39, at 575-77.

²⁹¹ Probably at this time the court was more concerned with the admonitory feature of the statute than with shifting the loss to a responsible enterprise. The Connecticut rental agency that was careless in renting automobiles might rent one to a driver who could cause an accident in Connecticut.

²⁹² See *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957) (dram shop act). In *Graham v. Wilkins*, 145 Conn. 34, 138 A.2d 705 (1958), the court applied Connecticut law on a contract theory, although the lease agreement was entered into in Pennsylvania. The court found that the contract was intended to have its beneficial effect in Connecticut. Apparently the plaintiff was a Connecticut resident; the defendant was a Connecticut resident, although it was claimed he was still domiciled in Rhode Island. The factual contacts of the transaction with Connecticut justified the application of Connecticut's tort policy.

²⁹³ 45 N.Y. 113 (1871).

²⁹⁴ See *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S. 2d 133 (1961); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

have achieved the same result as was achieved in *Dyke* by declining to apply the limitation of the state of injury in a suit by a resident passenger against a carrier when the trip originated in the forum.²⁹⁵ Again the court is dealing with a tort problem involving tort policies, notwithstanding that the parties have entered into a contractual relationship out of which the injuries in question occurred. Tort-contract identification does not seem to present any significant questions today and will not be relevant in the application of the policy-centered approach.²⁹⁶

In this part of the writing a number of situations presented in suits arising out of the commission of a tort when the conflicts issue, functionally analyzed, involved policies other than those sought to be implemented by that area of law we call tort have been analyzed. Recognition of this factor may promote the avoidance of the "tort set" (and the tendency, conscious or unconscious, toward the application of the law of the place where the injury occurred) and result in a more realistic appraisal of the precise policies and interests involved. The matter of proper identification of the problem area in these cases seems crucial to an understanding of why in many of them the law of the place of injury should not be applied. The reason that the law of the place of injury should not be applied is that with respect to the particular issue on which a conflict exists no tort policies (that the state of injury would admittedly be interested in implementing) are involved, or the non-tort policies of another state are such that they demonstrate clearly

²⁹⁵ In *Kilberg* the court held it was against New York's public policy to apply the limitation. Since the New York wrongful death statute was not applicable extraterritorially, what the court did in effect, was to look to Massachusetts law to determine liability and to New York law to determine damages. See the discussion in Sedler, *supra* note 6, at 130-32; Wilde, *supra* note 226, at 349. Subsequently, the New York court has held that its wrongful death statute is applicable extraterritorially. *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967). In *Griffith* the court applied Pennsylvania law as the state of the most significant relationship.

²⁹⁶ The contract approach is still utilized in cases involving provisions in a transportation ticket limiting the time in which suit can be brought. Usually the ticket contains an express choice of law provision, which the court will uphold when the plaintiff could be found to have had actual notice of it. *Compare Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955) with *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957). In the absence of an express choice of law provision, the courts look to the state of the most significant relationship to determine the validity of the limitation provision. See *Piscane v. Italia Societa Per Azioni Di Navigazione*, 219 F.Supp. 424 (S.D.N.Y. 1963). In this country the matter is controlled by federal law, which voids limitation periods of less than one year. See *Schwartz v. S.S. Nassau*, 345 F.2d 465 (2d Cir. 1965). As a matter of federal substantive law the limitation is ineffective unless the ticket impressed the importance of the terms and conditions upon the passenger. See *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968). As a practical matter, the question is whether the parties can impose conditions on the enforcement of a tort claim by agreement, and the courts have not lost sight of the tort policies involved.

that the interest of that state is paramount and the interest of the state of injury minimal. From the standpoint of identification of the problem area, as that process has been developed, it is evident that many of the leading tort conflicts cases are really not tort cases at all.

B. Contract-something

Here the situation in which a party seeks to avoid liability on a contract into which he has admittedly entered will first be considered. The grounds of avoidance, however, involve policies unrelated to the purposes of that body of law we call contract and in fact, are directly antithetical to those purposes, namely, the protection of a class of persons who, in the opinion of the legislature of their home states, need to be protected from entering into certain or all contractual obligations. If a court approaches the question with a "contract set," it thinks in terms of those policies associated with contracts—insuring security of transactions, giving effect to the legitimate expectations of the parties, promoting the flow of commerce—and it will be looking to the state the law of which should be applied to regulate the "contract" aspect of the case. Irrespective of whether it follows the place of contracting rule of the original Restatement²⁹⁷ or the localizing approach of the Restatement Second²⁹⁸ or a rule of validation,²⁹⁹ its concern will be with contract policies rather than with the protective policies reflected in the law of the state that allows one party to avoid the contract in question. If the law of the state affording protection is ever applied, it will be only because it comes out to be the state chosen by the contract rule.

Once it is recognized, however, that the reason for the immunity that is claimed has nothing to do with contract policies, but is based on policies of an entirely different and anti-contractual nature—the precise label or area of law we assign to these policies is not important—the court is free from the "contract set." Identifying the problem area as one of immunity causes the court to look to the state seemingly interested in granting such immunity, and this will be the state of the party's residence, where the adverse effects of enforcing the contract against him will be felt. The same situation as in the tort-immunity cases is presented, and the same conclusions are applicable. If that state does not grant the immunity claimed, there is no reason for any other

²⁹⁷ RESTATEMENT OF CONFLICT OF LAWS § 311 (1934). When the contract was to be performed in another state, the law of that state governed questions relating to the details and sufficiency of performance. *Id.* § 358.

²⁹⁸ RESTATEMENT (SECOND) § 188.

²⁹⁹ See generally A. EHRENZWEIG, *supra* note 39, at 465-90.

state to do so, and the claim of immunity should be rejected.³⁰⁰ When the law of that state does provide immunity and the state interested in regulating the contract does not, there is a conflict between the immunity policies of the state of residence and the contract policies of the contract state.³⁰¹ How the courts may resolve this conflict will be discussed shortly. But by focusing on the non-contract, or more accurately, anti-contract policies involved in the claim of immunity; that is, by precisely identifying the problem area, the court will avoid the "contract set" and will not be unconsciously influenced toward the automatic application of the law of the "contract" state.

This situation is illustrated by the classic case of *Milliken v. Pratt*,³⁰² in which a Maine creditor brought suit in Massachusetts against a Massachusetts wife who had become surety for an obligation of her husband. As Massachusetts law stood at the time of the transaction,³⁰³ a wife could not bind herself as surety for her husband; Maine law was to the contrary. The court concluded that Maine law governed the contract and rejected the defense. Professor Currie has used this case and the problem of married women's contracts to develop his approach of interest analysis,³⁰⁴ and for him this case clearly presents a true conflict. Maine's policy was to protect the creditor, and it had an interest in protecting a Maine creditor who entered into a contract in Maine.³⁰⁵ Massachusetts's policy was to protect its married women against overreaching by their husbands,³⁰⁶ and it had an interest in implementing its policy whenever a Massachusetts married woman was involved, although she may have entered into the contract in another state. Since there was a true conflict, he would say that the forum, Massachusetts, should prefer its own interests and apply its own law.³⁰⁷

Professor Ehrenzweig, on the other hand, argues that "the state of the woman's domicile need not, and indeed should not extend its protection to foreign transactions at the expense of unwary citizens of

³⁰⁰ In terms of interest analysis there is a false conflict, since the state interested in granting immunity does not do so, and no other state has an interest in immunizing him.

³⁰¹ We will assume that all the significant contractual facts occurred in a single state. When this is not so, the contract state is the state whose law would apply under the forum's view of the applicable law in contract cases.

³⁰² 125 Mass. 374 (1878).

³⁰³ At the time of the suit the restriction had been removed. As a practical matter this factor may have influenced the decision.

³⁰⁴ B. CURRIE, *supra* note 3, at ch. 2.

³⁰⁵ For the reason that this was considered a Maine contract see the discussion in Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399, 402 (1968).

³⁰⁶ See the discussion in B. CURRIE, *supra* note 3, at 80-81, 85-86.

³⁰⁷ *Id.* at 118-19.

other states,"³⁰⁸ and would apply Maine law under the "rule of validity." Professor Cavers agrees, stating that protective policies should only be applied when the contract involved a resident of the state with the protective policy and was entered into in that state, or if not, its being entered into in another state "was due to facts that were fortuitous or had been manipulated to evade the protective law."³⁰⁹

With *Milliken* may be contrasted the much more recent case of *Lillienthal v. Kaufman*,³¹⁰ in which an Oregon borrower secured a loan in California from a California lender. When the borrower defaulted the lender discovered that two years prior to the transaction the borrower had been declared a spendthrift in Oregon and placed under guardianship. Under Oregon law the guardian could avoid the contracts of the spendthrift other than those for necessities, and the guardian refused to pay the note. The borrower then brought suit in Oregon and was met with the defense of spendthrift immunity, which the Oregon court had earlier sustained in a purely domestic case involving the same defendant.³¹¹ In *Lillienthal* the defense was extended to the foreign case as well.

The Court held that California law governed the contract as the state of the most significant relationship and the state of the validating law. It went on to hold, however, that to apply California law would be against Oregon's public policy, and that the public policy of the forum "was so strong that the law of the forum must prevail although another jurisdiction, with different laws, had more and closer contacts with the transaction."³¹² It explicitly applied Professor Currie's governmental interest approach in justifying the result. It saw California's interest as seeing that its creditor be paid and upholding its reputation as a state where contracts could be made with certain knowledge that they would be enforced. Oregon's interest was in protecting the spendthrift and his family, and the Oregon legislature had determined that the policy of protecting the spendthrifts was more important than the policy of enforcing contracts. While Oregon also had an interest in encouraging residents of other states to conduct business with Oregon residents, this interest, in the words of the court, "was deflated by

308 A. EHRENZWEIG, *supra* note 39, at 477.

309 D. CAVERS, *supra* note 21, at 181. See also Weintraub, *supra* note 305, at 403-05. 310 239 Ore. 1, 395 P.2d 543 (1964).

311 *Olshen v. Kaufman*, 235 Ore. 423, 385 P.2d 161 (1963).

312 Under the traditional approach the public policy exception was limited to the refusal to entertain a claim created in another state. RESTATEMENT OF CONFLICT OF LAWS § 612 (1934). It did not justify the application of the forum's law to the transaction, and the dismissal on public policy grounds would not be *res judicata*.

the recollection that the Oregon Legislature has determined, despite the weight of these considerations, that a spendthrift's contracts are voidable."³¹³ In other words, the policy to be implemented by the spendthrift statute was no different in the foreign case than the domestic one, and the court would recognize the legislative determination in both cases. Functionally, this is the same situation as *Milliken*, and the Oregon court came up with the opposite solution.

What is more significant to me, however, is that despite the talk about what law governed a contract and public policy, the court explicitly recognized that the policies behind the Oregon rule were distinctly anti-contractual policies, policies relating to the protection of a person and his family, which, for want of a better term, we may call family law policies. To put it another way, let me try to analyze the decision in terms of the approach I have suggested. The court recognized that the issue on which there was a conflict of laws—whether a spendthrift could avoid his contracts—presented a family law problem. This being so, it looked to the family domicile as the state of primary reference, and this state was the forum, which recognized the defense. It then considered the interest of the “contract” state and saw that its own family law policies conflicted with that state’s contract policies. Since its own policies were strong ones, established by the legislature, it refused to subordinate its own interest. The court could also have observed that the number of cases in which the defense would be available would be few in number, and that realistically its decision to allow the defense in the foreign case would not inhibit interstate transactions. Californians will not refuse to deal with Oregonians because of the possibility that in a rare case an Oregonian will be able to assert the defense of spendthrift status. While the expectations of the California creditor will be defeated, his surprise is probably no greater than that of the disappointed Oregon creditor. Thus it is sound for Oregon to prefer its family law policy over the contract policy of California.³¹⁴

In terms of our approach, however, it would have been equally defensible if the Oregon court in *Lillienthal* had gone the way of the

³¹³ The court also observed:

We have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending upon which law is applied. The interests of neither jurisdiction are clearly more important than those of the other. We are of the opinion that in such a case the public policy of Oregon should prevail and the law of Oregon should be applied

239 Ore. at 16, 395 P.2d at 549.

³¹⁴ If suit had been brought in California, it would be expected that California would prefer its contract policy to the family law policy of Oregon.

Massachusetts court in *Milliken*. The Oregon court could have properly taken the position that it would be fundamentally unfair to expose out-of-staters dealing in their home state to the same risks imposed upon Oregon creditors dealing in Oregon, and that the legislature would not have intended that the statute be applied here.³¹⁵ It could also have adopted a more moderate and restrained interpretation of Oregon's policy and interest in order to avoid the conflict. But it did not do so and chose to implement its own policy. The important consideration, in my view, is that a court recognize that it is not dealing with a defense based on contract policies, but one involving policies of an entirely different nature. The fact that suit is brought to recover on a contract does not mean that the court should approach every issue in the case with a "contract set." The court in *Lillienthal*, if it did have a set, had one of family-protection rather than one of contract-security of transactions. It precisely identified the policies and interests of the concerned states and made the value judgment to implement its own policies and interests in the circumstances.

The importance of identification of the problem area here and its relationship to judicial method will become more apparent in the following examples, which we will assume also come before the Oregon court. Suppose a California borrower entered into a contract in Oregon with an Oregon lender in the same circumstances as in *Lillienthal*. Let us also assume that spendthrift status exists in California and that the borrower has been declared a spendthrift there. Under California law, however, the spendthrift's guardian may not avoid his contracts. The borrower defaults and is sued in Oregon, either by way of personal service or under a "long arm" statute applicable to non-residents who have entered into contracts in Oregon. He asserts the defense of spendthrift immunity. When the Oregon court identifies the problem area as one of family law rather than contract, because the policies behind the Oregon rule relate to protection of the family and are inconsistent with its contractual policies, it will look to California as the state of primary reference. California, being the state of the borrower's domicile, where the social effects of his spendthrift status will be felt, is the only state interested in extending this kind of family law protection. Since California does not do so, and since Oregon has no interest in protecting the family of a California defendant to whom California does not extend protection, the defense should not be recognized.

This result is in no sense discriminatory. While Oregon protects an Oregon borrower in a suit against him by a California creditor and

³¹⁵ See D. CAVERS, *supra* note 21, at 191-92; Weintraub, *supra* note 305, at 419-21.

does not protect a California borrower in a suit against him by an Oregon creditor, this is because California, his home state, does not extend this protection to him. Both California and Oregon have a general policy of enforcing contractual obligations. Oregon makes an exception in the case of spendthrifts, because in this situation it believes that family protection policies outweigh contractual ones. Its interest in applying that policy is limited to its own spendthrifts. If the borrower were from another state that recognized spendthrift immunity, he would be able to assert that defense in Oregon. He cannot complain if he is given the same protection—or lack of it—given by the law of his home state.³¹⁶

In our next case an Oregon businessman enters into an oral contract with a California businessman in California, to be performed in that state. When the Oregon businessman breaches, suit is brought against him in Oregon. The contract is unenforceable under the Oregon statute of frauds; it is valid under California law. Assuming that the Oregon court does not treat the statute of frauds question as one of "procedure"³¹⁷ it should refuse to allow the defense. The policies behind the statute of frauds are obviously contractual in nature; *i.e.* contracts should not be enforced unless the parties show that they are sufficiently serious about the transaction to put it in writing or make a memorandum. Having identified the problem area in this way the court will look to the state the law of which should be applied to determine rights under the contract, and under any approach, this is clearly California. Although in terms of interest analysis the case may appear to present a conflict of interest (Oregon is interested in protecting its resident defendant; California is interested in protecting its resident plaintiff), Oregon, having identified the problem area as one of contract, will apply the law of the contract state since there are no countervailing non-contractual policies that would justify the application of

³¹⁶ Admittedly, he is being denied the protection of Oregon law and the benefits that Oregon extends to its own citizens. The discrimination, however, is not unreasonable, because (1) his home state does not extend him that protection, and (2) Oregon has an interest in applying its general contractual policy to deny the defense. Therefore, the refusal to apply Oregon law raises no constitutional questions under the equal protection clause of the Fourteenth Amendment or the privileges and immunities clause of Art. IV, § 2. See the discussion in B. CURRIE, *supra* note 3, at 503. Suppose, however, that a resident of a guest statute state is injured by a resident of a state that does not have a guest statute, and suit is brought in the state of the defendant's residence. Although the plaintiff's home state does not protect him, no interest of the defendant's home state would be served by denying recovery, since its general tort policy allows recovery. To deny recovery in such a case would thus be discriminatory, and possibly unconstitutional. See the discussion in *id.* at 487-90.

³¹⁷ See the discussion in Sedler, *supra* note 172, at 851-55.

its own law.³¹⁸ To put it another way, the court in *Lillienthal* would not have found it to be against its public policy to enforce a California contract that did not satisfy the Oregon statute of frauds.³¹⁹ It did find it against its public policy to enforce a California contract against an Oregon spendthrift in view of Oregon's strong family law policy, reflected in the statute enacted for the protection of spendthrifts.

Our third case is the most significant from the standpoint of the precedential effect of decisions in conflicts cases. In Oregon a married woman from State X contracts with an Oregonian to stand surety for the debt of her husband. All factual contacts are in Oregon, and this is clearly an Oregon contract. Under Oregon law the contract is fully valid, but under the law of State X a married woman may not be held as surety for the debt of her husband. Suit is brought in Oregon, either by obtaining personal service or under the non-resident contracting act, and the married woman asserts the defense of incapacity. In terms of interest analysis this is a true conflict—the protective policy of State X conflicts with the contractual policy of Oregon—and in such a case it has been said that the forum is justified in applying its own law. In *Lillienthal*, however, the Oregon court held that it would prefer the protective policy reflected in Oregon law over the contractual policy of the contract state. Explaining the decision in terms of the approach suggested, it identified the problem area as one of family law, looked to the defendant's residence as the state of primary reference and applied its law to allow the defense. Having identified the problem area in that way, and having held that the family law policy was to be preferred over the contractual one in that case, its decision serves as a *precedent* in another case involving a conflict between family law and contractual policies. Since it gave effect to the protective policy of the state of defendant's residence in that case must it not—or at least should it not—give the same effect to the protective policy of the defendant's state in this one? The question is not whether capacity is to be determined by the law of defendant's residence or by the law governing the contract, but whether the *Oregon court* has chosen to deal with the problem by preferring the protective policy of the state of

³¹⁸ This principle is demonstrated in every case where the forum applies the law of another state to enforce a contract against its resident that is invalid under its own laws. A good example is when the forum enforces against its borrower a contract that is usurious under its own law, but not under the law of lender's state. *See, e.g., Whitman v. Green*, 289 F.2d 566 (9th Cir. 1961); *Dairy Equip. Co. v. Boehme*, 92 Idaho 301, 442 P.2d 437 (1968).

³¹⁹ *See Lams v. F.H. Smith Co.*, 36 Del. 477, 178 A. 651 (Super. Ct. 1935); *Jackson v. Jackson*, 122 Utah 507, 252 P.2d 214 (1953).

residence or the contractual policy of the contract state. If Oregon prefers the protective policy of the state of residence when that state is Oregon, it should also uphold the protective policy when the situation is reversed and Oregon's contractual policy is required to yield. Perhaps the task of the court is not only to identify the problem area that an issue presents in a given case, but to identify the problem area that such an issue presents in all cases. Consistency of judicial decision and proper recognition of the interests of other states in a federal system, it is submitted, require no less.

The variations of the contract-immunity problem are the same as those discussed previously with respect to tort-immunity. The forum, having a protective policy that it chooses to implement, as in *Lillienthal*, will apply that policy whenever its resident is a defendant, irrespective of where the plaintiff resides or where the contract is localized. When the defendant is a resident of a state that does not provide immunity, the defense should not be recognized because the only state interested in immunizing him does not do so.³²⁰ When a resident of an immunity state contracts with a resident of a nonimmunity state in the latter's state, the result *in either state* should depend on how that state has chosen to treat the problem generally. By that I mean that if it has chosen to prefer the protective policy of the state of residence over the contractual policy of the contract state with respect to one immunity, as was done in *Lillienthal*, it should do so whenever the defendant resides in an immunity state, even if a different immunity is involved. So too, if it has chosen to prefer the contractual policy to the protective one when it was the contract state, it should also do so when its own protective policy is in issue. When two residents of an immunity state contract in a nonimmunity state, that state will have to decide whether its contractual policy is sufficiently strong that it should uphold it over the immunity policy of the parties' home state. This is functionally the same situation as when two residents of a guest statute state, for example, are involved in an automobile accident in a nonguest statute state.³²¹ In all of these cases the court must avoid the "contract set" and recognize the anticontractual policies behind the granting of immunity. Its decision should represent a value judgment on whether the protective or the contractual policies are to be preferred, and it should

³²⁰ When the defense is a contractual one, however, it will be applied in favor of a nonresident defendant notwithstanding that the defense does not exist under the law of his home state. *See, e.g., E.C. Warner Co. v. W. B. Foshay Co.*, 57 F.2d 656 (8th Cir. 1932).

³²¹ And, as in that situation, the parties' home state would be expected to apply its law and allow the defense.

follow that judgment no matter whether the protective or contractual policies are its own or that of another state.

A closely related situation involving the conflict between contractual and other policies as reflected in the matter of identification of the problem area is that presented in the case of *Haag v. Barnes*.³²² In that case the mother of a bastard child brought a suit for support against the child's admitted father in New York. Apparently the mother had at all times been domiciled in New York, although she had temporarily resided in other places. The father at all times was a resident of Illinois. The child was born in Chicago, but would be considered a New York domiciliary³²³ and at the time of the suit resided in New York with the mother. After the child's birth the mother and father negotiated an agreement in Chicago pursuant to which the father agreed to pay \$275 per month for the support of the child until he reached the age of sixteen. He was to be released from all further obligations, and the parties agreed that the contract should be governed by Illinois law. Under Illinois law the agreement was valid and barred a subsequent action for support. Under New York law such an agreement was binding only if at the time it was entered into "the court shall have determined that adequate provision has been made."³²⁴ The New York Court of Appeals held that Illinois law applied and affirmed the dismissal of the suit.

The desire of the court to dismiss the suit is understandable, since the father in fact had provided support far in excess of the agreement, and the mother was obviously trying to extort additional money.³²⁵ But it seemed to think that it had to apply Illinois law in order to do so,³²⁶ and it justified the application of Illinois law as the law expressly chosen by the parties and as the law of the state having the most significant relationship with the transaction and the parties.³²⁷ In other words, the court treated the case as one of contract and applied the modern rule for choice of law in contract cases.³²⁸

³²² 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

³²³ This is so because his domicile follows that of the mother. See RESTATEMENT (SECOND) § 14(2).

³²⁴ 9 N.Y.2d at 558-59, 175 N.E.2d at 443, 216 N.Y.S.2d at 68.

³²⁵ The court stressed this fact in its opinion. *Id.* at 558, 175 N.E.2d at 443, 216 N.Y.S.2d at 67. See also B. CURRIE, *supra* note 3, at 729; Ehrenzweig, *The "Bastard" in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498, 499 (1962).

³²⁶ It could have applied New York law holding the absence of such approval as a "technical defect curable *nunc pro tunc* by a finding of adequacy in the pending proceeding." B. CURRIE, *supra* note 3, at 729.

³²⁷ 9 N.Y.2d at 559, 175 N.E.2d at 443, 216 N.Y.S.2d at 68.

³²⁸ RESTATEMENT (SECOND) §§ 187-88.

While it is true that the parties entered into an agreement respecting support, for the court to treat the problem area involved here as one of contract is shocking and indeed *contrary to the very postulates on which the New York law was based*; namely that parties *cannot* enter into their own contractual arrangements for the support of a child without court approval. The case did not involve the sale of commodities, but the maintenance of a child's well-being. Certainly the relevant policies to be considered—and any set with which the court should approach the question—are not contractual ones. From any standpoint, the court was dealing with a problem of family relationships, and the state seemingly interested in applying its law to the relationship in question, the state of primary reference under our approach, would be the state of the child's domicile, which here was New York. New York's interest in applying its protective policy for the benefit of a New York child was very strong, and the most that could be said was that New York's policy of protecting the child conflicted with Illinois' policy of enabling the father to limit his support obligation by agreement. Certainly in a case such as this it would be expected that New York would apply its own law to implement that policy.³²⁹ Illinois should also recognize this as a family law problem and look to New York as the state of primary reference. The question for it would be whether its policy—which is also properly denominated as a family policy—of protecting the father was sufficiently strong to require its application here. It too might, “by a more moderate and restrained interpretation of its policy and interest,” decide to defer to New York.³³⁰

The point is that the court is not dealing with a contract problem. The relevant policies and responses are not those associated with that area of law we call contract. This was not a commercial transaction.³³¹ Mr. Barnes did not enter into his ledger: “Affair with Dorothy Hagg—so much for flowers, so much for theatre tickets, so much for the little bastard!” The problem involved the protection of children, and the analysis of policies and interests must be approached from that perspective.

The same approach and identification of the problem area should

³²⁹ B. CURRIE, *supra* note 3, at 735-36 (forum's interest in effectuation of its policy); Ehrenzweig, *supra* note 325, at 502-03 (law of the forum).

³³⁰ Professor Currie also contends that New York should apply its own law if the mother and child were not New York residents at the time of birth, but were at the time of suit. B. CURRIE, *supra* note 3, at 736-39.

³³¹ For a discussion of “How ‘Commercial’ Is the Contract” see Weintraub, *supra* note 305, at 426-29. Professor Weintraub contends that in the case of the less commercial contract, the need for validation—his basic approach—is not as great.

be followed whenever the court is dealing with a family arrangement, notwithstanding that it is embodied in a "contract." Courts do not always recognize this. For example, the leading case applying the modern rules' approach of the Restatement Second to contractual transactions is *Auten v. Auten*,³³² decided by the New York Court of Appeals in 1954. There an English husband had left his wife and come to the United States. She caught up with him in New York, where they entered into a separation agreement pursuant to which the wife was to return to England and the husband was to pay a monthly sum for her support and that of the children. The wife subsequently attempted to institute a divorce action in England, but no divorce decree was ever granted. When the husband was long in arrears the wife brought suit against him in New York to recover the sums due under the agreement. The lower court found that under New York law the filing for divorce would constitute a repudiation of the agreement, and applying New York law, granted summary judgment in favor of the husband. The wife had contended that under English law the filing for divorce would not have this effect. The Court of Appeals held that English law should apply as the state of the most significant relationship. It observed that the only contact that New York had with the transaction was that the contract was executed there—because this was the only place where the wife could find the husband. Since all the other relevant factors were connected with England the court localized the contract there and held that English law should apply.

But in *Auten*, as in *Haag*, the court was not dealing with a commercial transaction. The case involved the question of whether parties could regulate marital obligations by agreement and the effect of a divorce action on such an agreement. To sustain the husband's defense would mean that the English wife and children would be deprived of support. Obviously this is a family problem, and since the parties were all English domiciliaries at the time of the contract, and the wife and children still were, England would seem to be the only state interested in resolving that problem. The application of English law here was not inconsistent with any contractual policy of New York for the simple reason that the case did not involve the kind of transaction in which contractual policies would be relevant. By identifying the problem area as one of family law the court would undoubtedly apply the law of the only interested state, the family domicile.

The "contract-something" identification is also involved whenever spouses from a community property state enter into a commercial trans-

³³² 308 N.Y. 155, 124 N.E.2d 99 (1954).

action connected with another state, and the other contracting party seeks to subject community property to the obligation. Irrespective of whether the contract is localized in the parties' home state or not, if under the law of the home state community property is subject to the obligation, that should be the end of the matter. If the marital domicile subjects community property to local obligations, it cannot discriminate against obligations entered into elsewhere. Identifying the problem area here as one of community property and looking to the law of the marital domicile avoids the necessity of engaging in extensive mental gymnastics to achieve the same result.³³³

Finally we come to the matter of oral will contracts.³³⁴ To me this situation is the clearest example of how identification of the problem area may be result-determinative, and I believe that an analysis of the relatively few cases involving the question will demonstrate the proposition as effectively as can be done. The leading—and most recent—is *Bernkrant v. Fowler*,³³⁵ a "Traynor opinion" case³³⁶ decided by the California Supreme Court in 1961. The plaintiffs were Nevada residents who owned an apartment building there, subject to a purchase money mortgage in the amount of \$24,000. The seller, who was a California resident at the time of his death, and for purposes of the point in issue, was assumed to have been one at the time of the agreement, desired to refinance the transaction. He orally stated that he would "make a

³³³ As was done by the Washington Supreme Court in *Baffin Land Corp. v. Monticello Motor Inn*, 70 Wash.2d 893, 425 P.2d 623 (1967) and *Pacific States Cut Stone Co. v. Goble*, 70 Wash. 2d 907, 425 P.2d 631 (1967). In both cases the issue was whether community property was subject to the obligation. In *Baffin* the court found that Washington was the state of the most significant relationship and applied Washington law on that basis. In *Goble* the court found that the contract was localized in Oregon, but that the result would be the same under either law. As Professor Weintraub has observed, the problem before the court was functionally a false one, and "only a magician could manufacture a conflict and resolve it against the creditor." Weintraub, *supra* note 305, at 416-17. In *Potlatch Fed. Credit Union v. Kennedy*, — Wash. 2d —, 459 P.2d 32 (1969), the court applied Washington law in holding that the community was not liable on a transaction entered into by the husband in Idaho. Under Idaho law the community was liable even though the contract was not for the benefit of the community. Washington law was to the contrary. The court recognized that a true conflict was presented and applied Washington law on the grounds that (1) Washington had a strong interest in protecting its community and (2) the Idaho creditor knew that he was dealing with Washington residents.

³³⁴ See generally Cavers, *Oral Contracts to Provide by Will and the Choice-of-Law Process: Some Notes on Bernkrant*, in *PERSPECTIVES OF LAW—ESSAYS FOR AUSTIN WAKEMAN SCOTT* 38 (R. Pound, E. Griswold & A. Sutherland eds. 1964). The approach advocated by Professor Cavers is somewhat different from that suggested in the present writing.

³³⁵ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

³³⁶ For a discussion of the contribution of this distinguished judge to the development of the conflict of laws see B. CURRIE, *supra* note 3, at ch. 13.

sporting proposition and provide in his will that any debt at the time of his death would be forgiven and cancelled in exchange for a partial payment and refinancing of the debt."³³⁷ The requested financing was carried out, which reduced the debt by some \$13,000; the refinancing cost the plaintiffs about \$800 out of pocket. A year and a half later the seller died, and his will neither forgave the debt nor directed cancellation of the notes. The plaintiffs then brought suit in California, seeking cancellation of the obligation and a reconveyance of the property under mortgage.

The oral contract to will was found to be enforceable under the Nevada statute of frauds. The California statute, however, provided that: "An agreement . . . to make any provision for any person by will is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent."³³⁸ The court assumed that the transaction came within the California statute,³³⁹ so that if it were applicable the plaintiffs would be barred. But it found that the statute was inapplicable and allowed the action to proceed.³⁴⁰ Although, as it observed, California's interest in protecting estates being probated there from false claims was constitutionally sufficient to justify the application of California law, nevertheless:

The contract was made in Nevada and performed by plaintiffs there, and it involved the refinancing of obligations arising from the sale of Nevada land and secured by interests therein. Nevada has a substantial interest in the contract and in protecting the rights of its residents who are parties thereto, and its policy is that the contract is valid and enforceable. California's policy is also to enforce lawful contracts. That policy, however, must be subordinated in the case of any contract that does not meet the requirements of the applicable statute of frauds. In determining whether the contract herein is subject to the California statute of frauds,

³³⁷ This quotation is from the opinion of the district court of appeals. *Bernkrant v. Fowler*, 8 Cal. Rptr. 326, 328 (Dist. Ct. App. 1960), *rev'd*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

³³⁸ CAL. CIV. CODE § 1624(6) (West 1954).

³³⁹ As does Professor Cavers. Cavers, *supra* note 334, at 42. It is that assumption that I would question.

³⁴⁰ If the decedent had not been domiciled in California at the time of the transaction, Nevada law would clearly apply, since "protection of rights growing out of valid contracts precludes interpreting the general language of the statute of frauds to destroy such rights whether the possible applicability of the statute arises from the movement of one or more of the parties across state lines or subsequent enactment of the statute." 55 Cal. 2d at 595, 360 P.2d at 909-10, 12 Cal. Rptr. at 269-70. The lower court had made no finding where the decedent was domiciled at the time of the transaction, so the court proceeded on the assumption that he was domiciled in California and concluded that the result would be the same.

we must consider both the policy to protect the reasonable expectations of the parties and the policy of the statute of frauds. . . . Since California however, would have no interest in applying its own statute of frauds unless Granrud [the decedent] remained here until his death, plaintiffs were not bound to know that California's statute might ultimately be invoked against them. Unless they could rely on their own law, they would have to look to the laws of all of the jurisdictions to which Granrud might move regardless of where he was domiciled when the contract was made. . . . Since there is thus no conflict between the law of California and the law of Nevada, we can give effect to the common policy of both states to enforce lawful contracts and sustain Nevada's interest in protecting its residents and their reasonable expectations growing out of a transaction substantially related to that state without subordinating any legitimate interest of this state.³⁴¹

Professor Currie hailed the decision in *Bernkrant* as an example of a "more moderate and restrained interpretation of the forum's policy and interest," and proving that "the method of governmental interest analysis need not necessarily produce egocentric or provincial results."³⁴² Professor Cavers approves of the result on the ground that: "Where an oral testamentary contract would be invalid by the law of the testator's domicile at either the time of the transaction or at death, yet is valid by the law to which the parties' expectations clearly relate, the policy shared by both states of protecting such expectations should prevail."³⁴³ It has not been questioned that *Bernkrant* reached a sound result, a conclusion with which I shall agree, but for a very different reason.

Contrasted with *Bernkrant* may be the older case of *Emery v. Burbank*, decided by the Massachusetts Supreme Court in 1895.³⁴⁴ The decedent, a Massachusetts resident, made an oral agreement in Maine with the plaintiff, a Maine resident, to the effect that if the plaintiff would come to Massachusetts and take care of the decedent, the decedent would leave all of her property to the plaintiff when she died. This she failed to do, and the plaintiff brought suit in Massachusetts to enforce the contract. Oral contracts to will were valid in Maine, but

³⁴¹ *Id.* at 595-96, 360 P.2d at 910, 12 Cal. Rptr. at 270.

³⁴² B. CURRIE, *supra* note 3, at 688-89 & n.236.

³⁴³ Cavers, *supra* note 334, at 62.

³⁴⁴ 163 Mass. 326, 39 N.E. 1026 (1895). In *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953), the parties were all New Yorkers, and the only contact with another state was that the actual contract was made in Florida while the parties were vacationing there. The court applied New York law to invalidate the contract. Although some of the language in the opinion supports the thesis we are advocating, the factual context of the case renders it less significant than *Emery* for our purposes.

were proscribed by the Massachusetts statute of frauds. The Massachusetts court held that its statute of frauds was applicable and dismissed the suit. Although characterizing the question as one of "procedure" and invoking the rule that "matters of procedure are determined by the law of the forum," the court, speaking through Justice Holmes, also talked in terms of policy:

But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promiser.³⁴⁵ If the policy of Massachusetts makes void an oral contract of this sort made within the state, the same policy forbids that Massachusetts testators should be sued here upon such contract without written evidence, wherever it is made.

If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles.³⁴⁶

Are Justice Traynor and Justice Holmes talking about the same statute of frauds? It would seem not from the language in the opinions that we have quoted. Professor Cavers would justify the result in *Emery* on the ground that the transaction was so divided between the states concerned that there is little basis for a finding that the parties could have reasonably expected that the law of the state holding the contract valid would be the one to be applied and that, therefore, the testator's domicile at the time of contracting should be viewed as constituting the most significant contract. He would, however, also justify the court's reaching a contrary result if it found that the parties had expected that Maine law would be applied.³⁴⁷

It is my submission that the results in *Bernkrant* and *Emery* are both clearly correct. To illustrate this, however, and to bring into focus the point I really want to make, let me vary the situation in *Emery* to remove any factual connection with the decedent's state except the fact that he was domiciled there. Suppose that the decedent, a rich California widow, had a summer home in Nevada where she spent approximately four months each year. In Nevada she orally agreed with the plaintiff, a Nevada resident, who had never been to California and never wanted to go there, that if the plaintiff would keep house for her during her summer visits, she would leave the plaintiff 50% of her

³⁴⁵ This would not be true today, of course, since suit could be brought at the place of contracting under a long arm act.

³⁴⁶ 163 Mass. at 328, 39 N.E. at 1027.

³⁴⁷ Cavers, *supra* note 334, at 72.

estate by her will. The arrangement continued until the decedent's death five years later. The decedent did not include the bequest in her will, and the plaintiff brings suit against the executor in California to enforce the oral contract to will. The executor asserts the statute of frauds, as in *Bernkrant*. It is submitted that in such a case the California court, which decided *Bernkrant*, could well decide to sustain the defense and *that the difference in result would be due to the different identification of the problem area in the two cases.*

In *Bernkrant* the court identified the problem area as one of contract and having localized the contract in Nevada, refused to apply the California statute of frauds.³⁴⁸ The court approached the question with the "contract set" and talked in terms of the policies associated with that area of law call contract. It emphasized the need to protect the legitimate expectations of the parties and to insure security in commercial transactions. It did not give much consideration to the policies behind the California statute of frauds, which invalidated oral contracts to make a will. *May this not have been because the court did not see the transaction as really involving a contract to will?* Or to put it another way, maybe the court did not view the case as presenting a decedent's estates problem since the transaction was, in the words of the decedent, a "sporting proposition." The purpose of a rule prohibiting oral contracts to will, it would seem, would be to prevent the decedent from passing a portion of his estate and disappointing his heirs except by the execution of a formal document satisfying the requirements of a will. But here the decedent was *not* trying to pass a portion of his estate by his will. His hope was that he would never have to leave anything to the plaintiffs because he would have lived long enough for them to have paid the debt. Perhaps this "promise to will" was within the letter of the California statute, but this too may be questionable. In a purely domestic case is it not conceivable that the court—having to face up to the specific question—might decide that the transaction did not involve a contract to will within the meaning of the statute, because the decedent was not really trying to pass a portion of his estate under the arrangement?

In any event, in *Bernkrant* the court did not consider the transaction to be a contract to will, but an ordinary business arrangement for the refinancing of a mortgage with the addition of a contingent provision for forgiving the debt by will if the decedent should "lose his gamble." Certainly it did not see it as the kind of transaction with

³⁴⁸ The court did not even consider whether the California statute would be applied on the ground that it was "procedural." See note 314 *supra*.

which the legislature was concerned when it enacted the statute of frauds. Having perceived the transaction as it did, I would submit that the court in *Bernkrant* identified the problem area as one of contract, came up with the associated "contract" responses and looked to the state where all the events relating to the contract occurred. There was indeed no conflict between the policies of California and Nevada because in this case, which did not involve a contract to will, California had no interest in implementing its decedents' estates policy prohibiting oral contracts to will.

In the example case, as in *Emery*, the decedent clearly was attempting to pass a portion of his estate by the oral agreement and this is the kind of case with which the legislature was concerned when it enacted the statute of frauds. The forum's decedents' estates policies are sharply focused, and the court's set will not be one of contract. The forum's policy of protecting the estates of decedents against possible false claims is no less, as the court in *Emery* pointed out, because the contract was connected with another state. More importantly, the court is not concerned with implementing contractual policies because it is not dealing with an ordinary commercial arrangement. It is concerned with implementing the decedents estates policies reflected in its statute of frauds because it is dealing with an attempt to pass a portion of an estate by oral agreement.³⁴⁹ Having identified the problem area in this way, it would look to the decedent's domicile as the state of primary reference. Since that state is the forum it can be expected that the court, as did the court in *Emery*, would implement its decedents estates policy by applying its own law. In other words, in *Bernkrant* the court treated the transaction as a commercial contract rather than as a contract to will, and under the conflicts principles applicable to commercial contracts chose Nevada law. In the example, and in *Emery*, the transaction does involve a contract to will, and the decedent's domicile would want to apply its own law.³⁵⁰

Now suppose that *Emery* or the example case were brought in the contract state. As a practical matter the issue would be whether the executor was subject to suit on the ground that the decedent made a

³⁴⁹ In *Rubin v. Irving Trust Co.*, 305 N.Y.2d 288, 113 N.E.2d 424 (1953), the court pointed out that, "It is clear, also, that in reaching our decision here we are not to be guided by the same considerations as we would in determining the applicability of our Statute of Frauds to the ordinary or commercial contract." *Id.* at 300, 113 N.E.2d at 428.

³⁵⁰ See the discussion in Weintraub, *supra* note 305, at 426-29. Professor Weintraub concludes that the difference in commercialism between the contracts involved in *Bernkrant* and *Emery* was an important factor, albeit not the only one, leading to the difference in result.

contract there. I would suggest that the court might hold that the long arm" statute was not referring to contracts to will, which, it would point out, "are ordinarily governed by the law of the decedent's domicile." Even if it would entertain the suit, I would expect that it would recognize the interest of the domicile in implementing its decedents estates policies and allow the defense. Since the transaction is not a commercial contract its "contract" policies would not really be jeopardized by its so doing. By the same token, if in our example case the laws were reversed, and it was Nevada that barred enforcement of oral contracts to will rather than California, the defense would not be sustained. The California court, identifying the problem as one of decedents estates, would first look to the domicile of the decedent as the state of primary reference and see that it upholds the contract. Nevada, of course, has no interest in protecting the estate of a California decedent by its statute of frauds relating to wills,³⁵¹ and there is no reason to allow the defense.

The results in *Bernkrant* and *Emery* (and in our example case) are fully consistent when the question is approached in the context of identification of the problem area. The courts were dealing with different animals, and in view of the policies to be implemented by a law invalidating oral contracts to will, it is unsound to attach the same label to them. The fact that a party to a commercial transaction undertook the obligation "as a sporting proposition" to make a contingent provision in his will did not blind the court in *Bernkrant* to the real issue before it. It treated the transaction as a commercial contract and made the conflicts decision with reference to the policies applicable to that area of law. To me this is the clearest example of how proper and precise identification of the problem area may produce a sound solution to many conflicts questions.

C. *Property-Something*

Under the traditional approach characterization was very important in cases involving property rights. But this was often characterization of the property itself as "movable" or "immovable" since different choice of law rules were applicable to each category. Here the issue was whether the law of the forum or the law of the situs determined the characterization question.³⁵² Characterization questions would also arise with respect to the effect of gifts causa mortis: Was this a question of property so that it would be determined by the law of the situs, or a

³⁵¹ As it would a Californian entering into a commercial contract in Nevada that was within Nevada's statute of frauds.

³⁵² See the discussion in A. ROBERTSON, *supra* note 85, at 190-212.

question of decedents' estates to be determined by the law of the decedent's domicile?³⁵³ From the standpoint of policy, however, these kinds of questions all involved property considerations and do not differ from other "property" questions such as whether the validity of a charitable bequest of land is to be determined by the law of the situs or the law of the decedent's domicile.³⁵⁴ Therefore, identification of the problem area will not be helpful in providing a solution to these kinds of questions under a policy-centered approach.

When identification of the problem area does become important is when the policies behind a rule seemingly regulating property rights are not really property policies. In such a case if the court approaches the conflicts question with the "property set," it will be disposed toward applying the law of the state apparently interested in regulating property rights, which will usually be the situs.³⁵⁵ The utility of applying the law of the situs to all property questions under a policy-centered approach may itself be questioned,³⁵⁶ but clearly it should not be applied when the policies behind the rule in question are not property policies. Proper identification of the problem area will enable the court to avoid the "property set" in these cases and the resulting automatic application of situs law.

Suppose that North Carolina spouses jointly own land situated in Massachusetts, and one spouse executes a conveyance of the land to the other. Under Massachusetts law as it existed at that time, husband and wife could not contract with each other; North Carolina law allowed such contracts. In *Polson v. Stewart*,³⁵⁷ the Massachusetts court held that the rights of the parties should be determined by North Carolina law and upheld the conveyance. The same result prevailed in *Proctor v. Frost*,³⁵⁸ in which a Massachusetts wife gave a mortgage on her New Hampshire land as surety for her husband's debt. Under New Hampshire law a wife could not become surety for the debt of her husband,

³⁵³ See the discussion *id.* at 185. The same kind of question would arise with respect to a Totten trust. See, e.g., *Cutts v. Najdrowski*, 123 N.J. Eq. 481, 198 A. 885 (E. & A. 1938).

³⁵⁴ See *Duckwall v. Lease*, 106 Ind. App. 664, 20 N.E.2d 204 (1939); *Toledo Soc'y for Crippled Children v. Hickock*, 152 Tex. 578, 261 S.W.2d 692 (1953). See generally Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095 (1965).

³⁵⁵ See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 215-22, 254 (Tent. Draft No. 5, 1959).

³⁵⁶ See Weintraub, *An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 CORNELL L.Q. 1 (1966).

³⁵⁷ 167 Mass. 211, 45 N.E. 737 (1897).

³⁵⁸ 89 N.H. 304, 197 A. 813 (1938).

but the New Hampshire court held that the law was not applicable to an out-of-state wife. In *Smith v. Ingram*,³⁵⁹ however, North Carolina applied its law requiring the "privy examination" of a married woman making a conveyance of real property to a South Carolina wife who conveyed land in North Carolina although this was not required by South Carolina law.

In all of these cases the policies behind the rule of the situs are not property policies. They are not policies designed to promote efficient land utilization or to insure security of title. The purpose of the rule is clearly a family purpose; namely to protect the wife from overreaching on the part of the husband. As in the contract-immunity situation, the only state interested in extending such protection is the marital domicile. Only the "property set"—as is definitely demonstrated by the language of the court in *Smith*—would cause the situs to apply its rule to out-of-state parties. Proper identification of the problem area and an analysis of the precise policies behind the rule of the situs will avoid this result.³⁶⁰

If the laws were reversed and the spouses lacked capacity under the law of the marital domicile, the situs should recognize that incapacity as between the spouses. Of course, if the rights of a third party were involved, the situs' property policy of insuring certainty of land transactions would come into play, and the situs could be expected to apply its own law to protect the third party.³⁶¹ What must be remembered is that the policies behind the rule of incapacity are not property policies and that the only state interested in applying its protective policy is the state of the marital domicile.

³⁵⁹ 130 N.C. 100, 40 S.E. 984 (1902).

³⁶⁰ As the court observed in *Proctor v. Frost*:

The primary purpose of the statute as thus interpreted was not to regulate the transfer of New Hampshire real estate but to protect married women in New Hampshire from the consequences of their efforts, presumably ill-advised, to reinforce the credit of embarrassed husbands. Its effect was to create a "protective incapacity" personal to them. Nothing is said either in statute or decision in regard to the capacity of married women outside of New Hampshire to make contracts or conveyances.

89 N.H. at 307, 197 A. at 815. See the discussion in W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 270-76 (1942). In terms of interest analysis the case presents a false conflict. No policy of the situs would be advanced by the application of its law and the policy of the marital domicile would be defeated. See the discussion in D. CAVERS, *supra* note 21, at 184-85.

³⁶¹ This is what is done in cases involving improper transfers of community property. The situs will look to the law of the marital domicile to determine the rights of the spouses *inter se*, but will apply its own law to protect third parties dealing there. See *RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS* § 292 (Tent. Draft No. 5, 1959), and the Comment thereto.

The other matter of "property-something" identification on which I want to comment is that of "status-succession." Suppose that a person domiciled in State *A* dies intestate, leaving movable property in State *B*. His brother, domiciled in State *B*, had adopted a child there, and the child seeks to inherit from the decedent. Let us assume that under State *A* law adopted children cannot inherit from collaterals; under State *B* law they can. If the court identified the problem area as one of family law, it would look to the "status-creating state," State *B*. Whereas if it identifies the problem area as one of succession (which is a part of the "property" category), it will look to the law governing succession, State *A*. Obviously the relevant policies are succession policies relating to how the estate of the decedent is to be distributed, and this is how the courts have generally treated the question.³⁶² This is not a matter of distinguishing between the existence of the status and its incidents,³⁶³ but of realizing that the problem is not one of status at all, but of how a decedent's estate should be distributed.

Likewise recognition of the problem area as one of succession avoids the question of "what law determines status." Suppose that under the law governing succession adopted children are entitled to inherit from collaterals. The decedent's sister, domiciled in another state, adopted a child there, and that child seeks to inherit from the decedent. It is not accurate to say in such a case that the law of the adoptive state determines the status of the child and that the law of the succession state determines the child's right to succeed. What the court of the succession state is really doing is interpreting the words "adopted child" as those words are used in *its* succession statute. Did the legislature intend that the words "adopted child" be limited to children adopted there, or did it intend to include children adopted in other states? Since there would be no rational purpose to be achieved in discriminating against children adopted elsewhere it is reasonable to assume that such children are included in the term "adopted child." In the particular case the claimant obtained that status under the law of another state, so the court must look to the law of that state to resolve the *factual question*—does the claimant have the status of "adopted child"

³⁶² See, e.g., *In re Youman's Estate*, 218 Minn. 172, 15 N.W.2d 537 (1944); *In re Dreer's Estate*, 404 Pa. 368, 173 A.2d (1961); *In re Estate of Sendonas*, 62 Wash. 2d 129, 381 P.2d 752 (1963).

³⁶³ See the discussion in A. EHRENZWEIG, *supra* note 39, at 665-66. Professor Ehrenzweig contends, however, that in a case such as *Dreer* the adoptee's right to inherit under the law of the state where the adoption occurred may have been in the contemplation of the decedent, and that the court should not look only to the law of the decedent's domicile.

as that term is used in the forum's succession act? Foreign law is consulted as *datum* in order to apply the law of the forum.³⁶⁴

The realization that it is succession policies that are involved in such a situation—as opposed to the distinction between the existence of status and its incidents—becomes very important when the child would *not* have the claimed status under the law applicable to status, but *would* under the law governing succession. Again, the court is interpreting the term adopted child or legitimated child as that term is used in its law and is consulting the law of another state solely as datum. So, in the situation in which the father attempted to legitimate the child under the law of his domicile, and his acts were not sufficient to legitimate the child there but were sufficient under the law of the forum, the forum, interpreting its own law, should treat the child as legitimated and entitled to inherit.³⁶⁵ By realistically identifying the problem area as one of succession the court can avoid the “status-incident” confusion and can implement the succession policies of the state the law of which governs the disposition of the decedent's estate.

CONCLUSION

It is my thesis that the courts must assume the responsibility for the establishment of a body of conflicts law based on precedents and principles developed in the decisions of particular cases. The question before a court in a conflicts case should be whether, based on considerations of policy and fairness, the law of the forum should be displaced in the fact-law pattern presented and the law of another state used as a model for the rule of decision. In resolving that question I believe it to be of the utmost importance that the court properly identify the problem area before it so that it can focus on the precise policies and interests involved. Likewise, identification of the problem area will avoid the effect of the “set” that may be produced by the classification

³⁶⁴ See note 160 *supra*.

³⁶⁵ See *In re Estate of Lund*, 26 Cal. 2d 472, 159 P.2d 643 (1945); *In re Estate of Bassi*, 234 Cal. App. 2d 529, 44 Cal. Rptr. 541 (Dist. Ct. App. 1965). Some courts have relied on the fact that they were interpreting their own law to deny succession rights to a child who had legitimated or adoptive status under the law of another state, but not under its own law. See *Fuhrhop v. Austin*, 385 Ill. 149, 52 N.E.2d 267 (1944), *cert. denied*, 321 U.S. 796 (1944); *Doulgeris v. Bambacus*, 203 Va. 670, 127 S.E.2d 145 (1962). The latter result is questionable since presumably the legislature did not intend to exclude children enjoying that status under the law of another state. See also *In re Bir's Estate*, 83 Cal. App. 2d 256, 188 P.2d 499 (Dist. Ct. App. 1948), where the court construed the word “wife” in its succession statute to include two wives the decedent had married in India while he was domiciled there.

of a problem situation into areas of law, a process in which every judge and lawyer engages consciously or unconsciously. Once the judge identifies the problem area he may be led to the state of primary reference, the state seemingly interested in having its law applied to resolve that kind of problem. It is that state's law that he should consider first, and such consideration may be dispositive of the question, as when the question is one of immunity and the law of the state of primary reference does not recognize such immunity. When such consideration is not dispositive, the policies and interests of other concerned states may also have to be considered. But the court, by properly identifying the problem area, will have focused on the precise policies and interests involved and, in my opinion, is in a better position to arrive at a sound result.

It is for these reasons that I believe that identification of the problem area is an integral part of judicial method and the policy-centered conflict of laws. If I am right, the characterization component of the traditional approach, as transformed, may provide a useful tool for the solution of conflicts problems today. To so demonstrate has been the purpose of this writing.