

# Recent Trends in Choice-Of-Law Methodology

Arthur Taylor von Mehren

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

Arthur Taylor von Mehren, *Recent Trends in Choice-Of-Law Methodology*, 60 Cornell L. Rev. 927 (1975)  
Available at: <http://scholarship.law.cornell.edu/clr/vol60/iss6/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# RECENT TRENDS IN CHOICE-OF-LAW METHODOLOGY\*

*Arthur Taylor von Mehren*†

## INTRODUCTION

The connections between choice of law and comparative law are pervasive. Every choice-of-law problem potentially involves a comparative law problem, that of understanding and applying a rule or principle derived from another legal order. Choice-of-law methodologies also trench on comparative law. It is clear, for example, that a Bealean approach does not avoid—though it tends to conceal—the comparative law problem. Beale's choice-of-law methodology is based, in significant measure, on the inarticulate premise that considerable diversity in rules and principles need not—and usually does not—mean that the legal orders involved hold fundamentally different or conflicting views respecting the basic policies relevant to regulation of the matter at issue. Characterization, a procedure basic to the Bealean method, proceeds on the assumption that the doctrinal structures of the implicated legal orders are uniform. Where this is clearly not so, as, for example, where a French court must face a trust problem, characterization can only proceed on the basis of an explicit comparative law analysis.

Latter-day disenchantment with Beale and the first *Conflicts Restatement* has, on the whole, made the comparative dimension in choice-of-law methodology both more explicit and more important. Full development of the implications of the approach that began with Cook and Cavers requires a sensitive understanding for each case of the function of the potentially applicable domestic-law rules and principles of the various concerned legal orders. Currie's insistence on applying the forum's rule whenever the forum state has an interest in applying its policy may be more an unwillingness to become involved with comparative law problems than a necessary conclusion from the premises underlying his formal analysis.

Much of the discussion in this article of recent trends in

---

\* This article is a revised version of *Une esquisse de l'évolution du droit international privé aux Etats-Unis*, 100 JOURNAL DU DROIT INTERNATIONAL 116 (1973) and is published with the permission of that journal.

† Professor, Harvard Law School. B.S. 1942, LL.B. 1945, Ph.D. 1946, Harvard University.

American choice-of-law methodology suggests the growing significance of the comparative law dimension in the handling of choice-of-law issues. Accordingly, although its theme is not explicitly comparative, this article can fairly claim a place in the *Cornell Law Review's* issue honoring a friend of long standing, Professor Rudolf Schlesinger, distinguished scholar and teacher in the field of comparative law.<sup>1</sup>

Choice of law is doubtless the most elusive and difficult branch of private international law. Adjudicatory jurisdiction and recognition of judgments present difficulties and complexities,<sup>2</sup> but often these yield to analysis and reflection more readily and completely than do those encountered in choice of law. This article examines the reasons for the intractability of the choice-of-law problem and addresses the question whether American theory and practice in the last several decades have illuminated the field and made it more manageable.

## I

### HISTORICAL DEVELOPMENT OF CHOICE-OF-LAW THINKING

The choice-of-law problem presents two different, though at times interrelated, questions: (1) What legal order ultimately controls—or should control—in a situation or transaction that has significant connections with more than one state; (2) How should a given legal order regulate a particular multistate situation or transaction? The latter question is usually put in a more restricted form: Does the legal order wish to regulate a matter under its domestic rules or under those of another state or states? These are intrinsically difficult questions, involving considerations and issues that are not encountered generally in legal analysis. Most legal problems are studied and handled in terms of the values, purposes, and institutions of a single, politically organized society. Necessarily, broader as well as somewhat different ranges of policy are impli-

---

<sup>1</sup> There is a special sense in which this paper is explicitly comparative. It was originally written for the centenary issue of the *Journal du Droit International*. As such, the presentation and analysis represent an effort to describe and explain American developments for a Continental European audience.

<sup>2</sup> These areas are discussed in von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) and von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968). Extensive discussions and materials for the entire field of private international law are contained in A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* (1965).

cated in multistate situations, and a far greater variety of policy combinations may be encountered. To complicate matters further, because most forms of economic and social life are essentially intra- rather than inter-state in character, any given legal order's experience in handling multistate situations is small and episodic in comparison with its experience in handling analogous, fully domestic situations. Moreover, the individual's sense of justice is largely shaped by experience with the legal order of a single community.

Choice-of-law theory, preoccupied with determining which of several legal orders concerned with a given multistate situation is entitled to control, has implicitly assumed that the selected legal order would regulate the issue under its rules applicable to analogous fully-domestic situations. The only real challenge—and that a partial and limited one—to this assumption in traditional analysis is the *renvoi* theory.<sup>3</sup>

Various approaches have been proposed to treat the problem of selecting the controlling legal order. Some approaches work with broad policies respecting the requirements of social and economic intercourse among states. Thus, at an early stage in the development of American conflicts theory, Joseph Story writes in his *Conflict of Laws* that “[t]he true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.”<sup>4</sup> Another school argues that the controlling legal order is determined by the

---

<sup>3</sup> Space does not permit discussion here of the *renvoi* in this perspective. The matter is treated in von Mehren, *The Renvoi and Its Relation to Various Approaches to the Choice-of-Law Problem*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 380 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961). See also A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS*, *supra* note 2, at 509-16, 549-52.

<sup>4</sup> J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 35, at 34 (1834) (footnote omitted). Story adds that the doctrine “leaves behind many grave questions as to its application . . .” *Id.* § 38, at 37. Story's *Commentaries on the Conflict of Laws* was the first book in the English language which endeavored to treat the subject as a whole and which relied not only on common law decisions but drew also on the writings of leading civilians. The eighth and last edition of the *Commentaries*, edited by Bigelow, appeared in 1883. For evaluations of Story, see Lorenzen, *Story's Commentaries on the Conflict of Laws: One Hundred Years After*, 48 *HARV. L. REV.* 15 (1934); Nadelmann, *Some Historical Notes on the Doctrinal Sources of American Conflicts Law*, in *IUS ET LEX—FESTGABE ZUM 70. GEBURTSTAG VON MAX GUTZWILLER* 263, 272-76 (1959), reprinted in K. NADELMANN, *CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE I*, 10-14 (1972); Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 *AM. J. LEGAL HISTORY* 230 (1961), reprinted in K. NADELMANN, *CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE* 21 (1972).

territorial nature of substantive law. Joseph Beale<sup>5</sup> suggests that in the nature of things each community's law reaches only to its borders. The territorial vision sees the international community as a well-defined checkerboard with each state's law confined within the state's boundaries; moreover, each situation or transaction is firmly centered on one square so that overlapping never occurs. A third view, often called the local-law theory, had as its leading spokesman Walter Wheeler Cook.<sup>6</sup> This approach emphasizes the territorial nature of the administration of justice. The local-law school also sees the international community as a checkerboard and, as a particular litigation occurs on only one square, gives at first the illusion that overlapping is avoided.

The first two approaches obviously cannot provide satisfactory guidance in selecting the legal order that is to control a given multistate situation or transaction. Story's formula presents an attitude but does little to suggest or resolve the hard problems of analysis and choice that lurk behind an attractive facade. Beale's theory, for which much larger claims were made, asserts a view of the legal universe and of the nature of law that is incomplete and, in many respects, oversimplified and inaccurate. Moreover, even for a confirmed believer, the dogma of territoriality does not contain any compelling solution to such intractable problems as where to place on the territorial checkerboard a contract that is negotiated by parties physically present in different states or a tort that involves wrongful conduct in one state and injurious effects in another.

Cook's local-law approach provides a theory for determining the formally-controlling legal order. No selection is involved because the forum, from the perspective of the source of authority, always applies forum law, although the given rules may be mod-

---

<sup>5</sup> Professor Joseph H. Beale (1861-1943) taught at Harvard Law School from 1890 to 1938. His *TREATISE ON THE CONFLICT OF LAWS* (1935)—foreshadowed by numerous articles—taken together with the first *RESTATEMENT OF CONFLICT OF LAWS* (1934), for which Beale was the Reporter, represented at the time the most significant and influential formulation of American conflicts law since Story.

<sup>6</sup> Walter Wheeler Cook's (1873-1943) professional life was devoted to law teaching (*e.g.*, Chicago, Yale, Columbia, Johns Hopkins, and Northwestern). He was an exponent of the realist school of legal thought and education. Between 1919 and 1942 he wrote a series of articles on conflict of laws which, assembled and supplemented in his *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942), exerted great influence on American thinking in this field.

Another significant writer from the local-law perspective was Professor Ernest G. Lorenzen whose principal works are collected in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1947).

eled on the law of another legal order. The theory leaves entirely unanswered, however, the problem of how the multistate transaction or situation in question is to be regulated. In Story's and Beale's approaches, the selecting process can be—and is—viewed as providing the required choice of law. In Cook's theory, the choice-of-law process cannot stop with the determination of the legal order whose law, in a technical rather than a more substantive sense, is applied. Clearly, the forum will not wish to apply its domestic rules to every matter involving multistate elements litigated in its courts. Yet the local-law theory, as such, provides no guidance as to when recourse should be had to other rules. Cook wrote little of a general, theoretical nature regarding the problem that his local-law theory so clearly posed. He merely suggested that "the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc." should be used and noted that "[t]he problem involved is that of legal thinking in general."<sup>7</sup>

Theories of the kind represented by Story and Beale coalesce problems—what legal order is to control the situation and how it will wish to control—that Cook's analysis separates. This merger and the attendant emphasis on the selection issue raise difficulties. First, merger causes the selecting process to focus upon considerations relevant to the allocation of authority among legal orders and to ignore the subtle problem of how a given legal order wishes to regulate the multistate transaction or situation in question. The result is that one's sense of justice is not infrequently offended; the legal order selected may have a legitimate and acceptable claim to control, but control in terms of its domestic rule often cannot be justified in terms of the policies and values that the domestic rule seeks to advance.

Concentration upon the problem of selection also tends to inhibit precise analysis of the question of when a given legal order will wish to regulate a multistate transaction or situation under a rule other than its domestic rule. The problem of selecting a controlling legal order can be initially approached by asking whether the various concerned legal orders have, in view of the policies underlying their putatively applicable domestic rules, any reason to wish to regulate a given matter. Without any doubt, thinking along these lines influenced in some degree the results reached by such jurists as Beale and Story. But, since the formal components of the analysis often seek to exclude and, in any event,

---

<sup>7</sup> W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 43 (1942).

do not emphasize this problem, thinking on the issue is not rigorous and theory is neither shaped nor advanced.

Third, exclusive emphasis on the selection problem to the exclusion of the question of how a given legal order would wish to regulate probably multiplies conflicts unnecessarily. This result comes about for several reasons. Differences of considerable technical significance between domestic rules and principles of different states frequently do not reflect substantial policy differences. Consequently, the concerned communities in a multistate situation could often find either of two technically different rules acceptable. In addition, a number of special policies and considerations—in particular workability and the facilitation of multistate activity—derive from the very fact that a situation is multistate. The weight of such policies in a given multistate situation may cause a legal order to regulate a matter under a non-domestic rule even though there are reasons that support application of its domestic rule. Finally, the multistate configuration of a problem may cause the policies that support a rule in its fully domestic application to fall away; other policies that are subordinated by the society in pursuit of the aforesaid policies would then emerge and support a treatment of the multistate situation different from that afforded analogous domestic situations.

Another difficulty produced by coalescing the two issues of the controlling legal order and how it wishes to control is that theories of—and criteria for—the selecting process are often developed and tested in contexts where there is ultimately no real conflict of policy between the two or more legal orders significantly concerned with a given multistate problem. Consequently, as selection theory and practice have not been forged in the crucible of difficulty, the rule may not survive a real challenge. Where one senses, even though only dimly and intuitively, that there may be a significant divergence between forum policy and the policy of the legal order indicated by conventionally accepted selection theory and practice, there is a strong tendency to escape from the formal theory's imperatives in an essentially undisciplined and ad hoc fashion. Escape may take the form of changing a characterization, resorting to public policy, or utilizing the *renvoi*.<sup>8</sup>

In sum, the inevitable consequence of approaching the choice-of-law problem exclusively in terms of jurisdiction-selecting analyses is a looseness and incoherence of theory and practice. A facade of order and principle prevails, but the reality that it

---

<sup>8</sup> See note 3 *supra*.

conceals is far more complex than theory admits or suggests. Consequently, theories such as those adumbrated by Story and Beale have little explanatory or directive force. They serve as *ex post facto* rationalizations for results often reached on other grounds, thus failing to discipline and criticize theory and practice.

The difficulties and limitations inherent in a preoccupation with selecting the legal order entitled to control multistate situations and the related failure to grapple with the problem of how a legal order would wish to regulate these situations ultimately produced a Copernican revolution in American thinking. Analysis shifted to the second aspect of the choice-of-law problem, how a given legal order will wish to regulate the transaction or situation. Those who embraced Cook's local-law theory in a reaction to Bealean vested rights could hardly avoid this issue. The proposition that, in terms of the source of authority, the forum always applies its own law was useful in its time and place as an antidote to territorial and vested-rights dogmas, but of slight help to those who must decide choice-of-law questions.<sup>9</sup> Thus, one who realized the incompleteness of the local-law theory was nevertheless helped by it to see the inadequacies and ambiguities of choice-of-law practice based on the approaches of such theorists as Story and Beale. A natural reaction was to turn attention to the question of how a given legal order would wish to regulate particular choice-of-law problems.

In the American literature, the first general theoretical approach to the choice-of-law problem in terms of the regulating rule is an article written in 1933 by David F. Cavers.<sup>10</sup> Cavers first criticizes traditional approaches for seeking exclusively "to determine the *jurisdiction* whose law should govern the question at issue."<sup>11</sup> He notes that even with the reaction against territorial and vested-right theories and a connected "recognition that considerations of justice and social expediency should be, and in many cases have been, the dominant determinants of problems in this field. Yet these considerations are still harnessed to the old task of devising (or justifying) rules for selecting the appropriate jurisdiction whose

---

<sup>9</sup> Professor Hessel Yntema criticized Cook on precisely this ground. See Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. LAW 297, 316-17 (1953).

<sup>10</sup> See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). Professor David F. Cavers, born 1902, was a member of the Duke Law Faculty from 1931 to 1945 and of the Harvard Law School Faculty from 1929 to 1930 and from 1945 to 1969. At Duke, he created and edited the quarterly *Law and Contemporary Problems*. His professional interests are manifold and include an abiding concern for the field of conflict of laws.

<sup>11</sup> *Id.* at 178 (emphasis in original).



law should govern a given case."<sup>12</sup> He proposes that attention should be "focussed upon the problem of what should be the proper result in [the given case], as distinguished from the problem of what rule is the proper one to select a jurisdiction whose law should govern . . ."<sup>13</sup> Cavers summarizes his approach as follows:

When a court is faced with a question whether to reject, as inapplicable, the [domestic] law of the forum and to admit in evidence, as determinative of an issue in a case before it, a rule of law of a foreign jurisdiction, it should

- (1) scrutinize the event or transaction giving rise to the issue before it;
- (2) compare carefully the proffered rule of law and the result which its application might work in the case at bar with the rule of the forum (or other competing jurisdiction) and its effect therein;
- (3) appraise these results in the light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other; recognizing

. . . .  
b) in the evaluation of contacts, that the contact achieves significance in proportion to the significance of the action or circumstance constituting it when related to the controversy and the solutions thereto which the competing laws propound.<sup>14</sup>

In this pioneering article, Cavers neither develops his analysis fully nor explores its inherent problems. His methodological suggestions begin with a description of proper analysis of fully domestic problems or situations. "They demand a penetrating analysis of the controversy and the transaction out of which it arose, an exacting inquiry into and appraisal of the competing rules, a deliberate weighing of the equities."<sup>15</sup> The same general approach is to be used in resolving multistate problems. Thus, a court should undertake "a painstaking examination of the same factors whose materiality would be admitted were the case a purely local one, together with those additional factors which the interstate character of the transaction raises into prominence."<sup>16</sup> Consid-

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 191.

<sup>14</sup> *Id.* at 192-93.

<sup>15</sup> *Id.* at 187.

<sup>16</sup> *Id.* at 188. It must not be inferred from the passages quoted that Cavers at the time opposed the formulation of choice-of-law rules. On the contrary, he believed they could and should be developed. *See id.* at 193-96.

eration is not given to whether analysis of multistate problems along these lines implicates issues and involves dilemmas that are not encountered in fully domestic problems. Nor is more than passing attention given to how the ultimately controlling legal order is to be selected in the event that the proposed analysis reveals a real difference of opinion among the concerned jurisdictions. Here Cavers appears to suggest that the forum's view as to which of the competing rules is better in a general, jurisprudential sense can on occasion be decisive.<sup>17</sup>

If Cavers's article can be viewed as stimulating for the first time in American choice-of-law thinking an interest at the level of general analysis in the question of how a particular legal order would wish to regulate a given multistate situation or transaction, the most provocative formulation of the general approach is found in the writings of Brainerd Currie.<sup>18</sup> Currie begins with an analysis of forum law:

[T]he court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy . . . .

[Then, if] necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.<sup>19</sup>

When these questions are answered, the problem of selecting the controlling legal order must be faced: "If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law." However, "[i]f the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the

---

<sup>17</sup> Compare Cavers's discussion of transactions in which the result turns on the contractual capacity of infants and married women. *Id.* at 189-90. Cavers remarks "in the course of . . . evaluation, the court's opinion as to the desirability of limitations upon the contractual capacity of infants and married women will inevitably enter." *Id.* at 190. More recently, Cavers has grown less resigned to this tendency and has evidenced concern with an apparently increasing resort to the "better law" approach. See text accompanying notes 71-74 *infra*.

<sup>18</sup> Brainerd Currie (1912-1965) was professor of law at the University of Chicago and Duke University. Roughly the last two decades of his career were largely devoted to scholarship in the field of choice of law. His principal articles on the subject are collected and published in B. CURRIE, *SELECTED ESSAYS ON CONFLICT OF LAWS* (1963).

<sup>19</sup> *Id.* at 183-84. Currie uses "law of the forum" in the sense of domestic-law rules and principles.

forum if the foreign state has no such interest."<sup>20</sup> Currie thus asks the question whether the concerned jurisdictions, beginning with the forum, desire to regulate the question under their domestic-law rule. This formulation glosses over the fact that a legal order which does not wish to regulate a matter under its domestic rule usually has, nonetheless, a view regarding how the problem should be handled. In order to state the problem accurately, a more comprehensive formula is required: How does each legal order desire to regulate the matter? Nevertheless, Currie's analysis has the merit of separating the two issues that arise in choice-of-law problems. In his writing, the problem of whether a given legal order wishes to regulate in terms of its domestic rules dominates analysis and discussion; the problem of selection where several legal orders seek to regulate in a contradictory fashion is viewed as insolvable at least by courts and juristic theory, in any fashion other than application of the forum's domestic-law rule.<sup>21</sup>

Just as Story's and Beale's approaches illustrate the ambiguities and deficiencies that inhere in choice-of-law theories that address themselves essentially to the problem of selecting the controlling legal order, Currie's position reveals the ineluctable problems of any effort to determine whether—or, more broadly, how—a given community wishes to regulate a given multistate problem or situation. Analysis of his views also makes clear the interconnections between the regulation and selection issues.

Currie's approach to the question whether a community wishes to regulate under its domestic rule a given multistate problem or situation begins by recognizing two important propositions. First, a domestic rule or principle may rest on several supportive policies; second, the local rule applied to fully domestic situations may represent a subordination of competing policies. Thus, a rule that married women lack capacity to contract subordinates a "policy of security of transactions to [a] policy of protecting married women."<sup>22</sup>

The first proposition is obvious. Rules of tort law permitting recovery against one who negligently injures another may rest on mutually reinforcing policies of compensation and conduct regulation. Or, to take another example, statutes restricting the right of a guest to sue his host-driver for injuries suffered in an automobile accident can express both a view that the guest in suing would be

---

<sup>20</sup> *Id.* at 184.

<sup>21</sup> Currie does allow for a "restrained and moderate" definition of forum policy. *See* text accompanying notes 30-33 *infra*.

<sup>22</sup> B. CURRIE, *supra* note 18, at 85.

showing an unacceptable lack of gratitude and a conviction that such actions involve a high risk of host-guest collusion to the detriment of insurance carriers and the general public. In fully domestic situations, it is rarely necessary to decide what the effects of the disappearance of one of several supportive policies would be. On the other hand, the disappearance phenomenon is often encountered in an analysis along the general lines advocated by Currie. Thus, if the host-driver comes from a community in which a guest can sue and the car is registered and insured in that community, while the guest lives in a community having a guest statute, the collusion policy arguably no longer supports application of the guest statute.

Although Currie recognizes that this phenomenon occurs, he has relatively little to say about its significance for the choice-of-law problem. His emphasis, in various contexts, upon the difficulties and possible improprieties involved in the judicial ascertainment and evaluation of policy—particularly where another community's rules and policies are in question<sup>23</sup>—suggests that he would ordinarily consider the forum's domestic rules applicable if any significant policy remained supportive without regard to the disappearance in the multistate context of other policies importantly supportive in the fully domestic setting. A forum would consider its guest statute applicable if either of the policies supportive in a fully domestic situation—collusion to the detriment of insurance carriers and the general public, and unacceptable lack of gratitude—is relevant in the given multistate situation. Currie's reluctance to become involved with the subordination phenomenon is also seen in his seeming unwillingness to consider even the possibility of subordination unless the policy favoring subordination is one generally recognized by contemporary societies. Thus, Currie does not view the rule giving contractual capacity to married women as subordinating a protective policy to a policy of security of transactions.<sup>24</sup> No doubt Currie's conclusion is correct for the majority of cases; protective policies relating to special classes or groups of persons tend to disappear rapidly when they are no longer expressed in legal rules. Married women, once their incapacity ends, are probably soon viewed by the society as being like any other contracting party. Nevertheless, Currie's refusal to entertain the possibility that in some situations a protective policy

---

<sup>23</sup> See, e.g., *id.* at 181-83, 603-06.

<sup>24</sup> *Id.* at 86.

may be subordinated by a domestic-law rule favoring security of transactions is not satisfactorily explained.

Analytically, still another range of policies—those implicated through the problem's multistate nature—deserve consideration in any effort to determine whether and how a legal order wishes to regulate a given multistate situation. For instance, in a fully domestic situation a legal order that denies contractual capacity to married women may assume that merchants and others can and will take this rule into account in their economic activity. On the other hand, in a multistate situation there may be no reason for the party dealing with a married woman to consider the possibility that she lacks contractual capacity. Here, a policy of protecting legitimate expectations, irrelevant in analogous fully domestic situations, requires attention. Likewise, a multistate situation can involve policies—such as the facilitation of multistate activity—that are peculiar to the multistate context.

As one might expect from his general approach as described above, Currie says relatively little about policies that emerge because of the multistate nature of a transaction or situation. Presumably, Currie is prepared to recognize such policies and to consider them in his analysis, since "there is room for restraint and enlightenment in the determination of what state policy is and where state interests lie."<sup>25</sup> Indeed, such considerations could play a decisive role in delineating the scope of a state's interest in order to avoid a "conflict with foreign interests that may result from a too selfish and provincial determination."<sup>26</sup> But Currie never develops the point; perhaps he perceived that the required line of analysis could endanger the relative simplicity of his approach and also require the courts to perform functions for which he felt they were unfitted.<sup>27</sup>

Thus, the analysis through which Currie would determine how a legal order wishes to regulate a given multistate situation or transaction excludes issues and possibilities that are relevant in terms of his basic methodology. The exclusion is less radical in the case of the forum than in that of other legal orders. But, even for the forum, Currie would typically give a rather simplistic answer in terms of the domestic rule so long as a single, significant policy continued to support that rule. He would not consider closely whether subordinated and multistate policies called for another

---

<sup>25</sup> *Id.* at 186.

<sup>26</sup> *Id.* at 592.

<sup>27</sup> *See id.* at 604-06.

solution. Unless the reasons for so limiting the inquiry are convincing to those who utilize this methodology, ambiguity and uncertainty are necessarily produced. An approach in terms of analyzing whether and how a legal order wishes to regulate a multistate situation does not in itself suggest or contain these limitations. Consequently, unless justified by reference to compelling considerations of another kind, these limitations are arbitrary. And, even if not arbitrary, the question remains whether conclusions are sound that must be based on a significantly restricted application of a methodology.

Any effort to understand how a jurisdiction wishes to regulate a given multistate situation or transaction must also determine which connections between a community and the situation or transaction implicate policies held in domestic situations by the community's legal order. Currie recognizes this problem of linkage and remarks, for instance, that "there is no need to exclude the possibility of rational altruism: for example, when a state has determined upon the policy of placing upon local industry all the social costs of the enterprise, it may well decide to adhere to this policy regardless of where the harm occurs and who the victim is."<sup>28</sup> But such issues are not explored in depth.

Several points deserve fuller consideration. In the case of compensation policies, the linkage problem may require more careful and complete articulation of supporting policies than is usual: Is responsibility imposed simply to compensate the injured party or also to require those who create certain classes of risks either to bear them personally or to shift them through insurance to a larger group comprised of all members of the community who create comparable risks or who utilize the product or service? A policy such as condemnation of ingratitude, supportive of a guest statute, raises a slightly different aspect of the linkage issue: Is a given legal order entitled to police the conscience of those who have no long-term relations with the community? Religions and systems of ethics typically are universalistic; do legal rules with religious or ethical bases make similarly universal claims? And, if so, should other legal orders give weight to such claims? Presumably, to the extent that law is viewed as instrumental and as rooted in a given society, no policy supportive of a legal rule or principle is of necessarily universal application. In all events, the linkage problem deserves more thoughtful consideration than it receives from Currie.

---

<sup>28</sup> *Id.* at 186 (footnote omitted).

The foregoing demonstrates that Currie avoids, by limiting the scope of his inquiry and analysis, many of the difficulties that inhere in a comprehensive effort to determine how a legal order would wish to regulate a given multistate transaction or situation. The limitation is least drastic—but still significant—where the legal order in question is the forum. How satisfying, then, can the results of investigation be when the analysis is, in its own terms, incomplete? Can we comfortably accept Currie's demonstrations that no conflict exists among concerned jurisdictions with respect to a given multistate solution? Can we rest secure in his views as to when the forum would wish to regulate the matter under its domestic rule?

Similar doubts arise with regard to Currie's handling of the second aspect of the choice-of-law problem, choosing among legal orders, each of which has a legitimate "interest in the application of its law and policy."<sup>29</sup> The limits set by Currie to policy analysis also undermine any efforts to exercise "judicial statesmanship" to avoid "the conflict with foreign interests that may result from a too selfish and provincial determination" of a state's interests.<sup>30</sup> Hence, the exercise of "restraint and enlightenment in the determination of what state policy is and where state interests lie"<sup>31</sup> becomes correspondingly problematic.

Still other difficulties adhere to Currie's approach to the problem of selecting the controlling legal order in the event of true conflict. Currie originally sought to render the problem manageable by requiring the application of forum law whenever there is "a legitimate basis for the assertion of an interest in the application" of "the governmental policy expressed in the law of the forum."<sup>32</sup> Under this formulation, the forum presumably would not take into account policies respecting relations and intercourse among separate legal orders, but which are not directly related to the domestic-law rule potentially applicable.<sup>33</sup> Later, Currie advocated restrained and moderate definition of the forum's policy, an approach that must include recognition of multistate policies. Yet, he hardly touched the problems of just what these policies are and how they are to be weighed against the forum's domestic-law policies. Nor does Currie consider whether such determinations require

---

<sup>29</sup> *Id.* at 189.

<sup>30</sup> *Id.* at 592.

<sup>31</sup> *Id.* at 186.

<sup>32</sup> *Id.* at 183.

<sup>33</sup> *Cf.* Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process*, 35 N.Y.U.L. Rev. 1126, 1138 (1960).

rather full understanding of how other concerned legal orders wish to handle the particular multistate situation.

The preceding discussion is sufficient to suggest that the simplicity and rationality that Currie claimed for his methodology are as elusive, in their way, as that claimed by Beale. Currie's professed starting points are, unlike those of Beale, firmly rooted in an instrumental and sociological view of law. Consequently, Currie's premises have a greater explanatory power and form a more acceptable basis for decision than do Beale's assumptions respecting the territorial nature of law. But the inability or unwillingness—at least on Currie's part—to accept fully the logic of the method diminishes its explanatory power. Currie's refusal to follow through with the logic of his methodology is inherent in his effort to keep the approach simple.<sup>34</sup> For those who find the limitations within which Currie works comfortable and appropriate, the result is considerable simplicity. However, just as in the case of Beale, simplicity must be paid for by accepting propositions that cannot be explained or justified in terms of the methodology.

## II

### THEORETICAL DIFFICULTIES

How well do the approaches of Story, Beale, Cook, Cavers, and Currie satisfy the juristic standards normally applied to the formulation and administration of legal rules and principles? Any answer must begin with an attempt to state briefly those standards. In large measure, legal rules and principles are today viewed instrumentally as designed to advance certain values and purposes with a minimum of expense to competing values and purposes. Rules are to be applied teleologically. Justice requires that these rules and their administration be principled; similar treatment is to be accorded equivalent patterns of value and purpose.

None of the choice-of-law methodologies examined fully meets the first standard. Story and Beale have little to offer on the general problem of instrumentalism; Cavers, in his writing discussed above, and Cook urge an instrumental approach, but say relatively little about its specific implications for choice of law.<sup>35</sup>

---

<sup>34</sup> Compare Leflar's observation: "Simplicity of rule and ease of judicial administration were the prime considerations underlying Currie's system, just as with Beale's system, though for different reasons." R. LEFLAR, *AMERICAN CONFLICTS LAW* § 101, at 234 (1968) (footnote omitted).

<sup>35</sup> In his more recent writing, discussed in text accompanying notes 71-99 *infra*, Cavers treats aspects of these problems at length.



Currie comes closest to providing an instrumental method but, at least by standards developed in dealing with single-state situations, his analysis is oversimplified and involves arbitrary exclusions.<sup>36</sup> These shortcomings in choice-of-law methodologies, when measured against the general standards of instrumental jurisprudence, are in some measure inescapable. A teleological approach in multistate situations involves inherently greater difficulties and ambiguities than are encountered when the same approach is applied in a single-state context. At the threshold is the difficulty of ascertaining and stating the relevant policies held by concerned jurisdictions. Jurists find this task difficult and delicate enough when they confront it in their own legal orders; further complications inevitably arise in multistate situations. Understanding of values and purposes ultimately derives from long participation in a society's life. Judgments dealing with problem areas of domestic law benefit from sustained professional analysis and criticism and are subject to correction through the community's political processes. In assessing the values and purposes of other legal orders, jurists enjoy few, if any, of these advantages.<sup>37</sup> Moreover, multistate problems present a range of policies and values—those relating to effective and harmonious intercourse and relations between and among communities—that do not arise in single-state situations. Finally, the sheer number of relevant policies and considerations multiplies rapidly as the views of other legal orders are taken into account. Full instrumental analysis of choice-of-law problems thus becomes elusive in view of the almost endless variations that are possible.<sup>38</sup>

---

<sup>36</sup> See text accompanying notes 22-32 *supra*.

<sup>37</sup> Compare Judge Breitel's remark in his dissenting opinion in *Tooker v. Lopez*: "Intramural speculation on the policies of other States has obvious limitations because of restricted information and wisdom. It is difficult enough to interpret the statutes and decisional rules of one's own State." 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411, 301 N.Y.S.2d 519, 543 (1969).

<sup>38</sup> Professor Reese has recently noted that to

determine what policy or policies underlie the relevant decisional or statutory local law rules of the potentially interested states . . . will often prove an onerous, difficult, and frustrating task. Under the best of circumstances, the amount of judicial time spent in trying to ferret out these policies is likely to be considerable; after all possible work has been done, the exact nature of these policies may still remain indeterminate.

Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 317 (1972). See also Kahn-Freund, *Delictual Liability and the Conflict of Laws*, in *ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE*, 1968-II RECUEIL DES COURS 1, 60-62.

This task can be simplified by working with the purposes that general comparative analysis views as informing the rules or principles in question. The purposes thus identified could be enlarged or restricted by investigation directed to the particular legal order in

In considering whether the several methodologies discussed satisfy the requirement that rules and their administration be principled, this requirement's possible meaning in multistate situations must be explored. In multistate affairs identical situations can be handled by several legal orders. Is it unprincipled for these legal orders to reach different results? Differing results may be disturbing, but they do not seem unprincipled. So long as a legal order treats in a similar fashion situations that are, in terms of its values and purposes, equivalent, the results are principled in the sense of being consequent. In this respect, although one may well conclude that the approach is parochial and ignores requirements that flow from a legal order's participation in an international economic and social order, Currie does not advocate unprincipled decisions when he writes:

There remains the stubborn fact that under any conceivable conflict-of-laws method the interests of one state will be sacrificed to those of another whenever there is conflict. The only virtue of [my] method . . . is that it at least makes the choice of interests on a rational and objective basis: the forum consistently applies its own law in case of conflict, and thus at least advances its domestic policy. This is not an ideal; it is simply the best that is available.<sup>39</sup>

"Unprincipled" has another, somewhat different, meaning. Speaking in terms of a single community, it is unprincipled to apply to one case a rule that one is not prepared to generalize for all analogous cases. Currie's rule of forum preference can be viewed as unprincipled in this sense, unless the state holding it would, as a member of the international community, advocate its universal adoption. However, it must be recognized that in an imperfect community—one that lacks a common legislature and judiciary—the attainment of solutions principled in this second sense is extremely difficult. A kind of Gresham's law operates: each of the involved legal orders hesitates to adopt principled solutions for fear that the others will be less principled. Here again, the realities of the multistate situation are very different from those of analogous fully-domestic situations.

One of the merits of Beale's approach, so long as jurists were able to live by its precepts, was that its results were principled in

---

question. Unless there appeared to be a reasonably clear basis for deviating from the pattern of purpose generally informing the rule or principle in question this would not occur. Comparative law research and writing, which has significantly increased in recent decades, can here provide a valuable service to conflict of laws. *E.g.*, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (R. Schlesinger gen. ed. 1968).

<sup>39</sup> B. CURRIE, *supra* note 18, at 169.

the second of the senses discussed above, and appeared to be so in the first as well unless one compares various situations in instrumental terms. On the other hand, the virtues, instrumentally speaking, of methodologies of the kind advocated by Cook, Cavers, and Currie involve the price of a strong tendency toward unprincipled, in the second sense of self-regarding, results. Currie's view that a forum should define its interests in a restrained and moderate fashion, avoiding "a too selfish and provincial determination,"<sup>40</sup> reflects a desire to escape the unprincipled solutions that his earlier formulation required.<sup>41</sup> Similarly, in recent years Cavers has expended considerable effort in seeking to develop principles of preference that will provide choice-of-law solutions that are both instrumental and principled in the sense of not being self-regarding.<sup>42</sup> For the reasons already suggested, it is inherently more difficult to avoid unprincipled decisions in the handling of multistate situations than in dealing with analogous single-state situations. Nonetheless, the tendency of contemporary instrumental approaches to choice-of-law toward self-regarding results is a serious defect. This problem and efforts to overcome it are further considered below.<sup>43</sup>

It seems fair to conclude that none of the choice-of-law methodologies discussed fully meets the standards normally set for the administration of justice in single-state situations. The question remains whether any choice-of-law methodology, no matter how developed and refined, can fully satisfy these standards. If not, jurists face the rather somber prospect of being condemned—at least in the absence of international conventions—to methodologies that, although the best available, are not fully satisfactory.

An answer to this question can begin by dismissing from further consideration methodologies of the type advocated by Story and Beale. Their defects are so radical when tested against instrumental standards that they are simply unacceptable today. Story's approach has little explanatory power and could gain such

---

<sup>40</sup> *Id.* at 592.

<sup>41</sup> Currie's considerable effort to find a basis for principled solutions in the privileges and immunities clause and the equal protection clause of the Constitution of the United States evinces the same concern. See B. CURRIE, *supra* note 18, at 445-525, *Chapter X, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*; B. CURRIE, *supra* note 18, at 526-83, *Chapter XI, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*. These two chapters were written in collaboration with Professor Herma Hill Schreter, now Kay.

<sup>42</sup> See text accompanying notes 71-97 *infra*.

<sup>43</sup> See text accompanying notes 44-103 *infra*.

only by a metamorphosis into a policy-based analysis. Beale's approach has the fundamental difficulty of requiring the acceptance of conceptions and propositions that are not rooted in experience and do not reflect in any direct and consistent fashion the values and purposes that contemporary legal orders seek to advance. Challenged by sociological jurisprudence, the jurisprudence of conceptions has declined in the choice-of-law field as it has more generally. Choice-of-law theory and practice cannot long remain insulated from the main currents of general legal thought.

The problem becomes, therefore, whether policy-based analyses can overcome to any significant degree the above-noted shortcomings. The easier portion of the task will be to improve the analysis both of the policies held by the concerned legal orders and of these policies' reach. Increased experience should permit courts and jurists to be more articulate on both issues. Greater attention will gradually be given to the problem of subordinated policies and to policies that arise because of a situation's multistate character. In time, the jurisprudence of legal orders using policy-based analyses should make understanding each other's policies easier and more reliable. Although this enterprise will never be as comfortable and reliable as is policy analysis in a single-state situation, there is reason to hope that generally acceptable levels can be reached.<sup>44</sup>

It will, however, probably be more difficult to moderate the tendency of policy-based approaches to eventuate in unprincipled results. The problem is greater than has so far been suggested. In multistate situations, issues of comprehensibility and invidiousness (in the sense of results that are perceived as unfair) are associated with the issue of unprincipledness.<sup>45</sup> Incomprehensible or invidious results are, in a sense, the lay analogy of the jurist's unprincipled results. When a layman cannot understand distinctions taken or when he considers them unfair, the justice of the result is called into question. Incomprehensibility and invidiousness can be problems in single-state situations, but multistate situations have a much greater potential for causing difficulty. In particular, difficulties

---

<sup>44</sup> On occasion, the objection is made to the general methodology under discussion that it is improper in an international context—as distinguished from a federal setting—for one legal order to explore and weigh the policies of another. See Kahn-Freund, *supra* note 38. For a policy-based analysis the alternative would seem to be to ignore completely the views of the foreign legal order. It is hard to see why this result should be preferred or why inquiries that are undertaken in a reasoned effort to resolve appropriately a problem in which both legal orders are concerned should be viewed as officious intermeddling by one of them.

<sup>45</sup> It should be noted that a generally accepted terminology has not yet emerged for discussion of these issues. The effort here is to consider, as it may be appropriate, the individual's sense of justice.

regarding comprehensibility are generated by multistate situations because lay understanding may well be shaped by territorial considerations, even though these are seen as otherwise relatively unimportant by a policy-based analysis. Judge Breitel made the point in his dissenting opinion in *Tooker v. Lopez*:<sup>46</sup>

Unless conflicts rules move over to substitute a completely personal law for the territorial system that infuses Anglo-American jurisprudence and underlies the understanding and expectations of Americans, it is still true that the law of a territory governs the conduct and qualifiedly the status of persons, resident and non-resident, within it, except in the extraordinary situation where the localization of persons and conduct is adventitious.<sup>47</sup>

Incomprehensible results are also likely to be taken as invidious, as are distinctions resting upon the personal law of one of the parties. Judge Wyzanski advanced this proposition in an alienation of affections case:

[A] doctrine that in all matrimonial tort cases the right to maintain a suit against a local defendant . . . turns on the matrimonial domicile of the plaintiff [takes a distinction which] . . . the lay plaintiff will regard . . . as involving a personal discrimination against him rather than as a step toward comity between states.<sup>48</sup>

### III

#### *Babcock* AND ITS PROGENY

Before examining theories designed to deal with the intertwined problems of unprincipled, incomprehensible, and invidious results,<sup>49</sup> it is instructive to illustrate the general problem by examining a series of important New York decisions. The discussion will also serve to illustrate the form that a policy-based approach to choice of law has taken in an influential state court. The cases to be examined all involve whether a guest can recover from his host-driver for injuries suffered in an automobile accident because of the latter's negligence.

The seminal decision—one of great importance generally for contemporary American choice-of-law theory and practice—is *Babcock v. Jackson*.<sup>50</sup> In that case, a New York guest was invited in New

<sup>46</sup> 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

<sup>47</sup> *Id.* at 593, 249 N.E.2d at 409, 301 N.Y.S.2d at 540.

<sup>48</sup> *Gordon v. Parker*, 83 F. Supp. 40, 43 (D. Mass. 1949).

<sup>49</sup> See text accompanying notes 68-103 *infra*.

<sup>50</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (5-2 decision).

York by a New York driver to drive to Ontario for a short trip. In Ontario, the car went out of control and crashed into a wall, injuring the guest. Ontario had a guest statute which precluded recovery against the driver; New York allowed recovery in such cases. Suit was brought in New York and the guest recovered. In terms of instrumental analysis of the policies presumably underlying the competing domestic rules regarding guest recovery, the choice-of-law problem seems relatively simple. We can speculate that Ontario—wary of possible collusion to the detriment of insurance companies, and, ultimately, seeking to protect the community from higher premiums—has in purely domestic situations subordinated policies of deterrence and compensation to policies disfavoring ungrateful guests. Presumably, none of the latter policies reached situations where the guest is habitually resident in New York and the insurance coverage was written there.<sup>51</sup> Consequently, the policies of deterrence and compensation<sup>52</sup> that are subordinated for domestic situations revive, and Ontario has no basis, at least so far as policies clustering around the guest-statute problem are concerned, to deny recovery. (The Court of Appeals's analysis of Ontario's position was less complete; no mention was made of the ungrateful guest policy nor of the revival of policies subordinated by Ontario for fully domestic situations.)

From New York's perspective, the situation is also clear-cut. By not having a guest statute, New York in domestic situations advances policies of deterrence and compensation. If the ungrateful-guest policy and the anticollusion policy have any weight, they are subordinated. Presumably, the deterrence policy represented by New York's domestic rule is less significant in the *Babcock* situation since the conduct and injury occurred elsewhere, but the compensation policy clearly applies with undiminished force. There is little reason to doubt the accuracy of the New York Court of Appeals' conclusion that New York would wish to regulate the given multistate situations in the same way as an analogous fully domestic situation.

So far as the policies associated with the relevant domestic rules are concerned, an instrumental analysis indicates that both Ontario and New York should allow the guest to recover. How-

---

<sup>51</sup> This assumes that a society's legal rules are not universal in their claims and that the relationship of the guest and of the insurance operation to Ontario did not bring into play the specific policies underlying its guest statute.

<sup>52</sup> Ontario's deterrence policy expressed in general rules of delictual liability clearly reaches the situation. Its compensation policy may be viewed as attenuated, but not fully excluded, because the injured person is a member of another community.

ever, in view of the multistate nature of the situation, the issues of comprehensibility and invidiousness require attention. Does the fact that the accident occurred in Ontario constitute a significant argument against applying New York's domestic rule? Since the host-guest relationship was created in New York between New York domiciliaries, and the occurrence of the accident in Ontario can be viewed as "fortuitous,"<sup>53</sup> permitting the guest to recover against the host should be entirely comprehensible to the New York parties and to the New York and Ontario communities in general. If geography strongly shapes lay understandings and expectations, the territorial connections of the situation as a whole with New York are sufficiently strong, and those with Ontario are so essentially casual, that the application of the New York rule seems thoroughly understandable. Consequently, unless permitting recovery here would call for drawing of incomprehensible or invidious distinctions in related fact situations, both New York and Ontario should permit recovery.<sup>54</sup>

Does allowing recovery in *Babcock* call for invidious distinctions in related fact situations? The question can be explored in three contexts. In the first, New Yorkers who are away from home for fairly substantial periods of time establish a host-guest relationship abroad and an accident abroad follows. The second situation has a New Yorker inviting a nonresident in New York and an accident occurring in the guest's home state. In the third case, the invitation and the accident both take place in the guest's home state. In all cases, the place of accident has a guest statute that bars recovery in analogous fully domestic situations.

The New York Court of Appeals dealt with the first situation in two decisions: *Dym v. Gordon*<sup>55</sup> and *Tooker v. Lopez*.<sup>56</sup> In both cases, the host and guest were New Yorkers attending a university in another state.<sup>57</sup> Analysis along the lines undertaken above for

---

<sup>53</sup> The majority opinion speaks of "the purely adventitious circumstance that the accident occurred" in Ontario and describes Ontario as "the place of the fortuitous occurrence of the accident." 12 N.Y.2d at 482, 483, 191 N.E.2d at 284, 285, 240 N.Y.S.2d at 750, 751.

<sup>54</sup> If the Ontario community considers shockingly immoral the ingratitude shown by a guest in suing his host, a suit brought in Ontario could be dismissed without prejudice to further proceedings in New York. Strong moral revulsion justifies a refusal on the ground of *ordre public* to adjudicate a controversy, but not the giving of judgment on the merits for the defendant.

<sup>55</sup> 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (4-3 decision).

<sup>56</sup> 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (4-3 decision).

<sup>57</sup> The host and guest were students at a summer session in the *Dym* case. In *Tooker*, they were undergraduate students in attendance during the regular academic year. In both cases, the guest statute in question permitted recovery where wilful misconduct or gross

the *Babcock* case indicates that if only policies informing the competing domestic rules are considered, recovery should be permitted.<sup>58</sup> The Court of Appeals so held in the *Tooker* case. The "case is one of the simplest in the choice-of-law area."<sup>59</sup>

New York's "grave concern" in affording recovery for the injuries suffered by Catharina Tooker, a New York domiciliary, and the loss suffered by her family as a result of her wrongful death, is evident merely in stating the policy which our law reflects. On the other hand, Michigan has no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured here.<sup>60</sup>

In the earlier *Dym* decision, which *Tooker* must be taken to overrule,<sup>61</sup> the majority had taken a different tack, placing considerable emphasis upon the fact that the place of the accident was not "fortuitous" or "adventitious."

[T]he parties were dwelling in Colorado when the relationship was formed and the accident arose out of Colorado based activity; therefore, the fact that the accident occurred in Colorado could in no sense be termed fortuitous. Thus it is that in this case where Colorado has such significant contacts with the *relationship itself* and the *basis of its formation* the application of its law and underlying policy are clearly warranted.<sup>62</sup>

The Court employed rather different methodologies in the two cases.<sup>63</sup> In *Tooker*, the court considered only the policies spe-

---

negligence on the part of the host-driver could be established. It can also be pointed out that the accident in *Dym* involved another car and the court in that case attached some significance to the suggestion that a guest statute serves in such cases to give injured persons in the other car a priority over the guest in seeking recovery against the host-driver. (In *Tooker*, the court stated in dictum that this view was erroneous. See 24 N.Y.2d at 574-75, 239 N.E.2d at 397, 301 N.Y.S.2d at 523.) Presumably, this policy, if decisive, could have been recognized by subordinating the guest's recovery to other claims arising from the accident instead of denying recovery entirely.

<sup>58</sup> If a policy against ungratefulness underlies the guest statutes, the place of accident has a somewhat greater claim to govern than it did in *Babcock* because the guests stand in a closer relationship to the local community.

<sup>59</sup> 24 N.Y.2d at 576, 249 N.E.2d at 397, 301 N.Y.S.2d at 525.

<sup>60</sup> 24 N.Y.2d at 577, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525.

<sup>61</sup> See the remarks of Judge Burke, author of the opinion for the court in *Dym*, concurring in the *Tooker* case. 24 N.Y.2d at 591, 249 N.E.2d at 407, 301 N.Y.S.2d at 538.

<sup>62</sup> 16 N.Y.2d at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467 (emphasis in original). The majority also remarked: "Having accepted the benefits of [Colorado] law for such a prolonged period, it is spurious to maintain that Colorado has no interest in a relationship which was formed there. In *Babcock* the New Yorkers at all times were *in transitu* and we were impressed with the fundamental unfairness of subjecting them to a law which they in no sense had adopted." *Id.* at 125, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

<sup>63</sup> Judge Burke, in his concurring opinion, characterizes *Tooker* as a pure "interest



cifically related to those rules which each concerned legal order would apply to an analogous fully domestic situation; in *Dym*, the court gave weight to a general policy of comprehensibility. Much of Judge Breitel's dissenting opinion in *Tooker* can be viewed as asserting that comprehensibility is a significant policy and that the result reached by the majority is simply not understandable to laymen.<sup>64</sup> Outright dismissal of comprehensibility as a policy to be considered in handling multistate problems would be most difficult to justify. On the other hand, often it will not be easy to determine whether a given result is incomprehensible or, if so, to decide what consequences follow for the given case. Perhaps the policy of comprehensibility standing alone should not change a result that is supported by strong countervailing policy considerations. The situation may well be different, however, where to incomprehensibility is added the conclusion that the result is either in itself invidious or likely to require invidious distinctions in related cases.

The result reached in *Dym* does not represent an invidious distinction as compared with *Babcock* unless either distinction based on the relationship's seat is incomprehensible or comprehensibility is considered an inadequate basis for distinguishing between two roughly similar situations. If *Dym* and *Babcock* were both correctly decided, related cases can, at least for the most part, be disposed of without encountering objections either of incomprehensibility or invidiousness. Cases of Ontario guests, invited by New York hosts in New York, and injured in an accident in either New York or Ontario, represent the situations most productive of difficulty when *Dym* is taken as correctly decided. At least in the second case, so far as New York's policies are concerned, the basis for permitting recovery is less substantial than in *Babcock*. Furthermore, to the extent that Ontario disapproves of ungrateful guests, in both cases the basis in Ontario policy for denying recovery is more substantial. However, where the relationship had its seat in New York and the accident occurred there, denial of relief, even if comprehensible, may seem invidious since the guest's personal law would be considered decisive. The situation is less clear where the accident occurs in Ontario. Such comprehensibility as flows from the seat of the relationship here wars with that which flows from one's personal law and the place of the accident. It would seem, therefore, that in the

---

analysis approach' to choice-of-law problems. 24 N.Y.2d at 591, 249 N.E.2d at 408, 301 N.Y.S.2d at 538.

<sup>64</sup> See especially *id.* at 593, 249 N.E.2d at 409, 301 N.Y.S.2d at 540, quoted in conjunction with note 46 *supra*.

second case neither permitting nor denying recovery would violate appropriate standards of comprehensibility nor involve an offensive discrimination. A final case, that of an Ontario resident, invited in Ontario by a New York driver and injured in Ontario, presents no difficulty from the perspective of comprehensibility or invidiousness if the *Dym* rule is taken to be correct.

Far more serious problems of comprehensibility and invidious discrimination arise in these situations once *Tooker* supplants *Dym*. If the New York guest can recover from the New York host even though the relationship's seat is in Ontario and the accident occurred in Ontario, how should the Ontario guest be treated in an otherwise comparable situation? From the perspective of the policies underlying New York's domestic rules, clearly the Ontario guest's claim is less strong than the New York guest's was in *Tooker*. On the other hand, one of the policies presumably underlying Ontario's guest statute—the protection of insurance companies and their policy holders—does not reach the situation. Consequently, it is not clear that both legal orders, consulting only the policies underlying their domestic-law rules, would wish to bar recovery. The canon of comprehensibility is satisfied by applying the guest statute; the guest is from Ontario, and the accident occurred there. Yet, once *Tooker* is in the books, lay thinking may well consider the result invidious; if territorial considerations were not decisive for the New York plaintiff in *Tooker* why should they control in the case of an Ontario plaintiff?

The suggested difficulty did not deter the New York Court of Appeals from denying in these circumstances recovery to the Ontario guest in *Neumeier v. Kuehner*.<sup>65</sup> The one dissenter in *Neumeier*, Judge Bergan, argued, however, that according different treatment on the basis of the guest's personal law results in an offensive discrimination:

There is a difference of fundamental character between justifying a departure from *lex loci delictus* because the court will not, as a matter of policy, permit a New York owner of a car licensed and insured in New York to escape a liability that would be imposed on him here; and a departure based on the fact a New York resident makes the claim for injury. The first ground of departure is justifiable as sound policy; the second is justifiable only if one is willing to treat the rights of a stranger permitted to sue in New York differently from the way a resident is treated. Neither because of "interest" nor "contact" nor any other defensible ground is it proper to say in a court of law

---

<sup>65</sup> 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (6-1 decision).

that the rights of one man whose suit is accepted shall be adjudged differently on the merits on the basis of where he happens to live.<sup>66</sup>

Judge Bergan concluded with the observation that the result reached in *Neumeier* involves "an inadmissible distinction."<sup>67</sup>

Our analysis of *Babcock* and its progeny thus suggests that at a certain point policy-based analyses face an unpleasant dilemma that arises from the impossibility of resolving the choice-of-law problem in terms of the specific policies underlying the rules whose applicability is in question without seriously compromising comprehensibility and a policy against invidious distinctions. Conversely, as *Dym* makes clear, policies of comprehensibility and noninvidiousness can only be advanced at the expense of the specific policies underlying domestic-law rules. *Babcock* was an easy case to decide, as it did not involve this dilemma. *Dym*, *Tooker*, and *Neumeier* all present the dilemma, however. Our analysis of the cases thus suggests that the results reached in such multistate situations cannot be entirely satisfying.

#### IV

##### CAVERS'S CHOICE-OF-LAW THEORY

Surprisingly little scholarly attention has been devoted to the problem of principled, comprehensible, and noninvidious solutions to choice-of-law questions. Leflar has the issue generally in mind when he writes that

Governmental interest is too large a notion to be narrowly defined or rigidly confined. It must include all the relevant concerns that the particular government, not only as a sovereign entity but also as a repository of justice, may have in a set of facts or an issue.<sup>68</sup>

However, his analysis in terms of five "choice-influencing considerations" (predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law<sup>69</sup>) adds little toward solving the dilemma under discussion. An approach in terms of "the better rule of law" probably complicates the problem even further, unless general agreement

<sup>66</sup> *Id.* at 132-33, 286 N.E.2d at 460, 335 N.Y.S.2d at 74.

<sup>67</sup> *Id.* at 134, 286 N.E.2d at 461, 335 N.Y.S.2d at 75.

<sup>68</sup> R. LEFLAR, *supra* note 34, § 109, at 252.

<sup>69</sup> *See id.* § 105, at 245.

were to exist on the standards by which superiority was to be judged.<sup>70</sup>

By all odds, the most sustained and comprehensive attempt in American conflicts literature to deal with certain aspects of the dilemma facing choice-of-law theory and practice is the recent writing of Cavers. His effort to provide principled bases for determining which legal order's position should prevail when analysis of a multistate situation reveals conflicting views began in 1965 with publication of *The Choice-of-Law Process*. He has since pursued the same theme in other publications.<sup>71</sup> He notes that

the factors [analyzed in a policy-based approach] often point in different directions and carry in themselves no measures of their significance. To me . . . the policy factors will ordinarily be by all odds the most consequential, yet, where they conflict, the choice between them becomes one that inevitably represents the expression of a preference. But should not that preference be both articulate and principled?<sup>72</sup>

As a basis for such principles, he proposes that the required value judgments should be made

[f]rom the point of view of any forum—the more interested the better—which undertakes to propose, and to adhere to, a principle of preference in the hope, but not on the condition, that it will provide a mutually acceptable scheme of accommodation for laws of the same general type as are involved in the case before it.<sup>73</sup>

A later formulation takes the following form: the principle is not unlike that propounded by Savigny and cast in aphoristic terms by De Nova who remarks its "Kantian flavour": the test of the appropriateness of a conflicts rule is "whether [the] suggested rule really deserves to be included in a law common to all nations."<sup>74</sup>

---

<sup>70</sup> Cf. Cavers, *The Value of Principled Preferences*, 49 TEXAS L. REV. 211, 213 (1971). In a recent article Leflar seems to view the "better rule" criterion as a guide to—rather than for—judicial practice in the choice-of-law field. See Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457, 474 (1972). It is interesting to note that a number of courts have found the "better rule" test attractive. E.g., *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); see also Cavers, *supra*, at 213-15.

<sup>71</sup> See especially Cavers, *Contemporary Conflicts Law In American Perspective*, in ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, 1970-III RECUEIL DES COURS 74 [hereinafter cited as CONTEMPORARY CONFLICTS LAW]; Cavers, *supra* note 70.

<sup>72</sup> CONTEMPORARY CONFLICTS LAW 145-46.

<sup>73</sup> D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 132 (1965) [hereinafter cited as CHOICE-OF-LAW PROCESS].

<sup>74</sup> CONTEMPORARY CONFLICTS LAW 153. In developing his theory, Cavers found suggestive the writings of the Harvard philosopher John Rawls whose views have since been developed more fully in J. RAWLS, *A THEORY OF JUSTICE* (1971).

Utilizing this approach, Cavers developed, in the context of tort and contract law and by way of example, six principles of preference.<sup>75</sup> Four relate to delictual liability:

1. Where the liability laws of the state of injury set a *higher* standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.<sup>76</sup>

2. [Conversely, where the state in which the defendant *acted and caused* an injury sets *lower* standards than does the home state of the victim, the former controls,] at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.<sup>77</sup>

3. Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.<sup>78</sup>

4. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which is *higher* than the like standard imposed by the state of injury, the law of the former state should determine the standard of conduct or of financial protection applicable to the case for the benefit of the party protected by that state's law.<sup>79</sup>

The two remaining examples are developed in contract settings:

5. Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber

---

<sup>75</sup> Cavers suggests—only to reject—a seventh principle, applicable to delictual liability. See CHOICE-OF-LAW PROCESS 177-80. The rejected principle is the converse of the fourth principle.

<sup>76</sup> *Id.* at 139 (emphasis in original). The qualification does not become operative simply upon proof of a relationship. The relationship must be one which, under the circumstances, justifies the application of the personal law.

<sup>77</sup> CHOICE-OF-LAW PROCESS 146.

<sup>78</sup> *Id.* at 159.

<sup>79</sup> *Id.* at 166 (emphasis in original).

property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.<sup>80</sup>

6. If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the situs of the land. This principle does not govern the legal effect of the transaction on third parties with independent interests.<sup>81</sup>

Although a full analysis of these rather intricate propositions cannot be undertaken here, a discussion of the basic approach is essential.<sup>82</sup> The principles are designed to deal with true conflicts—situations in which analysis of the policies held by the potentially concerned legal orders indicates that several jurisdictions are indeed concerned and that they do not agree upon how a given issue should be regulated.<sup>83</sup> Thus, Cavers addresses himself to the question of which legal order, where substantial difficulties arise, should ultimately control a given aspect of a multistate situation or transaction. It must also be kept in mind “that the failure of a case to come within the scope of a principle of preference does not mean that the proper choice to be made must for that reason be the reverse of the choice indicated by the principle.”<sup>84</sup> Each principle is developed and discussed in a rather particularized context. Although general commentary is difficult, some remarks can be ventured nevertheless.

---

<sup>80</sup> *Id.* at 181.

<sup>81</sup> *Id.* at 194.

<sup>82</sup> It should be noted that for Cavers the principles stated are only “guides for decision, leaving ample room for independent judgment to any courts that resorted to them.” *Id.* at 136. He also envisaged the possibility that, as distinctions were drawn in the application of the principles, some “would be subjected to fission,” and, if the process were to continue, that a specific rule or set of rules might emerge. *Id.* at 137.

<sup>83</sup> The principles can, of course, also help in deciding “whether a conflict is false or avoidable.” Cavers, *supra* note 70, at 221.

<sup>84</sup> CHOICE-OF-LAW PROCESS 189.

Reflection on the first principle and on the supporting commentary suggests several observations. In the first place, the principle seems to represent in part an assignment *vis-à-vis* other potentially competing policies of a relatively higher value to "laws and regulations governing conduct [designed] to provide for 'the general security.'"<sup>85</sup> There is further an assumption that policies providing for the "general security" are at least as widely shared by contemporary societies as any potentially relevant policy.<sup>86</sup> Although the points are not discussed, it is also implied that the principle is comprehensible to the layman and that comprehensibility is a significant policy. The principle's territorial bias serves comprehensibility because of our innate tendency—due to the importance of territorial organization for daily social, political, and economic life—to think in territorial terms. Thus, a defendant "cannot fairly claim to enjoy whatever benefits a state may offer those who enter its bounds and at the same time claim exemption from the burdens."<sup>87</sup> The significance of comprehensibility is further suggested by the principle's possible qualification "where the person injured was . . . so related to the person causing the injury that the question should be relegated to the law governing their relationship."<sup>88</sup>

The second principle of preference does not, as Cavers points out, rest in any large measure on the need of the location of the action and injury to provide for the general security; that purpose would—except where a rule's purpose was to encourage a given form of conduct by removing or limiting the risk of attendant liability—be at least as effectively advanced by applying the law of another concerned jurisdiction that set higher standards. Ultimately, the basis for the second principle comes down to a policy of comprehensibility and of avoiding invidious distinctions. If considerations of lay comprehensibility are left aside, a policy-based

---

<sup>85</sup> *Id.* at 139-40.

<sup>86</sup> The need to maintain physical and financial protection against injury-causing conduct is not the particular concern of one or a few states or a need relating to one or a few special laws. All states experience this need and do so with respect to all—or nearly all—of their laws establishing standards of conduct and remedies to protect against physical and financial hazards. Therefore, if general recognition is given to this principle, all states will on occasion benefit by it.

*Id.* at 140-41.

<sup>87</sup> *Id.* at 141.

If he has not entered the state but has caused harm within it by his act outside it, then, save perhaps where the physical or legal consequences of his action were not foreseeable, it is equally fair to hold him to the standards of the state into which he sent whatever harmful agent, animal, object, or message caused the injury.

*Id.*

<sup>88</sup> *Id.* at 139.

analysis reaches, in many of the situations contemplated by the principle, the conclusion that, if a higher degree of protection is afforded, the laws of the parties' home states should regulate. Indeed, the very important and influential decisions of the New York Court of Appeals in *Babcock* and *Tooker* taken together can be viewed as announcing this proposition, at least where the parties have the same home state.<sup>89</sup>

Cavers's third principle rests upon the idea that rules stringently regulating certain kinds of conduct, such as the selling of liquor or blasting operations, recognize hazards that require special care, and hence the rules have a strong admonitory function. The regulatory policy here is thus stronger than that attaching to many other rules of delictual liability. Further, where the conduct in question is an economic activity, the provision of compensation for those harmed thereby is viewed as a cost that should rest ultimately upon the community rather than upon those injured. The reach of rules and standards of liability in situations where costs should be internalized is little affected by the fact that the injury materialized or the victim had his home elsewhere. In addition, since the operation of the market will, at least in theory, cause the economic activity in question to internalize the cost,<sup>90</sup> permitting recovery in the multistate situations contemplated by the third principle does not impose an economic burden that the defendant must bear, but merely results in a marginally higher cost to the community for the services in question.<sup>91</sup>

The fourth principle developed by Cavers is based upon the proposition that the application of higher standards of conduct or financial protection for the benefit of one party to a relationship, when the standards are held by the state in which the "relationship has its seat," is neither incomprehensible nor invidious and further would not require invidious or incomprehensible results in related cases. As Cavers indicates,

The relationship would provide an objective basis for differen-

---

<sup>89</sup> Aside from perhaps increased difficulty at the level of comprehensibility, there seems little reason why the result should differ where the parties have different home states if these agree on the regulation of the particular issue. *Cf.* *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

<sup>90</sup> For an interesting study of how legal rules can affect the internalization of costs, see G. CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

<sup>91</sup> If market mechanisms do not operate perfectly, the result of denying recovery will be a windfall for the defendant if his cost internalization did not distinguish between domestic and multistate situations. Conversely, permitting recovery would impose an economic burden upon the defendant if insufficient costs had been internalized. It can be noted that the risk of inadequate costing is borne by the activity in fully domestic situations.



tiating the cases involving it from other cases arising within the state of injury and thus relieve the problem of discrimination. What the forum would be concerned with would be a special case, one carrying with it a special justification.<sup>92</sup>

It can perhaps be argued that in the modern, highly mobile world, application of the law of the seat of a relationship is indeed often *more* comprehensible than application of the law of the place where the injurious conduct occurred and the injury resulted; if so, the comprehensibility argument affirmatively supports the fourth principle. Cavers suggests, although without full analysis, another argument affirmatively supporting the principle. He asserts that legal orders generally perceive a need to regulate relationships having their seat in the community, and continues:

[C]ould the principle I have stated reasonably be proposed for mutual acceptance by states in a position of equal liberty? By acceptance, each state would gain the advantage of being able to impose more exacting legal consequences on a relationship it had undertaken to regulate even though the parties to the relationship had gone to a state that imposed less exacting consequences. Each state, when the place of injury, would surrender the power to apply its own lower standards of conduct or financial protection to a relationship arising in, and regulated by, another state. . . . In sum, I believe the proposed preference could be advanced for mutual acceptance with good prospects of success.<sup>93</sup>

The remaining two principles of preference deal with the fields of contract and property law. In situations where one concerned jurisdiction has protective laws while another subordinates protective policies to foster free and secure transactions, the fifth principle renders applicable the former's law where

the person protected has a home in [that] state . . . and . . . the affected transaction or protected property interest were centered there or, . . . if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.<sup>94</sup>

The *raison d'être* of this principle appears to be that where the parties' understandings and expectations could and should have been shaped by the protective rules in question, the policy fostering economic activity should properly yield to the protective policy.

The last principle makes decisive in many cases

the express (or reasonably inferable) intention of the parties . . .

---

<sup>92</sup> CHOICE-OF-LAW PROCESS 169-70.

<sup>93</sup> *Id.* at 168, 170.

<sup>94</sup> *Id.* at 181.

that the law of a particular state which is reasonably related to the transaction should be applied to it, . . . if [that law] allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there.<sup>95</sup>

The principle is justified as follows:

The widespread recognition of the autonomy of the parties in choice of law relating to contracts and, to a lesser degree, to other transactions, is an index of the relatively high importance attached to certainty in these areas and the relatively low importance attached to many of the legal restraints and requirements that might defeat the parties' expectations.<sup>96</sup>

The ultimate basis for this principle is perhaps that the multistate nature of a transaction attenuates the claim of any given legal order to regulate, so that except in cases covered by the preceding principle, a presumably shared policy of facilitating multistate transactions makes it appropriate for all concerned jurisdictions to accept a reasonable accommodation by the parties to the multiplicity of possibly applicable rules and principles.

Having discussed in turn each of Cavers's principles of preference, the question remains whether they imply a general approach that avoids, at least in substantial measure, the dilemmas that tend to arise in policy-based analyses. A first observation is that some of Cavers's arguments in support of certain of his principles of preference do not, strictly speaking, validate the proposed preference but rather suggest useful refinements in the analysis of how a concerned jurisdiction would wish to regulate the situation or transaction. Thus, the argument advanced in support of the third principle, that the regulatory policy behind rules governing certain kinds of conduct (for example, the selling of liquor or blasting operations), is significantly stronger than the regulatory policy behind a general delictual rule imposing liability for negligent conduct, although it touches an argument for preference, goes basically to the full understanding of the policy underlying the rule in question. Such refinement is obviously important in determining whether a significant conflict actually exists, but does not provide a basis for resolving true conflicts that will necessarily commend itself to all concerned jurisdictions. The principle in question is also

---

<sup>95</sup> *Id.* at 194.

[The] principle should be applicable to a separable part of a transaction or to a particular rule of law relating to it . . . Similarly rare but unobjectionable would be a situation in which the parties' intention is directed to the whole law of the state chosen by them.

*Id.* at 194-95.

<sup>96</sup> *Id.* at 195-96.

supported by arguments that go directly to the problem of preference. Thus, the reciprocity argument asserts that legal orders will desire reciprocal recognition of admonitory law. Moreover, policies of comprehensibility and noninvidiousness support the principle. The defendant's expectations were presumably shaped by the law of the place of the event; costs were calculated, and insurance arrangements were also made on that basis. Nor, in view of the territorial connections present, would the rule be perceived as reflecting simply the defendant's personal law.

An analysis of the principles suggests that they rest upon four general propositions, which can in certain situations lead to agreement among concerned jurisdictions that in the event of a true conflict the views of one should prevail. The first proposition is that, at least in certain areas, the concerned legal orders will see mutual advantage in agreeing that policies typically subordinated by them in domestic situations are, in the event of true conflicts, likewise to be subordinated in multistate situations. Thus, if a legal order consistently advances certain protection policies—protection of married women for example—through its domestic-law rules, it should recognize comparable policies asserted by other legal orders in multistate situations even though the legal order in question would not accord protection under its domestic rules in the particular fact situations.

The proposition that mutual advantage can be perceived depends upon the assumption that, where policies have to be subordinated, all the concerned jurisdictions, in handling domestic situations, will—speaking in general terms rather than with respect to the precise problem that requires decision—consistently prefer to advance certain policies at the expense of others. If this requirement is satisfied, Cavers believes that each legal order may perceive mutual advantage—and act accordingly—in accepting comparable priorities in cases of true conflicts. Each legal order gains recognition of its preferred policies at the price of subordinating its less preferred policies when another legal order has a reasonable basis for applying its comparable preferred policy.

There are serious difficulties with this analysis. It builds on a model designed to test the justice of rules proposed for a single society: which rules would members of a society, who choose freely but without knowledge as to how a chosen rule would affect them personally, consider most just? In developing rules for a single society, it is helpful to analyze a problem from the perspective of hypothetical members of the community who are asked what

values they are prepared to support without regard to their particular social circumstances, political power, or economic position. Just results are seen as emerging from each being placed in a position where the self-advantage of all must be consulted and the highest common denominator determined. The method of analysis presupposes that all will live by the resulting rules, not seeking self-advantage in the particular case. A single community, by enforcing rules and principles, makes this presupposition operative. In multistate situations, however, only the self-restraint of each legal order and the possibility of retaliation operate to check freeloading. Considering the range of situations and circumstances in which this principle would be called upon to operate, it is hard to be sanguine with regard to its effectiveness in choice-of-law practice. Moreover, unless the overall balance of preferred policies is the same for all the legal orders in question, some jurisdictions will not maximize the total reach of their policies if all obey the principle in question.

The next general proposition suggested by Cavers's principles of preference is more persuasive. In the event of a true conflict, a legal order should not insist on regulating the situation or transaction in a way that is incomprehensible to laymen or that results in invidious distinctions either in the given case or in closely related ones. Thus, Cavers emphasizes territorial circumstances and the seat of relationships. This recognizes that justice in multistate situations involves more than the full and accurate analysis of the reach of the policies specifically underlying competing rules and principles. Each multijurisdictional situation or transaction reveals the existence of a community which, although more ad hoc and transitory than a politically organized society, need not be viewed as existing in a state of nature. Consequently, the various separate legal orders involved in the situation or transaction should recognize that the individuals caught up in these overarching communities have a claim to treatment that they perceive as equal. Here, one aspect of a widely held principle of justice—that of equal treatment—is extrapolated from politically organized communities to looser, less stable, and politically unorganized supra-state communities.

The remaining two general propositions derive largely from the fifth and sixth principles and suggest that certain policies come into play and are mutually shared precisely because of the multistate nature of a transaction or a situation. Both propositions take into account reasonable party expectations, thus avoiding difficul-

ties at the level of comprehensibility and invidiousness.<sup>97</sup> The first proposition is that the ad hoc community of normally separate legal orders engendered by the multistate transaction or situation should respect strong protective policies held by one member, where relevant in the circumstances, so long as the parties knew, or clearly should have known, of the protective policy, and could have conformed, without serious cost in terms of their activities generally, to the requirement in question. In terms of relations in—and regulation of—multistate situations, a special value is thus placed upon respecting, where feasible, protective policies. Observing such policies under these conditions prevents a transaction that one concerned community considers affirmatively improper from being enforced, thereby incurring the not unreasonable cost of foregoing, or restructuring, the transaction. Under these circumstances, slight inhibition of economic activity is a reasonable sacrifice in order to avoid giving specific offense to a concerned legal order by frustrating its protective policy.

The final proposition is that multistate situations and transactions are not regrettable phenomena that must, at best, be tolerated, but are rather expressions of economic and social vitality, beneficial in the vast majority of cases for all the legal orders involved. Consequently, when a multistate problem arises, the ad hoc community of legal orders that results can be taken to have a common policy of facilitating the multistate activity. This common policy can be overcome where one legal order has a strong countervailing policy, but only where that policy is of substantial importance to the concerned legal order. Moreover, the degree of substantiality required presumably varies inversely with the difficulty of knowing and conforming to the countervailing policy.<sup>98</sup>

Cavers's principles of preference can, therefore, be viewed as contributing to three problem areas in which policy-based choice-of-law theory needs improvement: further refinement of the analysis of policies specifically giving rise to rules and principles; the issues of incomprehensibility and invidiousness; and the articulation of essentially multistate policies. Obviously, much remains to be done. Nor is there any warrant that entirely satisfying solutions

---

<sup>97</sup> Comprehensibility is not merely a function of past expectations. But where the parties have expectations and the choice-of-law rule takes these into account, the result will rarely—if ever—be incomprehensible to the parties.

<sup>98</sup> Two California decisions illustrate well the application in practice of this proposition: *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957).

can ultimately be found for every choice-of-law problem. Indeed, our discussion suggests that in certain situations following the dominant policies underlying specific substantive rules inevitably clashes with policies of comprehensibility and noninvidiousness. In multistate situations, the paradox is often inescapable. One must then choose between sacrificing, with Cavers, instrumental requirements of specific legal rules in order to satisfy a general sense of justice, and advancing, as the New York Court of Appeals did in *Tooker* and in *Neumeier*, policies underlying specific rules at some expense to the general sense of fairness.

## V

### THE RESTATEMENT SECOND

Before concluding our analysis of contemporary American theory and practice, a few observations must be made respecting the recently published *Restatement (Second) of Conflict of Laws*.<sup>99</sup> The new *Restatement* reflects contemporary trends and cross currents respecting choice of law. The dispositive rules of the first *Restatement*,<sup>100</sup> derived from a vested-rights analysis, are supplanted by the broad proposition that the law of the state having the most significant relationship to the issue presented shall govern and by guidelines to assist in interpreting and applying the concept of most significant relationship. Thus section 145 provides the following "General Principle" for choice of law in the field of delicts:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
  - (a) the place where the injury occurred,
  - (b) the place where the conduct causing the injury occurred,
  - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
  - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Section 6, which is incorporated by reference in many of the *Restatement's* choice-of-law provisions, reads as follows:

---

<sup>99</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). The Reporter for this important reworking of contemporary American theory and practice was Professor Willis L. M. Reese of Columbia University Law School.

<sup>100</sup> See note 5 *supra*.

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - (a) the needs of the interstate and international systems,
  - (b) the relevant policies of the forum,
  - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  - (d) the protection of justified expectations,
  - (e) the basic policies underlying the particular field of law,
  - (f) certainty, predictability and uniformity of result, and
  - (g) ease in the determination and application of the law to be applied.

The new *Restatement* thus provides "basic norms consist[ing] of standards . . . largely open-ended in their content . . ." <sup>101</sup> The approach is ample enough to encompass a highly developed policy-based analysis. However, the *Restatement* does not significantly refine and discipline theory and analysis. No principled basis is adumbrated, for example, in terms of which clashes between policies underlying specific domestic-law rules and more general policies of comprehensibility or of facilitation of multistate activity can be resolved. The need for additional guidance is felt, but what is offered takes the somewhat evasive form of "a secondary statement in black letter setting forth the choice of law the courts will 'usually' make in given situations." <sup>102</sup> By and large, the new *Restatement* is a monument to the fundamental changes that have in the last decades taken place in American thinking regarding the choice-of-law problem. It does not, however, resolve the difficulties and tensions that policy-based approaches encounter.

#### CONCLUSION

The foregoing analysis of contemporary American theory and practice is most incomplete. <sup>103</sup> Important treatises are not considered. <sup>104</sup> Relatively few decisions are analyzed, and discussion

<sup>101</sup> Wechsler, Introduction to 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS at viii (1971).

<sup>102</sup> *Id.*

<sup>103</sup> For a recent and more complete survey, see CONTEMPORARY CONFLICTS LAW 75; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 4-7 (1971).

<sup>104</sup> Brief reference has been made to R. LEFLAR, *supra* note 34. Other important works include A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS (1962) and PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY (1967). Ehrenzweig, a harsh critic of the *Restatement's* approach to choice-of-law problems, was a provocative and prolific writer in this field.

focuses for the most part on choice of law for the field of delicts.<sup>105</sup> The problems that must be considered in any attempt to evaluate the contemporary American choice-of-law scene are simply so vast and difficult that one must seek to grasp the outlines and direction of the whole by considering some fragments of the total scene. Nonetheless, the discussion undertaken affords a basis for reflection and generalization.

This analysis has sought to demonstrate the inherent complexity of policy-based approaches to choice of law and to suggest some of the areas that are likely in the years ahead to command the attention of jurists utilizing an instrumental methodology. One type of juristic effort, not considered in the foregoing discussion, that is likely to assume increasing importance is the development of choice-of-law rules. In the administration of justice, rules are psychologically attractive and of considerable practical advantage. Inevitably, a radical shift in methodology involves, as the new *Restatement* so well illustrates, a discarding of old rules before new ones have had time to emerge. Moreover, the process of developing rules is particularly difficult where they are to reflect an instrumental analysis of varied and complex policy mixes such as are often encountered in multistate situations. Consequently, it is understandable that today instrumental analyses typically provide a statement of method and of factors to be considered rather than a dispositive statement of results. There remains what Willis Reese has called the "principal question in choice of law today . . . whether we should [and can] have rules . . ." <sup>106</sup> Policy-based approaches are not antagonistic to rules, in principle, although the required analysis reveals sharply the difficulties that may be involved in generalizing results in the form of rules. Indeed, the drive toward rule-making is already seen in the three principles that Judge Fuld adumbrated in his concurring opinion in *Tooker* for guest-statute cases,<sup>107</sup> and in the efforts of Cavers to develop principles of preference.

---

<sup>105</sup> The emphasis on these problems is due in considerable measure to the central position they have occupied in scholarly commentary and in judicial efforts to break new ground.

<sup>106</sup> Reese, *supra* note 38.

<sup>107</sup> 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532-33. Judge Fuld's principles are:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of



Choice-of-law rules deriving from an instrumental analysis will, with some exceptions, be more complex and less dispositive than the rules to which we are accustomed in domestic law. Rules for domestic-law situations assume, for the most part, a stable mix of policy; consequently, the dispositive formula need not be conditioned upon the presence of particular policy ingredients.

A comparable assumption of stability cannot be made for multistate situations; therefore, as is seen in Fuld's, Cavers's, and the *Restatement Second's* formulations, decisive variations in policy have to be recognized in any attempt to state dispositive propositions. Choice-of-law rules will not only be more complex than their domestic counterparts; they are also likely to emerge more slowly, at least when they are formulated judicially. Judicial experience with any given choice-of-law problem is usually more episodic than with analogous domestic-law problems and, as a far greater variety of policy mixes will normally require consideration, greater experience in dealing with a given multistate situation is required before one can proceed on a firm basis. Choice-of-law rules will also typically be narrower in scope than the domestic-law rules. Moreover, for reasons noted above, it will often be impossible to state a proposition in a way that does not directly take into account which of several possible policy mixes is encountered in the given case. Subject to these qualifications, the results reached through policy-based analysis should be susceptible of generalization in a dispositive manner, that is to say, of statement as rules.

Choice-of-law problems, when fully understood, are inherently more complex than their domestic-law analogues. A greater number and variety of policies must be considered. Some of these are wholly or largely unique to multistate situations, so that there is little or no domestic learning or experience on which to draw. These complications should gradually yield to reflection and experience. However, an ultimate source of complexity in choice of

---

the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

*Id.*

In the recent case of *Neumeier v. Kuehner*, discussed in text accompanying notes 65-67 *supra*, Judge Fuld quoted the above passage and applied the third principle. See 31 N.Y.2d at 128-29, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70-71.

law will remain: justice must be administered for ad hoc communities having common elements of social and economic life, but lacking a legislator and an adjudicator who are responsible to, and speak for, the community as a whole. No one can authoritatively resolve conflicts in values and purposes for the entire ad hoc community; justice is in the hands of authorities whose first loyalty and basic understanding do not run to the whole community. Yet since that community is an economic and social reality, its unitary claims also influence legislators and adjudicators.

Severe practical and philosophical difficulties arise from the resulting tension between the perspective of the politically organized society from which the legislator or adjudicator derives legal authority and that of the larger social or economic community in the context of which the multistate problems arise. Under these circumstances a given result may be unreasonable on occasion, either from the perspective of the ad hoc community or of the politically organized society. For the same reasons, the total body of rules and principles will typically contain elements some of which are incoherent from one, and some from another, perspective. Moreover, those subject to the resulting legal rules will occasionally experience a sense of injustice because of the related phenomenon of viewing the multistate problem from perspectives other than that taken by the legislator or adjudicator. For these reasons, among others, choice-or-law problems insistently raise the issue of whether and how justice can be fairly administered where social and economic intercourse do not flow within legal units but over and beyond them, creating ad hoc economic and social entities larger than any single politically organized society.

Policy-based analyses have made us aware, perhaps painfully so, of the true complexity and difficulty of the choice-of-law problem. Particularly during the last several decades, an enormous effort has been made by American jurists to understand the problem fully and to meet, rather than to conceal, its difficulties. These issues will continue to command attention; easy solutions that ignore the realities of complex problems are no longer acceptable.<sup>108</sup> Fortunately, in a large number of multistate situations,

---

<sup>108</sup> In this connection, it is interesting to note the influence of policy-based analyses on the formulation of conflicts rules in the Draft Convention on the Law Applicable to Products Liability, adopted by the Twelfth Session of the Hague Conference of Private International Law. See CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION, TOME III, RESPONSABILITÉ DU FAIT DES PRODUITS, Acte final, 246-50 (1974). See also Lorenz, *Der Haager Konventionsentwurf über das auf die Produkthaftpflicht anwendbare Recht*, 37 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELS] 317 (1973).

policy-based analyses yield solutions that do not involve significant complexities or ambiguities. Where real difficulties are encountered, the effort to achieve satisfying solutions must continue. Here, attention may increasingly be given to innovative approaches such as Cavers's proposed principles of preference and the possibility of regulating certain multistate situations under rules that do not flow directly from the domestic law of any concerned jurisdiction.<sup>109</sup>

---

The Convention provides that "the internal law of the State of the place of injury" applies if that State is also "(a) the place of the habitual residence of the person directly suffering damage, or (b) the principal place of business of the person claimed to be liable, or (c) the place where the product was acquired by the person directly suffering damage." Art. 4. However, if either relating element (b) or (c) coincides with relating element (a), "the internal law of the State of the habitual residence of the person directly suffering damage" is applicable. Art. 5. When neither article 4 nor 5 applies, "the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the place of injury." Art. 6. However, "[n]either the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels." Art. 7.

<sup>109</sup> For a discussion of this latter approach, see von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).