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POLICY IN CHOICE OF LAW: THE ROAD TO *BABCOCK*

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The conflict of laws provides a fertile hunting ground for those seeking examples of judicial decisionmaking that are couched in terms of policy rather than based on applications of rules. Although common law courts may in the first instance formulate rules of law by reference to policy,[1] thereafter they apply the rule so formulated, or a legislative rule where appropriate,[2] to resolve cases before them. The rules, not the policies from which they may have been derived, form the foundation of judicial precedent upon which the common law functions. Once a question has arisen and a "rule" has been enunciated, reference to the underlying policy is normally eschewed in subsequent cases.[3] Indeed, complete judicial reliance upon considerations of pure policy in lieu of judicially established rules would, in effect if not in fact, vitiate the usefulness of the rules themselves.

Nevertheless, at least with respect to choice-of-law decisions since 1963, common law courts throughout the United States have resorted with increasing regularity to the use of policy, instead of applying the "appropriate" rule.[4] This article will trace

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1. "It is admitted that there is no precedent for the present action. . . . We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other." Priestley v. Fowler, 3 M. & W. 1, 5, 150 Eng. Rep. 1030, 1032 (1838) (per Lord Abinger, C.B.). *See also* P. DEVLIN, SAMPLES OF LAWMAKING 9-10 (1962).

2. Courts do not have equal freedom when legislative rules are involved. Choice of law has been primarily a judicial matter, so restrictions on the application of statutory law will not be considered here.

3. While policy is often used in the interpretation and construction of the rule, what is meant here is the use of policy in place of rules, not the use of policy simply to interpret a rule.

4. However, it is not accurate to say that policy-oriented choice of law immediately became the majority rule, even in tort cases. As recently as 1973, ten years after *Babcock*, *see* note 5 *infra* and accompanying text, 21 states continued to apply the traditional rule

some of the important steps leading to the 1963 landmark decision of the New York Court of Appeals in *Babcock v. Jackson*,[5] which set into motion the recent trend in American choice-of-law judgments that rules are "out" and policy is "in."

I. ASSAULTS ON THE VESTED RIGHTS LEGACY

The conflicts legacy inherited by American courts from the early twentieth century is a formal and rigid set of choice-of-law rules which, as former Chief Justice Traynor aptly noted, resembles a petrified forest.[6] Few judge-made rules of law can claim a firmer foundation in American jurisprudence than the choice-of-law rules catalogued in the first Restatement of Conflict of Laws, published by the American Law Institute (ALI) in 1934. From the beginning of the vested rights era[7] until the growth of alternative conflicts approaches in the 1960s, choice of law was limited almost

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in torts: Arkansas (Bell Transp. Co. v. Morehead, 246 Ark. 170, 437 S.W. 2d 234 (1969) (vicarious liability)); Colorado (Estate of Murphy v. Colorado Aviation, Inc., 353 F. Supp. 1095 (D. Colo. 1973) (wrongful death)); Connecticut (Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971) (products liability and wrongful death)); Delaware (Unit, Inc. v. Kentucky Fried Chicken Corp., 304 A.2d 320 (1973) (fraud)); Florida (Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18 (1972) (characterization to avoid lex loci rule in personal injury)); Georgia (Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969) (products liability)); Kansas (McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965) (wrongful death)); Maryland (Wilson v. Fraser, 353 F. Supp. 1 (D. Md. 1973) (wrongful death)); Massachusetts (Doody v. John Sexton & Co., 411 F.2d 1119 (1st Cir. 1969) (fraud)); Michigan (Pusquilian v. Cedar Point, Inc., 41 Mich. App. 399, 200 N.W. 2d 489 (1972) (statute of limitation for personal injury related to remedy, not right to which lex loci would apply)); Nebraska (Epperson v. Christensen, 324 F. Supp. 1121 (D. Neb. 1971) (guest statute)); North Carolina (Kline v. Wheels by Kinney, Inc., 464 F.2d 184 (4th Cir. 1972) (personal injury)); Oklahoma (Mills v. Hoflitch, 326 F. Supp. 95 (W.D. Okla. 1971), *aff'd*, 465 F.2d 29 (10th Cir. 1972) (guest statute)); South Carolina (Griffin v. Planters Chem. Corp., 302 F. Supp. 937 (D.S.C. 1969) (wrongful death)); South Dakota (Heidemann v. Rohl, 86 S.D. 250, 194 N.W. 2d 164 (1972) (vicarious liability)); Texas (Click v. Thuron Indus., Inc., 475 S.W.2d 715 (1972) (wrongful death)); Utah (Jackson v. Continental Bank & Trust Co., 443 F.2d 1344 (10th Cir. 1971) (guest statute)); Vermont (Marra v. Bushee, 317 F. Supp. 972 (D. Vt. 1970) (alienation of affection)); Virginia (Rhode Island Hosp. Trust Nat'l Bank v. Swartz, 455 F.2d 847 (4th Cir. 1972) (negligent misrepresentation)); Washington (Huddleston v. Angeles Cooperative Creamery, 315 F. Supp. 307 (W.D. Wash. 1970) (imputed negligence)); and West Virginia (Chase v. Greyhound Lines, Inc., 195 S.E.2d 810 (1973) (family immunity)).

5. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

6. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959) [hereinafter cited as Traynor, *Conflict*]. *See* Traynor, *Law and Change in a Democratic Society*, 1956 U. ILL. L.F. 230 [hereinafter cited as Traynor, *Law*].

7. The vested rights era is said to have begun with the work of Justice Story, which first appeared in 1834, *see* Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33

exclusively to the application of—and where necessary, the interpretation and construction of—formal and rigid conflict rules.[8] The *only* basis for selecting the applicable substantive rule of law in multi-state cases was the appropriate choice-of-law rules.

YALE L.J. 736, 737 (1924), and is embodied in the first Restatement of Conflict of Laws. Vested rights are considered a product of the underlying principle of the territoriality of law, of which Story declared:

> The first and most general maxim or proposition is that . . . every nation possesses an exclusive sovereignty and jurisdiction within its territory. The direct consequence of this rule [is] that the laws of every state affect and bind directly all property, whether real or personal, within its territory and all persons who are resident within it; whether natural-born subjects or aliens, and also all contracts made and acts done within it.

J. STORY, CONFLICT OF LAWS 19 (7th ed. 1872). The vested rights theory holds that law is entirely territorial and cannot operate outside the limits of the sovereign which creates it. Rather, an extrastate right is recognized and enforced because it arose under and was created by the law of the place where a particular transaction took place. R. LEFLAR, THE LAW OF CONFLICT OF LAWS 3 (1959). "Although the act complained of may be subject to no law having force in the forum, it gave rise to an obligation, . . . which like other obligations follows the person, and may be enforced wherever the person may be found." Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (per Holmes, J.). "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." 3 J. BEALE, THE CONFLICT OF LAWS 1969 (1935) [hereinafter cited as J. BEALE, TREATISE].

Another theoretical explanation for the enforcement of extraterritorial rights is the principle of comity. Under this theory, when foreign law is used, the foreign law "operates in" or is "applied by" the forum out of courtesy or owing to the forum's desire for reciprocity. L. BAR, THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW 43 (2d ed. G. Gillespie trans. 1892). *See* R. MINOR, CONFLICT OF LAWS 5-6 (1901); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 8 (1937). Most of the major proponents of the vested rights theory have rejected such reasoning. *See* J. BEALE, THE CONFLICT OF LAWS 106 (1916) [hereinafter cited as J. BEALE, CONFLICT]; A. DICEY, CONFLICT OF LAWS 6-7 (6th ed. 1949); H. GOODRICH, CONFLICT OF LAWS 11-12 (3d ed. 1949); Beale, *The Jurisdiction of the Sovereign State*, 36 HARV. L. REV. 241 (1923). Since territoriality is a spatial metaphor which entails abstract notions of boundaries, it is conceptually incorrect to assert that law "operates" or "is applied" outside the sovereignty in which it was enacted. *See* Cheatham, *American Theories of Conflict of Laws*, 58 HARV. L. REV. 361, 367-68 (1945).

8. The major treatise on this system of traditional rules was written by Professor Joseph Beale, a faithful disciple of the common law who served as the Reporter for the 1934 Restatement. J. BEALE, TREATISE, *supra* note 7 (published in three volumes with section numbers that correspond with those of the Restatement). By comparing the related sections in each volume, one can readily see that the rules Beale advocated were generally accepted by the ALI; however, it is also apparent that the often dogmatic reasons he proposed to support the rules were not so readily accepted. The comments to the sections of the Restatement are typically short and without much substance, particularly in comparison with the corresponding sections of Beale's treatise.

However, courts often found that mechanical application of the traditional rules led to wholly unacceptable results.[9] Where economic benefit or standards of justice to the litigants were at stake, many courts availed themselves of a variety of "escape devices," one of which involved a consideration of public policy

9. Consider, for example, the unpalatable decision of the appellate division in Babcock v. Jackson, 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (1962). In *Babcock*, three New York residents, on a weekend trip from their home in Rochester, were involved in a road accident in Ontario, Canada. At the time, Ontario law prevented an injured guest from recovering from a host driver, irrespective of whether the driver had been negligent. The four-to-one majority of the court issued a memorandum opinion which held the plaintiff's claims irremediable according to the traditional rule. Ms. Babcock, the injured guest, was therefore denied the right to seek recovery from Mr. Jackson, the driver, simply because his conduct and the resultant injury had occurred in Ontario.

It seems irrefutable that considerations of fairness, including the probable expectations of the parties, demanded that the opposite result be reached. Philosophy Professor John Rawls of Harvard University would reach the same conclusion by applying his test for justice. If Ms. Babcock and Mr. Jackson were to be restored to their positions prior to the trip, not knowing which role they would assume in the accident, they undoubtedly would have chosen to have their rights and liabilities as to each other governed by New York law, rather than the law of any other state or province through which they might happen to pass. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971). New York law was the one with which the parties were presumably most familiar and under which they could have protected themselves by insurance, conduct or otherwise. To choose a floating liability standard in advance of the trip, as the traditional conflicts rules impliedly demand, would be to gamble.

The appellate division's decision was also unsatisfactory from an economic perspective. Since two New Yorkers were involved, the economic burden of the injury to Ms. Babcock was best handled by recourse to the New York system of risk assignment. That system was mandatory car insurance, which Mr. Jackson was obliged to obtain in order to create a fund to cover the burden of such road accidents. Under the traditional choice-of-law rule, that fund was unavailable, and the state of New York may have been required to finance the burden of the injury by other means.

Also consider the unfortunate, but not so atypical, 1966 Connecticut conflicts case, Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966). Mr. and Mrs. Landers were domiciled and resident in Connecticut. While passing through Virginia, Mr. Landers drove in a grossly negligent manner and caused the family car to crash into a creek. Mrs. Landers was seriously injured. After arriving home, Mrs. Landers brought an action against her husband in a Connecticut court. On appeal of the judgment based upon a demurrer to the complaint, the entire appellate court, in a single page opinion, embraced the antediluvian traditional choice-of-law rule and applied Virginia's rule of marital immunity disallowing a wife's suit. The court considered the policy-oriented choice-of-law approach embodied in the "more significant relationship" rule in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379a (Tent. Draft No. 9, 1964) (current version at RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1972)), but stated peremptorily: "Our rule is in accord with the majority rule. . . . We see no reason to change. . . ." 153 Conn. at 304, 216 A.2d at 184.

This decision is unacceptable on any theory of justice, except for one that favors the reduction of insurance claims at any cost. The marital immunity law of the place where the husband's negligent act resulted in an injury cannot be said to have had any relationship, much less a significant or a substantial relationship, to this couple from Connecticut.

ramifications.[10] Recognition of policy factors in these cases was not intended to displace the well-settled rules; rather, it was designed to avoid the harsh consequences which resulted from unquestioning application of the rules. *Babcock* represents the first instance of judicial reliance upon policy as an actual alternative to the traditional system. Prior to *Babcock*, policy had never been openly used as the sole means of selecting the applicable rule of substantive law.[11]

10. The most frequently used devices have been listed recently in A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW (1970). They include:

(1) multiple, alternative or vague choice-of-law rules for a given category of law-fact combinations;
(2) primary characterization of the operative facts as tort, contracts, administration of decedents' estates, etc.;
(3) manipulation of connecting factors;
(4) the substance-procedure dichotomy;
(5) the Renvoi technique;
(6) the presumption of similarity of laws;
(7) the "penal" and "revenue" laws exception; and
(8) the Public Policy doctrine.

Id. at 15-17. For a discussion of the local public policy doctrine as an "escape device" see generally Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

11. Judge Fuld, who wrote the opinion in *Babcock*, cited a number of cases which he believed demonstrated that "there [had] in recent years been . . . a judicial trend towards [the traditional rule's] abandonment or modification." 12 N.Y.2d at 478 & n.5, 191 N.E.2d at 281 & n.5, 240 N.Y.S.2d at 747 & n.5. However, none of the opinions cited by Judge Fuld reflected a wholesale repudiation of the lex loci rule.

In Richards v. United States, 369 U.S. 1 (1961), the Court interpreted the Federal Tort Claims Act to require federal courts, in multistate tort actions, to look in the first instance to the law of the state where the negligent acts took place. *Id.* at 10. While the injuries which gave rise to the plaintiffs' wrongful death claims had occurred in Missouri, the allegedly negligent acts had taken place in Oklahoma. Both the district court and the court of appeals had interpreted pertinent Oklahoma conflict-of-laws decisions and had determined that Oklahoma actions for wrongful death were controlled by the lex loci delicti rule. *Id.* at 16. The Missouri wrongful death statute limited the plaintiffs' recovery to $15,000, an amount which had already been received or tendered to each plaintiff in the case. The Supreme Court affirmed, holding that the plaintiffs had failed to state claims upon which relief could be granted. *Id.* The Court did not call for the abandonment or modification of the lex loci rule but merely allowed that states could "depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation." *Id.* at 12. The Court did not contemplate that such departures would replace the traditional rules altogether; it simply acknowledged that some state courts might reject "the older rule in those situations where its application might appear inappropriate or inequitable . . . ." *Id.* at 13.

Another decision cited by Judge Fuld was Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (in bank). 12 N.Y.2d at 478 n.5, 191 N.E.2d at 283 n.5, 240 N.Y.S.2d at 749 n.5. In *Grant*, three plaintiffs had been injured in an automobile collision with the defendant's decedent on a highway in Arizona. Defendant McAuliffe was appointed administrator of the decedent's estate by a California superior court. All three plaintiffs, as well as the decedent, were California residents at the time of the accident.

Judicial deviation from the firmly established conflicts rules did not go unnoticed by early twentieth century academic commentators.[12] Several scholars expressed dissatisfaction with strict application of the orthodox choice-of-law principles and looked

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McAuliffe filed a motion in abatement which would have been sustained under Arizona law on the ground that the tort action had not been filed prior to the death of the tortfeasor. 41 Cal. 2d at 862, 264 P.2d at 946. Under California statutory law, however, causes of action for negligent torts survived the death of the tortfeasor and could be maintained against the administrator of his or her estate. *Id.* Mr. Justice Traynor described the question presented as "one of first impression . . . ," *id.* at 863, 264 P.2d at 946, in that the resolution of whether California or Arizona law applied turned on how survival of causes of action was to be characterized. Traynor declared that survival of causes of action was analogous to statutes of limitations, which were inherently procedural in nature, and was therefore governed by the domestic law of the forum. *Id.* at 864-65, 264 P.2d at 947. Hence, the plaintiffs were permitted to prosecute their claims under authority of California laws relating to the administration of estates. *Id.* at 867, 264 P.2d at 949. By characterizing survival of causes of action as procedural, the California court avoided its own lex loci rule regarding the substantive rights of aggrieved parties in tort actions. *See id.* at 862, 264 P.2d at 946. While it is tempting to view Traynor's opinion as mere sophistry in light of his later outright support for abandonment of the lex loci rule for reasons of public policy, *see* Traynor, *Conflict*, *supra* note 6, at 670 & n.34; Traynor, *Law*, *supra* note 6, at 234, commentators are divided as to whether *Grant* overturned the orthodox place-of-injury rule. *See* A. SHAPIRA, *supra* note 10, at 16 & n.47; Cavers, *Comment on* Babcock v. Jackson, 63 COLUM. L. REV. 1219 (1963). *But see* Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 731 (1961); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958) [hereinafter Currie, *Survival*]. Professor Cavers seems to consider *Grant* in terms of its literal language as "exploiting the color of procedure in the laws at issue," Cavers, *supra* at 1220, or a case involving matters of special concern to the domicil (estate administration) which did not bear on the defendant's conduct and, therefore, did not entail substantive choice-of-law problems. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 157 & n.22 (1965). Professor Currie staunchly defends *Grant* as an instance in which public policy prevailed over mechanistic formalism but does not regard the case as one exhibiting any real conflict of laws problem. Currie, *Survival*, *supra* at 239-42; *see also* Traynor, *Conflict*, *supra* note 6, at 670 & n.34; note 52 *infra* (false conflicts). At the very least, it can be said that the express language in *Grant* does not declare a break with the place-of-injury rule.

Neither did the last two cases mentioned by Judge Fuld explicitly reject the lex loci tradition. Rather, they created narrow exceptions to its operation. In Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957), the Minnesota court held a Minnesota saloonkeeper liable for injuries sustained in Wisconsin by a Minnesota passenger of a Minnesota driver who had been furnished excessive liquor in violation of a dramshop act. *Id.* at 376, 82 N.W.2d at 367. The decision has been viewed as one limited to the special regulatory scheme which imposed greater liabilities on a particular activity than would be provided by the general law of torts. D. CAVERS, *supra* at 159-60. Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959), held that the law of the spouses' domicile, rather than the place of injury, applied to determine the immunity of the defendant spouse from suit by the plaintiff spouse, but not to other issues. *Id.* at 138, 95 N.W. 2d at 818.

Each of these decisions acknowledged the continuing existence of the traditional rule. The last three were, in fact, examples of judicial employment of various "escape devices." *See* note 10 *supra* and accompanying text.

12. *E.g.*, Lorenzen, *supra* note 7, at 747.

for altogether new ways to solve the problem.[13] These writers concluded almost unanimously that the vested rights theory, upon which the traditional choice-of-law rules were based, could not be modified in any way to produce acceptable results in all cases. The theory, and the rules so logically derived from it, had to be discarded completely.

While acknowledging these scholarly attacks and the undeniable instances of judicial avoidance of the traditional rules, the advocates of the vested rights system of conflict of laws argued strenuously against changing, much less abandoning, it. The credentials of the proponents of the traditional system were formidable, including some of the giants of the common law, such as Holmes, Cardozo and Beale in the United States and Dicey in England. Cardozo, in defense of the use of traditional conflicts rules, declared: "There are times when . . . rest should be preferred to motion [and the conflict of laws is one of those places]."[14] As usual, the learned jurist had sound reasoning upon which to ground his conclusion. The major virtue of the traditional system of choice-of-law rules lay in the certainty and predictability they fostered, or, as Cardozo explained:

> Fields there are in the domain of law where fundamental conceptions have been developed to their uttermost conclusions by the organon of logic. . . . One finds it . . . in . . . the conflict of laws. We deal there with the application of law in space. The walls of the compartments must be firm, the lines of demarcation plain, or there will be overlappings and encroachments with incongruities and clashes. In such circumstances, the finality of the rule itself is a jural end.[15]

Besides predictability and certainty of result, another strongly advanced policy argument favoring retention of the traditional rules

13. Notable among the early criticisms were Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924), *reprinted in* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS ch. 1 (1942); Lorenzen, *supra* note 7; Lorenzen & Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555 (1935); Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183 (1936).

14. B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67 (1928).

15. *Id.* Cardozo continued by suggesting that policy and justice considerations may have a place elsewhere in the conflict of laws, but not, as he understood it, in the approach to the subject adopted at that time in the United States.

was that of ease of application by courts.[16] In addition to these pragmatic grounds, commentators justified continued use of the traditional rules by asserting the existence of an underlying premise of fairness to the parties. Reference to clear, rigid and predictable choice-of-law rules assured each party that he or she could rely upon well defined substantive rights and take action to protect against potential liability arising from the body of law in effect at the time and place of the transaction in question. As stated by Goodrich:

> Fairness to the parties requires that the obligations created between them remain unchanged by fortuitous changes in the geographical locations of either until such obligations are settled or otherwise discharged. . . .
>
> . . . .
>
> This fundamental premise is at the bottom of nearly every conflict of laws case.[17]

Thus, the defenders of the traditional choice-of-law rules and the vested rights theory upon which they were based did not rebut the mounting criticism but merely brushed it aside. Joseph Beale never did answer the devastating attack on the rules and the theory advanced by Walter Wheeler Cook.[18] However, Beale did

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16. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 976 (1952).

17. Goodrich, *Public Policy in the Conflict of Laws*, 36 W. VA. L.Q. 156, 164-65 (1931). Notice the early use of the word "fortuituous."

18. *See* Cook, *supra* note 13, which appeared eleven years before the publication of Beale's treatise. Vested rights had also been attacked in Europe before Beale's work was published, especially by the French writer Pierre Arminjon. *See* M. WOLFF, PRIVATE INTERNATIONAL LAW 2 (1945). A review of pertinent European literature also demonstrates that choice-of-law theory had not been so rule-oriented everywhere and at all times. For example, Bar in Germany related the views of two nineteenth century French writers on French jurisprudence:

> Fœlix . . . starts with this principle: that in consequence of the sovereign power that belongs to each state, the application of foreign laws may be entirely excluded; and where it is admitted, it rests upon a voluntary and friendly concession by the sovereign power, out of regard to the mutual advantages of such a course . . . .
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> . . . .
>
> Masse . . . proceeds similarly to Fœlix. . . . He asserts that in each case convenience and justice must determine the application of foreign law.

L. BAR, *supra* note 7, at 43-45. Nevertheless, in 1930, Goodrich contended that the vested rights doctrine was well established and "[t]his will continue to be the situation un-

acknowledge that change would occur in the law, and presumably in choice of law as well, and that such change could be born of policy considerations:

> The birth of an idea is as sacred as that of a child; but it is obscure, unnoticed, its embodiment into its final frame of words a matter of years and decades. So of a legal idea. It begins as an adumbration of a newly recognized social need; the early efforts to state it in words are far from accurate; and before it is finally recognized for what it is, generations may have elapsed.[19]

However, when the time came to raze the entire structure of traditional rules and replace it with considerations of policy, it appeared to those who were convinced of its value that a "crisis"[20] or even a "revolution"[21] was at hand.

II. ATTEMPTS TO DEVELOP A POLICY-ORIENTED APPROACH

The growth of the common law has resulted from judicial decisions based ultimately upon considerations of domestic policy.[22] Holmes argued that the development of the common law is a result of the paradox of form and substance. In form, the growth of the law lies in its logical development through the judgments of courts—each new decision follows deductively from existing pre-

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less there is a sweeping revolutionary change, no signs of which are apparent at present." Goodrich, *supra* note 17, at 168.

19. Beale, *Social Justice and Business Costs—A Study in the Legal History of Today*, 49 HARV. L. REV. 593 (1936).

20. Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91, 95 (1964 II).

21. J. MORRIS, CONFLICT OF LAWS 278 (1971). The fact that the "revolution" did not emerge until 1963 can be understood better if one considers David Currie's observation: "Revolutions cannot always be completed overnight, especially when judges are asked to make them." Currie, *Comment on* Reich v. Purcell, 15 U.C.L.A. L. REV. 595, 596 (1968).

22. Even as the positivism of Austin and Dicey was in its prime and the vested rights theory was aborning, Holmes stated: "A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897). In 1880, even the early English conflicts scholar Westlake ventured to state the policy basis of a French rule under which no damages were allowed in respect of illicit intercourse: "The investigation which would arise [would be] thought hurtful to public morality." J. WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW 224 (2d ed. 1880).

cedents. In substance, however, the growth of law is legislative; new rules are constantly being made.

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.[23]

When rules of substantive law were formulated in the early common law, their function and purpose were relevant in the decision of a court to adopt or reject them.[24] The judiciary cannot abdicate its vital function, equally present in today's choice-of-law cases, to formulate, adjust or abandon a rule of law when the purposes of the rule are changed or when its objectives are no longer met.[25] Yet, reliance upon the security of existing precedent

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23. O. HOLMES, THE COMMON LAW 35 (1881). Consider, however, the following reproach of American judicial preoccupation with policy to decide conflict-of-laws situations prior to *Babcock*:

> But the process of invoking the magic of policy at the expense of principles has now reached a point at which a non-American reader may be forgiven for getting as impatient with this fetish as any intelligent student of English law will get with "authority" and anyone interested in German Law with "*Rechtswissenschaft*."

Kahn-Freund, Book Review, 76 HARV. L. REV. 223, 228 (1962) (emphasis in original).

24. As early as 1758, William Blackstone stated: "[W]hen [the reason or spirit of a law, or the cause which moved the legislator to enact it] ceases, the law itself ought likewise to cease with it." 1 W. BLACKSTONE, COMMENTARIES *61.

25. The development of law in the area of products liability demonstrates the responsiveness of courts to adapt the common law to modern circumstances and expectations. The general rule of common law that no special duty is owed by the manufacturer to the consumer was established in Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). In *Winterbottom*, the court adopted the concept of a limited duty from Vaughn v. Menlove, 3 Bing N.C. 467, 132 Eng. Rep. 490 (1837). These decisions were consistent with several policy objectives of mid-nineteenth century English society—the protection of infant enterprises by limiting rights of recovery and the prevention of a flood of litigation which would overload the court system.

The common law rule was followed in America, as well, but did not produce results that were deemed acceptable. The rule was finally abandoned in the classic policy-based judgment of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). In seeking contemporary policy objectives instead of relying on stare decisis, Judge Cardozo recognized that a manufacturer who places products in the marketplace must be held responsible for injuries which arise due to foreseeable dangers inherent in the normal use of those products. *Id.* at 387-88, 111 N.E. at 1053. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), contains an excellent policy discussion by Justice Traynor favoring the manufacturer as the superior

at the expense of principles of contemporary justice or economics continues today to a point where the American conflicts scholar might be excused for becoming impatient with such judicial "rule fetish."[26]

The reluctance of many courts to base choice-of-law decisions on public policy rationales may be explained in two ways. First, the direct use of policy in lawmaking is more generally conceived as a function of the legislative, as opposed to the judicial, branch of government. Thus, implementing a policy-oriented methodology requires changing judicial attitudes so as to comprehend the courts' proper role in the evolution of choice of law. Form should not be elevated over substance.[27] Rules of law, including choice-of-law rules, do not exist in a vacuum. They are judged by the results they produce in actual cases. Second, the greater impediment to the adoption of policy in place of rules was the fear that ambiguous notions of policy could lead to haphazard, arbitrary or inconsistent results in diverse forums. The earliest critics of the traditional lex loci, or place-of-injury, rule urged that conflicts law must be developed from a public policy foundation[28] and sought

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risk bearer for damages suffered due to injuries resulting from the use of defective products. *Id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

Once a court had settled on this policy, it was easy to extend the right of action to other foreseeable plaintiffs, such as borrowers, passersby and passengers and to extend liability to others in the chain of distribution who were capable of passing on the costs of injuries, such as wholesalers, retailers, lenders and component manufacturers. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965).

In England, where the courts have been traditionally reluctant to interfere with established rules of law, the Law Commission recently encouraged courts and legislators to consider policy factors with respect to the revision and consolidation of statutes, which was sorely needed to be undertaken in English law. The Commission stated: "Our basic principle is simple, to advocate the repeal of all ancient and apparently obsolete legislation unless it can be demonstrated that it is currently serving a useful purpose." LAW COMMISSION, 2D ANNUAL REPORT, No. 12, at 22-23 (1966-1967). *See also* LAW COMMISSION, 3D ANNUAL REPORT, No. 15, at 22 (1967-1968). To meet this criterion and to make appropriate recommendations, the Commission was forced to state clearly the purpose of each rule of law that it considered and decided to retain. *See* note 22 *supra*. In at least one area of investigation—"Dangerous Things and Activities"—the Commission's preliminary comment recognized the need to discard the established rules and to look at the true policy bases for them. "As the law now stands the categories [where one finds strict liability] are uncertainly defined. . . . Insufficient attention has been given to the social purposes which are, or should be, served and to the availability of liability or accident insurance." *Id.* at 9.

26. *See* note 4 *supra*. *But see* Kahn-Freund, *supra* note 23, at 228. For a relevant discussion of the distinction between the English and American doctrines of precedent *see* A. CROSS, PRECEDENT IN ENGLISH LAW 15-16 (2d ed. 1968).

27. *See* note 23 *supra* and accompanying text.

28. *See, e.g.*, Cook, *supra* note 13, at 486-88; Lorenzen, *supra* note 7, at 747-48; Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 730-33 (1957) (referring to the technique of policy analysis). Both Cook and Lorenzen published an

to identify those policies which could resolve conflicts problems in conformity with modern demands of justice. The major questions presented were: (1) which policies are relevant to the choice-of-law process; (2) how are they to be categorized; and (3) in what fashion are they to be incorporated into the approach taken to conflicts cases?

As early as 1920, Professor Ernest Lorenzen of Yale University sought to adapt the traditional set of choice-of-law rules to include domestic and international or interstate policy considerations. He wrote:

> If the situation is one admitting of the application of "foreign" law, the choice of the rule to be applied will be determined again in many instances by general social or economic considerations. For example, if the question relates to capacity, a state may conclude that the principal interest involved is the protection of its citizens or persons domiciled within its territory, wherever they may be.[29]

Thus, Lorenzen would use policy arguments to justify application of the traditional lex patria or lex domicilii choice-of-law rule to govern capacity. His view was that a court faced with a question of capacity should consider not only the "appropriate" rule as dictated by the vested rights theory but should also contemplate the consequences of the application of that rule in terms of policy.[30] Which policy bases were to be considered? Lorenzen answered:

> From the standpoint of the Conflict of Laws all states are primarily interested in the proper administration of justice. . . . [T]he court will take into consideration the needs of interna-

article within a year of the initial work undertaken on the first Restatement. *See* notes 7 & 13 *supra*; *see also* E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 106 *passim* (1947); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

29. E. LORENZEN, *supra* note 28, at 15.

30. Lorenzen asserted that "in fact, the only answer that can be given to the question why the common law has chosen a particular rule to govern in the conflict of laws or in any other branch of law is that it has seemed to the forum sound policy to do so." E. LORENZEN, *supra* note 28, at 106. In the same essay, originally published in 1920, Lorenzen compared the teachings of the Dutch Scholar Jitta to the vested rights dogma, stating that "this author rejects all mechanical application of the lex fori, the lex domicilii, the lex rei sitae, the lex loci contractus, etc., and inquires always what are the reasonable requirements of international social life in the particular case." *Id.* at 95.

> tional trade and the requirements of an increasing intercourse between states and nations. . . . The general problem is, therefore, always the same; what are the demands of justice in the particular situation; what is the controlling policy?[31]

Professor Walter Wheeler Cook of Northwestern University stressed the need to recognize the policy considerations already existent, though perhaps not immediately apparent, in conflicts jurisprudence. He urged a detailed study of past choice-of-law cases to identify the policies underlying them.[32] In an article first published in 1924, Cook observed that

> in law as in the natural sciences, practice has preceded theory . . . conclusions have not actually been reached purely deductively. . . . [A] "new" case . . . involves comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a "rule" or "principle" within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those decisions have produced.[33]

With respect to choice-of-law cases, Cook believed:

> [O]ur choice is really being guided by considerations of social and economic policy or ethics . . . . [I]n some cases it makes little difference which rule is adopted, so long as it is reasonably clear . . . and it is not departed

31. *Id.* at 15. Whether this approach is advisable is still hotly disputed. *See, e.g.*, Kahn-Freund, *supra* note 23, at 228.

32. Cook, *supra* note 13, at 486. Even the famous judgment in Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904), was "a practical result based upon reasons of policy established in prior cases." *Id.* at 135-36. The policy pertained to the insistence that the local right of action in tort be similar to that in the state where the wrong was committed. Such a policy was also involved in the English decision in The Halley, L.R. 2 P.C. 193 (1868). It is noteworthy that Beale based his deductive vested rights system on policy grounds as well. *See* J. BEALE, CONFLICT, *supra* note 7, at 71-72.

33. Cook, *supra* note 13, at 486. Such a comparison as Cook envisaged is much more difficult where judgments of the courts make no reference to policy considerations. Cook was aware that any statement of policy by a court was in fact an experiment, the validity of which was tested by the results it promoted. *See* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 44 n.11 (1942).

> from in cases clearly falling within it, but in others clearly vital problems of social and economic policy must be considered before a wise choice between conflicting rules can be made.[34]

In 1933, one year before the publication of the first Restatement, Professor David Cavers of Harvard University made an important contribution to the explicit consideration of policy in the choice-of-law process. Conflicts cases, Cavers argued, cannot be decided on policy grounds without a prior examination of the content of the competing rules in question and of the result in the particular case of applying each rule. He rejected the argument that the only alternative to the use of strict and formal choice-of-law rules was the unfettered manipulation of results by courts. Two years before Beale completed his massive conflicts treatise, Cavers suggested that a systematic policy-oriented method to choice of law could be developed.[35]

In 1934, as the Restatement went to press, Professor Raymond Heilman advocated the restructuring of conflicts rules in order to set forth the economic and social objectives they entailed. Heilman found the vested rights theory to be "palpably inadequate" in this regard.[36] At the same time, in a review of German conflicts law, Professor Max Rheinstein of the University of Chicago advocated the resolution of conflicts cases by an investigation of the "conflicting social interests which are to be regulated."[37] Rheinstein, like Cavers before him, stressed the need to understand the content of the foreign law before any such policy inquiry could be undertaken.

By 1935, the year after the appearance of the final version of the Restatement and the year that Beale's massive treatise on

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34. W. Cook, *supra* note 33, at 45-46.

35. Cavers, *supra* note 13, at 208. The doctrine of public policy, whereby a court restricted by the vested rights theory has the power to set aside the selected rule of substantive law, has very little relationship to the incorporation of domestic and international policy considerations as the fundamental basis of a choice-of-law doctrine. It is a mere limitation on the operation of the particular rule in question. *See* Restatement of Conflict of Laws § 612 (1934); note 10 *supra* and accompanying text.

36. Heilman, *Judicial Method and Economic Objectives in the Conflict of Laws*, 43 Yale L.J. 1082, 1089 (1934).

37. Rheinstein, *Comparative Law and Conflict of Laws in Germany*, 2 U. Chi. L. Rev. 232, 252 (1934). The study of comparative law is fundamental to a rational approach to the conflict of laws.

choice of law was published, these suggestions had developed to the point that the Yale Law Journal observed in a Comment:

> In deciding tort cases involving a conflict of laws [one may examine] the purpose of the applicable rules. . . . [I]t is important to distinguish between rules that are intended to regulate and establish standards of conduct, and those with some different purpose.
>
> . . . .
>
> In each situation the court of the forum may apply the law of the jurisdiction which has the greatest interest in securing conformity with the particular rule in issue. Also, it may consider the general public policy of such rules throughout the United States . . . .[38]

Two important distinctions had been made: (1) not all rules of substantive law have the same purpose, *i.e.*, some set standards of conduct, some do not; and (2) a state may have a different interest in the application of a certain rule of law than does the United States as a whole. These were halting, but necessary, steps toward the use of policy in place of rules in conflicts cases.

Following the publication of the Restatement, the call for direct consideration of policy as an integral part of the choice-of-law process became stronger than ever.[39] Major American conflicts

38. 44 YALE L.J. 1233, 1236-38 (1935). The Comment concluded that in suits regarding questions of family law, only the state of marital domicile has an interest. *Id.* at 1239.

39. For example, Dean Griswold, a scholar of the traditional rules, attempted a policy analysis of Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934). Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1206 (1938). Cook commented on Griswold's analysis: "[A]n excellent conclusion but reached in a needlessly clumsy way [since it relied on the use of Renvoi.]" W. COOK, *supra* note 33, at 249.

Even Professor Beale seemed aware of the force of the argument against his strict rule-oriented system. In a review of several early workers' compensation cases and of Young v. Masci, 289 U.S. 253 (1933), he admitted that the Supreme Court was, in effect, reaching out for a "social purpose." Beale, *supra* note 19, at 607. Beale submitted that these cases, one of which was also analyzed by Currie 27 years later, *see* note 75 *infra*, marked "the emergence of a distinctly sociological jurisprudence," based upon the policy of distributing the financial burden of accidents among the ultimate consumers. *Id.* at 608. For a discussion of the same principle as it applies to products liability see note 25 *supra*. The following year, however, it would seem that Beale forgot the force of the policy argument when he stated:

> Most differences between the principles of Conflict of Laws fifty years ago and those prevailing today must be in the development of doctrines already formulated or in changes merely of detail. Perhaps the most striking legal development

texts published during this period, while purporting to accept the dogma of Beale, often included commentary on the need for courts faced with a conflicts case to investigate the social policies which were implicated.[40] Yet, the questions of which policies were relevant and of how courts should go about examining and applying them were still left unanswered. Many articles published since the late 1930s have addressed these questions.

The first attempt to catalogue policies for use in the choice-of-law process appeared in a casebook by Professors Fowler Vincent Harper and Charles Taintor, first published in 1937.[41] The policies Harper and Taintor listed were those which they claimed courts had already relied upon in conflicts cases, albeit not always openly. The four policies they designated, "in direct order of their generality," were: (1) uniformity of result, independent of the choice of forum; (2) fairness to litigants, by selection of a law from a state with significant contacts to the controversy; (3) desirability of result in the class of cases presented by the case at hand; and (4) desirability of result in the particular controversy.[42] The authors acknowledged, not surprisingly, that there was significant disagreement among courts as to which of these were of greater importance and how they should be utilized in a conflicts case.

In 1942, Professor Robert Neuner of Yale Law School published the next attempt to enumerate and explore the appropriate policy bases of choice of law.[43] Neuner differentiated between general policy considerations[44] and particular domestic policy

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> in the last fifty years [in the conflict of laws] is the greater independence of married women and their children.

Beale, *The Conflict of Laws, 1886-1936*, 50 HARV. L. REV. 887, 890 (1937).

40. *E.g.*, G. STUMBERG, *supra* note 7, at 183-87. Even Johnson in Quebec, a staunch defender of the lex loci delicti, began his chapter on torts as follows: "The purpose of the law of delictual responsibility is to protect individuals against wrongful acts by which they suffer loss or prejudice; to indemnify them in money damages." 3 W. JOHNSON, CONFLICT OF LAWS 666 (2d ed. 1962).

41. F. HARPER & C. TAINTOR, CASES AND OTHER MATERIALS ON JUDICIAL TECHNIQUE ON CONFLICT OF LAWS (1937).

42. *Id.* at 55-58. The authors asserted that the ultimate solution to cases involving conflicting policies could only be arrived at by the United States Supreme Court (and only to the extent that the Constitution conferred power to resolve such questions) or, where no such higher tribunal existed, through treaties or voluntary submission to international courts. *Id.* at 58.

43. *See* Neuner, *Policy Considerations in the Conflict of Laws*, 20 CAN. B. REV. 479 (1942).

44. These included the importance of: (1) using policy considerations in the conflict of laws; (2) ensuring cooperation between different states; (3) protecting the expectations of the parties; and (4) achieving a just result in a particular case. *Id.* at 479-89.

considerations.[45] By suggesting the use of the policies underlying conflicts rules, he followed the earlier suggestion by Cook that choice-of-law rules, such as the lex domicilii, could be used to further policy objectives, at least when questions of domicile or capacity were concerned. Such use of policy remained essentially within the traditional framework. As for the use of general policies which were not tied to the rules in the traditional system, Neuner renamed the four policies listed by Harper and Taintor and suggested that a distinction be drawn where such policies were to be used in interstate, as opposed to international, conflicts cases.[46] Neuner also examined the fairness element in more detail and noted the important correspondence between considerations of policy and the realization of a just result in various types of multistate cases. He concluded that the wide variety of choice-of-law problems made it impossible to derive a useful set of policy-oriented choice-of-law rules from such general considerations.[47] One must consider in each case the particular choice-of-law rule that is proffered in solution and review the policy foundations upon which that rule is based. He stated:

> Almost all rules of conflict of laws have a core which expresses an understandable principle of policy. If today the working of a conflict of laws rule so often seems pure arbitrariness, the reason is not that the conflict of laws rule does not embody a principle of policy, but that courts and legislators have forgotten the policy ground of the rule and interpreted it, not according to its reason, but in a more or less mechanical way.[48]

Neuner also discovered that the policy bases of individual conflicts rules often led to opposite results and that some further criteria were necessary to obtain an acceptable decision. His sole recommendation was disappointing: once a preference for one policy basis over another had been shown, that preference should be adhered to in future cases so that prospective litigants would not be unduly surprised.[49]

45. As examples, Neuner discussed the various domestic purposes underlying the rules dealing with domicile, moveables and contracts. *Id.* at 489-500.

46. *Id.* at 481. Neuner relied solely on the constitutional issue. *See* note 42 *supra*.

47. *Id.* at 488-89. Neuner was in basic agreement with Currie's remark that "a choice of law rule is an empty and bloodless thing" and that we "would be better off without [such rules]." B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 52, 183 (1963).

48. Neuner, *supra* note 43, at 490.

49. *Id.* at 500.

Professor Moffatt Hancock, then of the University of Toronto, lamented the tendency of courts in conflicts cases to rely solely upon authority and to make their judgments appear as irresistible conclusions. Hancock agreed that there were important social policies underlying the traditional American tort choice-of-law rule, the lex loci delicti, and its English counterpart, the century old rule in the case of *Phillips v. Eyre*.[50] He flatly declared that the vested rights theory could throw no light on the matter.[51] Hancock proposed starting from an entirely new premise. In cases where the operative facts were spread among two or more states, each may be said to have an interest in the application of its law.[52] In 1943, he published a list of "some of the more significant choice-of-law policies which come into play in multiple contact cases."[53] He maintained that judicial resolution of conflicts cases by policy-oriented choice-of-law *principles*, in place of choice-of-law rules, would make for greater predictability and certainty. Hancock advised a court facing a choice-of-law problem to:

> (1) judge the conduct of the parties by a law with which it is significantly connected (a policy of fairness, to protect justified expectations);
> (2) achieve uniformity of result, independent of the place of the forum (a policy to prevent forum shopping);
> (3) achieve certainty and predictability of results; and
> (4) recognize a foreign state's interests in transactions occurring within that state's territory.[54]

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50. L.R. 6 Q.B. 1 (1870). The court's statement of the English rule is:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

Id. at 28-29. The exact meaning of these words is far from clear, and much painstaking effort has been spent in their explanation. It seems apparent, however, from a consideration of the facts in *Phillips v. Eyre* and of the cases cited in support of the rule, that the rule dictates that foreign torts sued upon in an English court be tried according to English law.

51. M. HANCOCK, TORTS IN THE CONFLICT OF LAWS 20, 36 (1942).

52. *Id.* at 175. *See also* G. STUMBERG, *supra* note 7, at 182.

53. Hancock, *Choice of Law Policies in Multiple Contact Cases*, 5 U. TOR. L.J. 133, 135 (1943).

54. *Id.* at 135-37.

Hancock's fourth policy basis was new. It presaged Brainerd Currie's important work on governmental interest analysis[55] by nearly fifteen years. As for the determination of state interests, Hancock explained:

> [W]hether the policies of various states involved in a conflicts problem can be reconciled or not, it is always important that they should be given fair and tolerant consideration by the court of the forum. . . . A court ought to study carefully the relevant rules of the various state laws involved and try to discover the social policies which they are meant to achieve. They ought to be examined in their context as part of the law of the state of origin. Their history in that state ought, if necessary, to be investigated.[56]

Hancock's effort constituted another milestone in the path of using policy in place of rules in the choice-of-law process. His was the first conscious attempt to separate the considerations of purely *domestic policies*, *i.e.*, policies underlying rules of substantive law, from the consideration of *conflicts policies*, *i.e.*, policies that come into play in performing the choice-of-law process. Currie was later to rely almost exclusively on the former in the development of his governmental interest analysis; the Restatement (Second) of Conflict of Laws[57] was to make use of both.

In 1946, Professor Paul Freund published his now-famous article[58] in which he reviewed several judgments of the United States Supreme Court upon which Currie was later to rely in explaining his policy-oriented choice-of-law approach.[59] Freund suggested that the policy-oriented technique employed by the Supreme Court in deciding when one state could refuse to apply

55. Governmental interest analysis is the name given to the policy-oriented choice-of-law approach described by Brainerd Currie in a series of articles published in the later 1950s. They are collected in B. CURRIE, *supra* note 47. Currie relied primarily on the use of domestic policies to segregate cases in which only one state had an interest in the application of its rule of law, cases which he called false conflicts. Currie's approach did not provide much assistance when more than one state was interested in the application of its rule.

56. Hancock, *supra* note 53, at 142. It is noteworthy that in *Babcock*, Judge Fuld examined the social policy objectives sought to be advanced by Ontario's guest statute and found them inapposite. *See* note 100 *infra* and accompanying text.

57. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). For further discussion of Cheatham and Reese's influence on section six see note 62 *infra*.

58. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

59. *Id.* at 1220-25. *See* note 75 *infra*.

another state's worker's compensation laws was "suggestive of an approach in conflicts cases generally."[60] Currie responded to the suggestion by formulating his governmental interest analysis.

One of the most complete inventories of policy considerations for use in conflicts cases appeared in 1952 in an article by Professors Elliott Cheatham and Willis Reese of Columbia University.[61] At the time, Professor Reese had just been appointed the Reporter for the Restatement (Second). The list of policies that he and Cheatham published provided an early indication as to the form the final version of the Restatement (Second) would take. Starting with the four policies identified by Hancock, Cheatham and Reese found ten choice-of-law policies to be relevant:

(1) application of a relevant choice-of-law statute (a rare situation);

(2) consideration of the needs of the interstate and international systems;

(3) application of the local rule of law unless there is a good reason not to apply it;

(4) effectuation of the purpose of the relevant rule of local law;

(5) realization of certainty, predictability and uniformity of result;

(6) protection of the justified expectations of the parties;

(7) application of the law of the state of dominant interest in the resolution of the issues involved;

(8) consideration of the convenience of the court (ease in determination of the law to be applied);

(9) consideration of the fundamental policies underlying the broad field of law involved; and

(10) realization of a just result in the individual case.[62]

Note that the fourth and seventh incorporate a consideration of the domestic policies underlying the conflicting rules of law. In addition to serving as a basis for the Restatement (Second), this

60. *Id.* at 1220.

61. Cheatham & Reese, *supra* note 16.

62. *Id.* at 962-81. All of the Cheatham and Reese policies were incorporated into section six of the Restatement (Second) with the exceptions of numbers three and ten.

enumeration has been the source of another choice-of-law approach currently used by some courts in the United States.[63] This listing has not been supplemented significantly, although Professor Hessel Yntema managed to assemble an array of some seven-

63. Professor Robert Leflar selected five of Cheatham and Reese's ten policies to be used by courts as "choice influencing considerations," including the last one, which Reese had deleted. He added to these considerations another: the "better rule of law." R. LEFLAR, AMERICAN CONFLICTS LAW 233, 245 (1968). By 1973, the courts of four states had committed themselves to the use of Leflar's approach to choice of law, at least in tort cases:

> (1) Minnesota (*see* Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971) (fraud); Duffy v. Currier, 291 F. Supp. 810 (D. Minn. 1968) (most significant contacts analyzed in applying wrongful death statute); Mikovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973) (guest statute); Allen v. Gannaway, 294 Minn. 1, 199 N.W.2d 424 (1972) (most significant contacts analyzed in applying guest statute); Bolgrean v. Stitch, 293 Minn. 8, 196 N.W.2d 442 (1972) (guest statute); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968) (guest statute); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966) (Restatement (Second) used to apply guest statute); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966) (Restatement (Second) used to consider parental immunity));
> (2) New Hampshire (*see* Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1972) (guest statute); Taylor v. Bullock, 111 N.H. 214, 279 A.2d 585 (1971) (marital immunity); Schneider v. Schneider, 110 N.H. 70, 260 A.2d 97 (1969) (marital immunity); Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968) (marital immunity); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (guest statute); Dow v. Larrabee, 107 N.H. 70, 217 A.2d 506 (1966) (guest statute); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966) (marital immunity));
> (3) Rhode Island (*see* Thayer v. Perini Corp., 303 F. Supp. 683 (D.R.I. 1969) (dominant contacts analysis in wrongful death action); Tiernan v. Westext Transp., Inc., 295 F. Supp. 1256 (D.R.I. 1969) (wrongful death); Busby v. Perini, 110 R.I. 149, 290 A.2d 210 (1972) (workers' compensation); Brown v. Church of Holy Name, 105 R.I. 322, 252 A.2d 176 (1969) (charitable immunity); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917, *cert. denied*, 393 U.S. 957 (1968) (guest statute)); and
> (4) Wisconsin (*see* Snow v. Continental Prods. Corp., 353 F. Supp. 59 (E.D. Wis. 1972) (wrongful death); Decker v. Fox River Tractor Co., 324 F. Supp. 1089 (E.D. Wis. 1971) (Wisconsin's comparative negligence law preferred as the "better rule of law"); Korth v. Mueller, 310 F. Supp. 878 (W.D. Wis. 1970) (marital immunity); Satchwill v. Vollrath Co., 293 F. Supp. 533 (E.D. Wis. 1968) (wrongful death); Clough v. Liberty Mut. Ins. Co., 282 F. Supp. 553 (E.D. Wis. 1968) (insurance exclusion clause in personal injury action); Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973) (coemployment defense); Haines v. Mid-Century Ins. Co., 47

teen policy objectives which he found had been used by courts in the resolution of conflicts cases.[64]

Two important appeals for the use of policy in the choice-of-law process came from Europe. The first, although published in the Harvard Law Review, was the initial attack from England on the continued use of mechanical choice-of-law rules in tort. In 1951, Dr. John Morris of Oxford University suggested that a flexible approach, similar to the English conflicts doctrine of the proper law of the contract, be adopted in place of the *Phillips v. Eyre* choice-of-law rule.[65] Nearly two decades later, in *Boys v. Chaplin*,[66] the House of Lords began to consider and adopt such an approach. The second appeal came from Italy, where Professor Quadri advocated replacing the rigid traditional choice-of-law rules with a more flexible approach which included direct considerations of policy.[67] The development toward a policy-oriented choice-of-law system has necessarily been slower in Europe than in the United States, due largely to the practice in civil law countries, as in socialist law countries, to codify choice-of-law rules or rules of private international law, as they are called there.[68]

Wis. 2d 442, 177 N.W.2d 328 (1970) (marital immunity); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) (guest statute); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968) (guest statute and marital immunity); Heath v. Zelmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967) (guest statute); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) (Restatement (Second) used to apply guest statute)).

64. Yntema, *supra* note 28, at 734-35. *See* G. KEGEL, INTERNATIONALES PRIVATRECHT 32 *et seq.* (2d ed. 1954) (distinctions between policies relating to governmental and private interests); de Vries, *Recent Developments in PIL in the U.S.*, 75 RECUEIL DES COURS 205, 209 (1949 II); Falconbridge, *Conflict of Laws: 1923-1947*, 26 CAN. B. REV. 334, 344 (1948); Rabel, *An Interim Account on Comparative Conflicts Law*, 46 MICH. L. REV. 625, 632 (1948).

65. Morris, *The Proper Law of Tort*, 64 HARV. L. REV. 881 (1951).

66. [1971] A.C. 356.

67. *See* De Nova, *Current Developments of Private International Law*, 13 AM. J. COMP. L. 542, 565 (1964); De Nova, *New Trends in Italian Private International Law*, 28 LAW & CONTEMP. PROB. 808, 817-21 (1963). According to De Nova, Quadri found the scope of a rule of law through interpretation of the rule "in light of its purposes." *Id.* at 819. The same point had been made in an earlier conflicts analysis: "We will admit that every judge has to administer the laws of his own country, but then he must apply them *only to the persons and the cases for which they were made*." F. VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 100 (W. Guthrie trans. 1869) (emphasis added). Investigation into the purpose of rules in determining their applicability was recommended at least as early as 1768 by Sir William Blackstone. *See* note 24 *supra*.

68. *See* Madl, *Struggle with Reality in Private International Law*, 11 ACTA JURIDICA ACADEMIAE SCIENTARUM HUNGARICAE 153, 170 (1969). Madl also makes the point that the policies behind rules of law in socialist states will be difficult for judges in western

III. EARLY POLICY-ORIENTED CONFLICTS CASES

Direct reference to and utilization of policy considerations may be found in several early English conflicts cases. For example, in *The Halley*,[69] an early English conflicts case in tort, Lord Justice Selwyn closed with:

> [I]t is, in their Lordships' opinion, alike *contrary to principle* and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law and will give a remedy in the shape of damages in respect of an act which, *according to its own principles*, imposes no liability on the person from whom the damages are claimed.[70]

Similarly, in *Phillips v. Eyre*[71] itself, Justice Willes suggested an additional policy ground in support of the judgment, noting that the effect of a contrary conflicts rule would be international complications. In essence, the court recognized the policy basis we now describe generally as the maintenance of interstate and international systems. In *Machado v. Fontes*,[72] Lord Justice Rigby discussed the rule of *Phillips v. Eyre* and its treatment in subsequent cases in clear policy terms:

> [A]ll the learned judges . . . laid down the law without hesitation and in a uniform manner; and first one judge and then another gave, in different language but exactly to the *same purport and effect*, the rule enunciated by Willes J.[73]

The occasional reference to policy grounds was not limited to tort cases in the conflict of laws. There are numerous additional examples of English decisions with similar references to policy rationale in divorce, contract, adoption and other areas of law.[74]

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courts to articulate, since the political assumptions upon which they are based are so different. *Id.*

69. L.R. 2 P.C. 193 (1868).

70. *Id.* at 204 (emphasis added).

71. L.R. 6 Q.B. 1 (1870).

72. [1897] 2 Q.B. 231.

73. *Id.* at 235 (emphasis added).

74. *E.g.*, McKee v. McKee, [1951] A.C. 352 (per Simonds, L.) (divorce); Assam Ry. v. I.R.C., [1935] A.C. 445, 458 (per Wright, L.) (contract); *Re* H. Infants, [1966] 1 W.L.R. 381 (per Cross, J.) (adoption). On the other hand, an English court has—not atypically—resolved a choice of law question in a contracts case without consideration of the issues at stake in the proceeding, much less an examination of the relevant policy

Nor were such references unknown in the United States. Many early conflicts decisions based upon the vested rights doctrine also made passing reference to policy considerations.[75] Occasionally, the policy reference appears to be the only substance of the decision. More often, however, the use of policy was in justification of the result obtained using the traditional choice-of-law rule or an exception to that rule. The major policies employed in this fashion, as discussed above, were fairness to the parties and certainty of result. As Justice Holmes explained in *American Banana Co. v. United Fruit Co.*:[76] "For another jurisdiction, if it would happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, . . . would be unjust."[77] These passing references to policy considerations were less frequent once precedent in the conflict of laws began to accumulate and choice-of-law rules became available that could be applied either directly or by analogy in most situations.[78]

In 1907, the court of appeals of the District of Columbia decided *Moore v. Pywell*.[79] In *Moore*, the decedent was recovering from typhoid fever at his home in Maryland, where his doctor prescribed a certain medicine, ecthol. This prescription was filled at the defendant's drug store in the District of Columbia, but the druggist negligently included the drug ichtoyol instead of ecthol. Death resulted in Maryland when the medicine was taken. The decedent's personal representative brought a wrongful death action in the District of Columbia based on the wrongful death statute of that jurisdiction. On the motion of the defendant, the trial judge entered a summary judgment against the plaintiff, since the death had not occurred in the District of Columbia.[80]

bases. The Assunzione, [1954] P. 150, *aff'g* [1953] 1 W.L.R. 929. The issues at stake and the competing rules are discussed in Smith, *The Assunzione Revisited*, 18 INT'L COMP. L.Q. 449 (1969).

75. The major cases are analyzed in B. CURRIE, *supra* note 47, at 201 *et seq.* They include: Carroll v. Lanza, 349 U.S. 409 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Assoc. v. Industrial Accident Comm'n, 294 U.S. 532 (1935). *See also* Cheatham, *Stone on Conflict of Laws*, 46 COLUM. L. REV. 719, 720-22 (1946). The same principles have been applied in a case concerning commercial insurance. Watson v. Employers Liability Ins. Corp., 348 U.S. 66 (1954). Currie claimed that the *Watson* decision was based entirely upon state interest analysis and explicitly rejected the territorialist dogma. B. CURRIE, *supra* note 47, at 238.

76. 213 U.S. 347 (1909).

77. *Id.* at 356. For another discussion of fairness to parties and certainty of result as policies which support the traditional rule see text accompanying note 17 *supra*.

78. *See generally* A. CROSS, *supra* note 26, at 175-97.

79. 9 L.R.A. (n.s.) 1078 (App. D.C. 1907).

80. *Id.* at 1079-80. The Maryland and District of Columbia statutes called for a differ-

The court of appeals allowed the plaintiff to amend his complaint to include the Maryland statute, which was substantially similar to the one in the District of Columbia. Because recovery would have been allowed in Maryland or the District of Columbia had all the facts occurred in either jurisdiction, the plaintiff recovered.[81] This result was recognized as contrary to the traditional choice-of-law rules, which would have precluded an action under either the District rule (since the death did not occur there) or the Maryland rule (since it could not be applied extraterritorially by the District court), but it was squarely in line with an earlier judgment of the United States Supreme Court, *Stewart v. Baltimore & Ohio Railroad*.[82] There Mr. Justice Brewer stated:

> The purpose of the several [wrongful death] statutes passed in the States . . . is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal but remedial, for the benefit of the persons injured by death. . . . [W]here the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for tort can be maintained in any state in which that common law obstacle has been removed.[83]

Another relevant case is familiar to all contemporary conflicts students. In 1928, the Connecticut Supreme Court held, in *Levy v. Daniel's U-Drive Auto Renting Co.*, that a passenger's suit against a company that had furnished a rented car in which he was injured should be characterized as one in contract, not in tort. While the case is often studied as an example of characterization to obtain or to avoid the application of a certain rule,[84] it is important to ob-

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ent nominal plaintiff and provided for a slightly different mode of distributing damages to the heirs. Nevertheless, these facts were not deemed controlling in light of the identical purpose served by the two statutes. *Id.* at 1081. Since the court settled on the policy underlying the case, it was not necessary to apply the traditional choice-of-law rule; indeed, it would have been inconsistent to do so.

81. 168 U.S. 445 (1897).

82. *Id.* at 448. The trial court and the court of appeals in *Stewart* had held for the defendant, since neither the District of Columbia nor the Maryland laws could be applied if the forum was in the District of Columbia and the death had occurred in Maryland. *Id.* at 447.

83. 108 Conn. 333, 143 A. 163 (1928).

84. *Levy* exemplifies a court's use of the second of Dr. Shapira's listed devices. *See* note 10 *supra*.

serve *how* the court managed to so characterize the case as one in contract as opposed to tort. A Connecticut statute held the lessor of a rented car liable to any person injured by the operation of the car. This was admittedly a deviation from the rule of common law. The court stated:

> The purpose of the statute was not primarily to give the injured person a right of recovery against the tortious operator of the car, but to protect the safety of the traffic upon the highways by providing an incentive to him who rented motor vehicles to rent them to competent and careful operators, by making him liable for damage resulting from tortious operation of rented vehicles. . . . [T]his imminent danger justified . . . this statute.[85]

By operation of law, the Connecticut court inserted a term into the rental contract upon which the plaintiff or any other person injured by the operation of a car could base his or her action. Since the purpose of the local statutory scheme was furthered by the court's imposition of liability in contract, the fact that the injury occurred in another state was irrelevant. The court admittedly applied a rigid vested rights choice-of-law rule, the lex loci contractus, but only after making a meaningful policy analysis.

Another early and easily recognizable choice-of-law analysis based expressly on considerations of policy is the 1949 judgment of Judge Wyzanski in *Gordon v. Parker*.[86] In *Gordon*, the plaintiff brought an action for alienation of affection in a Massachusetts federal district court. Mr. and Mrs. Gordon were domiciled in Pennsylvania. The defendant, a domiciliary of Massachusetts, met the plaintiff's wife in Massachusetts, where they allegedly engaged in sexual intercourse. The defendant argued that "where the asserted damage has been inflicted on a marital relationship Massachusetts would recognize that the existence of liability should be determined by the policy not of the forum, or of the place of wrong, but of the state of marital domicil."[87] Massachusetts law still recognized actions for alienation of affection, but Pennsylvania had abolished them.

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85. *Id.* at 336, 143 A. at 164.
86. 83 F. Supp. 40 (D. Mass. 1949).
87. *Id.* at 41-42.

Judge Wyzanski analyzed the facts of the case and the content of the competing Pennsylvania and Massachusetts rules and concluded that each state had an interest in the application of its own rule.[88] He decided that a Massachusetts state court would choose in favor of its own interests. The learned judge anticipated Currie's "restrained and moderate interpretation" of state interests[89] and held that the Pennsylvania objective of keeping alienation of affection actions out of Pennsylvania courts was not relevant when the action was brought in Massachusetts.[90] He therefore permitted the suit.

Similar inquiries into state interest which resulted in early judicial recognition of false conflicts[91] may be found in other cases.[92] By the late 1950s, American courts were gradually becoming aware of the need to turn to the policies governing conflicts cases and to the policies underlying the competing rules of law, but no systematic method of making such a policy reference was available. In a number of early conflicts cases, courts chose to rely on policy arguments to justify or avoid the application of a particular rule[93] but not to make a choice between rules. Frequent use of policy arguments was made in resolving questions of statutory

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88. *Id.* Pennsylvania was an "interested state" since the marital domicile was there, giving it an obvious interest in the protection of the marriage. The purposes of the Massachusetts rule permitting the action were the control of such activity to prevent lowering community standards within its own borders and intermeddling with marriages outside its borders. *Id.* at 42.

89. Currie's later refinement of governmental interest analysis is set forth in Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757 (1963). Justice Traynor prophesied a similar policy-oriented approach in choice of law in his first conflicts opinion for the California Supreme Court, Squire v. Porter, 21 Cal.2d 45, 129 P.2d 691 (1942) (dissent), *cert. denied*, 318 U.S. 757 (1943), some 25 years before he finally established it in Reich v. Purcell, 67 Cal. 2d 556, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

90. 83 F. Supp. at 43.

91. For a discussion of the term false conflicts see note 55 *supra*.

92. *See* Gratz v. Claughton, 187 F.2d 46 (2d Cir. 1951), *cert. denied*, 341 U.S. 920 (1951); Zucker v. Vogt, 200 F. Supp. 340 (D. Conn. 1961); Noel v. Airponents, Inc., 169 F. Supp. 348 (D.N.J. 1958); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957). For a discussion of *Schmidt* and *Grant* see note 11 *supra*.

93. *See, e.g.*, St. Louis-S.F. R.R. v. Cox, 171 Ark. 103, 283 S.W. 31 (1926) (failure to return compensation tendered as settlement deemed procedural, hence governed by lex fori, because such return is a form of remedy which the parties did not contemplate when the contract was formed); Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932) (purpose of the Louisiana law considered); Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934) (lex loci rule "developed under the impulses of neighborliness and orderliness").

construction,[94] but policy-oriented choice of law was not yet conceived as a replacement for the established approach which so often produced unacceptable results.

By 1961, the judicial inclination in multistate cases to reach a result consistent with considerations of local policy had developed, at least in New York, to the point that the court of appeals could issue the extraordinary decision in *Kilberg v. Northeast Airlines, Inc.*[95] A New York plaintiff sought damages in the amount of $150,000 against the defendant airline for wrongful death in a Massachusetts crash. The airline, urging application of the lex loci delicti, relied upon a Massachusetts statutory wrongful death limitation under which liability would be set at not less than $2,000 nor more than $15,000. While the court stated that it was constrained to apply the lex loci delicti rule to choose the substantive rule of law establishing the rights and liabilities between the parties, it was not so constrained with respect to the "procedural" issue of limitation on damages.[96] New York had a strong policy, expressed through a constitutional restriction, against limiting damages in wrongful death cases. Relying quite openly upon this New York policy, the court held that while the Massachusetts wrongful death statute gave the plaintiff a cause of action, the Massachusetts limitation would not be applied.[97] Providing helpful precedent for future policy-oriented cases, the court noted that modern conditions make it unjust to subject traveling citizens to such varying laws, that the place of injury in such crashes is fortuitous and that the New York Court should strive to protect New York plaintiffs.[98]

In 1963, a new judicial attitude to choice of law was born, the effects of which have been felt worldwide in private international law. In *Babcock v. Jackson*,[99] Chief Judge Fuld of the New York Court of Appeals recognized that considerations of policy were a

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94. *See* Lauritzen v. Larsen, 345 U.S. 571 (1953) (Jones Act construed in a spirit "reconciling our own interests with foreign interests"); Bowerman v. Sheehan, 242 Mich. 95, 219 N.W. 69 (1928) (vicarious liability statute); B. CURRIE, *supra* note 47, at 364; *see also* the state court judgment in Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 10 Cal. 2d 567, 75 P.2d 1058 (1938), *aff'd*, 306 U.S. 493 (1939) (workers' compensation statute).

95. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

96. *Id.* at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

97. *Id.* at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.

98. *Id.*

99. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), *rev'g* 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (1962). For the facts in *Babcock* see note 9 *supra*.

self sufficient and acceptable approach to choice of law. The old trappings of the jurisdiction-selection process could now be discarded. Judge Fuld held that the traditional lex loci delicti choice-of-law rule did not invariably govern in multistate tort cases and substituted in its place an analysis of the interests of New York and Ontario. He stated:

> New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted—as attested by the fact that the Legislature of this State has repeatedly refused to enact a statute denying or limiting recovery in such cases—and our courts have neither reason nor warrant for departing from that policy simply because the accident, solely affecting New York residents and arising out of the operation of a New York based automobile, happened beyond its borders. Per contra, Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law. The object of Ontario's guest statute, it has been said, is "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies" and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers.[100]

With *Babcock*, the judicial revolution in choice of law was well underway. The "revolution" celebrated its fourteenth anniversary in 1977, and it is safe to say, at least in the United States, that the new order in choice of law is here to stay. There can be no turning back to the hoary rules of the first Restatement. Those rules, as certain and as "fair" as they were, failed to take into account those criteria upon which we judge the propriety of conflicts decisions. However, many difficult cases yet lay ahead. Now that the technique of resolving judicial disputes by reference to purpose and policy has been so clearly set forth and the judiciary

100. *Id.* at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750 (citations omitted).

has begun experimenting on a large scale with the use of policy considerations in place of rules, it may be hard to confine the techniques and approaches that are generated to the choice-of-law arena.