BOOK REVIEW

A TREATISE ON THE CONFLICT OF LAWS. By Albert A. Ehrenzweig.[1] St. Paul: West Publishing Co. 1962. Pp. li, 824. $10.00.

This is the most learned and original treatise on the conflict of laws in English since Beale's.[2] It comes at a time when the edifice of traditional conflict-of-laws doctrine is in ruins. It offers nothing less than a new " 'general theory' of conflicts law." (p. 308) We have reason to know that such a treatise can be influential. The question is how constructive Ehrenzweig's influence is likely to be.

Part I, Jurisdiction and Judgments, appeared earlier as a separate volume.[3] I have expressed elsewhere my appreciation and some of my criticisms of this portion of the work.[4] It has been revised but little for inclusion in the present volume,[5] and I shall not discuss it here except to note that, if there was reason earlier to express appreciation for the copious bibliography, table of cases, and index, there is now abundant reason to reiterate that expression. These are richly valuable aids to research.

Ehrenzweig begins, commendably enough, by emphasizing the primacy of the law of the forum. (pp. 308-09) Resort to foreign law is exceptional, analytically; but it will not be a rare phenomenon under the author's system. Of course the *Restatement*, both in the original and in its present transitional form, is repudiated. Choice between the law of the forum and foreign law will be determined by two types of rules:

(1) "[T]hose few but important rules of choice which have been

---

[1] Walter Perry Johnson Professor of Law, University of California, Berkeley.

[2] BEALE, CONFLICT OF LAWS (1935).

[3] EHRENZWEIG, CONFLICT OF LAWS—PART I (1959).

[4] Currie, Book Review, 73 HARV. L. REV. 801 (1960).

[5] It should have been revised more. The argument that the full faith and credit clause imposes no significant restraint on a state's choice of law, in so far as it was based on history, was demonstrably untenable. See Currie, *supra* note 4, at 804-05; Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 79-80 (1957). The fact that the argument is retained substantially unchanged (pp. 28-33, especially p. 32 n.32) does not inspire confidence in Ehrenzweig as historian.

Perhaps in a future edition Ehrenzweig will explain a puzzling statement carried over intact (p. 254) from the earlier volume (p. 249): "Many states do not recognize the legitimacy of children conceived after the divorce of their parents." Do any? See Cincinnati, N.O. & T.P. Ry. v. Wilson's Adm'r, 157 Ky. 460, 163 S.W. 493 (1914); Annot., 51 L.R.A. (N.S.) 308 (1914).

formulated by statute or precedent with sufficient clarity and consistency to be 'applied' like other rules of statute or common law";

(2) " '[T]rue rules' derived from the actual doing of the courts." (p. 308)

Such choice-of-law rules will not resolve all problems. "[W]here the available material does not even suffice as a basis for such answers, we shall have to be satisfied with interpreting each domestic rule as to its applicability to those foreign facts for the sake of which that rule is claimed to be displaced." (pp. 308-09) But this inquiry into " 'the reach of a policy underlying local law' " is to be made only "in the last resort." (p. 353)

"Formulated" rules for choice of law are to be found in "statutes, precedent or doctrine." (p. 352) Now, of course, if a state legislature is specific as to the application of a statute to cases involving foreign factors the courts of that state are bound, within constitutional limits, to respect the determination. Indeed, the practice of spelling out the application of statutes to mixed cases is one to be encouraged so long as it may be assumed that in the process the legislature will address itself realistically to the legitimate scope of its policy. But a rule for choice between domestic and foreign law is not removed from criticism simply because it is enacted by a legislature rather than announced by a court; nor are other states necessarily required to respect the legislative determination. I do not suppose that Ehrenzweig would desist from his criticism of the *Restatement* if it were enacted into positive law by the California legislature.[6]

Illustrations are provided of "formulated" rules found in precedent. "In some areas the law of the forum as such has always been and is likely to remain inapplicable. Thus, typically, *formulated rules* of choice have always compelled application of foreign laws to foreign marriages. . . ." (p. 352) Indeed they have, sometimes with mischievous results. Thus Massachusetts bastardized and disinherited the son of an American because his parents had been married in church instead of in the town hall across the street—

[6] Having read this review in manuscript, Ehrenzweig writes: "You object to my uncritical acceptance of rules 'formulated' by statutes. I do not believe that I implied anywhere that such rules should not be criticized and most certainly I would still try to resist the Restatement if it were 'enacted into positive law.' In fact, where I found statutory rules seriously objectionable on policy or otherwise, I have subjected them to detailed criticism. See e.g. on the Uniform Reciprocal Support of Dependents Act, at Treatise pp. 270, 271, 406-408." I stand corrected but somewhat confused as to the significance of "formulated rules."

in Italy at a time when the Italian Code recognized only civil ceremonies.[7] Atypically, perhaps, but none the less sensibly, some courts have refused to apply foreign law either to uphold or to invalidate a foreign marriage when the result would be to subvert the interests of the forum state.[8] I am no more prepared to accept the perverseness of "formulated" rules than that of the garden variety of choice-of-law rules.

It is far from clear, in fact, just when a judicially applied rule passes from the general company of rules for choice of law and attains the "formulated" status. The concept seems to be that many choice-of-law rules are academic constructs simply given meaningless repetition by the courts by way of dicta and in cases presenting no real conflict. This is of course true to a considerable extent, and one of Ehrenzweig's great services to the subject is his insistence on weeding out cases that are not true authority for the purported rules. If, however, a rule is "formulated" and hence elevated to a respected and protected position simply because it has been authoritatively stated as the ratio decidendi of a decision, then a great deal of the *Restatement*—far more than Ehrenzweig could tolerate, I suspect—will be secure against attack. In *Shaw v. Lee*[9] the North Carolina Supreme Court had an opportunity to depart from the established rule that the law of the place of the wrong governs in matters of tort liability. A North Carolina husband was killed and his North Carolina wife injured in an automobile collision in Virginia. She sued his administrator in North Carolina, as by North Carolina law she had every right to do; but Virginia retained the rule of interspousal immunity. The case was ably argned. The court was urged to apply the law of the domicile, or to go farther and apply the law of North Carolina as the law of the only interested state. It refused to do either—flatly, authoritatively, and specifically because "We do not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict-of-laws rules."[10] This,

[7] Vergnani v. Guidetti, 308 Mass. 450, 32 N.E.2d 272 (1941), discussed in CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 71-72 n.166 (1963). Ehrenzweig does not discuss the case.

[8] Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787 (1908); *cf.* Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y. Supp. 439 (1931).

[9] 258 N.C. 609, 129 S.E.2d 288 (1963), discussed in Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1236-37 (1963).

[10] 258 N.C. at 616, 129 S.E.2d at 293.

Having read this review in manuscript, Ehrenzweig writes: "You suggest that I would accept a formulated rule if stated 'as the ratio decidendi of a decision.' I

then, is a "formulated" rule, at least for North Carolina, if there can be such a thing. Yet I do not accept it as a rational rule for choice of law. Neither does Ehrenzweig. (pp. 581-83) Then what price "formulated" rules?[11]

At least in this immediate context, other "formulated" rules are identified only by the statement that "Similarly, certain transactions concerning land have been generally subjected to the law of the situs." (p. 352) It is true, of course, that certain choice-of-law rules give relatively little trouble. Among these are the rules referring certain questions about land to the law of the situs. Such a concession is to be made with caution, and Ehrenzweig himself makes the warning explicit: "Thus, while the lex situs can indeed claim broad applicability, its propriety must be carefully examined in each specific situation." (p. 607) I suggest, however, that the virtue of these relatively harmless and functional rules lies elsewhere than in the fact that they have been authoritatively reiterated over the years by the courts, thus gaining the status of "formulated" rules. It lies in the fact that they are framed with regard to considerations that are relevant to the policies involved and the legitimate reach of those policies. One of the most troublesome rules has been that referring questions concerning the validity and interpretation of contracts to the law of the place of contracting—obviously because the place of contracting has little relevance to the policies involved in contract law. Less troublesome has been the rule referring liability in tort to the law of the place of wrongful conduct and injury, since each of those factors has some relevance to some policies expressed in the law of torts; only a sharpened awareness of the crudeness with which the rule relates factors to policy has brought it into disrepute. There are rules, however, that approximate closely

believe that I have consistently taken the contrary position. In fact my whole analysis of such fundamental propositions as the status concept, and my 'clean hands' approach in custody cases, are based on a discounting of any rules which though 'formulated' in this sense, are not 'true rules.' The Shaw case is simply one of the many instances where 'untrue' formulation has misled the court.... If I made any mistake, it is, I believe, only that I have not perhaps made clear enough that an acceptable formulated rule must be a 'true' one." I am glad to reproduce this explanation for the benefit of the reader, though I do not find that it tends much to dispel my own confusion as to "formulated" rules.

[11] It is Professor Ehrenzweig's privilege, I suppose, to consult the states at large to find a "true rule" and to give it priority over what is in North Carolina a "formulater rule." But his "true rule" referring interspousal immunity to the law of the domicile is unsatisfactory when the domicile retains immunity and the state of injury and forum has abolished it. See Currie, *supra* note 9, at 1236.

a reasoned determination of the interterritorial scope of policy. My favorite illustration is the rule referring questions concerning intestate distribution of movables to the law of the domicile. A court called upon to determine the policy expressed in domestic succession laws (or preferably a specific provision thereof), and to determine the scope of the domestic interest in the application of the policy, might well, on purely pragmatic grounds, decide to assert an interest only when the decedent is a domiciliary.[12] Neighboring states might similarly define their interests, and harmony would prevail; succession laws might differ materially or even radically from state to state, but there would be no conflict (except over characterization). Each state would have defined its sphere of interest in such a way as to respect that of the other states.

This happy condition seems to exist now among the states of the Union. Nevertheless it is regrettable that such a determination should be cast in the form of a rule for choice of law instead of in the form of a simple delimitation of state interests. When we encounter international conflicts the rule will run into trouble, for, of course, there are countries that disagree, asserting an interest in the application of their succession laws to their nationals, wherever domiciled. We tend to handle such problems badly, because of the aura of doctrine surrounding rules for choice of law and because of the structure of such rules. We can hardly escape being drawn into the metaphysical problems of characterization and renvoi. The defects of such rules will be emphasized, instead of alleviated, it seems to me, if they are elevated to the status of "formulated" rules.[13]

[12] A defense of the rule that would do tolerable service as a pragmatic justification for such a delimitation of interest is made in BATY, POLARIZED LAW (1914), discussed in Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

[13] Ehrenzweig's criticism of characterization (pp. 327-34), with which I agree generally, falls just short of conviction because, while maintaining that the problem is actually one of interpretation of the domestic law, he insists on keeping ("formulated") choice-of-law rules in the picture and maintains that they must be "interpreted" as well. (p. 330) So long as we retain choice-of-law rules and give them even lip service it is difficult for me, I confess, to understand how we can avoid the problems inherent in their structure. But for this blemish the point could have been neatly made: Confronted with a marginal case, a court should not inquire whether the problem is one of intestate succession to movables, nor whether the decedent was domiciled here or there. In somewhat similar cases it has delimited the scope of domestic policy, and has incautiously given generalized expression to the delimitation. The question is not whether the marginal case is within the generalized statement or not. The question is whether the policy expressed in this particular provision of domestic law ought reasonably to be applied in the circumstances of this case for the legitimate furtherance of domestic interests. A fresh interpretation of domestic law is required.

And so we come to "true rules." These are found "in the first place by analyzing these holdings [purportedly announcing formulated rules] for their true motivations, or, in the last resort, in the absence of consistent practice, by determining 'the reach of a policy underlying local law.'" (p. 353)[14] As his first illustration Ehrenzweig presents the problem of the Statute of Frauds:

> But if we read the cases without paying attention to language long corrupted by lifeless dogma, we find that the courts have ordinarily upheld contracts under any "proper" law; and the Supreme Court has recognized a "presumption in favor of applying that law tending toward the validation of the alleged contract." This Rule of Validation [*sic*] then is the true rule which accords with both the actual practice of the courts and the "reach of the policy" of our domestic rule. The Statute of Frauds was enacted to prevent fraud and perjury. Such fraud and perjury would be promoted rather than prevented if a defense under the Statute were made available to a defendant merely because he had made his promise, promised performance, or was domiciled in a state, which would recognize this defense. (p. 353)

I have set myself the task of analyzing all the cases cited by Ehrenzweig in support of his conclusion as to what courts "ordinarily" do. A task of such proportions cannot conveniently be carried out for purposes of a book review, and what I say here will not be based on such a systematic analysis. I predict, however, that analysis of the cases will not bear out the conclusion. The cases that loom largest in my present consciousness are:

Leroux v. Brown,[15] in which the court, by a merely literal construction of the statute, invalidated a French contract valid by French law, thereby giving a resident of England the benefit of English law;

Lams v. H. F. Smith Co.[16] and *Emery v. Burbank*,[17] in which the courts explicitly sought that characterization which would, in their judgment, *in the long run* maximize the interest of the forum state

[14] It is not clear whether the process of interpretation of domestic law is to yield "true" rules, as suggested by the quotation in the text, or whether it is simply a supplemental device to be used when such rules cannot be derived. *Cf.* pp. 308-09. "True rules" shade not only into interpretation but also, not surprisingly, into "formulated rules." Thus in introducing the first illustration of "true rules" Ehrenzweig says: "Here court practice seems to be sufficiently crystallized soon to be entitled to express formulation." (p. 353)

[15] 12 C.B. 801, 138 Eng. Rep. 1119 (1852), distinguished by Ehrenzweig as involving an international conflict (p. 21 n.37). *Cf.* pp. 471-72.

[16] 36 Del. 477, 178 Atl. 651 (1935).

[17] 163 Mass. 326, 39 N.E. 1026 (1895).

in applying the policy of the statute for the protection of local defendants (with the immediate results that the contract was invalidated in one case and validated in the other); and

Bernkrant v. Fowler,[18] in which Mr. Justice Traynor upheld a contract valid under the law of Nevada when he might have found a variety of bases for invalidating it under the law of California. There is no conceptual nonsense in the opinion; it is applauded by Ehrenzweig, by this reviewer, and by all the commentators who have spoken on it to my knowledge. But in my judgment its rationale is far more sophisticated than the notion that a contract is to be upheld if it is valid by reference to "any proper law."

On the basis of the *Lams* and *Emery* cases, without more, I challenge Ehrenzweig's analysis of the cases. I do so with confidence because any such "Rule of Validation" would involve arbitrary discrimination.[19] To Ehrenzweig, the selection by domestic parties of a foreign place of contracting for the purpose of avoiding the Statute of Frauds is just as effective and should cause no more concern than a taxpayer's taking advantage of "loopholes" for the purpose of tax avoidance. (p. 346) But in my judgment a state cannot maintain a domestic policy of protecting litigants against fraud and perjury while withholding application of that policy when an irrelevant foreign factor is injected. If at the present time such discrimination would be saved from the stigma of arbitrariness by the Quixotic quest for a Utopia of uniformity, I nevertheless believe that few courts, proceeding pragmatically as Ehrenzweig postulates rather than under the spell of jurisdiction-selecting rules, would indulge in it.

The decision of the Supreme Court cited as recognizing a presumption in favor of applying the law upholding the validity of the contract was a *maritime* case, involving choice between the law of New York and the federal maritime law. (p. 353 n.5; p. 467) The basic question was whether the contract was within the admiralty jurisdiction.[20] When this question was answered in the affirmative it followed that federal law applied unless the Court should consider the question "peculiarly a matter of state and local concern"[21]

[18] 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

[19] See CURRIE, *op. cit. supra* note 7, chs. 10, 11; Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 822 (1963).

[20] Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).

[21] *Id.* at 741.

and thus not subject to a uniform, national rule. It is strange that so much reliance should be placed on such a decision by one who is at pains to distinguish interterritorial from interhierarchical and other types of conflicts. (p. 309)

Ehrenzweig's treatment of the policy of the Statute of Frauds, quoted above, is a travesty of interpretation—in part a play on words and in part an attempted play that misfires. The fraud that the statute aims to prevent is the fraud of attempting to enforce a promise that was not made; the perjury it aims to prevent is falsely testifying that the defendant promised. It may be dishonest for a defendant to invoke the statute when the oral promise was in truth made, but that dishonesty has nothing to do with the policy of the statute. I do not see how the defendant can perjure himself simply by pleading the statute as a defense; but however one may deplore the immorality of his doing so, it must be plain that this is not the evil to prevent which the statute was enacted. Rather obviously, Ehrenzweig does not like the Staute of Frauds. I do not care much for it myself. But an individual opinion is not ground for turning a policy interpretation of the statute into a tantrum; nor, more importantly, is it a ground for nullification simply because the deed can be cloaked in the obfuscations of conflict-of-laws theory.

The "Rule of Validation" is not, of course, limited to the Statute of Frauds, but extends to contracts generally. (p. 465) Now, I should have supposed that if one wished to cite high authority for the proposition that a contract will be upheld if it is valid under any "proper" law one would turn first of all to the usury cases, beginning with the Supreme Court's decision in *Seeman v. Philadelphia Warehouse Co.*[22] But, though he is willing to seize upon an admiralty case to support the "Rule of Validation" with respect to the Statute of Frauds, the author does not cite the *Seeman* case at all in support of his thesis. Why not? We are told that the case of the usurious contract is "the most important case in which that rule [the "Rule of Validation"] clearly does *not* apply...." (p. 482. Author's italics.) The *Seeman* case is *distinguished* as one of those "comparatively rare cases in which a borrower with a bargaining power equal to that of the lender had expressly chosen to subject himself to a law with interest rates higher than those in the borrower's

[22] 274 U.S. 403 (1927). See also Green v. Northwestern Trust Co., 128 Minn. 30, 150 N.W. 229 (1914); Thompson v. Erie R.R., 147 App. Div. 8, 131 N.Y. Supp. 627 (1911), *rev'd on other grounds*, 207 N.Y. 171, 100 NE. 791 (1912).

state." (p. 483) This occasion provides neither the time nor the space in which to review Ehrenzweig's case analysis; but on the basis of general acquaintance with the cases it is difficult to avoid the impression that his analysis is highly subjective. The cases apparently furnishing strongest support for the principle of maximum validity are rejected because they are usury cases; for Ehrenzweig approves the policy of usury laws, with certain exceptions, as heartily as he disapproves the policy of the Statute of Frauds.

In his search for "true rules" in tort cases Ehrenzweig is, as usual, commendably particularistic, eschewing "not only the fundamentalism of the First Restatement and the nihilism of the Second, but all attempts at generalization...." (p. 548) The law of the forum, subject to the author's insistence that rules of jurisdiction be altered to avoid trial in a forum having no claim to apply its law, is the starting point; exceptional cases in which the foreign law is to be applied are discussed. (p. 555) A distinction is drawn between "primarily admonitory and compensatory tort liabilities." (p. 549) In the important sector of accidents we are offered a "general theory of the conflicts law of enterprise liability...." (p. 570), although here the author becomes somewhat impatient with the whole question of choice of law. He looks forward to a time when "tort liability and tort liability insurance can be replaced by a general scheme of accident insurance...." (p. 597 and cross-references) In the meantime, there must be makeshift rules for choice. The law of the forum predominates, but there is much preoccupation with " 'foreseeable (and calculable) law' " (p. 576; *cf.* p. 329), and with both liability and accident insurance.

To illustrate the author's analysis I have selected his discussion of guest statutes. This is to a degree unfair, because most of his other arguments make better sense. He has, however, adhered to his position in spite of criticism from more than one quarter; therefore a further examination of his reasoning seems justified even though it may give a distorted perspective to the faults of the book.

In the name of "economic realities rather than dogmatic fancies" (p. 580) Ehrenzweig proposes a choice-of-law rule as grotesque as any I have ever suggested in mock seriousness: the automobile host's liability to his guest is to be determined by the law of the place where the automobile is permanently garaged.[23] (*Ibid.*) After referring to

[23] It is not clear whether this rule is to be subordinated to one referring to the law

"the interests of the host in procuring a liability insurance adequate under the applicable law, and the interests of his insurer in reasonable calculability of the premium" (p. 580), he states four propositions:

> [1] If... the car is kept in a common-law jurisdiction, the prospective host could secure insurance to protect himself against liability for his ordinary negligence wherever it may result in injury, and [2] his insurer could (though it does not), calculate his premium accordingly. [3] If... the car is permanently kept in a state which has enacted a guest statute, the host could arrange his protection with a view to that statute without fear of being subjected to a broader liability in a common-law state. [4] And the prospective guest, aware of his limited protection, could be expected to purchase his own accident insurance. (pp. 580-81)

Let us suppose that I decide to drive my car from my home in North Carolina to California, intending on arrival to invite Mr. Ehrenzweig to be my guest on a side trip. The argument ([1], [3]) supposes that, if I am prudent, I will obtain liability insurance, first investigating the law of the state in which the car is permanently garaged (North Carolina) to determine whether I would be liable for ordinary negligence or only for gross negligence. If for ordinary negligence I want to be sure that the risk is covered, and shall expect to pay a higher price. If only for gross negligence I can expect a relatively low rate. But I already have liability insurance; and if I am so meticulous as to call my agent and discuss adjustment of coverage and rate he will only soothe me and get me off the line as quickly as possible. My policy already protects me, within its limits, against liability regardless of differing rules of decision, regardless of choice-of-law rules, and regardless of whether the injury is to my intended California guest or to some pedestrian or other motorist anywhere along the way. The argument ([4]) further supposes that when I arrive in Califoruia and extend my invitation Mr. Ehrenzweig will inquire where the car is garaged and, if the law of North Carolina imposes liability only for gross negligence, will procure accident insurance to offset the absence of protection against ordinary negligence. As one who believes in the value of accident insurance, why has he not already procured a long-term policy instead of relying on these (presumably) short-term, ad hoc arrangements?

---

of the forum when both parties are domiciled there. *Cf.* Ehrenzweig, *Comment on Babcock v. Jackson,* 63 COLUM. L. REV. 1212, 1245-46 (1963). It is clear that it is preferred to one pointing to the law of the common domicile when the forum is elsewhere, as of course it is to the place-of-injury rule. (p. 580)

I think I can assure him that the long-term protection is relatively cheaper, even if we do not count the recurrent costs of legal research. Indeed, in the context of "economic realities" Mr. Ehrenzweig, as one who believes in accident insurance, would be well advised to procure a long-term policy without regard to whether, in the event of accident, he will have to prove gross negligence or only ordinary negligence. Almost inevitably any policy will have far ampler coverage than the specific risk contemplated; in all probability the premium will not vary one cent even though the law to be applied if the risk materializes is reliably known in advance. And, as Mr. Ehrenzweig knows perfectly well (though he seems to forget it when he writes about general theories of choice of law), he can carry and collect all the accident insurance he likes without in the least diminishing his recovery against his host.

The argument ([2]) supposes that when I apply for my liability insurance policy (which, of course, must as a practical matter cover many risks other than injury to a guest) the insurer may gain some advantage by inquiring into the law of North Carolina and setting his rates accordingly. Ehrenzweig has been convinced that insurers do not do this (p. 581), but perhaps that is because, while the traditional rule pointing to the place of injury is still fairly well entrenched, the place of injury is itself unpredictable. Give insurers a rule pointing with certainty to a determinable law and they can adjust premium rates to their advantage. *How?* The insurer can predict that, if a guest is injured by reason of the insured's operation of the car, the standard of ordinary negligence or gross negligence will be applied. But the insurer has no way of predicting the probability of such an injury in relation to the other risks to be insured; he has no way of predicting whether the future "guest" will be held instead to have been present in the car to advance some interest of the host, and thus entitled, notwithstanding a guest statute, to ordinary care; nor whether a jury will find the host guilty of gross negligence if that is required; nor the magnitude of the verdict; and so on indefinitely. All this and more has been overwhelmingly demonstrated by Robert Morris in his article, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight.*[24] Liability insurance rates are calculated simply by projecting past experience, specifically the liabilities incurred by the insurer on claims

[24] 70 YALE L.J. 554 (1961).

against groups of insured persons determined by the area of their residence. It is difficult to see how they could be calculated on any fundamentally different basis. If Ehrenzweig knows of any method whereby they could be calculated in such a way as to take advantage of his suggested choice-of-law rule there would perhaps be widespread interest in it. But of course he cannot. He cites Morris' article (p. 581 n.17), but apparently without comprehension of its significance for his argument ("For thoughtful criticism . . . from the standpoint of present insurance practice, see Morris . . . ." (p. 593 n.26)). It is ironical in the extreme that the place-of-garage rule should be offered as the result of a search conducted "against the background of economic realities rather than dogmatic fancies." (p. 580)[25]

Finally, and quite importantly, I think, such a rule would leave a trail of indiscriminate wreckage through the policies adopted by the states concerned. Assuming that North Carolina has a policy of protecting its people against liability based on proof of ordinary negligence alone, that policy may be defeated if, en route to California, I decide to switch to a second car garaged at my cottage in the mountains of Tennessee. If in Texas I give a lift to a hitchhiking student and leave him, badly injured, in a Texas hospital, reference to the (assumed) policy of the law of the place of the garage may frustrate Texas' policy of requiring the tortfeasor to provide a fund from which local Samaritans can be reimbursed. If I injure Ehrenzweig in California or elsewhere that state's interest in having him compensated, regardless of how much accident insurance he may carry, may be frustrated. All this Ehrenzweig admits; but it leaves him unmoved.[26]

Surely this refusal to recoguize, or to concede any significance to, governmental interests is a basic flaw in a labor of love and great industry that might have been a major contribution to conflict-of-laws method. Fundamentally, I think, the refusal is a matter of linguistics only, for in his pursuit of the "reach" of the policy of laws he often speaks in terms of construction and interpretation.[27]

[25] Ehrenzweig still persists in his view despite the criticism of Morris and others. See his *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1243, 1246 (1963). The court in that case (12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751 (1963)) unfortunately gave some support to his proposal, without adequate analysis.

[26] Ehrenzweig, *supra* note 25, at 1246 n.18.

[27] I do not know, and cannot explore here, the extent to which Ehrenzweig and I disagree as to the consideration to be given foreign law. There seems a trace of

His distinction between admonitory and compensatory laws was an early harbinger of policy-oriented analysis, though the conception is more general than the issue-by-issue determination that seems required. To one who has found governmental-interest analysis a powerful tool for dealing with conflicts, and who has sensed so much of fundamental agreement in Ehrenzweig's approach, it comes as something of a shock to find him saying,

> Governmental interest . . . is not a useful tool or even a usable concept outside the constitutional area where such interests may be recognized or established by congressional or judicial fiat. Otherwise, "conflicts law is private law . . . ." Any general test involving a government as such, even though only in terms, is therefore open to objection at the outset. (p. 350)

Of course conflicts law is private law; but if private law does not embody public policy I have misread the message of sociological jurisprudence. In its modern form governmental-interest analysis is derived from the teachings of that jurisprudence and from conviction that the methods employed by the Supreme Court in its more satisfactory decisions on constitutional issues must have significance for choice of law generally. In elaboration of his truism that conflicts law is private law Ehrenzweig makes a remarkable statement: "It is clearly of no concern to any sovereign whether his law is or is not applied in foreign litigation between private parties." (p. 321) Then why, may one ask, did the United Kingdom and Denmark file briefs as amici curiae in *Romero v. International Terminal Operating Co.*,[28] pleading against the application of American law to the suit of a Spanish seaman, injured here, against his Spanish employer? The Danish brief said:

> What might seem a relatively minor extra burden to the United States could be a major disaster to Danish shipping and hence to Denmark's entire economy. A decision which would have the effect of imposing American law and American standards of compensation on Danish shipowners for injuries received by Danish seamen on Danish ships could be gravely deleterious to the economic health of Denmark.[29]

One might go on. Other illustrations showing that a sovereign may care about the application of his law in foreign lawsuits in-

belligerence in his statement that "Foreign policies are relevant only insofar as they are recognized as relevant by the policy of the forum." *Id.* at 1244.

[28] 358 U.S. 354 (1959), discussed in CURRIE, *op. cit. supra* note 7, ch. 7.

[29] Quoted in CURRIE, *op. cit. supra* note 7, at 365-66.

volving private parties may be less dramatic; amicus briefs may not be frequently filed; governmental interests may not be actively or even consciously asserted by any state agency. But governmental-interest analysis cannot be scuttled by undiscriminating, blanket repudiation of the concept.[30]

By way of summary and conclusion I suggest that in the numerous articles reflected in this volume Ehrenzweig has done yeoman service in helping to raze the edifice of traditional doctrine; that his influence will be constructive in so far as it emphasizes the law of the interested forum and relies on construction and interpretation, or the scope of policy embodied in laws; that his acceptance of "formulated" rules is less astute than might be expected of one with such powers of criticism; that his formulation of "true rules" is highly subjective despite his admirable insistence on meticulous treatment of precedent; that his resort to "economic realities" to inform the search for "true rules" is in at least one instance remarkably unrealistic; and that the entire project, which might have been a powerful force for progress toward a rational method of handling conflicts problems, must be counted as rather less constructive than it might have been because of what I can only characterize [*sic*] as a stubborn refusal to recognize the significance for conflict of laws of the Supreme Court's treatment of the subject on the constitutional level, and of the sociological jurisprudence that has informed that treatment.

BRAINERD CURRIE*

[30] Out of consideration for the reader I shall not take this occasion to answer all of Ehrenzweig's criticisms of my own work. I shall limit myself to mention of only a selection of his comments, and relegate my remarks to this final footnote.

An inveterate labeler, Ehrenzweig refers to governmental-interest analysis as "neocomity." (p. 348) The index to my book contains two entries for the word "comity." In one place it appears in quotation marks (CURRIE, *op. cit. supra note 7*, at 194); in the other it appears in a discussion of eighteenth-century legal ideas (*id.* at 340).

"Thus, we must fear that little more has been achieved so far than a frame of reference for a debate on the desirability of particular solutions...." (p. 350) On the contrary, the liberal-activist criticism of governmental-interest analysis ought to be that it leaves too little scope for a free-wheeling quest for the just result. A court is bound to uphold the interests of its own state even when the state's policy is reactionary. If Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), had been decided by a Massachusetts court it is difficult to see how application of the Massachusetts limitation could have been avoided.

"[A]nd little has been gained to prevent, or at least hamper the continuing enterprise of 'restating' living law by forcing it into dead letter." (p. 351) Perhaps. But my goals are those of the analyst, not the polemicist.

* William R. Perkins Professor of Law, Duke University.