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## ARTICLES

### A SUGGESTED APPROACH TO CHOICE-OF-LAW

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#### INTRODUCTION

This paper is the product, slight though it may be, of some forty years of teaching and study. It states two basic conclusions about choice-of-law and then discusses in detail the application of these conclusions to various aspects of the subject. These conclusions are, first, that we should seek to develop actual rules of choice-of-law rather than rest content with *ad hoc* decisions, and second, that we should be eclectic in our approach to the subject and should not rely exclusively on any single approach or theory. These thoughts will be developed in the pages that follow.

#### I. RULES OF LAW AS AGAINST AD HOC APPROACH

A basic objective in law is to develop rules that will work well in actual practice. As the term is used here, a rule is a formulation that states how an issue, or group of issues, should be decided. It will, of course, be necessary for lawyers and judges to construe and interpret the words of a rule in order to determine what issues come within its scope.<sup>1</sup> In other respects, the task of the lawyer or judge is relatively simple. By relying on the rule, the lawyer will be able to predict with fair confidence how a given issue will be decided. The judge will need to do no more than apply the rule to decide the case. In brief, rules promote values that are dear to the

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1. A rule, of course, must be reinterpreted when new situations arise. Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 1005-08 (1988).

law. They provide certainty and predictability of result for the benefit of lawyers and litigants, as well as ease of decision for judges.<sup>2</sup>

The difficulty with rules is that, being made by human hands, they will sometimes lead to unfortunate results. A rule, of course, can be rejected or amended, but much harm can occur before the change has been effected. In addition, rejection or amendment is likely to be particularly difficult in the case of statutory or judge-made rules that have become firmly entrenched, such as the former rule that the law of the place of injury governs rights and liabilities in tort. Instead of rejecting or amending a rule, however, a court may simply avoid it. Thus, application of the place of injury rule in a personal injury case has been avoided by characterizing the issue, for example, as one of contract,<sup>3</sup> family law,<sup>4</sup> or procedure<sup>5</sup> rather than of tort. The difficulty with such an approach, of course, is that it inevitably leads to confusion and loss of predictability because the opinions rarely, if ever, state the reasons that induced the court to depart from the normally applicable rule.

Bad rules will lead to bad results on an unacceptable number of occasions. They must therefore either be revised or rejected. Even good rules will sometimes lead to results that are less than desirable. The question, then, is whether the advantages of a rule, such as predictability of result and ease of decision, outweigh the less than perfect results to which the rule may occasionally lead.

In the choice-of-law there is weighty authority, particularly among the commentators, for the proposition that courts should abandon choice-of-law rules and that decisions should depend upon the policies underlying the potentially applicable local law rules of the states involved.<sup>6</sup> Advocates of this view contend that the very nature of choice-of-law makes it inherently impossible to create satisfactory rules. This is because, when read literally, most choice-of-law rules, no matter how narrow their scope of applica-

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2. See generally Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

3. See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928).

4. See, e.g., *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

5. See, e.g., *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953).

6. See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177-87 (1963); A. VAN MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76-77 (1965).

tion, will apply to situations with widely different groupings of contacts among the states, and with substantial differences between the relevant rules and the policies of these states. According to this view, no rule can be devised that would satisfactorily regulate the myriad of situations that fall within its scope.

Much can be said in support of the non-rulists. Surely they are correct in attacking the rules to which they take especial umbrage, namely those applicable to torts and contracts. Torts and contracts are extremely broad areas of the law that involve many complexities. Traditionally, however, one or two simple rules of choice-of-law governed these fields. For example, it was said that a single choice-of-law rule, application of the law of the place of injury, governed all issues of tort law.<sup>7</sup> Similarly, two rules covered the whole area of contract law: application of the law of the place of formation to issues of validity and obligation; and application of the law of the place of performance to issues of performance.<sup>8</sup> Not surprisingly, these rules frequently were inadequate and have been largely abandoned.

The failure of these choice-of-law rules in tort and contract law, however, does not mean that the search for rules should be abandoned. The development of rules is one of the basic aims in most areas of the law; it seems hard to believe that the same should not be true of choice-of-law. To be sure, the choice-of-law field is vast and complex and many of its areas remain relatively unexplored. Undoubtedly, our present day knowledge and experience is not enough to permit the statement of many hard and fast rules. But surely we should be alert, as our experience develops, to identify areas which seem to be ripe for regulation by a definite rule. Without doubt, some newly devised choice-of-law rules will not work well in actual practice. But this is true of any common law development. Inevitably, courts and lawyers will sometimes err in their search for new rules and new principles. This does not mean that the game is not worth the candle. Truth can sometimes only be reached after the experience of previous error.

For a rulist, such as the present writer, the first thing to do is to conserve, insofar as possible, what we already have. We should not abandon existing choice-of-law rules until it is evident that the harm that they create outweighs the benefits that they promote,

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7. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

8. *Id.* §§ 332, 358.

such as certainty, predictability of result, and ease of decision. Close to being a rule is the almost universally approved principle that, with some qualifications, parties can choose the law to govern their contractual rights and liabilities.<sup>9</sup> As a general rule, parties enter into contracts with forethought. It is important that, insofar as possible, parties be able to know what their rights and liabilities will be prior to the contract formation. This can best be achieved by letting them agree to what law will govern the contract. In the absence of such an agreement, the choice-of-law rules governing contracts are extremely uncertain.<sup>10</sup> Of necessity, the general rule that contracting parties be allowed to choose the governing law must be qualified to some extent. Situations will arise where it would be impermissible to let the parties escape, by means of a choice-of-law clause, from an important state policy underlying the otherwise applicable law.<sup>11</sup> To date, these exceptions have been few and far between.<sup>12</sup> Accordingly, the rule remains substantially intact. Surely, it should not be abandoned.

The author also favors retention, at least for the present, of the rule that the transfer of interests in land should be determined by the law that would be applied by the courts of the situs.<sup>13</sup> This simple rule covers an extremely broad area and might therefore be thought to be subject to the same defects as were the rules dealing with contracts and torts. This, however, is not the case.

The choice-of-law rules that were once thought applicable in contract and tort law could lead occasionally to the application of the law of a state which had little contact with the occurrence and no interest in the resolution of the particular dispute. By contrast, the state where land is located will, in the nature of things, often be the state which has the greatest interest in the matter at hand. This is true, for example, of such issues as who may own land, the uses to which land may be put, and the period during which the power to alienate interests in land may be suspended.<sup>14</sup> There is good reason why the law of the situs should be applied to govern issues such as these. There are, of course, many other issues, such

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9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

10. 2 J. BEALE, THE CONFLICT OF LAWS 1077-79 (1935).

11. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187, comments f-g (1971).

12. For examples of cases where the parties' choice-of-law was not honored, see *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023 (4th Cir. 1983); *Southern Int'l Sales Co. v. Potter & Brumfield Div. of AMC, Inc.*, 410 F. Supp. 1339 (S.D.N.Y. 1976).

13. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971).

14. *Id.* § 223 comment b.

as who will take property in the event of an intestacy where the state of the situs may not be the state with the greatest interest.<sup>15</sup> Nevertheless, there will be good, although not as compelling, reasons for applying situs law. For example, one peculiarity of the transfer of interests in land is that frequently a title search will be necessary. This process will be aided immeasurably by the consistent application of situs law. Also, the rule that requires application of situs law is simple and easy to apply. The predictability of result that it affords will facilitate the task of a lawyer in advising a client of his rights and in conducting negotiations. Consistent use of the rule will also lighten the burden of the harried judge and is presumably in line with the expectations of the parties. These values should not be readily discarded.<sup>16</sup>

To be sure, the simplistic quality and breadth of the situs rule must inevitably raise serious doubt as to whether it can satisfactorily handle the many different situations that fall within its scope. To date, there have been a few isolated instances where situs courts have applied some other law on the ground that, in the particular instance, application of situs law would have led to a less than desirable result.<sup>17</sup> The courts in these cases, however, did not voice opposition to the usual application of situs law. The cases that have applied a rule other than that of the situs are not to be reprehended. Courts should not feel forever chained to some judge-made and all-embracing choice-of-law rule. Before departing from a rule, however, the cost of doing so should be kept in mind. Any departure from a rule, even when phrased in terms of an exception, will weaken its authority. Continued departures, if substantial in number, will eventually destroy the rule itself. The result will be the loss of values that the law holds dear, namely certainty, predictability of result, and ease of decision.

By and large, the situs rule, to date, has not been seriously challenged.<sup>18</sup> Its continued survival is easily explicable in the case of those situations where the state of the situs, merely because it is the situs, is the state of greatest interest in the decision of the is-

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15. *Id.* § 236 comment a.

16. *Id.*

17. *See, e.g.*, *Proctor v. Frost*, 89 N.H. 304, 197 A. 813 (1938). *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 8.21A-8.22 (3d ed. 1986).

18. *See supra* text accompanying note 14. In the area of succession to a decedent's estate, the trend is towards treating an estate, composed of both movables and immovables, as a unit governed by the law of the decedent's domicile at death. *See, e.g.*, UNIF. PROBATE CODE § 2-201(b), 8 U.L.A. 75 (1975); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(d)(7) (1986).

sue at hand.<sup>19</sup> The rule's survival in the case of other issues may be due in part to the flexibility of the rule which in turn is due to the fact that it does not call for application of the local law of the situs, but rather requires the same decision that the situs courts would have reached in the very case at hand. In other words, if a situs court would have applied the law of some other state, the forum will do likewise. This application of the renvoi doctrine makes good sense. If the situs courts would be willing in the particular instance to subordinate the value of the situs rule to achieve a particular result, there is every reason why the courts of other states should do likewise.<sup>20</sup>

The basic objections to the situs rule are its universal character and the fact that its application will sometimes lead to the disregard of the policies underlying the relevant local law rules of the other interested states. All this is true, but it must be remembered that in addition to local law policies there are choice-of-law policies also, such as certainty, predictability of result, ease of decision, and protection of the justified expectations of the parties.<sup>21</sup> Surely there are situations where these choice-of-law policies outweigh those of local law.<sup>22</sup> The situs rule may be a case in point.

Another all-encompassing rule of choice-of-law that is still in force is that succession to interests in movables is governed by the law of the decedent's domicile at death.<sup>23</sup> This law will be applied, for example, to determine such questions as the validity of a will, what constitutes an effective revocation of a will,<sup>24</sup> and what persons will take in the event of an intestacy.<sup>25</sup> Here, again, the rule is made flexible by the fact that it calls for application of the law that would have been applied in the case at hand by the courts of the last domicile. So if the courts of the last domicile would not have applied their own local law, but rather that of another state, the forum will do the same. In this way, uniformity of result is assured.<sup>26</sup>

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19. See *supra* text accompanying note 14.

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 comment b, and Introductory note (1971).

21. *Id.* § 6.

22. *Id.*

23. *Id.* §§ 260, 263.

24. *Id.* § 263.

25. *Id.* § 260.

26. *Id.* §§ 260-65.

The rule is likewise supported by important policies. It is easy to apply, and of greater significance, as noted earlier, it will lead to uniformity of result. This is important because situations will arise where the movable assets of an estate are located in several states. Clearly, it is desirable that where possible an estate should be treated as a unit as opposed to treating its parts separately under the laws of different states. The domicile rule avoids this possibility.

To date, little criticism has been directed at the domicile rule. Its virtues are apparent and there is every reason to believe that it will continue to be applied throughout the indefinite future. A court should not depart from it without good reason.

Another rule of general application that is still in force is that the rights and liabilities of shareholders as amongst themselves and as against the officers and directors of a corporation, are determined by the law of the state of incorporation.<sup>27</sup> There have been only a very small number of departures from this rule.<sup>28</sup> Here again, the virtues of the general rule are so apparent that it will almost surely continue to be applied. Uniform treatment of shareholders with respect to their rights and liabilities is obviously desirable and this can hardly be attained except by application of a single law. Likewise, no other rule could as effectively achieve predictability of result, which is a value of particular importance in the field. No doubt situations will arise where the needs of an individual case will require departure from the rule. Judging from the past, such instances will be few in number. In any event, the virtues of the present rule are so great and so apparent that exceptions to its application should only be made with deliberation and hesitation.

There also exist some hard-and-fast choice-of-law rules of narrow application. One example is the rule that minor details of performance are governed by the law of the place of performance.<sup>29</sup> This law determines whether a debtor should be allowed days of

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27. *Id.* §§ 303-10.

28. These departures have usually occurred in situations where the corporation has little or no contact with the state of incorporation and maintains its corporate headquarters and does most of its business elsewhere. *See, e.g.,* *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317 (5th Cir. 1959); *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961); *Warren v. First Nat'l Bank of Columbus*, 149 Ill. 9, 38 N.E. 122 (1893); *Latty, Pseudo-Foreign Corporations*, 65 *YALE L.J.* 137 (1955).

29. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 206 (1971).

grace, the exact time and place at which performance is due, and the kind of currency in which payment should be made. These matters are of primary concern to the state in which the acts giving rise to the matters occur. This is also the state whose law the parties would have been most likely to consult. Thus, there is every reason why this rule should continue to be applied.

Another hard-and-fast rule of narrow application is that the effect of a conveyance upon the pre-existing interests in a chattel of a person who was not a party to the conveyance, is determined by the law of the state where the chattel was located at the time of the conveyance.<sup>30</sup> This rule derives from the necessities of the situation. Before entering a transaction involving a chattel, a person should have a firm basis for determining what effect the transaction will have upon already existing interests in the chattel. Similarly, a prospective purchaser of a chattel should be able to foretell with some confidence whether his interests as a purchaser would take precedence over those created by an already existing conditional sale or chattel mortgage. Such reasonable predictability can only be assured by a rule which clearly identifies the state of the governing law. Inevitably, this must be the state where the chattel is located at the time of the proposed transaction. Reference to any prior location would be impractical for several reasons, one of which is that a person contemplating the acquisition of an interest in the chattel might have no way of knowing where the chattel had previously been.

The question as to what law governs intra-family immunity in tort should also be explored. Clearly, the state of the common domicile of the parties has the dominant interest in this area and its law is usually applied.<sup>31</sup> A distinction is sometimes drawn between the situation where there is no immunity under the law of the state of common domicile but immunity in the state of injury, and the converse situation where there is immunity in the state of common domicile but none in the state of injury. In the latter situation, a few courts have applied the law of the state of injury on the ground that that state has an interest in providing compensation to those injured within the territory.<sup>32</sup> The fact nevertheless remains that in both situations the state of common domicile has

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30. *Id.* § 245; *Cammell v. Sewell*, 157 Eng. Rep. 1371, 5 H. & N. 728 (1860).

31. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1971).

32. *See, e.g.*, *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *Layne v. Layne*, 433 S.W.2d 116 (Ky. 1968); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

the dominant interest in the question of whether spouses or members of a single family should enjoy immunity against each other in tort. Here, the advantages of having a hard-and-fast rule calling for application of the law of the domicile seems to outweigh the possibility that in rare situations a more desirable result might be reached by application of the law of the place of injury. A majority of the courts seem to have taken this view.<sup>33</sup> As with other good things in life, rules of law must be bought at a price.

## II. GENERAL THEORIES

At the present time, rules cannot be devised to govern large areas of choice-of-law. This is particularly true for torts and contracts in situations where the parties have not chosen a governing law. Such rules cannot be devised principally because of our lack of knowledge of the innumerable combinations of facts, laws, and issues that may be involved. In a world containing as many states and quasi-independent states as ours does today, there are almost unlimited possibilities as to how the relevant contacts can be divided among them. The relative significance of these contacts in an individual case will in turn depend upon the issue involved. Also, the relevant local law rules of the interested states must be considered. It is only in the exceptional case in these areas that hard-and-fast rules of choice-of-law can presently be developed to satisfactorily handle the various situations that fall within their literal scope. We now turn to how, in this writer's opinion, the courts should approach those situations in which, at the present time, the statement of hard-and-fast rules is not practicable.

One of the amazing things about choice-of-law, both in the past and in the present, is the tendency to resort in all situations to one all-embracing theory. In the first part of this century, the basic theory in the United States was that of vested rights,<sup>34</sup> namely that although a court will not enforce a foreign law, it will enforce rights created by that law. Accordingly, the search was for the state whose law had created an enforceable right. In the case of torts, this was the state where the injury occurred<sup>35</sup> and in con-

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33. W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 453 (8th ed. 1984).

34. See, e.g., 2 J. BEALE, *supra* note 10, at 1090, 1288-90. See also D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 5-9 (1965).

35. *RESTATEMENT OF CONFLICT OF LAWS* § 377 (1934).

tracts, this was the state where the contract was made.<sup>36</sup> The first rule had many virtues. It was easy to apply, led to predictable results, and in general called for application of the law of a state which had a real interest in the disposition of a case. It is not surprising, therefore, that for many years the rule was almost unquestioningly applied. The rule's eventual demise was not caused by cases where the question involved was personal injury<sup>37</sup> or damage to tangible property, but, rather, by cases focusing on issues such as immunity from tort liability,<sup>38</sup> survival of actions,<sup>39</sup> and limitations on the amount of recovery.<sup>40</sup> Where all of the parties are foreign, the state where the injury occurred will frequently have little interest in the decision of such issues. Rather, the dominant interest will frequently be found in some other state, often that of the parties' common domicile.<sup>41</sup> It was cases such as these that led the courts to depart from the place-of-injury rule in its unqualified form.

The rule that contractual rights and liabilities are governed by the law of the state where the contract was made never worked well in practice and probably was never accepted by a majority of the courts.<sup>42</sup> One reason was that, in contrast to the place of injury rule in tort, the place of making rule would not necessarily have any substantial relationship to the contract. It is possible, for example, for a contract to be made in a state, in the sense that the last act necessary to bring it into existence took place there, without the state having any other contact or real interest in the issue to be decided. An example is the case where a letter of acceptance is mailed in one state with the result that the contract is legally made there, and yet all of the other contacts, such as the domicile of the parties and the place of negotiation and performance, are located in other states. In addition, of course, there are many dif-

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36. *Id.* § 332.

37. One relatively early case did abandon the rule in a personal injury case. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957).

38. *See, e.g.*, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S. 2d 743 (1963); *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

39. *See, e.g.*, *Grant v. McAuliffe*, 41 Cal. 2d 859, 64 P.2d 944 (1953).

40. *See, e.g.*, *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

41. *See, e.g.*, *Schultz v. Boy Scouts of America, Inc.*, N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1983); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 958-73 (1983).

42. Professor Beale, *The Reporter of the first Conflicts Restatement*, admitted as much. 2 J. BEALE, *supra* note 10, at 1100, 1172-73.

ferent kinds of contracts and issues involving contracts.<sup>43</sup> It soon became obvious, and perhaps it had always been obvious, that the place of making rule would not do. To be sure, the strategies used by the courts to evade the rules caused much confusion.<sup>44</sup>

The days of the vested rights doctrine are pretty much over.<sup>45</sup> Many sought to replace it with the governmental interest theory.<sup>46</sup> In a way this is remarkable. The governmental interest theory, at least in its present form, did not come to popular attention until around the middle of the twentieth century.<sup>47</sup> By that time, most should have been aware of the vastness of the area covered by choice-of-law and of its many complexities. Yet the proponents of the governmental interest theory sought to govern the entire conflict of law area by a single principle.<sup>48</sup> In hindsight, it is hardly surprising that they were unsuccessful.

In essence, the governmental interest theory calls for the interpretation and construction of the relevant rules of the states having contacts with the case. The court must ascertain the policy or policies underlying each of these rules in order to determine whether one or more of these policies would be furthered by the application of the rule to the case. If the policy underlying only one of these rules would be furthered, then that is the rule which should be applied. And the state possessing the rule can aptly be described as being that with the exclusive interest.<sup>49</sup>

Difficulties arise, however, in what is probably the more fre-

43. W. REESE & M. ROSENBERG, *supra* note 33, at 446; E. SCOLES & P. HAY, *CONFLICT OF LAWS* 652-71 (1982).

44. *See, e.g.*, *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895). Some courts resorted to the simple expedient of simply ignoring the place of making rule whenever it was convenient to do so. In such instances, they would apply some other choice-of-law rule, such as that calling for application of the law of the place of performance, and make no mention of the fact that in a previous case they had applied the law of the place of making. *Compare Scudder v. Union Bank*, 91 U.S. 406 (1875) (place of making) with *Hall v. Cordell*, 142 U.S. 116 (1891) (place of performance). *See also* the New York experience. *Jones v. Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y.S. 4 (1936); Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 *YALE L.J.* 893 (1942).

45. Some courts still follow the vested rights doctrine. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 *MERCER L. REV.* 521 (1983).

46. This theory is described in Currie, *The Governmental Interest Methodology*, reprinted in W. REESE & M. ROSENBERG, *supra* note 33, at 477.

47. Professor Brainerd Currie is generally recognized as the father of the current doctrine.

48. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *DUKE L.J.* 171.

49. *Id.*

quent situation: where the diverse policies underlying two or more laws would all be served by their rule's application. Some have said that in this situation a forum should always apply its own law.<sup>50</sup> Others have argued that the proper approach is to apply the law of the state of greatest interest<sup>51</sup> or the law of the state whose policy would be most impaired if the rule it embodies was not applied.<sup>52</sup> The main objection to this latter suggestion is the difficulty that will often, and perhaps usually, be encountered in determining, on some objective basis, which is the state of greatest interest or the state whose policy would be most impaired.<sup>53</sup> There will be two variables to consider. The first is the extent to which the contacts are distributed among two or more states, and the second is the policy or policies underlying the relevant rules of those states. Apart from the difficulty of ascertaining the nature of these policies, a problem that will subsequently be adverted to, there is the problem of weighing these policies in situations where they differ markedly from one another. Take, for example, the simple case where parties domiciled in state X are involved in an automobile accident in state Y. The passenger is injured, and the question is whether recovery in tort can be obtained from the driver. In this case, Y law should clearly be applied to determine issues involving standards of conduct, because both conduct and injury took place in Y. With regard to these issues Y is clearly the state of greatest interest.<sup>54</sup>

The problem becomes more difficult, however, when the issue involves immunity in tort. Suppose that the driver would have no immunity under X law, but would be immune from tort liability to the guest passenger under the law of Y. If the purpose of the Y rule of immunity is to promote gratitude on the part of the guest, while the purpose of the X rule of non-immunity is to insure compensation for tort injuries, which state, X or Y, has a greater interest or which state's policy would be more impaired if its law were not applied? Is there any objective way of determining which in-

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50. Currie, *supra* note 46, at 477.

51. A. VON MEHREN & D. TRAUTMAN, *supra* note 6, at 77.

52. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

53. The California courts have encountered many difficulties in making such determinations. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976). See also Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255 (1978).

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 comment d (1971).

terest, promoting gratitude or insuring compensation, is entitled to greater weight? It has been suggested that a solution to this dilemma can sometimes be found by weighing the relative strength of the policies underlying the competing rules.<sup>55</sup> Under this view the policy underlying a recently enacted statute might be thought stronger<sup>56</sup> than that behind a common law rule that had been subjected to mounting criticism in recent years. The difficulties posed by this latter suggestion are formidable. It may well prove impossible, even after diligent efforts, to determine the relative strength of a policy. Moreover, even if this proves possible, a great deal of judicial and legal effort is likely to be consumed in so doing.<sup>57</sup> An even greater objection to the weighing of interests, and the governmental interest doctrine in general, is the opportunity it affords for unbridled subjectivity on the part of the judge. It makes it all too easy for a judge to decide first upon the result he wishes to reach and then, consciously or subconsciously, to weigh interests in such a way as to call for application of the rule that, for unstated reasons, he had already decided to apply.<sup>58</sup> By so doing, the judge obscures the basis of the decision, which accordingly cannot provide a firm basis on which later courts can build. In such instances, the governmental interest approach may retard the development of the law.

The governmental interest approach poses still further problems. One of these is the difficulty that is frequently encountered in ascertaining what is the policy or policies underlying a given rule and whether the policy or policies would be served by application of the rule in the given case.<sup>59</sup> In part, the difficulty arises, in the case of state statutes, by the usual absence of any

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55. A. VON MEHREN & D. TRAUTMAN, *supra* note 6, at 376. See Trautman, *Comment: Kell v. Henderson*, 67 COLUM. L. REV. 465 (1967).

56. See A. VON MEHREN & D. TRAUTMAN, *supra* note 6, at 376-78.

57. For example, Professor Trautman has encountered many difficulties in seeking to ascertain the strength of the policy underlying the Ontario guest-passenger statute. See Trautman, *supra* note 55, at 465.

58. For example, the ultimate result in cases seeking recovery for personal injuries has usually been the application of a law that is favorable to the plaintiff. The fact that the courts advanced different reasons for reaching this result gives ground for the suspicion that the particular rationale employed in a given case was but a means of reaching an already predetermined result.

59. Witness, for example, the difficulties which the New York courts have encountered in determining the policies underlying guest-passenger statutes. See, e.g., *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (where the New York court found three policies, which almost certainly pointed in different directions, underlay the Colorado guest-passenger).

pertinent legislative history. In any event, ascribing a particular policy to a rule is often a matter of speculation. A greater difficulty is that frequently, perhaps ordinarily, a rule derives from two or more policies which may point in different directions in a given case.<sup>60</sup>

For example, it may be that a guest passenger statute was designed to promote two policies: to protect insurance companies from collusion on the part of host and guest, and at the same time to protect the host from the ingratitude of the guest. If so, the first policy would probably best be served by application of the statute of the state in which the insurance company is incorporated, the policy was issued, or the automobile is principally garaged. On the other hand, the second policy would call for application of the statute of the state of the parties' common domicile or perhaps of the state of conduct and injury.

A further difficulty is the extent to which a policy would be served by application of the statute involved in a multi-state case. Take, for example, a guest-passenger statute whose policy is to protect the host against the ingratitude of the guest. Clearly, this policy would be fully served by application of the statute of the state in which both parties are domiciled and in which the accident occurs. But suppose that the parties are domiciled in state X while the accident occurs in state Y, the state having the guest-passenger statute. Here, the application of the state Y statute would serve the policy of protecting against ingratitude because a state has an obvious interest in regulating conduct that occurs within its territory. Obviously, however, this interest is not as strong as it would have been if the parties had also been domiciled in state Y. Hence, there would be greater reason not to apply the statute and to thereby subordinate the policy it embodies to the interest of other states and of other choice-of-law values.

The governmental interest approach may also require much work on the part of both judge and lawyer. Determining the exact policy underlying a rule may of itself be a difficult task. This difficulty may be magnified many times in choice-of-law cases where the policy underlying the relevant rule of two or more states will frequently have to be examined. In addition, there will be occasions where the search for a policy, or number of policies, will pro-

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60. Witness again, the conflicting policies underlying the Colorado guest-passenger statute involved in *Dym. Id.*

duce no definite answer. At times the game will not be worth the candle.

In the final analysis, the most glaring defect of the governmental interest approach is that it is offered by its proponents as a panacea, a way of solving all questions of choice-of-law. This it surely cannot be.

### III. CHOICE-OF-LAW VALUES

Perhaps the most surprising thing about the theories we have examined is that, by and large, their proponents advocate the use of a single approach to choice-of-law, and each disregards many of the values that underlie the field. In contrast, it will be suggested here that all of these values should be considered in deciding choice-of-law questions. The relative importance of each value will obviously vary from situation to situation. Hence, an eclectic approach to the subject is required.

As previously indicated, the ultimate thrust in choice-of-law should be toward developing rules.<sup>61</sup> The rules that presently exist should be retained, unless and until good cause is shown for their abandonment. Furthermore, in areas where rules do not currently exist, primarily torts and contracts where parties have not addressed choice-of-law, the courts should be alert to establish rules in situations where they feel that they have enough knowledge to do so. It may be that few such situations will come to light in the immediate future. In the meantime, however, the courts should seek to provide whatever guidance is possible. This guidance should probably take the form of presumptions, subject to exceptions, of what the applicable law should be in the case at hand.<sup>62</sup> Eventually, as knowledge accumulates, the exceptions to a presumption might be narrowed to the point where the presumption partakes of many of the qualities of a rule. In stating the presumptions, and the exceptions to them, the courts should be guided by the several values that underlie choice-of-law.

Two values that underlie choice-of-law, but which are not necessarily most important, are certainty and predictability of result,

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61. See *supra* note 9 and accompanying text.

62. This is the position of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS and of much of the recent continental codifications. See, e.g., E.E.C. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS, art. 4. This document, signed June 19, 1980, appears in the OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES L 266, Volume 23, October 9, 1980.

and ease of decision.<sup>63</sup> It is surely desirable that, to the extent possible, the parties should know beforehand what rights and liabilities will result from any action on their part. These values are particularly important in areas where the parties are likely to give advance thought to the legal consequences of a proposed action, and where they are likely to consult a lawyer. Obvious examples of such areas are contracts, immovable property, succession to interests in property, whether movable or immovable, and trusts and corporations.<sup>64</sup> In these fields, the values under discussion are well served by existing rules of choice-of-law. Accordingly, these rules should not be changed except for good cause.

Torts pose a different problem. Usually the parties will not give advance thought to the legal consequences of what turns out to be a tortious action. Hence there is little need, so far as the parties are concerned, for certainty and predictability of result. These values would, of course, facilitate the task of lawyers seeking to settle a case. But, by and large, this consideration does not seem to have influenced the decisions.

Ease of decision deserves separate consideration. Hard as it may be for a devotee of the subject to realize, choice-of-law is but one of the problems that is likely to bedevil a busy judge in an individual case. Indeed, choice-of-law may not be the most important of these problems, and there obviously must be limits on the time that a judge can spend on the subject. Requiring a judge to determine what policies underlie each of the potentially relevant rules, and also weigh the relative strengths of those policies, would add immeasurably to his or her labors. Actual rules of choice-of-law, and to a lesser extent presumptions of what the governing law should be, will do much to lessen the judge's burden. This is yet another reason why the development of such rules and presumptions is desirable.

There is, of course, real merit in the notion that attention should be paid to the policies underlying the relevant rules of the states involved. Generally speaking, it makes no sense to apply a rule whose policy would not be served by its application. So, for example, a guest-passenger statute of the state in which the conduct and injury occurred should not be applied in a situation where the sole purpose of the statute is to protect the insurance

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63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

64. See *supra* notes 12-26 and accompanying text.

company against collusion and where the driver and guest passenger are domiciled in a second state where the liability policy in question was both negotiated and delivered.<sup>65</sup> In the view adopted here, however, reliance on the policies underlying the relevant choice-of-law rule is but one of a number of choice-of-law values. It should not be given effect in total disregard of other values. And surely this should not be so in a situation where the search for policies is unlikely to lead to any clear result or would consume an unreasonable amount of both lawyers' and judges' time. In these latter situations, the court should concentrate instead on other choice-of-law values.

Another value is that the law to be applied should be that of the state with the greatest interest in the issue to be decided or, in other words, the state whose policy would be most impaired by the non-application of its law. This value is closely allied, or perhaps identical, with that of the policy analysis which was discussed immediately above. It is subject to all of that value's strengths and weaknesses. On its face, it would seem to require weighing the relative strength of the policies underlying the relevant rules of the states involved. This, as previously noted, will usually amount to a time consuming and uncertain task; one which is particularly likely to be influenced by the subjective likes and dislikes of the individual judge. It is doubtful whether in actuality this value can be of assistance in solving anything but the most simple case.<sup>66</sup>

A value of obvious importance is that whenever possible choice-of-law rules should seek to further the basic policies underlying the substantive field involved.<sup>67</sup> To a considerable extent, this is already being done. For example, there seems to be general agreement that protection of justified expectations is the basic policy underlying contract law. To this end, the parties are given broad power to choose the law to govern their rights and liabilities under a contract.<sup>68</sup> In the absence of a party choice, the courts are inclined to apply a law that will uphold the contract.<sup>69</sup> Protection of justified expectations is also a fundamental policy in the areas of

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65. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

66. See *supra* notes 43-57 and accompanying text.

67. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

68. See *supra* notes 9-11 and accompanying text.

69. Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 984-86 (1959).

trusts, wills, and marriage.<sup>70</sup> Here again the courts have shown themselves eager to apply a validating rule.

The field of torts presents a more complicated problem. Two underlying policies are involved and they may point in opposite directions.<sup>71</sup> One of these policies is to provide compensation for injured parties. This policy, if it stood alone, would usually call for the application of the law of the state that is most favorable to the plaintiff, provided, of course, that this state has relatively close contacts with the occurrence.<sup>72</sup> The second policy is to deter tortious conduct. This would usually call for application of the law of the state where the conduct occurs, even in a situation where this law would be less favorable to the plaintiff than that of the state of injury. Some commentators believe that, at least in the field of unintended injuries to person and property, the value of compensation transcends in importance that of deterrence.<sup>73</sup> This is due in part to the prevalence of liability insurance and in part to the fact that in these cases it is unlikely that the defendant is blameworthy. This much may well have been recognized in the cases. At least they evince a tendency to apply a plaintiff-favoring rule.<sup>74</sup> Instead of relying on an underlying policy of compensation, however, the courts usually base their decisions on either a grouping of contacts or an analysis of what are found to be the policies of the interested states. A reading of these decisions leads to the disquieting feeling that the courts' rationale is frequently nothing but a masquerade for a result previously reached on some other ground. Clarity can only be achieved once the courts feel free to admit in their choice-of-law decisions that they were guided by the fundamental tort policy favoring the award of compensation to the plaintiff.

### CONCLUSION

The foregoing analysis leads to several conclusions. When faced with a choice-of-law question, the judge should first ascertain whether the matter at hand is governed by an actual rule of choice-of-law. If so, he should apply that rule unless he is con-

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70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 263, 269, 283 (1971).

71. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984).

72. E. SCOLES & P. HAY, *supra* note 43.

73. *Id.*

74. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 17 (1977).

vinced that the demands of justice or the needs of the particular case require a departure from the rules or the creation of an exception.<sup>75</sup> The judge should take such a step only after fully realizing that by doing so, he is weakening an existing rule and creating at least some uncertainty and confusion for the future. Accordingly, the recommendation proffered here is that, at least on the basis of existing knowledge, a judge should continue to apply the rule that transfers of interests in land are governed by the law of the situs,<sup>76</sup> that succession to interests in movables is governed by the law of the decedent's last domicile,<sup>77</sup> and that, by and large, intracorporate affairs are governed by the law of the state of incorporation.<sup>78</sup> The courts should also continue to apply such narrow rules as are currently in effect such as the rule that minor details of performance are governed by the law of the state of performance.<sup>79</sup>

In the remaining areas where rules are not presently crystallized, the courts should be cognizant of situations which, on the basis of present knowledge, would seem ripe for the statement of hard-and-fast rules. For example, it might be desirable for the courts to lay down a hard-and-fast rule that the law of the common domicile of the spouses should be applied to determine the issue of intra-family immunity in tort.<sup>80</sup> This would be in line with the majority of the decisions. Also, it would make good sense because the state of the spouses' common domicile is clearly the one that has the greatest interest in this particular issue. Rule making, of course, presents perils since there is always the danger that once a rule is devised, it will work poorly in unforeseen situations. In such instances, the rule, if judicially created, can be changed by later court decisions. Indeed, is not the sort of rule making here envisaged true of the common law process in general which over the centuries has progressed on a trial and error basis?

In the areas that are not ripe for law making, the courts should nevertheless seek to provide whatever guidance is possible. This can be done by way of presumptions,<sup>81</sup> namely, that the law of a given state should be applied in the absence of a good reason

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75. See *supra* notes 9-28 and accompanying text.

76. See *supra* notes 13-22 and accompanying text.

77. See *supra* notes 23-25 and accompanying text.

78. See *supra* notes 27-28 and accompanying text.

79. See *supra* notes 29-30 and accompanying text.

80. See *supra* notes 31-33 and accompanying text.

81. See *supra* note 62 and accompanying text.

not to do so. In determining whether to depart from a presumption, the courts should regard all of the choice-of-law values that have previously been discussed. The courts should consider the values of certainty, predictability, and uniformity of result, as well as ease in decision making. These values counsel against any departure from the applicable presumption. Therefore the author believes that in tort actions to recover for personal injuries, or for damage to personal property, the law of the state of conduct and injury should be applied in the absence of compelling considerations to the contrary. At the least, this presumption is easy to apply and will lead to the application of the law of a state which has a close connection with the occurrence.

One value which sometimes calls for a departure from a presumption and which is worthy of real consideration is that which requires respect for the policies underlying the relevant rules of the potentially interested states.<sup>82</sup> It bears repeating that, generally speaking, it makes no sense to apply a rule whose policy would not be furthered by its application. Also, in situations where the policies of two or more states are implicated, it would obviously be desirable to apply the law whose policy is more strongly involved or whose policy would be most impaired if this law were not applied. The problem here, of course, is the difficulty of ascertaining what are the policies that underlie a given rule and, as between the rules of several states, whose underlying policy is most seriously involved. It must be remembered that this value, although important, is but one of several values and should not be pursued in total disregard of the others. If the search for policies proves to be too time consuming, or unlikely to lead to a clear conclusion, the search should be abandoned and attention given to the other values.<sup>83</sup>

Protection of justified expectations is a most important value.<sup>84</sup> But this value is believed to be adequately protected by existing choice-of-law rules in those areas where the protection of justified expectations is important, namely contracts, marriage, property, and corporations.<sup>85</sup>

All that has been said here leads to two rather modest conclu-

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82. See *supra* notes 46-60 and accompanying text.

83. See *supra* note 65 and accompanying text.

84. See *supra* notes 67-71 and accompanying text.

85. See *supra* notes 9-28 and accompanying text.

sions. The first is that rules are as desirable in choice-of-law as in other areas of the law. The second is that in deciding cases in those areas where rules cannot presently be stated, the courts should pay regard to all of the values involved. Finally, the courts should search for rules and practice eclecticism.

