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Russell J. Weintraub

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Recommended Citation

Russell J. Weintraub, *Method for Solving Conflict Problems Torts*, 48 Cornell L. Rev. 215 (1963)
Available at: <http://scholarship.law.cornell.edu/clr/vol48/iss2/1>

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CORNELL LAW QUARTERLY

VOLUME 48

WINTER, 1963

NUMBER 2

A METHOD FOR SOLVING CONFLICT PROBLEMS—TORTS

Russell J. Weintraub†*

Of all choice-of-law rules, the one which United States courts have most widely accepted and universally applied is the rule governing liability for tort by the "law of the place of wrong"¹ or, more precisely, the place of impact.² It is inconceivable that a single choice-of-law

* The author gratefully acknowledges the able research assistance of Gary L. Anderson, class of 1962, and Richard P. Glovka, class of 1963.

† RUSSELL J. WEINTRAUB, Associate Professor of Law, University of Iowa. B.A. 1950, New York University; LL.B. 1953, Harvard Law School. Teaching Fellow, Harvard Law School, 1955-57. Co-author, *The Iowa Law of Workmen's Compensation*; *Contemporary Values and the Responsibility of the College*; Supplement, *Moore's Federal Practice* (1960-61). Contributor to legal and other periodicals.

¹ Restatement, Conflict of Laws § 378 (1934).

² Where the defendant acts in one jurisdiction and the harm to the plaintiff occurs in another jurisdiction, it is the law of the place of harm which is applied. *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940) (unwholesome canned food); *Maryland v. Eis Automotive Corp.*, 145 F. Supp. 444 (D. Conn. 1956) (negligently manufactured brake); *Western Newspaper Union v. Woodward*, 133 F. Supp. 17 (W.D. Mo. 1955) (fraudulent misrepresentation); *Jeffrey v. Whitworth College*, 128 F. Supp. 219 (E.D. Wash. 1955) (negligent failure to warn of danger); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (W.D. Mo. 1953) (conspiracy in restraint of trade); *Mann v. Policyholders' Nat'l Life Ins. Co.*, 78 N.D. 724, 51 N.W.2d 853 (1952) (negligent failure to act on policy application); *El Paso & Northwestern Ry. v. McComas*, 36 Tex. Civ. App. 170, 81 S.W. 760 (Ct. Civ. App. 1904) (improperly loaded lumber); *Dallas v. Whitney*, 118 W. Va. 106, 188 S.E. 766 (1936) (blasting). See also *Conn. Valley Lumber Co. v. Me. Cent. R.R.*, 78 N.H. 553, 103 Atl. 263 (1918) (defendant damages bridge in two jurisdictions, damage within each jurisdiction governed by that jurisdiction's law).

An apparent exception has developed in cases involving harm to the incidents of marriage where the law of the place where the defendant acted, rather than the law of the marital domicile has been applied. *Albert v. McGrath*, 278 F.2d 16 (D.C. Cir. 1960) (alienation of affections); *Orr v. Sassemann*, 239 F.2d 182 (5th Cir. 1956) (alienation of affections); *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949) (alienation of affections). For such holdings on the issue of loss of consortium, see cases cited notes 23, 25 *infra*.

Occasionally, other courts have departed from the standard rule, applying the law of the place where the defendant acted. *Bender v. Hearst Corp.*, 263 F.2d 360 (2d Cir. 1959) (wrongful interference with contract); *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950) (court follows parties in regarding recovery as controlled by law of place where airplane negligently repaired); *Moore v. Pywell*, 29 App. D.C. 312 (D.C. Cir. 1907) (negligent filling of prescription); *Caldwell v. Gore*, 175 La. 501, 143 So. 387 (1932) (erection of dam flooding plaintiff's land).

Probably the two best known cases applying the law of the place where the defendant acted rather than the law of the place where the plaintiff was injured are *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928) (bailor responsibility

rule could serve adequately over the vast range of tort problems—intentional torts, negligence, liability without fault, capacity to sue, measure of damages, distribution of damages, survival of actions, and more, much more. The result of applying a single rule in so many different contexts has often been irrational, and worse, unjust, decisions. Sporadically, a court has departed from the rigid standard rule to reach what it sensed was a just result. Too often, however, the “reasons” articulated by courts for such departures have been so patently irrational and arbitrary as to invite widespread criticism of a proper result and make the choice between disease and cure a difficult one. It is the purpose of this article to suggest a method for solving conflict problems in the torts area which, it is hoped, will achieve just results logically, predictably, and consistently.³

I. IDENTIFY AND ELIMINATE SPURIOUS CONFLICTS

The first step in the solution of a choice-of-law problem in the torts area should be the identification and elimination of spurious conflicts. A spurious conflict is present when two or more jurisdictions, having some contact with the parties or the occurrence, have tort rules pointing to different results, but, upon analysis of the purposes underlying the putatively relevant and divergent rules, it becomes apparent that one rule and one rule only is rationally applicable to the case in issue. If, for example, one contact state has a rationally applicable rule making the defendant liable and no other contact state has a rule eliminating liability, the purposes of which would be advanced by applying the liability-insulating rule to the case at bar, there is no conflict. The defendant should be liable. Conversely, if one state having a contact with the parties or the occurrence has a rationally applicable rule insulating the defendant from liability and no other contact state would advance the

statute), and *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957) (dram shop act). These two cases are further discussed in this article at text accompanying notes 31 and 44 respectively.

The Federal Torts Claims Act provides for tort liability of the federal government “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b) (1958). This has been interpreted to mean the whole law of the place “where the act or omission occurred,” including its conflict of laws rules. *Richards v. United States*, 369 U.S. 1 (1962). Similar language is contained in the Federal Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958): “Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may maintain a suit for damages . . .” See *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958) (negligent servicing in New York, Venezuelan airplane crashes on high seas).

³ The author’s general theories of choice of law are stated in “A Method for Solving Conflict Problems,” 21 U. Pitt. L. Rev. 573 (1960). These general theories were applied to contract problems in “The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique,” 46 Iowa L. Rev. 713 (1961). This article applies these theories to torts.

purposes of its liability-producing rule by applying that rule to the case, the defendant should not be liable.

A. *The Place of Impact*

The classic example of a spurious conflict is the one involving capacity of the wife to sue the husband in tort. The husband and wife are domiciled in State F, a state which permits the wife to sue the husband for personal injuries caused by the husband's negligence. While a passenger in an automobile driven by the husband in State X, the wife is injured as a result of the husband's negligence. Under X law, a wife may not sue her husband in tort. The wife brings suit against the husband in State F. There is no true conflict. F, as the wife's domicile, will advance at least some of the purposes underlying its rule permitting suit—compensation to the wife to prevent her from becoming a public charge and to ease her and the family's financial burden.⁴ In the event that the wife has received medical treatment in F, recovery will also provide a pool for the compensation of medical creditors in F. What policies might underlie State X's incapacity rule? On the surface, X might be seeking to preserve marital harmony by preventing husband and wife from becoming adversaries in a public trial. This, of course, is a naive appraisal. Almost invariably the real defendant is the husband's liability insurer. Both husband and wife desire recovery in order to help meet the medical and other costs of the wife's injury.⁵ But even assuming a marital harmony policy, X is not the forum and has no interest in providing protection for F marriages when F itself does not think protection necessary.⁶ Paradoxically, a more realistic policy supporting the X rule might be the prevention of a collusive suit, husband and wife combining to get as much from the insurer as possible. A policy in X against collusive husband-wife suits might carry the day if X were the forum, but it can hardly prevail when X's only contact is as place of impact and F is both forum and marital domicile. Moreover, a complete interdicting of suit does not seem as rationally expressive of a policy against collusion as might rules concerning presumptions, burden of proof, and quantum of evidence required.⁷ Despite all this, the place of wrong rule has repeatedly resulted in F's denying recovery to the wife.⁸

⁴ The burden is shifted from the family because the husband is only the nominal defendant. It is his liability insurer who will pay. This is discussed below.

⁵ See Hancock, "The Rise and Fall of *Buckeye v. Buckeye*, 1931-1959: Marital Immunity for Tort in Conflict of Laws," 29 U. Chi. L. Rev. 237, 244 n.36 (1962); Comment, 44 Yale L.J. 1233, 1239 (1935).

⁶ Hancock, *supra* note 5, at 244.

⁷ See Ford, "Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement," 15 U. Pitt. L. Rev. 397, 400 (1954).

⁸ E.g., *Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931); *Bissonnette v. Bissonnette*,

The landmark case departing from the standard rule and permitting the wife to recover under such circumstances is *Haumschild v. Continental Cas. Co.*⁹ While a husband and wife domiciled in Wisconsin were driving in California, the wife was injured by the husband's negligence. Overruling a long line of Wisconsin cases, the most notorious of which is *Buckeye v. Buckeye*,¹⁰ the court permitted the wife to sue her husband¹¹ and his liability insurer under Wisconsin law, although under California law, California being a community property state, a wife may not maintain such a suit.¹² The result, however, was not based upon an analysis of the policies underlying the respective Wisconsin and California rules. The court chose the law of the domicile rather than that of the place of impact because it characterized the question as one of family law rather than tort law.

Is there any objection to reaching a desirable result by simply changing the characterization label from "tort" to "family law"? After all, a good many commentators had urged such a result and suggested a change in characterization as a means of achieving it.¹³ There are, however, many things wrong with the *Haumschild* methodology. Such characterization *legerdemain* is arbitrary and unconvincing.¹⁴ It upsets a pattern of decisions based on logic, albeit sterile logic, without providing a logical

145 Conn. 733, 142 A.2d 527 (1958); *Bohenek v. Niedzwiecki*, 142 Conn. 278, 113 A.2d 509 (1955); *Robinson v. Gaines*, 331 S.W.2d 653 (Mo. 1960) (suit against husband's estate); *Gray v. Gray*, 87 N.H. 82, 174 Atl. 508 (1934); *Coster v. Coster*, 289 N.Y. 438, 46 N.E.2d 509 (1943) (forum closed—married pendente lite); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931). Cf. *Rines v. Rines*, 97 N.H. 55, 80 A.2d 497 (1951) (mother's suit against unemancipated minor).

The marital domicile has more readily given effect to its own policies when the situation is reversed, the marital domicile forbidding suit, the place of impact permitting it. When refusing to apply the law of the place of impact, the marital domicile typically avoids a decision on the merits, simply refusing a forum. See *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).

⁹ 7 Wis. 2d 130, 95 N.W.2d 814 (1959). Also permitting such suits, see *Morin v. Letourneau*, 102 N.H. 309, 156 A.2d 131 (1959) (law of state of impact interpreted as barring remedy but not right—married after accident); *Pittman v. Deiter*, 10 Pa. D. & C.2d 360 (Phila. County 1957); cf. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (unemancipated minors permitted to recover against parent under law of domicile); *Fowlkes v. Ray-O-Vac Co.*, 52 Ga. App. 338, 183 S.E. 210 (1935) (law of forum-domicile permits suit of unemancipated minor against parent).

¹⁰ 203 Wis. 248, 234 N.W. 342 (1931).

¹¹ The marriage had been annulled after the accident, but the decision does not rest on this ground.

¹² *Emery v. Emery*, supra note 9, held that the capacity of a minor child to sue a parent and whether or not a parent's action is community property are governed, thus causing a husband's negligence to be imputed to the wife, by the law of the domicile. The majority in *Haumschild* did not rest on this development in California law, although the concurring opinion stressed it.

¹³ See Cook, *The Logical and Legal Bases of the Conflict of Laws* 346 (1942) ("capacity to sue"); Stumberg, *Principles of Conflict of Laws* 206 (2d ed. 1951) ("domestic relations"); Ford, supra note 7, at 424 ("status"); Kelso, "Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas," 33 Ind. L.J. 297, 308 (1958) ("family relations").

¹⁴ Cf. Shavelson, "Survival of Tort Actions in the Conflict of Laws: A New Direction?" 42 Calif. L. Rev. 803, 809 n.22 (1954) ("procedural" or "substantive").

basis for the prediction of future decisions.¹⁵ This is not to suggest that every conflicts case must be decided *ad hoc* or that there should not be articulated generalizations in the form of choice-of-law rules. Such generalizations are valid, however, only insofar as the reasoning leading to such generalizations is valid. Choice-of-law rules are useful only as shorthand expressions of a policy-centered analysis such as that demonstrated above. Their shorthand nature should be recognized and they should be abandoned when they no longer advance the policies on which they are based. The danger of *Haumschild's* articulating a choice-of-law rule in lieu of, instead of as a result of, such a policy-centered analysis is that the rule will be applied in a deceptively analogous situation in which it will produce results as unjust and irrational as those it displaced.¹⁶

This danger has been fully realized in the case of *Haynie v. Hanson*.¹⁷ A married couple, domiciled in Illinois, were in Wisconsin when the wife was injured as the result of a collision between an automobile driven by her husband and one driven by a Mr. Hanson. Mr. Hanson held liability insurance issued by Heritage Mutual Insurance Company. At all relevant times, Mr. Hanson was a resident of Wisconsin and Heritage Mutual was a Wisconsin corporation.¹⁸ The wife brought suit in Wisconsin against both Hanson and his liability insurer. The defendants sought to implead the husband's liability insurer alleging that the husband's insurer would be liable for contribution because of the husband's negligence. A dismissal of the cross-complaint was affirmed.¹⁹ The husband had no underlying liability on which to base contribution because husband and wife were domiciled in Illinois. Under Illinois law the wife does not have capacity to sue her husband in tort. *Haumschild* had decided that the law of the marital domicile governs a wife's capacity to sue.

Perhaps, however, it was not quite that simple. Wisconsin, as domicile of the defendants, certainly had no interest in preventing them from obtaining contribution. The possible policies underlying the Illinois incapacity rule, prevention of domestic discord and avoidance of collusive suits, were not rationally applicable when the wife was not suing her husband. In thus producing a spurious conflict, the *Haynie* decision denied Wisconsin's strong interest without advancing any interest of Illinois.

¹⁵ See Leflar, "Choice of Law: Torts: Current Trends," 6 Vand. L. Rev. 447, 461 (1953).

¹⁶ See Currie, "Justice Traynor and the Conflict of Laws," 13 Stan. L. Rev. 719, 732 n.58 (1961); Hancock, *supra* note 5, at 253-54.

¹⁷ 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

¹⁸ Brief for Appellant, p. 11, *Haynie v. Hanson*, *supra* note 17.

¹⁹ *Accord*, *Pirc v. Kortebein*, 186 F. Supp. 621 (D. Wis. 1960).

In terms of a policy-centered analysis, the commentators' clamor for a change in the choice-of-law rule governing a wife's capacity to sue her husband in tort, as haltingly and imperfectly recognized in *Haumschild*, is all part of a more fundamental and more pervasive proposition. The place of impact, qua place of impact, has no interest in insulating the defendant from liability, unless it can rationally be argued under the circumstances that the defendant has acted in reliance on that place's insulating rule. Such a reliance argument will almost invariably be untenable when directed at rules governing liability for unintentional torts, excluding, of course, such purely directory local rules as speed limits, rules of the road, and the like.

There is one unrecognized situation which is a potential breeder of more spurious conflicts than perhaps any other. This is the "guest statute" situation. The conditions here for producing spurious conflicts by applying the liability-insulating rule of the place of impact are just about perfect. First, slightly more than half of the states require that more than ordinary negligence be chargeable to the host in order for a guest automobile passenger to recover against the host for injuries suffered as a passenger.²⁰ Second, it is very likely that the host and guest will be domiciled in the same state. The chances of the following situation happening are therefore quite good. Host and guest are domiciled in State F. State F permits injured guests to recover against their hosts by showing that the injuries are due to the ordinary negligence of the host. Host and guest depart together for a short trip into State X. While in State X, the host's negligent driving causes injury to his guest. State X has a "guest statute" preventing recovery under such circumstances unless the guest can show "gross" or "wanton" negligence on the part of the host. The guest brings suit against the host in State F. It would make no sense to apply X's guest statute. Two possible policies might underlie the X statute. One, naive in view of the great likelihood that the real defendant is the host's liability insurer, is the policy of preventing the guest from manifesting such ingratitude toward his host. Two, paradoxically and more realistically, is the prevention of a collusive suit, host aiding guest against the host's liability insurer.²¹ Neither of these policies is rationally applicable to a suit in F between an F host and an F guest. Yet repeatedly the place-

²⁰ Twenty-nine states, either by statute or case development fall into this category. For lists see Ehrenzweig, "Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability under 'Foreseeable and Insurable Laws'" 69 *Yale L.J.* 595, 599 n.30 (1960); Notes, 34 *Ind. L.J.* 338 n.2 (1959); 3 *Wyo. L.J.* 225 n.2 (1949); 47 *Iowa L. Rev.* 1049 n.6 (1962).

²¹ See *Naphtali v. Lafazan*, 8 App. Div. 2d 22, 25, 186 N.Y.S.2d 1010, 1014 (Sup. Ct. 2d Dep't 1959); Ehrenzweig, *supra* note 20, at 599.

of-wrong rule has resulted in the application of the foreign guest statute in just such a situation.²²

*Sestito v. Knop*²³ is another example of a spurious conflict spawned by the failure to recognize that the place of impact has no interest in insulating the defendant from liability. In *Sestito*, a husband whose marital domicile was in Michigan, was injured in an automobile collision in Wisconsin and rendered impotent. His wife brought an action in a federal court sitting in Wisconsin for loss of consortium. Defendants were the driver of the other automobile and his liability insurer. The other driver was domiciled in Illinois.²⁴ Wisconsin did not recognize such an action, but Michigan did. Applying Wisconsin law, as that of the place of wrong, the trial court dismissed the complaint and the dismissal was affirmed on appeal. The wife ingeniously argued that the wrong was an injury to the marital relation and that this occurred in Michigan, the marital domicile. The court, however, rejected this argument ruling that the place of the wrong was where the husband had been injured, this being the last event necessary to create liability.²⁵ The plaintiff did not urge, nor did the court note, that not only plaintiff's domicile, but also Illinois, the domicile of the other driver, permitted wives actions for loss of consortium.²⁶ If the defendant driver's home state would not have shielded him from liability, Wisconsin, as place of impact, had no

²² E.g., *Sharp v. Johnson*, 248 Minn. 518, 80 N.W.2d 650 (1957); *Blount v. Blount*, 125 So. 2d 66 (La. Ct. App. 1960); *Naphtali v. Lafazan*, supra note 21; *Estate of Bednarowicz v. Vetrone*, 400 Pa. 385, 162 A.2d 687 (1960); *Fykseen v. Fykseen*, 267 Wis. 542, 66 N.W.2d 150 (1954).

Sometimes the day is saved by a finding that the guest's evidence meets the sterner requirements of the foreign statute: *Douglas v. Wood*, 254 S.W.2d 490 (Ky. Ct. App. 1953); *Smith v. Northern Ins. Co.*, 120 So. 2d 309 (Orleans Ct. App., La. 1960); *Wilcox v. Swenson*, 324 S.W.2d 664 (Mo. 1959); *McAllister v. Maltais*, 102 N.H. 245, 154 A.2d 456 (1959); *Dodrill v. Young*, 143 W. Va. 429, 102 S.E.2d 724 (1958). Or the court may find that the plaintiff was not a "guest" within the meaning of the foreign statute: *Burt v. Richardson*, 251 Minn. 335, 87 N.W.2d 833 (1958); *Oehler v. Allstate Ins. Co.*, 2 Wis. 2d 656, 87 N.W.2d 289 (1958). In *Smoot v. Fischer*, 248 S.W.2d 38 (Mo. Ct. App. 1952) the crash was on a bridge between Illinois and Missouri. The court avoided the Illinois guest statute by holding that Missouri had "concurrent jurisdiction." In *Rodney v. Staman*, 371 Pa. 1, 89 A.2d 313 (1952), the court resorted to more heroic measures. Although the court held the foreign guest statute applicable, it decided that the question of whether or not the evidence as a whole was sufficient to take the case to the jury would be determined by the forum's law, and thus was able to affirm a judgment for the guest's estate, the guest incidentally being the wife of the host. There was a sharp dissent pointing out that the case never would have gotten to the jury in the guest statute state. The dissent declared "we have no concern with the wisdom of the Ohio statute or the propriety of the decisions construing it." *Id.* at 15, 89 A.2d at 320. If the marital domicile of host and guest is not concerned, then who should be?

²³ 297 F.2d 33 (7th Cir. 1961).

²⁴ Brief for Plaintiff-Appellant, appendix, p. 2, *Sestito v. Knop*, supra note 23.

²⁵ Accord, *Jordan v. States Marine Corp.*, 257 F.2d 232 (9th Cir. 1958); *McVickers v. Chesapeake & O. Ry.*, 194 F. Supp. 848 (E.D. Mich. 1961). But cf. *Lister v. McAnulty*, [1944] Can. Sup. Ct. 317, [1944] 3 D.L.R. 673 (law of marital domicile applied to prevent husband's recovery for loss of consortium, though law of place of accident would permit recovery).

²⁶ *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

interest in so doing. It is true that the defendant insurer was incorporated in Pennsylvania and licensed to do business in Wisconsin,²⁷ and neither of these states permitted a wife to recover for loss of consortium.²⁸ But neither of these states could have a legitimate interest in insulating the insurer from a liability which would attach under the laws of both the plaintiff's and the insured's domiciles.

One situation in which it might be expected that a policy-centered analysis of choice of law would be commonplace is in the interpretation of statutes creating civil liability, when the plaintiff seeks to apply such a statute to a harm he has suffered outside the enacting state. If the statute does not expressly cover the choice-of-law problem, and very few do, the standard process of statutory construction would demand an inquiry into the policies underlying the statute.²⁹ Although such an analysis has been undertaken by a few courts, particularly the United States Supreme Court, and although there appears to be a trend in this direction, the record is still very disappointing.³⁰

On the credit side of the ledger is *Schmidt v. Driscoll Hotel*.³¹ The defendant operated a bar in Minnesota. In violation of Minnesota law, one Sorrenson was served liquor at defendant's bar while intoxicated. As a result of this illegal sale, Sorrenson overturned his automobile while driving in Wisconsin. Plaintiff, a passenger, was injured and brought suit against the bar owners under the Minnesota dram shop act imposing civil liability upon liquor sellers under such circumstances. Wisconsin, the place of impact, would not have imposed civil liability.³² Wisconsin, however, had no interest in insulating the Minnesota bartender from liability. Moreover, the purposes underlying the Minnesota statute, compensation to those injured and control of the activities of Minnesota

²⁷ Brief for Plaintiff-Appellant, appendix, p. 2, *Sestito v. Knop*, supra note 23.

²⁸ As to Pennsylvania law, see *Neuberg v. Bobowicz*, 401 Pa. 146, 162 A.2d 662 (1960).

²⁹ But see Cheatham & Reese, "Choice of the Applicable Law," 52 Colum. L. Rev. 959, 965 (1952): "[I]t is often hard to refine the purpose behind a statute to the point where it becomes helpful in deciding a choice of law case."

³⁰ See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 384 (1959): "The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstances of the place of injury." (affirming dismissal of seaman's Jones Act and general maritime claims against his employer); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (Jones Act): "We are simply dealing with a problem of statutory construction. . . ."; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 281-82 (1952) (Lanham Act): "Resolution of the jurisdictional issue in this case therefore depends on construction of exercised congressional power, not the limitations upon that power itself." But cf. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (Sherman Act): "The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."

³¹ 249 Minn. 376, 82 N.W.2d 365 (1957).

³² Wis. Stat. Ann. § 176.35 (1957) (applicable only if sale to minor or, after notice to desist, to a habitual drunkard). Section 176.26 did make it a crime to sell to "any person intoxicated or bordering on intoxication."

bartenders, were fully applicable. The sale had been in Minnesota and the plaintiff was a Minnesota citizen. The court saw this and held the Minnesota statute applicable.³³

It is interesting to compare *Schmidt* with the Illinois case, *Eldridge v. Don Beachcomber, Inc.*³⁴ As in *Schmidt*, the plaintiff had been injured out of state by a drunk who had been served liquor in Illinois. The court, however, refused to permit the plaintiff to recover under the Illinois dram shop act.³⁵ *Eldridge*, however, is distinguishable from *Schmidt*. In *Eldridge* the plaintiff was not an Illinois resident. Moreover, the Illinois act, unlike the Minnesota statute, required no illegal act for the bar owner to be liable. All that was necessary was sale of liquor which caused "in whole or in part"³⁶ the intoxication of the person causing the damage. Thus, it could be argued that since the purpose of the Illinois act was not to control the conduct of Illinois bartenders, and since the plaintiff was not an Illinois citizen, the reasons justifying extraterritorial application of the Minnesota statute in *Schmidt* were absent and the *Eldridge* result was correct.³⁷ There is, however, a contrary argument. First, although the Illinois statute required no illegal act on the part of the bartender as a condition precedent to the imposition of civil liability, the presence of a civil liability statute would be likely to cause Illinois bar owners to avoid acts likely to lead to dangerously intoxicated patrons. Moreover, a likely rationale of the Illinois dram shop act is one similar to the rationale of workmen's compensation—placing upon an industry, as a cost of doing business,³⁸ the risks of injury fairly attributable to its methods of operation.³⁹ It is perhaps too callous a view to say that Illinois is "interested" in having the social costs of the Illinois tavern industry borne by that industry only when risks of such costs, created in Illinois, are realized within Illinois. So callous, perhaps, as to raise serious, though largely unexplored, problems under the "privileges and immunities"

³³ Cf. *Zucker v. Vogt*, 200 F. Supp. 340 (D. Conn. 1961). (Connecticut dram shop act permits recovery against owner of Connecticut bar illegally serving liquor causing fatal injuries to New York resident in New York).

³⁴ 342 Ill. App. 158, 95 N.E.2d 512 (1950), leave to appeal denied, 346 Ill. App. xiv (1952).

³⁵ Cf. *Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960) (Illinois statute does not apply when collision in Michigan, nor Michigan statute when liquor served in Illinois, although court bases civil liability on violation of Illinois criminal statute); *Goodwin v. Young*, 34 Hun. 252 (N.Y. Sup. Ct. 1884) (New York statute not applicable when damage in Vermont).

³⁶ Ill. Rev. Stat. ch. 43, § 135 (1961). *Osborn v. Leuffgen*, 381 Ill. 295, 45 N.E.2d 622 (1942) (contribution to intoxication, no matter how slight, sufficient).

³⁷ Note, 71 Harv. L. Rev. 1351, 1352 (1958).

³⁸ The cost is placed upon the industry in the first instance. Whether such cost is eventually absorbed or passed on by the industry is dependent upon the same complex economic and social factors which determine to what extent other costs of doing business are absorbed or passed on.

³⁹ See note, 4 Vill. L. Rev. 575, 577 (1959).

provision of article IV, section 2 and the "privileges or immunities" and "equal protection" clauses of the Fourteenth Amendment of the United States Constitution, especially the last.⁴⁰ The problem is particularly acute when dealing with legislation such as a dram shop act instead of, for example, workmen's compensation. In dealing with workmen's compensation, there is a greater likelihood that, if denied compensation under one state's statute because he is a nonresident, the injured person will have compensation available under the statute of a state with which he is more closely identified.⁴¹ Moreover, the territorial reasoning of *Eldridge* has resulted in denial of compensation for injury out of state even to Illinois citizens injured by Illinois drunks who were served liquor in Illinois bars.⁴²

Thus, a state's statute or common law rule, which would provide recovery for residents of that state, should also provide recovery for nonresidents of that state, unless to do so would officiously interfere with the policy of the victim's home state. For example, suppose the victim, a resident of State X, is employed by an X corporation and performs his duties mainly in X, although he does occasionally work in State Y. The employer has qualified as a self-insurer under X's workmen's compensation system, but has failed to apply or qualify as required by Y's workmen's compensation statute. The victim is injured while working in Y. Y would permit an employee of an uninsured employer to sue his employer at common law, escaping from the limited and definite liability of the workmen's compensation system. Y should not permit this victim to do so, and perhaps an attempt to do so should be held a denial of full faith and credit to the "exclusive remedy" provision in X's workmen's compensation statute.⁴³ There would not be a similar objection to Y's making compensation available under its own workman's compensation act. On the other extreme, recovery under local law should, and hopefully must, be available to a nonresident if withholding recovery would irrationally discriminate against him. Local denial is

⁴⁰ In the final analysis, the answer will probably turn upon the reasonableness of the classification for the purpose at hand. See Currie & Schreter, "Unconstitutional Discrimination in the Conflict of Laws: Equal Protection," 28 U. Chi. L. Rev. 1, 11 (1960); Currie & Schreter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale L.J. 1323, 1348 (1960); Kramer, "Interests and Policy Clashes in Conflict of Law," 13 Rutgers L. Rev. 523, 536 (1959); cf. *Canadian No. Ry. v. Eggen*, 252 U.S. 553, 559 (1920) (borrowing statute's exclusion of local citizen not "arbitrary or vexatious discrimination against non-residents").

⁴¹ But cf. Currie & Schreter, *supra* note 40, 69 Yale L.J. at 1366 (local dram shop act should not be available to non-resident if bar owner out-of-state corporation doing business locally).

⁴² *Butler v. Wittland*, 18 Ill. App. 2d 578, 153 N.E.2d 106 (1958).

⁴³ See Weintraub, "Due Process and Full Faith and Credit Limitations on a State's Choice of Law," 44 Iowa L. Rev. 449, 478 (1959).

likely to be most irrational and most discriminatory when it means as a practical matter that the nonresident will have no recovery available to him any place.

A case which is similar in result to *Schmidt* and in method to *Haumschild* is *Levy v. Daniels' U-Drive Auto Renting Co.*⁴⁴ A Connecticut statute made lessors of motor vehicles liable for harm done by the vehicle while leased. An automobile which defendant-lessor had rented to the driver in Connecticut caused harm in Massachusetts. Massachusetts had no lessor liability statute. The court held the Connecticut statute applicable, thus reaching a correct result. There was no conflict. Connecticut's interests in controlling the conduct of Connecticut lessors, or perhaps more realistically, in imposing the risks created by automobile renting on the lessors as a cost of doing business, and in compensating the victim, were fully applicable despite the fortuitous impact elsewhere. Massachusetts certainly had no interest in insulating the Connecticut lessor from liability.⁴⁵ The holding, however, was put upon the fantastic ground that the problem was one of contract, not tort, liability, the plaintiff being the third party beneficiary of a contract of bailment made in Connecticut, impliedly incorporating the Connecticut statute.⁴⁶ It is small wonder that the *Levy* rationale has proven unacceptable to another court.⁴⁷ What is unfortunate is that the result should fall with the reasoning.

At the opposite end of the spectrum from *Schmidt's* reasonable and just result is the holding in *Alabama Great So. R.R. v. Carroll*.⁴⁸ A train owned by an Alabama corporation was negligently inspected in Alabama by the corporation's employees. As a result, a coupling parted after the train had crossed the state line into Mississippi. The plaintiff, also employed by the corporation and a citizen of Alabama, was injured. Alabama had an employer's liability statute, but Mississippi retained the liability-insulating "fellow servant" rule. Instead of interpreting the Alabama

⁴⁴ 108 Conn. 333, 143 Atl. 163 (1938).

⁴⁵ Cf. J.H.C. Morris, "The Proper Law of a Tort," 64 Harv. L. Rev. 881, 890 (1951). But see Cheatham & Reese, supra note 29, at 967: "[T]his purpose [incentive to lessor to choose customers with care] would have been substantially achieved even if the scope of the statute's application had been confined to Connecticut accidents."

⁴⁶ Cf. *Graham v. Wilkins*, 145 Conn. 34, 138 A.2d 705 (1958) (Connecticut statute applicable to injury in Massachusetts even if contract of bailment not made in Connecticut, where vehicle was garaged and extensively operated in Connecticut).

⁴⁷ *Hanseman v. Hamilton*, 176 F. Supp. 371, 374 (D. Colo. 1959) (lessor's liability under Colorado statute inapplicable to injury in Ohio): "The characterization in the *Levy* case does not accord with the better view."

In a somewhat comparable situation, a state's owner's liability statute has been held inapplicable although the bailment took place within the state and the victim is a citizen of the state. *Selles v. Smith*, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958); *Chervien v. Geiter*, 272 N.Y. 165, 5 N.E.2d 185 (1936).

⁴⁸ 97 Ala. 126, 11 So. 803 (1892).

statute in light of its purposes⁴⁹ of providing compensation for injured employees and encouraging safe practices by employers, both of which were applicable here, the court rested a holding of inapplicability on the place-of-impact rule. Significantly, the Alabama statute was subsequently amended to cover out-of-state injury,⁵⁰ but too late to help Mr. Carroll.

*Grant v. McAuliffe*⁵¹ is an example of a rightful refusal to allow the law of the place of impact to insulate the defendant from liability, but reached by untenable reasoning. Two automobiles, driven by California citizens, collided in Arizona. One driver died and subsequently plaintiffs, occupants of the other automobile, brought an action in California against his estate. By California law, but not by Arizona law, such an action survived the death of the tortfeasor. The California court, departing from the traditional path,⁵² permitted recovery. The result was the only one rationally possible. California, as common domicile and forum, had an interest in compensating the plaintiffs and in distributing the defendant's estate so as to accomplish this. Arizona, being neither the decedent's domicile, nor the site of administration, had no interest in insulating the estate and the decedent's heirs from liability.⁵³ As in *Haumschild*, however, this rational and just result was achieved by the seemingly arbitrary process of label-switching. The characterization of the survival problem was changed from "tort," first to "procedure" and then to "administration of estates." It is not surprising that the *Grant* reasoning failed to convince another state's highest court considering the problem as one of first impression. The *Grant* result, however, was discarded with its reasoning.⁵⁴ Even more significantly, the eminent, perhaps pre-eminent, jurist who wrote the *Grant* opinion has since said of it:

It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.⁵⁵

⁴⁹ See *Morris*, supra note 45, at 888.

⁵⁰ Ala. Code Ann. § 7540 (1928) (if contract of employment made in Alabama).

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

⁵² *Ormsby v. Chase*, 290 U.S. 387 (1933); *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1928); *Dalton v. McLean*, 137 Me. 4, 14 A.2d 13 (1940).

The only significant departure from the standard rule before *Grant* had been an occasional refusal of a forum with no survival statute to entertain an action based on such a statute at the place of impact. *Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940); *Herzog v. Stern*, 264 N.Y. 379, 191 N.E.23 (1934). Contra, *Nelson v. Eckert*, 231 Ark. 348, 329 S.W.2d 426 (1959).

⁵³ See *Curtie*, "Survival of Actions: Adjudication versus Automation in the Conflict of Laws," 10 Stan. L. Rev. 205, 221, 239 (1958); *Shavelson*, "Survival of Tort Actions in the Conflict of Laws: A New Direction?" 42 Calif. L. Rev. 803, 811 (1954); Comment, 44 Yale L.J. 1233, 1238 (1935).

⁵⁴ *Allen v. Nessler*, 247 Minn. 230, 76 N.W.2d 793 (1956).

⁵⁵ *R. Traynor*, "Is this Conflict Really Necessary?" 37 Texas L. Rev. 657, 670 n.35 (1959).

In a later opinion, in another area of the conflict of laws, however, Justice Traynor does not allow "the brooding background" to deter him from a straight-forward analysis of the policies underlying apparently conflicting state laws.⁵⁶

In all of the foregoing situations, and in many more,⁵⁷ spurious conflicts can be identified and eliminated by simply recognizing, as suggested above, that the place of impact as such has no interest in insulating the defendant from liability, absent a reasonable basis for the defendant's arguing that he acted in reliance on the protection of that place's rule.

B. *Interests of Contact States*

Having seen what interest the place of impact does not have, it might be well to indicate briefly what interests it does have and also to indicate the probable interests of other states having a contact with the parties or with the occurrence in a tort case.

The place of impact will have an interest in compensating the injured party. Compensation will prevent the victim from becoming a public charge within the state and will provide a pool from which local medical and other creditors, who have furnished services to the victim as a result of his injury, may be compensated.⁵⁸ Of course, it may be that in an individual case the facts are such that these interests of the place of impact are reduced to the vanishing point. For example, the victim may leave the state of impact immediately, go to another state where he is domiciled, and receive medical treatment there. Although, even under such circumstances, the state of impact may retain sufficient interest in providing compensation to prevent our saying that it has no interest and that the application of its law will be unreasonable,⁵⁹ the fact that

⁵⁶ *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906 (1961).

⁵⁷ See, e.g., *De Bono v. Bittner*, 13 Misc. 2d 333, 178 N.Y.S.2d 419 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 10 App. Div. 2d 556, 196 N.Y.S.2d 595 (1st Dep't 1960) (whether release of joint tortfeasor validly reserved rights against defendant—law of place of impact shields defendant from liability under law of domicile of all parties); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368 (1951) (no contribution between joint tortfeasors, applying law of place of impact contrary to law of forum and defendant's domicile); *Goldstein v. Gilbert*, 125 W. Va. 250, 23 S.E.2d 606 (1942) (whether covenant not to sue executed for one tortfeasor bars action against joint tortfeasor); cf. *Victor v. Sperry*, 163 Cal. App. 2d 518, 329 P.2d 728 (Dist. Ct. App. 1958) (apply rule of place of impact yielding less than one-sixth amount of damages available under rule of common domicile).

⁵⁸ See *Currie*, "The Silver Oar and All That: A Study of the Romero Case," 27 U. Chi. L. Rev. 1, 71 (1959); *Hancock*, "Three Approaches to the Choice-of-Law Problem: The Classificatory, the Functional and the Result-Selective," in *XXth Century Comparative and Conflicts Law* 365, 371 (1961).

⁵⁹ Cf. *Carroll v. Lanza*, 349 U.S. 408, 413 (1955) (Missouri employee of sub-contractor, injured in Arkansas, permitted to bring tort suit in Arkansas against general contractor contrary to provisions of Missouri workmen's compensation act): "Arkansas therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case Carroll's injury may have cast no burden on her or on her institutions."

its interest in compensation is thus reduced should certainly be considered in reconciling any true conflict that might exist.⁶⁰ The interest of the place of impact in providing compensation is similarly reduced if the victim is killed and recovery is for wrongful death. The proceeds of such recovery, at least when there are close relatives surviving,⁶¹ are not subject to the claims of creditors.⁶² One matter over which it is clear that the place of impact as such has no interest is in the manner of distributing the proceeds of a wrongful death recovery. Any conflict in regard to such distribution between the law of the place of impact and the law of the domicile of the decedent and his next of kin is spurious. The law of the domicile should control. The rigid standard rule has, however, under such circumstances, consistently resulted in the application of the law of the place of impact.⁶³

In addition to its interest in compensating the victim, the place of impact has an interest in shaping its tort rules so as to discourage conduct which will result in harmful impacts within its borders. Such an interest in controlling the tortfeasor's conduct is strongest when dealing with intentional torts and diminishes to the vanishing point when dealing with the ordinary automobile negligence case, if one excludes such purely directory rules as speed limits. This is because the conduct of the negligent tortfeasor, particularly the "accident prone" highway menace, cannot realistically be shaped by rules governing civil liability.⁶⁴ The place where the defendant acts, if this is different from the place of impact, has similar interest in controlling his conduct.⁶⁵

The defendant's domicile, or in the case of a corporation, its place of incorporation, or place of doing business, has an interest in controlling the defendant's conduct. It also has an interest in insulating the defendant from liability.⁶⁶ This latter interest may be illustrated by cases

And see discussion below of place of impact's interest in controlling the tortfeasor's conduct.

⁶⁰ See Section II, *infra*.

⁶¹ See, e.g., Iowa Code § 635.9 (1962):

When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.

⁶² See Currie, "The Constitution and the Choice of Law," 26 U. Chi. L. Rev. 9, 15 (1958).

The fact that it is unnecessary to protect local creditors has made it possible for foreign administrators to sue locally on the wrongful death claim without obtaining local appointment. *Gross v. Hocker*, 243 Iowa 291, 51 N.W.2d 466 (1952); *Howard v. Pulver*, 329 Mich. 415, 45 N.W.2d 530 (1951); *Ghilain v. Couture*, 84 N.H. 48, 146 Atl. 395 (1929).

⁶³ *Workman v. Hargadon*, 345 S.W.2d 644 (Ky. 1961); *Matter of Winikoff's Estate*, 116 N.Y.S.2d 262 (Surr. Ct. Kings County 1952); *Breitwieser v. State*, 62 N.W.2d 900 (N.D. 1954); *Restatement, Conflict of Laws* § 393, comment c (1934).

⁶⁴ See 2 Harper & James, *Torts* § 11.4 (1956).

⁶⁵ See Cheatham, Goodrich, Griswold & Reese, *Cases on Conflict of Laws* 441 (4th ed. 1957); Ehrenzweig, "The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement," 36 Minn. L. Rev. 1, 5-6 (1951). But see note 2, *supra*.

⁶⁶ See *Wooden v. Western N.Y. & P.R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891) (New York

involving charitable immunity. The place of impact has no interest in insulating a charity incorporated elsewhere from tort liability, if the place of impact has no substantial contacts with the charity. This is true, for example, if the charity is merely conducting an outing or tour in a state which has a rule of charitable immunity and the state in which it is incorporated or generally conducts its activities has no immunity rule. The charity should not receive the benefit of the immunity rule for injuries suffered in the state where the short tour or outing is being held.⁶⁷ On the other hand, if the charity is generally engaged in beneficial activities within a state, that state has an interest in applying its immunity rule to the charity, even though the charity is incorporated elsewhere.⁶⁸

The forum, *qua* forum, has an interest in preserving the integrity and economy of its judicial process. It may protect this interest by closing its forum and refusing to render a judgment on the merits if, because of the absence of forum contacts and the presence of foreign contacts, the forum is a seriously inconvenient site for litigation and an appropriate site is available to the plaintiff.⁶⁹ Similar forum-closing action may be taken if adjudication at the forum will amount to prosecuting the defendant for a crime which he has committed in another jurisdiction,⁷⁰ or

citizen killed in Pennsylvania while riding on train of New York railroad—New York limit on damages applied). But cf. *Tuffarella v. Erie R.R.*, 10 App. Div. 2d 525, 203 N.Y.S.2d 468 (2d Dep't), motion for leave to appeal dismissed, 8 N.Y.2d 1040, 170 N.E.2d 232, 206 N.Y.S.2d 820 (1960), motion for leave to appeal denied, 12 App. Div. 2d 491, 209 N.Y.S.2d 274 (2d Dep't 1960), motion to amend answer denied, 27 Misc. 2d 638, 211 N.Y.S.2d 351 (Sup. Ct. Nassau County 1961), motion for summary judgment granted, 226 N.Y.S.2d 87 (Sup. Ct. Nassau County 1962) (one joint tortfeasor permitted to implead another under law of place of impact despite fact that law of domicile or place of incorporation of all parties would not permit impleading); *Szalatnay-Stacho v. Fink* [1947] K.B. 1 (absolute privilege provided by law of domicile not applicable to official act in England of one official of Czech government in exile affecting another such official, but English qualified privilege prevents liability).

⁶⁷ But see *Jeffrey v. Whitworth College*, 128 F. Supp. 219 (E.D. Wash. 1955); *Kaufman v. American Youth Hostels*, 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958), modified in other respects, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

⁶⁸ See *Menardi v. Thea. Jones Evangelistic Ass'n*, 154 F. Supp. 622 (E.D. Pa. 1957) (dismiss suit brought where charity transacting business, although no immunity rule at place of impact); *Allison v. Mennonite Publications Bd.*, 123 F. Supp. 23 (W.D. Pa. 1954) (dictum). But cf. *Heinemann v. Jewish Agricultural Soc'y*, 178 Misc. 897, 37 N.Y.S.2d 354 (Sup. Ct. Chautauqua County 1942), *aff'd mem.*, 266 App. Div. 907, 43 N.Y.S.2d 746 (4th Dep't 1943), motion for leave to appeal denied, 266 App. Div. 941, 46 N.Y.S.2d 219 (4th Dep't 1943), motion for leave to appeal granted, 291 N.Y. 828, 51 N.E.2d 698 (1943) (in suit at place of incorporation decline to apply immunity rule of State in which charity running training farm).

⁶⁹ See Restatement (Second), Conflict of Laws § 117e (Tent. Draft No. 4, 1957). There might well be included under this forum non conveniens doctrine, two other supposedly distinct bases for declining jurisdiction: (1) refusal to adjudicate concerning the "internal affairs" of a foreign corporation. See, e.g., *O'Hara v. Frenkil*, 155 Md. 189, 141 Atl. 528 (1928); (2) refusal to take jurisdiction when adjudication at the forum will place an unreasonable burden on interstate commerce. See e.g., *Atchison, T.& S.F. Ry. v. Wells*, 265 U.S. 101 (1924). See 1 Ehrenzweig, Conflict of Laws 133, 143-44 (1959).

⁷⁰ See *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 103, 120 N.E. 198 (1918): "The purpose must be, not reparation to one aggrieved, but vindication of the public justice."

if application of relevant foreign law will "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."⁷¹ Rarely, if ever, should this last reason be applicable to the law of a sister state.⁷² The forum, qua forum, however, has no interest in affecting the result on the merits by displacing logically applicable foreign law, and it should exert every effort to avoid doing so.⁷³ The so-called "procedural" category, now including many rules which have high potential for determining the outcome,⁷⁴ should be reserved for situations in which the difficulty of ascertaining and applying the foreign rule outweighs any small likelihood that the result may be changed by applying the forum's law.⁷⁵

An example of a forum's protection of the integrity of its procedures may be the refusals by state courts to permit suits under the "direct action" statutes of sister states.⁷⁶ The forum may feel that permitting the liability insurer to be named and joined as a defendant under such a statute is too likely to result in a perversion of justice. This may be naive in view of the known ubiquitousness of liability insurance. But

⁷¹ Id. at 111, 120 N.E. at 202.

⁷² See Goodrich, *Conflict of Laws* 21-22 (3d ed. 1949). But cf. *Gordon v. Parker*, 83 F. Supp. 40, 43 (D. Mass.), aff'd on other grounds, 178 F.2d 888 (1st Cir. 1949) (permitting action for alienation of affections though abolished by Pennsylvania, the marital domicile): "Pennsylvania was concerned with not having Pennsylvania courts hear this sordid type of controversy. . . . That is, Pennsylvania has spoken qua possible forum . . . but not qua state of matrimonial domicile."

⁷³ But see Comment, 61 *Colum. L. Rev.* 1497, 1503 (1961) (interest of forum in integrity of its system of administering justice permits use of its outcome-determinative rules of evidence).

⁷⁴ Statute of limitations: *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955); *Goodwin v. Townsend*, 197 F.2d 970 (3d Cir. 1952); *Nelson v. Eckert*, 231 Ark. 348, 329 S.W.2d 426 (1959); *Barrett v. Boston & Me. R.R.*, 178 A.2d 291 (N.H. 1962); *Conn. Valley Lumber Co. v. Me. Cent. R.R.*, 78 N.H. 553, 103 Atl. 263 (1918); *McDaniel v. Mulvihill*, 196 Tenn. 41, 263 S.W.2d 759 (1953). The problems created by holding statutes of limitation to be procedural have been alleviated somewhat by two devices: (1) "borrowing statutes" which make a foreign statute of limitations applicable to bar an action at the forum. See *Nolan v. Transocean Air Lines*, 276 F.2d 280 (2d Cir. 1960), remanded for reconsideration of another matter, 365 U.S. 293 (1961), former opinion adhered to, 290 F.2d 904 (2d Cir.), cert. denied, 368 U.S. 901 (1961); (2) the "specificity test" which treats certain statutes of limitations as substantive. See *Bengston v. Nesheim*, 259 F.2d 566 (9th Cir. 1958); *Maryland v. Eis Automotive Corp.*, 145 F. Supp. 444 (D. Com. 1956).

Burden of proof: *Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919). *Contra*, *O'Leary v. Ill. Terminal R.R.*, 299 S.W.2d 873 (Mo. 1957); cf. *Fitzpatrick v. Int'l Ry.*, 252 N.Y. 127, 169 N.E. 112 (1929) (forum's rule on burden of proof not used when applying foreign comparative negligence statute).

Miscellaneous: *Chasse v. Albert*, 147 Conn. 680, 166 A.2d 148 (1960) (*res ipsa*); *Leebove v. Rovin*, 363 Mich. 569, 111 N.W.2d 104 (1961) (whether sufficient evidence to go to jury).

⁷⁵ See Cook, "Substance and Procedure in the Conflict of Laws," 42 *Yale L.J.* 333, 344 (1933); cf. *Levinson v. Deupree*, 345 U.S. 648, 651-52 (1953).

⁷⁶ *Lieberthal v. Glens Falls Indem. Co.*, 316 Mich. 37, 24 N.W.2d 547 (1946); *McArthur v. Maryland Cas. Co.*, 184 Miss. 663, 186 So. 305 (1939); *Morton v. Maryland Cas. Co.*, 4 N.Y.2d 488, 151 N.E.2d 881, 176 N.Y.S.2d 329 (1958); *Penny v. Powell*, 347 S.W.2d 601 (Texas Sup. Ct. 1961). *Contra*, *Collins v. American Auto. Ins. Co.*, 230 F.2d 416 (2d Cir.), petition for cert. dismissed, 352 U.S. 802 (1956) (purporting to apply New York law now established to the contrary).

assuming such an attitude exists, should it be invoked to deny a forum to a local citizen who has been injured abroad in a jurisdiction having a direct action statute, when there is a foreign defendant insured by a foreign insurance company? The issue should be put to and faced by the court squarely, rather than in terms of whether the direct action statute is "procedural" or "substantive." Perhaps it might be put like this: the X statute affords this court an opportunity to provide a forum in this state for a resident of this state seeking to recover damages for personal injuries. That such a forum may be provided here without running afoul of any constitutional prohibitions is beyond debate.⁷⁷ Equally beyond debate is the fact that this court may deny such a forum if it wishes to. Before denial, however, this court should ask itself "what rational purpose would be served by sending our citizen elsewhere to bring his suit?"⁷⁸

If the forum has an interest other than as forum, if it has a rationally applicable rule of its own which conflicts with the rationally applicable rule of another jurisdiction, it should face up to the conflict, resolve it one way or another, and render a result on the merits. It should not elect the ostrich-like solution of closing its doors to the problem.⁷⁹

The domicile of the plaintiff has an interest in providing compensation for him. This will prevent him from becoming a public charge and help assure compensation for medical creditors who are likely to have attended the injured plaintiff at his domicile.⁸⁰ The plaintiff's domicile has no interest in insulating the defendant from liability. Failure to recognize this, resulted in a California court's denying a forum to a California citizen suing a Hawaiian defendant for damage caused in Hawaii by the defendant's child. Refusal was on the ground of substantial conflict between Hawaiian law holding a parent liable for torts of the child and California law denying such liability.⁸¹

It is emphasized that a check list of probable or usual interests, such

⁷⁷ See *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914); *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909).

⁷⁸ See Note, 74 *Harv. L. Rev.* 357, 379-80 (1960) (plaintiff's domicile has no interest in preventing direct action).

⁷⁹ But see the following examples of refusing a forum for suit against a local citizen: *Gaines v. Poindexter*, 155 F. Supp. 638 (W.D. La. 1957) (alienation of affections); *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939) (wife suing husband); *Koplik v. C.P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958) (wife suing husband); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936) (wife suing husband); *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23, cert. denied, 293 U.S. 597 (1934) (survival).

⁸⁰ See *Cheatham, Goodrich, Griswold, & Reese*, supra note 65. For a discussion of a state's "interest" in compensating an injured person who is not a citizen of the state see text accompanying notes 35-43 supra.

⁸¹ *Hudson v. Von Hamm*, 85 Cal. App. 323, 259 Pac. 374 (1st Dist. Ct. App. 1927); cf. *Le Forest v. Tolman*, 117 Mass. 109 (1875) (defendant's domicile applies law of plaintiff's domicile to absolve defendant from liability for dog bite).

as the foregoing, is not a suitable substitute for focusing on the specific rules in supposed conflict and analyzing these rules in terms of their underlying policies in an attempt to identify and eliminate spurious conflicts.

C. *Exceptional Situations*

This policy-centered analysis for avoiding spurious conflicts concerns itself only with conflicts policies. There may, at times, be other distinct policies at play in a given case which are weightier than the conflicts policies and which should produce a result different from that which would have been reached if only the conflicts policies had been considered. This is true, for example, when dealing with the multiple state torts of invasion of privacy⁸² and libel.⁸³ If the defendant has published the same damaging material in many jurisdictions, there is no good reason, so far as purely conflicts policies are concerned, why each jurisdiction should not be free to determine for itself the consequences of the harm caused within it, some granting recovery, some denying it, some applying liberal damages rules, some restricting damages. But to permit this when publication has been made in literally dozens of jurisdictions⁸⁴ would result in an unintelligible babble of rules if an attempt were made to try all of the resulting transitory causes of action in one suit, or in multiple litigation at much cost to the parties and harassment of the defendant. For these reasons, it may be desirable to select some one jurisdiction, such as the plaintiff's domicile, or, if the plaintiff has suffered most of his harm in some other jurisdiction, that jurisdiction,⁸⁵ to provide

⁸² *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958); *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C.), aff'd, 232 F.2d 369 (D.C. Cir. 1955), cert. denied, 352 U.S. 945 (1956); *Schumann v. Loew's Inc.*, 135 N.Y.S.2d 361 (Sup. Ct. N.Y. County 1954) (also libel).

⁸³ *Association for Preservation of Freedom of Choice v. Simon*, 299 F.2d 212 (2d Cir. 1962); *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir.), cert. denied, 334 U.S. 838 (1948); *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961); *Brewster v. Boston Herald-Traveler Corp.*, 188 F. Supp. 565 (D. Mass. 1960); *Dale Sys., Inc. v. Time, Inc.*, 116 F. Supp. 527 (D. Conn. 1953); *Dale Sys., Inc. v. General Teleradio, Inc.*, 105 F. Supp. 745 (S.D.N.Y. 1952); *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364 (D. Mass. 1940).

⁸⁴ See *Schumann v. Loew's Inc.*, supra note 82 (61 jurisdictions); *Bernstein v. Nat'l Broadcasting Co.*, supra note 82 (28 jurisdictions); *O'Reilly v. Curtis Publishing Co.*, supra note 83 (38 jurisdictions).

⁸⁵ See *Strickler v. Nat'l Broadcasting Co.*, supra note 82 (right of privacy—law of domicile); *Bernstein v. National Broadcasting Co.*, supra note 82 (right of privacy—law of domicile or where plaintiff has most of his contacts); *Palmisano v. News Syndicate Co.*, 130 F. Supp. 17 (S.D.N.Y. 1955) (libel—place of plaintiff's principal reputation); *Dale Sys., Inc. v. Time, Inc.*, supra note 83 (libel—law of domicile); *Stumberg*, "The Place of the Wrong' and the Conflict of Laws," 34 Wash. L. Rev. 388, 393 (1959) ("place where the plaintiff is likely to incur the most harm"). But cf. *Association for Preservation of Freedom of Choice v. Simon*, supra note 83 (libel—law of place of first publication); *Brewster v. Boston Herald-Traveler Corp.*, supra note 82 (libel—a flexible rule suitable to the facts); *Dale Sys., Inc. v. General Teleradio, Inc.*, supra note 83 (libel—law of place where there is a grouping of the dominant contacts).

the rules to govern liability for the damage done everywhere. This may be desirable for reasons of economy of judicial administration, when otherwise the result might be justly criticized for creating a spurious conflict. For instance, if the law of the plaintiff's domicile is selected, it may insulate the defendant from liability, failing to advance any substantive interest of the domicile, and at the same time conflict with the interests of other states who would hold the defendant liable for what he has there published. Granting all this, one should never lose sight of the possibility that such overriding policies of judicial economy may not exist in all cases of interstate publication. The defendant may have published in only two or three states, or the facts may be such that it is clear that a cause of action exists under the law of only one or a very few states.⁸⁶ If so, there is no rational purpose to be served in giving the defendant the benefit of a rule of the plaintiff's domicile which would relieve the defendant from liability existing under the laws of other states having an interest in discouraging such publications within their borders.

In the area of workmen's compensation there again is no choice-of-law problem in the classic sense of preventing forum-shopping and choosing the single most appropriate law to govern. In dispensing workmen's compensation, every state having sufficient contact with the employer-employee relationship to make it desirable that the employee be protected under its law and reasonable to require the employer to insure in the state should feel free to provide protection under its workmen's compensation law. The local administrative machinery required for enforcement of a state's compensation statute will preclude the confusion of claims under different laws being litigated in the same proceeding. Any subsequent award under the statute of another state will take account of the first award. The only conflicts problem in the workmen's compensation area is the articulating of the circumstances under which a forum does have sufficient connection with the employer-employee relationship to make it reasonable and desirable to apply its workmen's compensation statute to claims arising from that relationship.⁸⁷ These factors make workmen's compensation cases dangerously misleading bases upon which to build general conclusions about choice-of-law problems.⁸⁸

⁸⁶ See *Donahue v. Warner Bros.*, 194 F.2d 6 (10th Cir. 1952) (heirs' action for invasion of right of privacy existed, if at all, only under Utah law).

⁸⁷ For an attempt to state such circumstances see Weintraub, "Conflict of Laws," in *The Iowa Law of Workmen's Compensation* 137, 144-45 (1960).

⁸⁸ But see Leflar, *Conflict of Laws* 257 (1959); Currie, "The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws," 29 U. Chi. L. Rev. 258, 274 (1961).

D. *Applying the Known Rule*

One of the major difficulties with rigid, territorially oriented choice-of-law rules of the standard form, such as place of impact, is that such a rule, strictly followed, may lead to grave difficulties and inconveniences in the administration of justice. For example, suppose, as happened in *Walton v. Arabian Am. Oil Co.*,⁸⁹ an American citizen is injured by the servants of an American corporation and sues the corporation in an American court. The only difficulty is that the place of impact is Saudi Arabia and neither the plaintiff, nor apparently anyone else for that matter, knows the applicable Saudi-Arabian rule. What is the plaintiff to do? After all, the law that *must* be applied is that of the place of impact. The answer in *Walton* was a directed verdict for the defendant, despite the fact that the laws of the plaintiff's domicile and the defendant's place of incorporation were known and would have provided recovery. Surely there must have been a better way than this.⁹⁰

Such a better way is a correlate of the policy-centered analysis advocated above. Once a logically applicable rule, the underlying purposes of which will be advanced by applying to it the case at hand, is known to the forum, it is the rule to be applied—unless and until one of the parties who wishes to displace it can demonstrate that it conflicts with another logically applicable rule which, under all the circumstances, should be preferred over the first.⁹¹ Of course, the logically applicable rule that is known to the forum will usually be the forum's rule. It might even be argued that the forum's rule, as the one most familiar to local lawyers and judges, should be applied even though the forum has no interest in the litigation, until it is shown that an interested jurisdiction has a different rule. This is certainly a far more questionable procedure than applying the law of an interested forum. In any event, there should be no such rebuttable presumption in favor of the law of a neutral forum if the forum's rule is an anachronistic lag in the development of that state's law which would tend to concentrate rather than distribute losses; for example, a rule that actions for personal injury do not survive the death of the tortfeasor.

Actually, despite theoretical commitment to the place-of-impact rule,

⁸⁹ 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956).

⁹⁰ See also *Pando v. Jasper*, 133 Colo. 321, 295 P.2d 229 (1956) (error to instruct under guest statute of sister state which was not pleaded, although forum had similar statute).

⁹¹ See Cheatham & Reese, "Choice of the Applicable Law," 52 Colum. L. Rev. 959, 964 (1952); Currie, "On the Displacement of the Law of the Forum," 58 Colum. L. Rev. 964, 1003 (1958); Ehrenzweig, "The Lex Fori in the Conflict of Laws—Exception or Rule?" 32 Rocky Mt. L. Rev. 13, 14, 18 (1959). But see Childres, "Toward the Proper Law of the Tort," 40 Texas L. Rev. 336, 338 (1962): "[T]he call back to the *lex fori* as the basic rule is surely a retrograde step."

many courts have, either directly or through presumptions as to the nature of foreign law, applied the forum law in default of proof of the law at the place of impact.⁹²

E. *When the Interstate Nature of the Occurrence Changes Intrastate Results*

It is fundamental, of course, that in order for an interstate transaction to create a problem in the conflict of laws there must be some conflict in the laws of the contact states. If all contact states would reach identical results for identical reasons, if the occurrence had been intrastate in character, there is no rational basis upon which a different result can be reached because a state line has been crossed.⁹³ Despite the axiomatic quality of such a statement, the traditional, rigid, territorially oriented choice-of-law rules have, at times, under such circumstances, trapped courts into generating the most spurious conflicts of all.

This is precisely what happened in *Nelson v. Eckert*.⁹⁴ Arkansas citizens were riding in the same automobile in Texas when an accident killed the driver and all passengers. The administrators of the passengers sued the administrator of the driver in Arkansas more than two years after the mishap. If the accident had been an intrastate occurrence within either Arkansas or Texas, the action would have been barred because both states had two year statutes of limitations governing suits for wrongful death. Yet the court, using the traditional substantive-procedural dichotomy, held that the action was not barred. The Arkansas statute of limitations was substantive, being part of the Arkansas wrongful death act, and therefore did not apply if the impact was in another state. The Texas two year statute was not part of the Texas death act, was therefore procedural, and did not apply to an action brought in Arkansas.

⁹² *Estate of Gallagher v. Battle*, 209 Md. 592, 122 A.2d 93, cert. denied, 352 U.S. 894 (1956) (forum law applied when plaintiff gave no notice of his intention to rely on foreign law); *Craven v. Brighton Mills, Inc.*, 87 Ga. App. 126, 73 S.E.2d 248 (1952) (since foreign law neither pleaded nor proved, charge should have been under forum law); *Otey v. Midland Valley R.R.*, 108 Kan. 755, 197 Pac. 203 (1921) (forum law applicable until shown different rule at place of impact); *Selles v. Smith*, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958) (absent showing to contrary, presume sister state's common law same as forum's); *Cherwien v. Geiter*, 272 N.Y. 165, 5 N.E.2d 185 (1936) (same presumption); *Hopkins v. Amtorg Trading Corp.*, 265 App. Div. 278, 38 N.Y.S.2d 788 (1st Dep't 1942) (same presumption); *Velasquez v. Greyhound Lines, Inc.*, 12 Utah 2d 379, 366 P.2d 989 (1961) (forum law applied absent showing foreign law different); *Harper v. Hartford Acc. & Indem. Co.*, 14 Wis. 2d 500, 111 N.W.2d 480 (1961) (failure to plead and prove foreign law raises presumption that it is the same as the forum's); cf. *White v. Borders*, 104 Ga. App. 746, 123 S.E.2d 170 (1961) (common law of forum controls rather than common law of place of impact).

⁹³ See Cheatham, Goodrich, Griswold, & Reese, *supra* note 65, at 450 n.1; Harper, "Torts, Contracts, Property, Status, Characterization, and the Conflict of Laws," 59 Colum. L. Rev. 440, 444 n.14 (1959); M. Traynor, "Conflict of Laws: Professor Currie's Restrained and Enlightened Forum," 49 Calif. L. Rev. 845, 856 (1961).

⁹⁴ 231 Ark. 348, 329 S.W.2d 426 (1959).

The same thing nearly happened in *Waynick v. Chicago's Last Dep't Store*.⁹⁵ Plaintiffs had been injured in Michigan by a drunk who had been served liquor in Illinois. Suit was brought against the owner of the bar which had served the liquor. Both Michigan and Illinois had dram shop acts which, in a similar intrastate transaction, would have provided recovery. But the court held that neither statute was applicable. The Illinois act did not apply to injuries in Michigan and the Michigan act did not apply to liquor served in Illinois. The court was able to save the situation by the heroic device of finding liability under Michigan common law based on a violation of an Illinois criminal statute. In a similar situation, another federal court avoided the need for accomplishing by such an indirect method the only rational result. It dismissed any suggestion that the two similar dram shop acts created a conflict problem by noting that in view of the similarity it was "difficult to see how the harmony between different states which is the fundamental basis for the whole doctrine of conflict of laws could be adversely affected."⁹⁶

A similar, but distinct and less easily identified, spurious conflict arises when the two contact states would reach the same result in an intrastate transaction, but would reach this result for different reasons, at least one of which is applicable to the interstate transaction in issue. *Victor v. Sperry*⁹⁷ is an example. A California citizen was injured in Mexico while a passenger in an automobile being driven with the consent of its California owner. In California, the owner would have been liable under that State's owner's responsibility statute,⁹⁸ the driver having been negligent. Under Mexican law, the owner would have been subjected to absolute liability. The court held the owner not liable because the Mexican absolute liability rule was contrary to California public policy. The court never even mentioned California's owner's liability statute. Yet Mexico as place of impact and California as domicile both had an interest in compensating the plaintiff.

*Maryland Cas. Co. v. Jacek*⁹⁹ presents a slight variation on this theme. A New Jersey wife was injured in New York while a passenger in an automobile driven by her husband. The wife sued her husband in a

⁹⁵ 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960).

⁹⁶ *Zucker v. Vogt*, 200 F. Supp. 340, 343 (D. Conn. 1961). But cf. *Leebove v. Rovin*, 363 Mich. 569, 111 N.W.2d 104 (1961) (court engages in lengthy conflicts discussion while continually indicating in footnotes that there is no substantial difference between the laws of the two States involved).

⁹⁷ 163 Cal. App. 2d 518, 329 P.2d 728 (4th Dist. 1958).

⁹⁸ Cal. Vehicle Code § 17150. This assumes that the guest could meet the requirements of the California guest statute, not mentioned by the court. Cal. Vehicle Code § 17158.

⁹⁹ 156 F. Supp. 43 (D.N.J. 1957).

federal court sitting in New Jersey. There would have been no liability under New Jersey law because under that law a wife may not sue her husband in tort. Under New York law there was no such disability, but the husband's insurance policy would not be deemed to insure against liability to a spouse unless the policy expressly so provided. The husband's policy contained no such provision. Despite all this, there was a summary judgment against the insurer when it sought a declaratory judgment determining its rights and duties under the policy. The New York insurance statute¹⁰⁰ was held inapplicable to a policy issued in New Jersey.¹⁰¹

It is possible for an intrastate result to be changed rationally by the crossing of a state line. This would occur when the two contact states would reach the same result, but for different reasons, neither of which is applicable to the interstate transaction. For example, suppose a wife, whose marital domicile is in State F, was injured by her husband's negligent driving in State X. The wife brings suit against her husband in F. X has a rule preventing wives from suing their husbands in tort, but this rule is not rationally applicable when X is neither marital domicile nor forum. The cause of the collision was the husband's violation of an X rule of the road, although he would have been driving properly by F rules. The F rules of the road, however, are not applicable in X. Though there would have been no liability if the occurrence had been an intrastate one within either F or X, there should now be liability.¹⁰²

II. PROVIDE A RATIONAL BASIS FOR RESOLVING TRUE CONFLICTS

If, upon analysis of the policies underlying the different laws of two jurisdictions, it is decided that there is a true conflict, that each has a legitimate interest in having its own rule applied, there may still be a rational basis for resolving the conflict. Such a rational solution will be far more satisfactory than giving up the moment a true conflict appears and applying the law of the forum. It is emphasized that speaking of seeking a rational solution to a true conflict is not the same as suggesting that the interests of the two jurisdictions be "weighed." It is suggested, however, that in viewing the entire matter at issue with circumspection and common sense, a rational solution to a true conflict, one which should be satisfactory to either contact state, will very often suggest

¹⁰⁰ N.Y. Ins. Law § 167(3).

¹⁰¹ *Koplik v. C.P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958) has established that the New Jersey incapacity rule would be applied to a New Jersey wife injured in New York.

¹⁰² See Harper, "Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays," 56 Yale L.J. 1155, 1162-63 (1947) (suggesting another situation in which there might be an "interstate tort" although no "intrastate tort").

itself. Although such a process must of necessity be flexible and although circumspection and common sense cannot be blueprinted, it is the purpose of this section to suggest some significant criteria for the rational solution of true torts conflict problems.

A. *The General Direction for Resolution of a True Torts Conflict*

It is desirable that choice-of-law rules be formulated with careful attention to the substantive policies in the area of law in which the choice-of-law rules are to operate. The choice-of-law rules should, so far as possible, further such underlying policies, and advance rather than retard clearly discernible trends in each area of the law.¹⁰³ Moreover, such a trend is likely to be shared generally by most states, although individual rules of law may or may not manifest the trend. Thus a choice-of-law rule keyed to such a trend will be focusing on a broad common policy as a basis for reconciling a conflict of two narrow rules of law.

As is readily apparent from a perusal of the cases cited in this article, the vast bulk of torts conflicts cases concern automobile, or, in this air age, airplane accidents, in which recovery is sought on the basis of negligence on the part of the owner or driver of such a vehicle. In this field of negligence or accident law, the trend has been markedly toward distribution rather than concentration of losses, through the device of liability insurance.¹⁰⁴ Although the area of absolute liability is expanding in tort law,¹⁰⁵ most of accident law today is still based nominally on the negligence-fault concept. Cases which get to the jury, however, usually result in plaintiffs' verdicts and the substantive rules have shown a continual development in such a manner as to keep fewer and fewer cases from the jury.¹⁰⁶

It is beyond the scope of this article to appraise in detail the moral or social desirability of such a development. To assume, however, that it is the "negligent" driver or owner who pays the judgment in an accident case out of his own pocket, is to live in a never-never land. The issue is

¹⁰³ See Totterman, "Functional Bases of the Rule *Locus Regit Actum* in English Conflict Rules," 2 *Int'l & Comp. L.Q.* 27, 33 (1953).

¹⁰⁴ See Cheatham, Goodrich, Griswold, & Reese, *supra* note 65; Ehrenzweig, *Negligence Without Fault* 28 (1951); Green, *Judge and Jury* 241 (1930); 1 Harper & James, *Torts* xlv; vol. 2, 784, 1194, 1345 [hereinafter cited as Harper & James]; Ehrenzweig, "Guest Statutes in the Conflict of Laws," 69 *Yale L.J.* 595, 598 (1960); Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law," 65 *Yale L.J.* 1087, 1121 (1956); R. Keeton, "Creative Continuity in the Law of Torts," 75 *Harv. L. Rev.* 463, 466 (1962).

¹⁰⁵ 1 Harper & James xlv.

¹⁰⁶ 1 Harper & James xliii-iv, vol. 2, 895, 1371; Ehrenzweig, "Full Aid" Insurance for the Traffic Victim 3-4 (1954). But see Green, *Traffic Victims: Tort Law and Insurance* 101 (1958).

not whether the defendant should pay but whether the loss should be distributed or remain concentrated and the inexorable trend has been in favor of distribution. It is submitted that this is reasonable and just and that it is from such a trend that conflicts analysis, certainly in the negligence area and probably in other tort areas as well, should map its general direction. Whether in fact this tempting basis for resolution of a true conflict should be utilized in an individual case will depend upon factors in the particular fact situation pointing to or away from liability and distribution of the loss. Examples of such factors are indicated in the four following sections.

B. *Unfair Surprise*

One of the strongest factors weighing against resolution of a conflict in favor of liability would be unfair surprise to the defendant. There are two levels of argument available here. On one level, surprise to the defendant should be an element to be considered and perhaps, if sufficiently strong, be controlling in the resolution of a conflict between a rule which would confer liability and one which would deny liability. On the second level, there would be surprise to the defendant so extreme and so outrageous, if liability were found, that there would be a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

On the first level, surprise as an element to be weighed in resolving a true conflict, there are several points which should be kept in mind. If, as in most tort conflict cases, recovery is sought for negligence, it is very unlikely that any reasonable surprise argument can be made.¹⁰⁷ The defendant did not shape his conduct to take account of rules of liability for negligence or of measure of damages. The ubiquitousness of liability insurance must also be taken account of in any realistic discussion of surprise. Insurance may either increase or decrease the element of unfair surprise. Although a negligent defendant cannot reasonably argue that he would have been more careful if he had known of the eventual resolution of a conflict in favor of liability, it may be that he can reasonably argue that he did not foresee any liability for his conduct and therefore failed to take out liability insurance.¹⁰⁸ If so, then this

¹⁰⁷ See J.H.C. Morris, "The Proper Law of a Tort," 64 Harv. L. Rev. 381, 395 (1951); cf. *Fussner v. Andert*, 113 N.W.2d 355 (Minn. 1961) (refusal to make decision changing rule of damages for wrongful death of child prospective, defendant's conduct not having been controlled by existing law).

¹⁰⁸ This is the basis upon which recent decisions ending long-standing immunity from liability of charities and governments have been made prospective instead of in the traditional retroactive form. E.g., *Molitor v. Kaneland Community Unit Dist. #302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960) (immunity of school district);

should certainly be considered by the court. It is more likely, however, that insurance will weaken any argument based on surprise to the nominal defendant. If the defendant is insured, the one who will pay is the liability insurer. It would be more in accord with the facts to speak in terms of surprise to the insurance company. If this is done, then the surprise argument may all but disappear. Insurance actuaries do not base rates upon individual cases, but upon great numbers of cases.¹⁰⁹ That a bizarre event will occur in a given case is unlikely, but that it will not occur in a hundred thousand cases is equally unlikely.

As for a due process argument based on surprise, there is much confusion and not a little nonsense stemming largely from Learned Hand's opinion in *Scheer v. Rockne Motors Corp.*¹¹⁰ In this case a New York corporation owned an automobile. In New York, it entrusted the possession of the vehicle to one of its employees. The employee drove into Ontario where he crashed injuring the plaintiff, a passenger. The passenger sued the owner. Both New York and Ontario had statutes making the owner responsible for the negligence of someone to whom he had entrusted his automobile. In New York, however, the owner was relieved of responsibility if the driver violated geographical restrictions which the owner had imposed on the authority to drive. Under Ontario law, once having entrusted possession of the automobile to the driver, the owner would not be relieved of liability by the driver's violation of restrictions on his authority. The trial judge instructed the jury that if the defendant had given possession of the automobile to the driver, it was liable for his negligence. Judge Hand reversed the resulting verdict and judgment for the plaintiff, ruling that the Ontario statute "could not"¹¹¹ be applied to the defendant unless it were shown that the driver was not exceeding his authority in entering Ontario.¹¹²

Judge Hand relied for his conclusion largely upon *Young v. Masci*.¹¹³

Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (immunity of municipal corporation); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Kojis v. Doctors Hosp.*, 12 Wis 2d 367, 107 N.W.2d 292 (1961).

¹⁰⁹ See C. R. Morris, "Enterprise Liability and the Actuarial Process—The Insignificance of Foresight," 70 Yale L.J. 554, 560-76 (1961). But see Ehrenzweig, "Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement," 23 U. Chi. L. Rev. 474, 477-78 (1956).

¹¹⁰ 68 F.2d 942 (2d Cir. 1934).

¹¹¹ *Id.* at 944.

¹¹² See also *O'Connor v. Wray*, [1930] Can. Sup. Ct. 231, [1930] 2 D.L.R. 899 (refuses to apply Ontario statute to Quebec owner who was not himself in Ontario although he gave the driver of his automobile authority to drive there). But cf. *Fischl v. Chubb*, 30 Pa. D. & C. 40 (Montgomery County Ct. 1937) (applies New Jersey absolute liability statute to Pennsylvania dog owner whose dog bit the plaintiff in New Jersey).

It is not clear from the opinion whether Judge Hand would require express or only implied authority. See *Cavers*, "The Two 'Local Law' Theories," 63 Harv. L. Rev. 822, 827-28 (1950).

¹¹³ 289 U.S. 253 (1933).

There a New Jersey owner had loaned his automobile in New Jersey, without restriction on its use, to a driver who took it into New York. The plaintiff, injured by the driver's negligence in New York, sued the owner in New Jersey. The New Jersey courts compensated the plaintiff, applying the New York owner's responsibility statute. The Supreme Court affirmed, rejecting due process, equal protection, and freedom of contract arguments.

Judge Hand's opinion in *Scheer* led the Minnesota Supreme Court, in an otherwise excellent opinion, to suggest in a dictum that, even if Wisconsin and Minnesota had similar dram shop acts, a Minnesota bartender who served liquor in Minnesota to a drunk who caused damage in Wisconsin could not be subjected to liability under the Wisconsin statute absent a finding that he had "consented to be bound by Wisconsin law."¹¹⁴

First of all, *Young v. Masci* did not hold that the owner's authorizing the driver to drive into the state of impact was a constitutional condition precedent to applying to the owner the owner's responsibility statute of the state of impact. The Court very carefully pointed out that all it was deciding was that, at least in the situation where authority was given, there was no constitutional problem. It was not drawing a line for future decisions.¹¹⁵ Secondly, the kind of outrageous surprise necessary for a tenable due process argument in choice-of-law problems can occur only under two very rare circumstances. One would be the situation in which the defendant, at the time he acted, could not reasonably have foreseen that his conduct might create a contact with another state which would give that state a legitimate interest in applying its rule to his conduct—a rule different from that of the place of acting.¹¹⁶ *Siegmann v. Meyer*¹¹⁷ might be an example of this. In *Siegmann*, another Hand opinion, it was held that a New York husband who had never been in Florida could not be held liable under Florida law for his wife's tort there when there would be no such liability under New York law.¹¹⁸ Another situation which would come close to the due process line, if not cross it, might occur between two states which had dram shop acts. Suppose State X had an act which made the bartender liable only if he sold

¹¹⁴ *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 380, 82 N.W.2d 365, 367-68 (1957).

¹¹⁵ 289 U.S. 253, 260.

¹¹⁶ See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *Goodrich, Conflict of Laws* 279 (3d ed. 1949); *Leflar, Conflict of Laws* 212 (1959); *Katzenbach*, supra note 104, at 1122; *Rheinstein*, "The Place of Wrong; A Study in the Method of Case Law," 19 *Tul. L. Rev.* 4, 31 (1944); *Weintraub*, "Due Process and Full Faith and Credit Limitations on a State's Choice of Law," 44 *Iowa L. Rev.* 449, 457-60 (1959); Note, 1958 U. Ill. L.F. 287, 295.

¹¹⁷ 100 F.2d 367 (2d Cir. 1938).

¹¹⁸ But cf. *Watkins v. Cupit*, 130 So. 2d 720 (La. Ct. App. 1961) (Mississippi father held liable for his son's tort under Louisiana law).

liquor to someone obviously intoxicated and that State Y imposed liability if the liquor sold contributed in any degree to the intoxication which caused the damage. There would be a strong constitutional argument against holding a bartender liable under Y's statute if he had sold one beer to a sober man in X and the man had gone elsewhere to get drunk, finally causing damage in Y. There is no vestige of a constitutional argument, however, if both states would impose liability under the same circumstances.

A second type of due process problem would be created if a defendant had been required by X law to do a certain act in X and it was sought to hold him liable under Y law for harm this act caused in Y.¹¹⁹

C. *Anachronism*

Very often a true conflict will occur between a rule which is in step with general modern trends in the area, and a rule which is clearly an anachronistic lag in the development of the law of its jurisdiction. In such circumstances, resolution should be in favor of the rule which is more representative of current developments.¹²⁰ Usually an anachronistic rule will be one preventing liability. An example would be a state's failure to provide for actions to survive the death of a tortfeasor. Sometimes, however, there can be a current movement away from liability. For example, the abolition of a cause of action for alienation of affections. Justification for resolution of the conflict against the application of the out-dated rule is particularly strong if that rule has in fact been changed since the date of the occurrence in issue.¹²¹

This is not to suggest that a pseudo-conflicts analysis should be used to avoid a poor local rule when in fact there is no true conflict, when no other state has a legitimate interest in having its own more modern rule applied. The temptation to use the conflicts device for this purpose may be strong, but the only intellectually honest solution is a direct changing of the poor local rule.

D. *Unusable Foreign Procedure*

Suppose the plaintiff, domiciled in F, is injured in X by the defendant, there treated for his injuries, and, returning to F, there brings suit against the defendant. Both F and X have rules making the defendant liable for

¹¹⁹ Stumberg, *Principles of Conflict of Laws* 202 (2d ed. 1951); Rheinstein *supra* note 116.

¹²⁰ See Cheatham & Reese, *supra* note 91, at 980; Katzenbach, *supra* note 104, at 1125-26; Yntema, "The Objectives of Private International Law," 35 *Can. B. Rev.* 721, 738 (1957).

¹²¹ But see *Dalton v. McLean*, 137 Me. 4, 14 A.2d 13 (1940) (refuses to apply expressly retroactive survival statute of place of impact); *Allen v. Nessler*, 247 Minn. 230, 76 N.W.2d 793 (1956) (refuses to apply survival statute of place of impact passed since the occurrence).

his conduct and, under these circumstances, both have a legitimate interest in providing recovery for the plaintiff. X's procedure for awarding damages is, however, so unlike that followed in F, that an F court simply cannot award the same damages as an X court would. Rigid application of the place of impact rule will require the F court to dismiss the plaintiff's action and remit him to whatever recovery he might have in X.¹²² Under such circumstances, however, it would be better to resolve the conflict in rules of damages in favor of F's rule. All contact jurisdictions agree that the plaintiff should be compensated, disagreeing only on the method of compensation. F should choose to apply its own rationally applicable rule rather than send the plaintiff to sue elsewhere—an act which may now be impractical or impossible.

E. *The Foreign Choice-of-Law Rule*

At times an apparent conflict may be resolved by reference to a choice-of-law rule of one of the contact states.¹²³ Suppose, for example, a husband and wife, domiciled in X, are present in Y when the wife is injured by the husband's negligence. Under X domestic law, a wife may sue her husband for negligence. Y, a community property state, does not permit such a suit. Is there a real conflict? Does it make any difference where the action is brought? Without more, it is difficult to answer these questions. Y certainly has no interest in preserving the marital harmony of X spouses, if this is the reason for its rule. But if Y's purpose is to prevent collusive suits, Y might legitimately apply its own rule to a suit brought in Y. The conflict dissolves, however, once we know that the reason for Y's domestic interdicting of wife-husband suits is that the action belongs to the community, and Y will not permit the husband to profit from his own wrong; that Y courts do not consider a wife's cause of action to be community property if it arises in Y between spouses domiciled in noncommunity property states;¹²⁴ that

¹²² See *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904); *Carter v. Tillery*, 257 S.W.2d 465 (Texas Civ. App. 1953).

¹²³ See *Hancock, Torts in the Conflict of Laws 179-81* (1942); *Hancock, "Three Approaches to the Choice-of-Law Problem: The Classificatory, the Functional and the Result-Selective,"* in *XXth Century Comparative and Conflicts Law 365, 372 n.1.* (1961); *Katzenbach, supra note 104, at 1118.*

¹²⁴ *Bruton v. Villoria*, 138 Cal. App. 2d 642, 292 P.2d 638 (1956); cf. *Choate v. Ransom*, 74 Nev. 100, 323 P.2d 700 (1958) (community property rule of marital domicile bars suit at place of impact). But cf. *Texas & Pac. Ry. v. Humble*, 181 U.S. 57 (1901) (law of place of impact and former marital domicile applied to determine whether wife injured while leaving to join husband at new marital domicile must join husband as manager of community); *Redfern v. Collins*, 113 F. Supp. 892 (E.D. Tex. 1953) (law of place of impact rather than marital domicile determines whether husband necessary party to wife's suit as manager of the community); *Traglio v. Harris*, 104 F.2d 439 (9th Cir.), petition for cert. dismissed, 308 U.S. 629 (1939) (law of place of impact rather than marital domicile determines whether husband has community interest in wife's cause); *Astor Elec. Serv., Inc. v.*

Y, rather than fearing collusion, permits such spouses to sue one another in Y courts.

F. *How This Method Differs From a "Proper Law" Approach*

Talking of choice of law for torts in terms of applying the "proper law"¹²⁵ or the law of the place where there is a "grouping of contacts"¹²⁶ may mean many things. It may, for example, be a way of suggesting an elimination of spurious conflicts and a rational resolution of true conflicts in terms of the policies underlying the putatively conflicting domestic rules. If so, then the only disagreements the author would have would concern matters of terminology. If, however, such terms as "proper law" and "grouping of contacts" suggest a counting rather than an evaluation of contacts, such a method should not be followed. A dozen contacts with an occurrence may fail to give a state any interest in having its rule applied to determine the consequences of that occurrence. One contact may make the policies underlying a state's rule directly and rationally applicable to the event which caused that contact. Once each of two states has a contact with an occurrence such that each has an interest in having a different rule applied to determine controversies flowing from that occurrence, there is a real conflict which should be resolved by the method suggested above, and not by simply counting contacts.¹²⁷

G. *Illustrative Resolution of a True Conflict*

*Kilberg v. Northeast Airlines, Inc.*¹²⁸ will provide conflicts scholars with material for discussion for many years to come. A New York domiciliary boarded the defendant's airplane in New York, bound for Boston. Defendant airline was incorporated in Massachusetts and transacted much business in both Massachusetts and New York. The airplane crashed in Massachusetts killing the New York passenger. His administrator brought suit in New York. The administrator sought to avoid the Massachusetts death act's \$15,000 limit on recovery by couching his action in contract terms, the theory being that the defendant had broken its implied promise to carry the decedent safely.¹²⁹ If this were a contract and not a tort problem, the plaintiff believed that New York

Cabrera, 62 So. 2d 759 (Fla. 1952) (same); *Maag v. Voykovich*, 46 Wash. 2d 302, 280 P.2d 680 (1955) (law of place of commission determines whether husband's wrong is a community obligation).

¹²⁵ See *Childres*, supra note 91, at 339; *J.H.C. Morris*, supra note 107, at 883 (1951).

¹²⁶ See *Dale Sys., Inc. v. General Teleradio, Inc.*, 105 F. Supp. 745 (S.D.N.Y. 1952).

¹²⁷ See *Katzenbach*, supra note 104, at 1127.

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

¹²⁹ See *Dyke v. Erie Ry.*, 45 N.Y. 113 (1871) (in recovery for injuries to New York citizen, damages limit of place of impact does not apply when contract of carriage made and completed in New York).

law would govern as either place of making, or, under the New York view, the "center of gravity"¹³⁰ of the transaction. The administrator's hopes were momentarily defeated when the appellate division ordered his contract count dismissed for insufficiency. The Court of Appeals agreed that the contract count could not stand. The court reasoned that a contract action for wrongful death is unknown at common law and that therefore the suit must be brought under the wrongful death statute of the place of the wrong. Then, however, in a considered dictum, the majority declared that the \$15,000 limit in the Massachusetts statute was inapplicable. Imposition of such a limitation was contrary to New York public policy. Moreover, the question of whether or not there should be a limit on damages was "procedural" to be controlled by the law of the forum.

Is the opinion an unfortunate step backward to the narrowly provincial thinking that relied upon the epithets of "procedural" and "public policy" to avoid applying a rule different from that of the forum? The reasoning of the opinion leaves much to be desired,¹³¹ but perhaps the result is defensible and even desirable. New York certainly had an interest in awarding adequate damages for the death of a New York citizen.¹³² If damages were inadequate, the ones to suffer would be the surviving dependents of the decedent and perhaps, ultimately, the taxpayers of New York, if these dependents became public charges. Massachusetts, because the wrongful death recovery is not subject to the claims of creditors and because the decedent was not domiciled there, had no interest in setting the damages, except the vestigial one of influencing the conduct of a negligent tortfeasor. Massachusetts, as place of incorporation of the defendant and the center of its business activities did have an interest in shielding the defendant from what it might consider excessive liability.¹³³ This would not only help the defendant, but encourage other businesses to establish and expand operations in Massachusetts. To this extent, *Kilberg* presented a real conflict.

Was New York's discarding of the Massachusetts damages limit a proper resolution of this conflict? No tenable argument of unfair surprise can be made on behalf of the defendant.¹³⁴ The fatal flight originated in New York where the defendant did extensive business. The conduct of

¹³⁰ See *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

¹³¹ See Currie, "Justice Traynor and the Conflict of Laws," 13 *Stan. L. Rev.* 719, 720 n.6 (1961).

¹³² See Comment, 61 *Colum. L. Rev.* 1497, 1506-07 (1961).

¹³³ See Currie & Schreter, "Unconstitutional Discrimination in the Conflict of Laws: Equal Protection," 23 *U. Chi. L. Rev.* 1, 47 (1960); Note, 74 *Harv. L. Rev.* 1652, 1654 (1961).

¹³⁴ See Comment, 61 *Colum. L. Rev.* 1497, 1510 (1961).

the defendant was not shaped in any way by the damages rules of New York or Massachusetts. Nor would the rejection of the limitation on damages in this case be likely to upset the actuarial practices of defendant's insurer or of defendant as self-insurer. Application of the limitation would have, to the extent actual damages exceeded the low statutory ceiling, resulted in concentration of the loss on the estate and surviving dependents of the decedent. Rejection of the limitation permitted distribution of the insurable risk. It is true that the decedent himself could have distributed the risk of financial harm from his injury or death by taking out accident and life insurance. The cost of shifting or distributing a risk created by an industry should, however, be borne in the first instance by that industry as a cost of doing business. The *Kilberg* result was socially desirable and in keeping with the inexorable trend of the law of torts toward distribution rather than concentration of losses.¹³⁵

Can it be that such a desirable result is precluded by the full faith and credit clause of the United States Constitution?¹³⁶ That it is so precluded was suggested by the concurring opinion in *Kilberg*,¹³⁷ citing *Hughes v. Fetter*.¹³⁸ The Court of Appeals of the Second Circuit has now wrestled with this constitutional problem twice, in an opinion by a three-judge panel and again in a rehearing en banc. The three-judge panel, in *Pearson v. Northeast Airlines*,¹³⁹ a case arising from the same crash involved in *Kilberg*, held, two to one, that full faith and credit to the Massachusetts death act prevents a federal court sitting in New York from following the *Kilberg* dictum. Then, after a rehearing en banc, the court, six to three, rejected both due process and full faith and credit objections to refusal to apply the damage limitation of the Massachusetts statute.¹⁴⁰

Although a detailed tracing of the complex development of due process and full faith and credit limitations on a state's choice of law is beyond the scope of this article,¹⁴¹ an appraisal of the full faith and credit ob-

¹³⁵ On the issue of application of the place of impact's limitation, contra, *Maynard v. Eastern Air Lines, Inc.*, 178 F.2d 139 (2d Cir. 1949); cf. *Zirkelbach v. Decatur Cartage Co.*, 119 F. Supp. 753 (N.D. Ind. 1954) (damages limitation of decedent's domicile does not apply when impact elsewhere); *Davenport v. Webb*, 15 App. Div. 2d 42, 222 N.Y.S.2d 566 (1st Dep't 1961), aff'd 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962) (*Kilberg* not applicable to interest on damages).

¹³⁶ U.S. Const. art. IV, § 1.

¹³⁷ 9 N.Y.2d 34, 51, 172 N.E.2d 526, 535, 211 N.Y.S.2d 133, 146 (1961).

¹³⁸ 341 U.S. 609 (1951).

¹³⁹ 307 F.2d 131 (2d Cir. 1962).

¹⁴⁰ 309 F.2d 553 (2d Cir. 1962). The court also held that damages were to be measured by New York's Lord Campbell's type statute and not by degree of culpability as provided in the Massachusetts act.

¹⁴¹ See Weintraub, *supra* note 116.

jections raised in Judge Swan's majority opinion for the three-judge panel, and in Judge Friendly's dissenting en banc opinion, is called for. Judge Swan's majority opinion rests heavily upon *Hughes v. Fetter*¹⁴² which held it a violation of the full faith and credit requirement for Wisconsin to refuse to provide a forum for a wrongful death action involving Wisconsin parties and brought under the Illinois death act. The reasoning in *Hughes* was that Wisconsin had no policy against wrongful death actions since Wisconsin itself had a wrongful death statute. The full faith and credit standard articulated in *Hughes* and quoted in *Pearson* consists of weighing the need for a nationally uniform result under the Illinois statute against the interest of Wisconsin in denying a forum. Wisconsin, in the eyes of the majority in *Hughes*, had no legitimate forum-closing interest and therefore "the strong unifying principle embodied in the Full Faith and Credit Clause"¹⁴³ prevailed. It is submitted that in the context of *Kilberg* and *Pearson*, New York's substantial interests are not outweighed by a need for a nationally uniform result under the damage limitation provision of the Massachusetts statute. Moreover, in *Hughes* itself there is a strong indication that if Wisconsin had elected to apply its own death act instead of closing its forum to a suit under the Illinois act, there would have been no constitutional objection:

The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted."¹⁴⁴

Judge Friendly's dissent is quite another matter. He concedes that, on the facts in *Pearson*, New York could apply its own wrongful death act without violating the requirements of full faith and credit. But New York cannot, he says, do what the court in *Kilberg* did—utilize the Massachusetts statute as the basis for the cause of action and then refuse to apply a damage limitation which is a key provision of that very Massachusetts statute.

The increasing scope of statutory liabilities makes it particularly vital that lawmakers of one state should know that once a transitory right has been created by them, it will receive the uniform enforcement from other states which the Full Faith and Credit Clause contemplated . . . and that they should not be obliged to speculate that other states may take what is liked and reject what is disliked—a prospect that might well discourage or prevent enactments otherwise deemed desirable.¹⁴⁵

¹⁴² 341 U.S. 609 (1951).

¹⁴³ *Id.* at 612.

¹⁴⁴ *Id.* at 612 n.10.

¹⁴⁵ *Supra* note 140, at 566.

In view of the national-versus-state-interest weighing standard which is the essence of full faith and credit, it may be doubted whether, if New York could have substituted its law for that of Massachusetts in toto, there is any greater objection to New York's applying Massachusetts law generally and substituting New York law only on those issues where New York's interest and policies are strongest and most opposed to those of Massachusetts. Even conceding Judge Friendly's full faith and credit objections to *Kilberg*, however, it should be noted that those objections are not addressed to resolution of the conflict of laws in favor of New York law, as suggested herein. Judge Friendly instead objects to the same reasoning as was adversely criticized above in discussing *Kilberg*. Any disagreement on this point is simply over whether these objections are of constitutional dignity.

H. *How a Policy-Centered Approach Helps Avoid the Tyranny of Characterization*

The *Kilberg* case epitomizes the import role of characterization in the traditional, rigid, territorially oriented method for choice of law. If we have one choice-of-law rule for "torts" problems and a different one for "contracts" problems,¹⁴⁶ the result may well turn upon the label affixed to the case in the first step of analysis, or in subsequent steps when defining contact words in the choice-of-law rule or in deciding what

¹⁴⁶ See *Bittner v. Little*, 270 F.2d 286 (3d Cir. 1959) (effect of release of concurrent tortfeasor); *Landon v. United States*, 197 F.2d 128 (2d Cir. 1952) (whether damages under Federal Tort Claims Act governed by collateral source rule of place of impact or place of performance of employment contract); *Maynard v. Eastern Air Lines, Inc.*, 178 F.2d 139 (2d Cir. 1949) (limitation on wrongful death recovery); *Southwestern Greyhound Lines, Inc. v. Crown Coach Co.*, 178 F.2d 628 (8th Cir. 1949) (contribution); *Maryland Cas. Co. v. Jacek*, 156 F. Supp. 43 (D.N.J. 1957) (liability of insurer); *Preine v. Freeman*, 112 F. Supp. 257 (E.D. Va. 1953) (release of joint tortfeasors); *Williamson v. Massachusetts Bonding & Ins. Co.*, 142 Conn. 573, 116 A.2d 169 (1955) (liability of insurer); *Pittsburg, C., C. & S.L. Ry. v. Grom*, 142 Ky. 51, 133 S.W. 977 (1911) (duty of carrier); *Daily v. Somberg*, 28 N.J. 372, 146 A.2d 676 (1958) (release of successive tortfeasors); *Dyke v. Erie Ry.*, 45 N.Y. 113 (1871) (carrier's duty to passenger); *De Bono v. Bittner*, 13 Misc. 2d 333, 178 N.Y.S.2d 419 (Sup. Ct. N.Y. County 1958), aff'd mem., 10 App. Div. 2d 556, 196 N.Y.S.2d 595 (1st Dep't 1960) (release of concurrent tortfeasor); *Heinemann v. Jewish Agricultural Soc'y*, 178 Misc. 897, 37 N.Y.S.2d 354 (Sup. Ct. Chautauqua 1942), aff'd mem., 266 App. Div. 907, 43 N.Y.S.2d 746, motion for leave to appeal denied, 266 App. Div. 941, 46 N.Y.S.2d 219 (4th Dep't), motion for leave to appeal granted, 291 N.Y. 828, 51 N.E.2d 698 (1943) (duty of charity); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368 (1951) (contribution); *Goldstein v. Gilbert*, 125 W. Va. 250, 23 S.E.2d 606 (1942) (release of joint tortfeasor); *Wojciuk v. U.S. Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961) (warranty issues governed by different law than negligence issues); *Leflar*, "Conflict of Laws," in 1961 Ann. Survey Am. L. 29, 41-48 (1962) ("Contracts and Torts" a single topic); *Shuman & Prevezer*, "Torts in English and American Conflict of Laws: The Role of The Forum," 56 Mich. L. Rev. 1067, 1117 (1958) (greater damages may be reason for electing tort rather than contract theory); see also *Lister v. McAnulty*, [1944] Can. Sup. Ct. 317, [1944] 3 D.L.R. 673 (damages for loss of consortium a matter of "status" to be governed by law of marital domicile); *Harper*, "Tort Cases in the Conflict of Laws," 33 Can. B. Rev. 1155, 1165 (1955) (conversion—situs of goods or place of wrong).

is "procedural" and what "substantive." It is true that the possibility of changing the result by changing the label has introduced a certain flexibility into the traditional system and has at times permitted a perceptive court to avoid what seemed to be an unwise requirement of that system. It would be better, however, to reach such just results rationally and consistently rather than haphazardly and by a seemingly arbitrary switching of labels.

In the first step of the method here suggested, identifying and eliminating spurious conflicts, such labels are largely irrelevant. The focus is directly on the two rules in apparent conflict and their underlying policies. In the second step, a rational resolution of a true conflict primarily by attention to the policies underlying the substantive area involved, it is true that characterization problems may again appear in defining that substantive area. It is far less likely, however, that such general and pervasive policies will point to different results than that the narrow domestic rules of two states on a particular issue will do so.

I. *A Choice-of-Law Rule Suggested by These Concepts*

Insight into the nature of the problems to be solved is of far greater significance in reaching sensible solutions than is the method of articulating a particular rule for solution. Nevertheless, the statement of a rule to be applied is certainly important. The following rule is suggested as a shorthand statement of all that has been said above: An actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor.¹⁴⁷

III. IF THERE IS NO RATIONAL BASIS FOR PREFERRED ONE CONFLICTING POLICY OVER THE OTHER, WEIGH THE DESIRABILITY OF GIVING ABSOLUTE PREFERENCE TO THE FORUM POLICY AGAINST THE DESIRABILITY OF INSULATING THE RESULT FROM THE SELECTION OF THE FORUM

If no rational basis appears for resolving a true conflict, the forum rule should still not be applied as a matter of course. Although the forum has a rationally applicable rule, although this rule conflicts with

¹⁴⁷ Cf. Cook, *The Logical and Legal Bases of the Conflict of Laws* 345 (1949) (whichever rule is most favorable to the plaintiff); Ehrenzweig, "The Place of Acting in Intentional Multistate Torts: Laws and Reason Versus the Restatement," 36 *Minn. L. Rev.* 1, 5 (1951) (liable for intentional tort if liable under either law of place of conduct or of place of harm); Kuratowski, "Torts in Private International Law," 1 *Int'l L.Q.* 172, 182 (1947) (discusses German doctrine permitting the plaintiff to select the law of any country with which the occurrence is connected); RHEINSTEIN, *supra* note 116, at 30 (allow plaintiff to shop for most favorable forum).

a rationally applicable rule of another state, and although the forum is unable to resolve this conflict by reference to the general policies and trends of the law of torts, the forum may be able to find a solution suggested by a general policy of the conflict of laws itself. This policy is the insulation of the result from the selection of the forum. Depending upon the strength of the local policy involved, the forum may determine that it prefers to make the result independent of forum selection rather than simply fall back upon the forum law.

One situation in which a decision in favor of uniformity of result should always be made is that in which neither the forum's rule nor the rule of the other contact state is, in terms of underlying policy, applicable to the case at bar, but one rule or the other must be chosen as a rule for decision. For example, the plaintiff, domiciled in State X, is injured in X in a collision between his automobile and one driven by the defendant. The defendant, domiciled in State Y, dies. The plaintiff brings suit against the defendant's estate in Y. Under Y law, tort claims survive the death of the tortfeasor. Under X law, they do not. Under these circumstances, neither X nor Y has a contact with the parties or with the collision which would make applicable the policies underlying its rule on survival. The desirability of insulating the result from the selection of the forum outweighs the desirability of giving absolute preference to the forum policy, a policy which is not even logically applicable.¹⁴⁸

IV. INSULATE THE RESULT FROM THE SELECTION OF THE FORUM IF THIS IS POSSIBLE. OTHERWISE, APPLY THE FORUM'S RULE

One method of providing for uniformity of result, no matter in which contact state the case is litigated, is to apply a choice-of-law rule. Any choice-of-law rule which is uniformly interpreted and applied will satisfy the goal of uniformity, but the rub is that it must be uniformly interpreted and applied. Failure to take account of the fact that the jurisdiction indicated by the choice-of-law rule would reach a result other than that stated in its domestic law will defeat an attempt to make the result independent of forum selection.

Even a choice-of-law rule designed to encourage uniform interpretation and application, and backstopped with a reference to the whole law of the indicated jurisdiction, will fail to achieve uniformity in at least one situation in which uniformity might otherwise be achieved. This is when the forum's choice-of-law rule points to the forum, but the foreign state's

¹⁴⁸ But see Currie, "Survival of Actions: Adjudication versus Automation in the Conflict of Laws," 10 *Stan. L. Rev.* 205, 232 (1958) (advocating application of forum law).

choice-of-law rule does not. When, having exhausted the possibility of resolving a true conflict of laws on a substantive level, the sole remaining conflicts purpose is to insulate the result from the selection of the forum, the forum should immediately place itself in the position of a court in the foreign state having a contact with the parties or with the occurrence and decide the matter exactly as the foreign court would have decided the case at bar.¹⁴⁹

There are two circumstances in which the forum will not be able to achieve uniformity of result with all states having contacts with the parties or with the occurrence by placing itself in the position of the foreign court. The first situation is that in which there is only one foreign jurisdiction having a contact with the case, but its court would insist on adjudicating the case exactly as the forum court. This will result in an endless circle of references between forum and foreign court.¹⁵⁰ This impasse can be escaped if, as between forum and foreign jurisdiction, one is clearly the more natural or probable forum. The forum should apply the domestic rule of the jurisdiction having contact with the parties or with the occurrence which is the more probable forum.¹⁵¹ Since the foreign court is conforming to the forum's method of adjudication, if the foreign court accepts the forum's characterization of the natural forum, it will apply the same domestic law as is applied by the forum. If, however, it is not clear which is the natural forum and the foreign court's characterization of "natural forum" differs from that of the forum's, uniformity cannot be achieved. Similarly, uniformity cannot be achieved if neither contact state can realistically be characterized as the more natural forum.

The second situation in which uniformity is not possible is that in which there is more than one foreign jurisdiction having a contact with the case and in which the foreign courts have differing choice-of-law rules and would not be willing to conform to the forum's adjudication.

If uniformity is the sole remaining conflicts goal and this goal cannot be reached, there is no useful purpose which can be achieved by applying a domestic rule other than that of the forum.¹⁵² Applying the forum's domestic rule will provide a rule for decision and will be convenient for forum judges and lawyers. The forum's domestic rule should be applied if the forum has sufficient contact with the parties or with the occurrence

¹⁴⁹ Cf. *Matter of Schneider*, 198 Misc. 1017, 1020, 96 N.Y.S.2d 652, 656 (Surr. Ct. N.Y. County 1950); Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165 (1938).

¹⁵⁰ See Weintraub, "Conflicting Choice-of-Law Rules," 43 Iowa L. Rev. 519, 524 (1958).

¹⁵¹ See Freund, "Characterization with Respect to Contracts in the Conflict of Laws," in *The Conflict of Laws and International Contracts* 158, 161 (1951).

¹⁵² See Harper, "Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays," 56 Yale L.J. 1155, 1174-75 (1947).

to keep use of the forum's rule within the bounds of reason. If the forum does not have such a contact, it should select, from a jurisdiction which does, the foreign rule most similar to that of the forum.

V. CONCLUSION

The plea for a method of solving conflicts problems which is primarily concerned with the policies underlying putatively conflicting domestic rules and with the more general purposes and trends in the substantive area involved—such a plea is not that of a lone voice in the wilderness. Scholars of the first rank have been talking of such things for many years. More significantly for today, judges, led by Roger Traynor of California, are more and more applying such a method to the decision of conflicts cases. Now, the Supreme Court of the United States has recognized this case development by interpreting the language of the Federal Tort Claims Act, “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred,”¹⁵³ to mean the whole law of that place, including its conflict of law rules.¹⁵⁴ The main reason given by the Court for this interpretation is to permit the federal courts to utilize the flexibility and rationality which state courts are more and more introducing into a system formerly rigid and irrational. The last battle has not been fought, but the war has been won.

¹⁵³ 28 U.S.C. § 1346(b) (1958).

¹⁵⁴ *Richards v. United States*, 369 U.S. 1 (1962).