

## Choice of Law Rules or Approach

Willis L. M. Reese

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## CHOICE OF LAW: RULES OR APPROACH\*

Willis L. M. Reese†

The principal question in choice of law today is whether we should have rules or an approach. By "rule" is meant a phenomenon found in most areas of the law, namely a formula which once applied will lead the court to a conclusion. To be sure, there will inevitably be questions as to a rule's proper scope of application, including questions of how the words that comprise the rule should be defined or interpreted. Once it has been decided what a rule means and how it should be applied, however, a conclusion will be reached through the rule's application.

By "approach" is meant a system which does no more than state what factor or factors should be considered in arriving at a conclusion. An example of an approach is section 6 of the *Restatement (Second) of Conflict of Laws* which lists "factors relevant to the choice of the applicable rule of law," but neither states how a particular choice of law question should be decided in light of these factors nor what relative weight should be accorded them.<sup>1</sup> It should be added that there

\* This article is an amplified version of the fifty-fourth Frank Irvine Lecture delivered at Cornell University on April 21, 1971.

† Charles Evans Hughes Professor of Law and Director, Parker School of Foreign and Comparative Law, Columbia University; Reporter, *Restatement (Second) of Conflict of Laws*. A.B. 1935, LL.B. 1938, Yale University.

<sup>1</sup> The black letter of this section reads as follows:

### Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,

can be an approach, as opposed to a rule, in a situation where consideration is limited to a single factor. This is true, for example, of the principle so frequently voiced today by courts and writers that a court should apply the law of the state which has the greatest concern in the determination of the particular issue.<sup>2</sup> To identify this state it will usually be necessary first to determine what policy or policies underlie the relevant local law rules of the potentially interested states. If the policy underlying only one of these rules would be furthered by the rule's application, the state having this rule is obviously the state of greatest concern and this is the rule that should be applied. If, on the other hand, the policies underlying the rules of two or more states would each be furthered by their rule's application, the court will be faced with the unenviable task of determining which of the states involved has the greatest concern in the application of its rule.<sup>3</sup> The problem is made more acute by the fact that either different policies or policies of different intensity may underlie the identically worded statutes or decisional rules of two or more states.<sup>4</sup> As a result, a decision involving a statute or rule of one state will not be a conclusive precedent in a case involving even an identically worded statute or rule of another state. Clearly, what is involved here is the very antithesis of a choice of law rule. Rather it is an approach which inevitably calls for decision case by case.

Rules are employed in most areas of the law. Indeed, throughout the ages the development of rules has been one of the primary objectives of the common law judge. This has been so because of the advantages that rules bring. Perhaps the most obvious of these benefits are certainty and predictability, important factors not only for those planning future transactions but also for those confronting either lawsuits or problems of how much to offer or accept by way of settlement. An

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(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

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

Professor Robert Lefflar's "choice-influencing considerations" are essentially similar to the factors listed in section 6 and provide another good example of an approach as contrasted with a rule. These choice-influencing considerations are (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. R. LEFFLAR, *AMERICAN CONFLICTS LAW* § 105 (1968).

<sup>2</sup> See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 341-76 (1965).

<sup>3</sup> See generally A. VON MEHREN & D. TRAUTMAN, *supra* note 2, at 392-94.

<sup>4</sup> Compare *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), with *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); cf. Trautman, *Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465 (1967).

equally important advantage of rules is the fact that they greatly facilitate the judicial task. All that a judge need do when deciding a question covered by a rule is to select the proper rule and then, after gaining an understanding of its provisions, to apply it. By this process he will be led to a conclusion. Far more difficult is the task of a judge when an approach is involved. Here he is told simply to consider one or more enumerated factors in arriving at his conclusion and usually is given little, if any, guidance as to the relative weight he should give these factors. As a result, each decision will be essentially ad hoc and the judge will rarely be able to rely upon, or even to obtain much guidance from, earlier opinions.

The task of the judge is peculiarly difficult when he is told without further direction to apply the law of the state with the greatest concern in the decision of the particular issue. To ascertain what state that is, first the judge usually must determine what policy or policies underlie the relevant decisional or statutory local law rules of the potentially interested states. This will often prove an onerous, difficult, and frustrating task. Under the best of circumstances, the amount of judicial time spent in trying to ferret out these policies is likely to be considerable; after all possible work has been done, the exact nature of these policies may still remain indeterminate.<sup>5</sup> Committee reports will usually not be available in the case of state statutes, with the result that a conclusion about the underlying policy of a statute may sometimes be based as much on surmise or hunch as on any logical deduction. And even when committee reports are available, or when the policy underlying a statute or decisional rule is otherwise ascertainable, it will often be difficult to refine the policy to the point of being able to determine whether it would or would not be furthered by the rule's application in a case involving foreign facts.

Suppose, by way of example, that state *X* has a Statute of Frauds whose purpose is to protect persons against false claims. Suppose further that in state *Y*, which has no similar statute, a resident of state *X* enters into an oral contract, calling for performance in *X*, with a resident of *Y* and thereafter sues him in *X* for nonperformance. Would the policy underlying the *X* Statute of Frauds be furthered by its application to provide the *Y* resident with a defense? It is highly un-

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<sup>5</sup> *E.g.*, *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

likely that any committee report or other legislative document, even if one were available, would cast any clear light on this question.<sup>6</sup> Where then should the court turn for guidance?

Suppose now that the court determines that the policies underlying the relevant rules of two or more states would each be served by application of the rule. How is the court to determine which of the states involved is that of primary concern? Any inquiry of this sort is likely to involve the court in, among other things, the often impossible task of ascertaining the relative strength or weakness of the policies involved.<sup>7</sup> And if the court were to find that two or more of these policies were of approximately equal strength, it would be faced with the further problem of determining on some rational basis why one of these policies should be furthered at the expense of the other.

The difficulties involved in applying the law of the state with the greatest concern in the decision of the particular issue are well illustrated by the experience of the New York Court of Appeals. This court was the first clearly to espouse this approach in *Babcock v. Jackson*<sup>8</sup> and has probably remained its most ardent advocate. Since the time of *Babcock*, because of the uncertainty and unpredictability it engendered, the court has been deluged by appeals and wracked by dissent.<sup>9</sup> Also it seems fair to surmise that the number of choice of law cases brought before the lower New York courts has vastly increased.

The problems posed by choice of law are similar to those found in other legal areas. Policies underlie and are responsible for all rules of law. It is the policy which first comes to light. Thereafter, the policy may be embodied in a statute or it may be given effect by judicial decision. Policies are difficult to apply in their raw state, since their proper range of application may be uncertain. Even more importantly, a policy rarely stands alone; there will usually be one or more counter-vailing policies and consequently there will be the problem of determining the extent to which one policy should be furthered at the expense of another. The task of defining the policy's scope of application or of providing proper accommodation for conflicting policies bears close analogy to the choice of law problem of determining how best to accommodate multistate and local law policies, including the question of which state has the greatest concern in the decision of the

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<sup>6</sup> See *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

<sup>7</sup> See Trautman, *supra* note 4.

<sup>8</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>9</sup> See, e.g., *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

particular issue. In at least most areas of the law the constant aim of the courts has been to translate policies into rules as quickly as possible for the reason, among others, that rules are more precise and hence provide greater certainty and predictability than do policies and also are far easier for the courts to apply. Should the aim of the courts not be the same in choice of law? It is the opinion of the writer that this question should be answered in the affirmative and that the development of rules should be as much an objective in choice of law as it is in other areas. The remainder of this article will be devoted to a discussion of why it is that rules are currently in such low repute in choice of law, what should be done pending the development of new rules, and what are some of the means by which satisfactory choice of law rules may be developed.

The current unpopularity of rules in choice of law is believed to be primarily an overreaction to the failure of previous attempts at rule-making in tort and contract. These rules were few in number and all-embracing in character. Essentially there was but one rule in tort, namely, that a person's rights and liabilities should be determined by the law of the state where defendant's allegedly tortious act first caused injury to plaintiff.<sup>10</sup> There were two rules in contract. The first was that issues relating to the validity of a contract should be governed by the law of the state of contracting, which was the state where the final act necessary to create a binding contract occurred.<sup>11</sup> The second was that issues of performance, as contrasted to validity, should be governed by the law of the state where performance was to take place.<sup>12</sup> In retrospect, it is not surprising that these rules have been largely abandoned by the courts. There are many different issues in tort and contract, and in local law there are many different rules to govern these issues. Moreover, the state with the greatest concern in the decision of the case will not remain constant but will vary with the particular issue and with the particular grouping of contacts. It would have been miraculous under these circumstances if the myriad choice of law problems that have arisen in these two areas could have been handled satisfactorily by one or two simple, hard and fast rules. That this has not proven to be the case does not mean, however, that satisfactory rules cannot be devised to govern choice of law problems in these two areas. It means only that rules similar in character to those previously attempted are unlikely to prove successful.

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<sup>10</sup> RESTATEMENT OF CONFLICT OF LAWS §§ 377-79 (1934).

<sup>11</sup> *Id.* § 332.

<sup>12</sup> *Id.* § 358.

This is not meant to suggest that all-embracing choice of law rules can never be successful. It is still the rule, for example, that issues relating to the transfer of interests in land are determined by the law that would be applied by the courts of the situs.<sup>13</sup> It is clear, however, that this rule is supported by considerations that do not apply to the choice of law rules developed in tort and contract. The state of the situs is the state with the greatest concern in the determination of many issues relating to the transfer of interests in land.<sup>14</sup> Also problems of title search will be greatly facilitated by the consistent application of the law of the situs to all such issues.<sup>15</sup> There may also be instances where application of a simple, all-embracing rule of choice of law is supported by an overriding need for uniformity of result. This, it is thought, is the prime justification of the rule that issues of succession to movables are determined by the law of the state where the decedent was domiciled at the time of his death.<sup>16</sup> Be this as it may, the challenge to the desirability of choice of law rules has to date been made primarily in the areas of tort and contract. To these two areas the remainder of this article will be mainly directed.

Bad rules may well be worse than no rules at all. In any event, bad rules are likely to be avoided or overturned by the courts and hence are unlikely to produce predictability and uniformity of result. Rules are bad if they do not properly give effect to the policies involved, or if they are phrased so broadly as to be applicable to situations involving policies different from those the rules were designed to implement. The choice of law rules for tort and contract were bad primarily for the first reason. They were derived from the vested rights theory, that is, the theory that the applicable law should be that of the state where occurred the last event necessary to bring a legal right and a corresponding legal obligation into existence. This theory, it seems clear, gives little consideration to the multistate and local law policies that are likely to be involved in a choice of law question in tort or contract. The state of the last event is unlikely for this reason alone to be the state with the greatest concern in the decision of the particular issue.<sup>17</sup> Similarly, there will be situations where application of the relevant local law rule of this state would not further the policy underlying the rule and would be inconsistent with other multistate and

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

14 See text accompanying note 41 *infra*.

15 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223, comment *b* at 11 (1971).

16 *Id.* §§ 260, 263; but cf. Yiannopoulos, *Wills of Movables and American International Conflicts Law: A Critique of the Domiciliary "Rule,"* 46 CALIF. L. REV. 185 (1958).

17 See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971).

local law principles.<sup>18</sup> To be sure, application of the law of the place of the last event is easy for the court and provides predictability and uniformity of result. But these advantages are bought at the sacrifice of other policies, a price the courts have been unwilling to pay.<sup>19</sup> Further, there is no reason to suppose that predictability, uniformity of result, and ease of application could not be achieved by rules of a different type which would give greater effect to other relevant policies.

Rules may also be bad because they are phrased so broadly as to be applicable to situations involving policies different from those the rules were designed to implement. Take, for example, the question of interspousal immunity. It has been said that the applicable law should be that of the state of the spouses' common domicile on the ground that this is the state with the greatest concern in the determination of this particular issue.<sup>20</sup> The rule makes good sense when applied to a suit involving only the spouses, and it seems clear that this was the sole situation envisaged by the originators of the rule. Literally, however, the rule would also apply to a situation where the wife initially brings suit against a third person and he in turn seeks contribution from the husband on the ground that the latter's negligence contributed to the wife's injuries. In this situation, denial of the claim for contribution by reason of a rule of interspousal immunity in force in the state of the spouses' common domicile might well be unfair to the third person if the accident occurred in a state having no such rule, particularly if the third person were domiciled in that state.<sup>21</sup>

It is doubtful whether we are now in a position to frame many good choice of law rules in either tort or contract. Both fields are vast and many of their segments remain relatively unexplored. Yet courts and writers should attempt to discern issues that could in all probability be governed satisfactorily by a particular rule of choice of law. Indeed, the task has already been begun. A handful of narrow choice of law rules have been developed which have the overwhelming support of the courts.<sup>22</sup> Other such rules have been suggested in isolated judicial opinions<sup>23</sup> and in legal articles.<sup>24</sup> Still others are ripe for fashioning. Of

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<sup>18</sup> See notes 5, 9 & 17 *supra*.

<sup>19</sup> The place of injury rule has, for example, been abandoned in the great majority of recent cases. Weintraub, *The Emerging Problems in Judicial Administration of a State-Interest Analysis of Tort Conflict of Laws Problems*, 44 S. CAL. L. REV. 877, 878 (1971).

<sup>20</sup> *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

<sup>21</sup> See, e.g., *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

<sup>22</sup> See text accompanying notes 41-60 *infra*.

<sup>23</sup> See, e.g., the choice of law rules for guest-passenger situations set forth by Chief Judge Fuld in his concurring opinion in *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532-33 (1969).

<sup>24</sup> E.g., the choice of law rules for damage limitations in wrongful death actions sug-

course, there can be no complete assurance that a newly formulated rule will work well in actual practice. But the risk of failure should not deter an attempt at rule making in choice of law—just as it does not do so in other areas of the common law—whenever there is a good basis for the belief that a proposed rule would lead to good results under most circumstances. And a rule which has proved its worth in practice should not be refused application in a case that falls within its proper scope merely because it would lead in that case to a result that might be thought unfortunate. More specifically, the fact that a choice of law rule which has stood the test of experience would lead on some rare occasion to the application of the law of a state which is not that of greatest concern, or would result in the disregard of other multistate or local law policies, is not an adequate reason why the rule should not be applied on that occasion. Perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result.<sup>25</sup>

Pending the development of rules, the courts, in the absence of a statutory directive to the contrary, should look in each case to the basic policies involved and strive to reach the result that would best implement these policies. In choice of law, the basic policies are both multistate and local in character. Among the multistate policies are furtherance of the needs of the interstate and international legal systems, application of the law of the state with the greatest concern in the issue, certainty, predictability and uniformity of result, and easy determination and application of the pertinent law. Among the local law policies are protection of the justified interests of the parties and implementation of the basic policies underlying the particular field of local law.<sup>26</sup>

Application of the relevant local law rule of the state with greatest concern in the particular issue requires some further discussion. The process of ascertaining this state is likely to prove both difficult and frustrating.<sup>27</sup> Yet there is one mitigating factor. This is that, in accordance with the view here taken, application of the relevant local law rule of the state of greatest concern is only one of several choice of law policies and not necessarily the most important. Accordingly, the search for this state can properly be abandoned in situations where the court finds that the task would be disproportionately time consuming

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gested in Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 641, 646-47 (1968).

<sup>25</sup> See *id.* at 644.

<sup>26</sup> See note 1 *supra*.

<sup>27</sup> Text accompanying notes 5-9 *supra*.

or that there is no sound basis for determining the exact nature or relative strength of the policies underlying some of the potentially applicable local law rules. In such situations, it would be wise for the court to confine its efforts to implementing other choice of law policies.

Rules should emerge in choice of law the same way they do in other areas of common law. It is to be expected that, as cases are decided by reference to the underlying policies, issues which can apparently be regulated satisfactorily by a given rule will gradually appear. Upon the appearance of such an issue, the attempt should be made to formulate a suitable rule, as recently done by Chief Judge Fuld in the area of guest statutes.<sup>28</sup> Once the proposed rule has been formulated, its merits will, of course, thereafter be tested in subsequent cases. If the rule in either its original or an amended form survives this testing, it will take its place among those common law rules, whether of choice of law or otherwise, that are applied more or less automatically by the courts to situations falling within their literal terms.

This rule-making process would be aided immeasurably if the courts were always to give their real reasons for arriving at a particular result. The reasoning of a judge should be of material assistance to those who follow in his footsteps. Reasons that prove to be bad will no longer be employed and will render suspect the results to which they led. On the other hand, reasons that prove to be good will be relied upon in the further development of rules. Unfortunately, like other humans, judges do not always give the true reasons for their decisions. It is suggested, for example, that courts sometimes attribute a policy to a statute or decisional rule in order to arrive at a result which they have already decided to reach for other reasons. Opinions ostensibly based upon such false reasoning are likely to mislead other courts and litigants and to impede the development of the law.

There is an intermediate stage between the time when decisions are derived directly from the underlying policies and when precise rules are formulated. At this stage, knowledge has progressed to the point where it can be said that a given issue or category of issues will usually be decided in a particular way, even though it is impossible to determine just when exceptional situations may occur. Hence all that can be done is to state a general principle that is subject to an imprecise exception. Despite its obvious limitations, such a principle is far better than nothing at all, since it affords some certainty and predictability as well as some guidance for the courts. With such a principle in hand, it

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<sup>28</sup> *Tooker v. Lopez*, 24 N.Y.2d 569, 583, 585, 249 N.E.2d 394, 403, 404, 301 N.Y.S.2d 519, 531, 532-33 (1969) (concurring opinion).

may no longer always be necessary for courts and lawyers to look to the underlying policies in arriving at a decision. And when they do look to these policies, they will do so with the advantage of knowing that in at least the majority of situations these policies will point to a particular result.

It may be that at the present time most areas of choice of law can be usefully covered by principles of this sort. Professor Cavers has suggested that pending the development of narrow, precise rules, the courts should seek to construct what he calls broad "principle[s] of preference."<sup>29</sup> As their name implies, these principles are not to be considered immutable, but rather guides for decision to be followed except where important considerations peculiar to a particular case point in a different direction. They should be formulated with a view towards doing justice to the parties<sup>30</sup> and affording a means either to "reflect relevant multistate policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes."<sup>31</sup> The development and testing of these principles should, in Professor Cavers's opinion, be facilitated by their breadth, since cases falling within their scope can be expected to occur far more frequently than would cases directed to a more narrow problem.<sup>32</sup>

General principles of a different sort are contained in the *Restatement (Second) of Conflict of Laws*. These provide that the law of a given state will be applied, "unless, with respect to the particular issue, some other state has a more significant relationship" to the parties and the occurrence, in which event the law of the other state will be applied.<sup>33</sup> These principles have widely differing ranges of application. For example, the *Restatement (Second)* states broadly that issues arising from tortious injuries to persons or to tangible property are determined by the law of the state where the injury occurred unless some other state happens to be that of most significant relationship.<sup>34</sup> On the other hand, narrower formulations are found in the contracts area where an attempt is made to state rules for various kinds of contracts.<sup>35</sup> For example, in the absence of an effective choice of law by the parties, issues involving a contract for the transfer of an interest in land are determined by

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<sup>29</sup> D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 124 (1965) [hereinafter cited as CAVERS].

<sup>30</sup> *Id.* at 131-32.

<sup>31</sup> *Id.* at 64.

<sup>32</sup> *Id.* at 132-33.

<sup>33</sup> *E.g.*, *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 189 (1971).

<sup>34</sup> *Id.* §§ 146-47.

<sup>35</sup> *Id.* §§ 189-97.

the law of the state where the land is situated, unless another state is that of most significant relationship.<sup>36</sup>

These general principles of the *Restatement (Second)* do provide some guidance, since they indicate that usually the law of a particular state will be applied. On the other hand, they frequently fail to detail exactly when some other state will be that of most significant relationship and hence the state of the applicable law. On occasion, little more is said than that whether an exceptional situation exists and if so which is the state of most significant relationship should be determined in light of the factors set forth in section 6.<sup>37</sup> This section, it will be recalled, lists what are considered to be the most important choice of law factors. It does not say, however, how a particular question of choice of law should be decided in light of these factors or what relative weight should be accorded them. The *Restatement (Second)* may also serve to illustrate that it is possible to experiment with principles of different degrees of generality. It may well be that the progression from ad hoc decisions to precise rules will start with principles of great generality and then proceed through principles of ever increasing specificity until at last the time is reached for rule making.

We now return to the process which, it is believed, should be followed in the formulation of rules of choice of law. To be successful, such rules must satisfactorily implement the multistate and local law policies involved. It is unlikely that rules of wide application can attain this objective in torts and contracts and in many other areas of choice of law. This is so, among other reasons, because most areas of the law contain a multitude of local law rules embodying different policies, because the grouping of relevant contacts may vary widely from case to case, and because in many areas the state of greatest concern is likely to vary with the particular issue. More hope for success should be afforded by a relatively large number of narrow rules, each of which would be concerned with a particular issue or a group of closely related issues.

One should start with a particular issue and attempt to formulate a choice of law rule that will satisfactorily regulate this issue. Hopefully, it may eventually prove feasible to have a group of issues covered by a single rule. But one should not apply a rule fashioned for a particular issue to another until there is a fair basis for supposing that the rule which satisfactorily accommodates the policies underlying the first issue will also accommodate those underlying the second. The

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<sup>36</sup> *Id.* § 189.

<sup>37</sup> Note 1 *supra*.

danger of carrying over a choice of law rule from one issue to another presenting different considerations is well illustrated by *National Shawmut Bank v. Cumming*<sup>38</sup> which concerned the validity of an inter vivos trust. It had become well settled prior to that case that in the absence of a choice of law provision in the trust instrument, the validity of an inter vivos trust of movables would be upheld with respect to issues involving the rules against perpetuities and accumulations if the trust satisfied the requirements of the state where it was to be administered.<sup>39</sup> This rule makes good sense as far as these two issues are concerned. Protection of the expectations of the settlor by applying a law upholding the validity of the trust is an obvious desideratum. And this is especially true in the case of issues involving the rules against perpetuities and accumulations, since these rules are likely to stem from the same policies in all interested states and to differ among themselves only in matters of degree. Application of the law of the state of administration, where this will result in upholding the trust, in these circumstances is a satisfactory accommodation of the relevant policies: the expectations of the settlor are protected, the law of a state having a close relation to the trust is applied, and the policy of other states will not seriously be affronted by such application. Quite different was the issue in the *Cumming* case where a Vermont settlor established an inter vivos trust of movables in Massachusetts. Following his death, his widow sought to have the trust declared invalid under Vermont law on the ground that it had been made for the purpose of depriving her of inheritance rights. Nevertheless, the trust was upheld on the ground that it was valid under the law of Massachusetts, the state of administration. Here Vermont was the state with the greatest concern in the issue to be decided and there was a marked difference in policy as to that issue between Vermont and Massachusetts. It was dubious wisdom to apply in that case a rule originally formulated to deal with issues of perpetuities and accumulations.

Once an issue has been selected as a candidate for rule making, one should seek to determine whether in the great majority of situations a particular state will be that of greatest concern by reason of a particular contact irrespective of all other considerations, including the content of its relevant local law rule.<sup>40</sup> If so, it would usually be appropriate for

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<sup>38</sup> 325 Mass. 457, 91 N.E.2d 337 (1950).

<sup>39</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270, comment *c* (1971).

<sup>40</sup> Ascertainment of the state of greatest concern will not in this situation involve the difficulties discussed in the text accompanying notes 5-9 *supra*. This is because we are here concerned with the rare situation where a state will be that of greatest concern without regard to the content of its local law rule. Hence it will not be necessary in these

a rule to provide for the application of this state's law to the particular issue. This is undoubtedly the explanation and justification for the rule that the law of the situs will be applied to determine issues such as who may own land, the conditions under which land may be held, and the uses to which land may be put.<sup>41</sup> Clearly the state of the situs is the state with the greatest concern in the decision of such issues. Another group of issues that has received similar treatment involves the manner, method, and time of performance of a contract.<sup>42</sup> Such matters are of greatest concern to the state where the acts are performed, and the rule has long been that the law of this state should be applied. Whether one member of a family is immune from tort liability to another member of the family may be a further issue that, for similar reasons, can satisfactorily be regulated by a hard and fast choice of law rule.<sup>43</sup> The problem arises where injury occurs in a state other than that of the common domicile and where the relevant rules of the two states differ. There are two possible situations. One is when there is no immunity under the law of the state of domicile but where immunity is granted by the law of the state of injury. The second situation occurs when the immunity rules are reversed. Intrafamily immunity is normally accorded by a common law rule whose underlying policy is obscure. Reasons frequently advanced to explain the grant of such immunity are the common law doctrine of the legal identity of spouses, the desire to foster and preserve marital harmony and parental discipline, and the desire to protect insurance companies from false claims.<sup>44</sup> All of these policies point to the state of domicile as being that of greatest concern and would support a rule calling for application of that state's law. To be sure, cases may arise where the parties' relationship to their domicile is not particularly close or where the state of injury, in a case in which it does not grant immunity, would have a substantial interest in having its rule applied to afford recovery to the injured person. The question is whether the benefits of having a hard and fast rule would not outweigh the disadvantages which the rule might be thought to entail in an exceptional situation.<sup>45</sup>

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situations to investigate the policies underlying the relevant local law rules of the potentially interested states.

<sup>41</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223, comment *b* (1971).

<sup>42</sup> *Id.* § 206.

<sup>43</sup> *Cf. id.* § 169.

<sup>44</sup> *Id.* § 169, comment *b*.

<sup>45</sup> For a general discussion see Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954); Hancock, *The Rise and Fall of Buckeye v. Buckeye 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962); Jayme, *Inter-*

Issues involving other immunities from tort liability may call for a similar rule. Much can be said, for example, in support of a rule that the law of the common domicile of guest and host driver should be applied to determine whether the guest should be required to show more than ordinary negligence in order to recover from the host.<sup>46</sup> To be sure, the state of injury may have a legitimate interest in having its own rule on this issue applied, but this interest is unlikely to exceed in intensity that of the state of common domicile. A useful rule might also be that where the parties to a tort action have a common domicile the law of this state should be applied to determine issues relating to the measure of damages<sup>47</sup> or to survival of actions.<sup>48</sup> These too are issues as to which the state of common domicile will almost certainly have a far greater interest than the state of conduct and injury, whose primary concern in the case of nonresidents will relate only to the application of such of its rules as involve standards of conduct. Of course, application of the law of the state of common domicile will not cause joy where the forum believes that the rules of this state as to the measure of damages or survival of actions afford inadequate protection. Again there is the question of what price one should be willing to pay for a rule.

In all probability, there are not many issues as to which one state will be that of greatest concern by reason of a particular contact alone. There will be other issues as to which a state will, in the great majority of situations, occupy this position if in addition to a particular contact it has a particular local law rule. For example, the state where a person acts will almost certainly have the greatest concern in the application of its tort rule relating to standards of conduct, provided that the act did not measure up to the pertinent standard. All states seek to impose acceptable standards of conduct upon persons who act within their territory, and conformity with such standards will be encouraged if tort liability is imposed upon those who do not conform and as a consequence cause injury either in the state where they acted or elsewhere. Likewise, it is difficult to see how the interests of other states could

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*spousal Immunity: Revolution and Counterrevolution in American Tort Conflicts*, 40 S. CAL. L. REV. 307 (1967); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 217-20 (1963).

<sup>46</sup> See, e.g., *Tooker v. Lopez*, 24 N.Y.2d 569, 583, 585, 249 N.E.2d 394, 403, 404, 301 N.Y.S.2d 519, 531, 532-33 (1969) (concurring opinion).

<sup>47</sup> See, e.g., *Fabricius v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965); see also *CAVERS* 157-58.

<sup>48</sup> See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); see also *CAVERS* 157.

adversely be affected by the application of this rule. The situation that initially might give pause is where the defendant's act caused injury only in a second state and did not violate that state's acceptable standards of behavior. On reflection, however, it is difficult to see how this second state could have a legitimate interest in exculpating the defendant for an act done outside its territory or how it could reasonably object to the injured plaintiff being granted greater protection than he would receive under its own law. The problem is different in the converse situation where the act conformed to acceptable standards in the state where it was done but did not meet the standards of the state where it caused injury. Here the state of injury has an obvious interest in having its law applied to afford relief to the injured person. Whether application of this law would seriously affect the interests of the state where the act was done would depend upon whether that state actually wished to encourage the doing of the act or, as would more probably be the case, simply viewed the act with less disapprobation than did the state of injury. Undoubtedly there would also be circumstances where imposing liability under the law of the state of injury would be unfair to a person who had acted in another state and perhaps in reliance on that other state's law. All in all, it would seem the course of wisdom at the present time not to attempt to state a rule covering the situation where the act is tortious under the law of the state of injury but not under the law of the state where it was done.

Protection of the natural expectations of the parties is a factor which, when considered with certain contacts, may lead to the formulation of still other rules of choice of law. As used here, the term "natural expectations" includes not only the expectations that the parties actually had prior to entering into a transaction or the occurrence of some other event, but also the expectations that they presumably would have had if their minds had been directed to the issue at hand. Expectations of the first type are often encountered in such areas as contracts, trusts, and marriage. Expectations of the second type are also significant. To foster public confidence and respect, it is important that the law reach results appealing to common sense, and a person is likely to think that a result makes sense if it is one he would have anticipated had he thought about the question beforehand.<sup>49</sup> This, of course, is as true in choice of law as it is in any other legal field. It is desirable, in other words, that a person's rights and duties should be determined under a

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<sup>49</sup> See *Miller v. Miller*, 22 N.Y.2d 12, 23, 27-28, 237 N.E.2d 877, 883, 886, 290 N.Y.S.2d 734, 743, 747 (1968) (dissenting opinion).

law whose application he had reason to expect. This consideration supports a rule that a person who acts and causes injury in the state of his domicile should not be subjected to a higher measure of responsibility in tort than would be imposed by the law of that state.<sup>50</sup> In all probability, a person in such a position would be surprised by the application of some other law. And surely he would feel aggrieved if he were subjected to a greater measure of liability by application of another state's law simply because he had happened to injure in the state of his domicile a resident of that other state. This result can also be supported on the basis of state interests, since the state of the person's domicile would have an obvious concern in his welfare and in events that transpired within its territory. Conversely and for similar reasons, much can be said in support of a rule that a person who sustains injury in the state of his domicile by reason of an act which occurred there should not receive less protection than would be accorded him by that state's law.<sup>51</sup>

Another significant factor is that, to the extent made possible by other considerations, a choice of law rule should seek to further the basic policy underlying the substantive law field with which it is concerned. To date, this factor has had its principal impact upon choice of law rules relating to marriage, contracts, and trusts. The basic policy underlying the substantive law in each of these fields is protection of the expectations of the parties, which in their most elemental form are that the particular marriage, contract, or trust is valid and effective. These are expectations which the parties actually had prior to their entry into the particular transaction. At the present stage of development, these expectations are usually reflected in choice of law principles that are subject to an imprecise exception. A marriage which is valid under the law of the state of celebration, for example, will so be considered everywhere unless it violates the strong public policy of the state which has the most significant relationship to the spouses and the marriage.<sup>52</sup> A law which would invalidate a contract will not be applied "unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied."<sup>53</sup> And the law chosen

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<sup>50</sup> See *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966); *Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A.*, 245 F. Supp. 819 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 855 (2d Cir. 1966); cf. *CAVERS* 146-50; *Rosenberg*, *supra* note 24, at 646-47.

<sup>51</sup> Cf. *CAVERS* 139-45; *Rosenberg*, *supra* note 24, at 646-47.

<sup>52</sup> *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 283 (1971).

<sup>53</sup> *Id.* § 188, comment *b* at 577.

by the parties will be applied to determine their rights and liabilities under a contract, unless among other exceptions this would violate "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and . . . would be the state of the applicable law in the absence of an effective choice of law by the parties."<sup>54</sup>

On the other hand, there are situations where the value of protecting the expectations of the parties has led to the formulation of precise rules of choice of law. The validity of an *inter vivos* trust of movables will be upheld, with respect to issues involving the rules against perpetuities and accumulations, if the trust meets the requirements of the state of administration, at least in the absence of a choice of law provision to the contrary in the trust instrument.<sup>55</sup> For similar reasons the validity of a testamentary trust of movables will be upheld with respect to the same issues, again in the absence of a choice of law provision in the trust instrument, if the trust is valid under either the law of the state of administration or that of the state where the testator was domiciled at the time of his death.<sup>56</sup> Usury provides another example of an issue where the value of protecting expectations has led to a fairly precise rule. So far as is known, all common law states have rules against usury, and usually the permissible rate of interest will differ only slightly from state to state. Consequently, as a general rule it is deemed more important to uphold the contract and thus protect the expectations of the parties than to apply the prohibitions against usury of any particular state. The rule is to the effect that the "validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law . . ." <sup>57</sup> To be sure, this rule lacks some precision by reason of its use of the words "substantial relationship" and "not greatly in excess." Nevertheless, it does provide a considerable measure of predictability and uniformity of result.

Capacity is another issue where it may be possible to state a precise rule to the effect that a person will be held to have capacity to contract if he has such capacity under the law of the state of his domicile. At least in the great majority of situations, this state will be the

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<sup>54</sup> *Id.* § 187.

<sup>55</sup> See text accompanying note 39 *supra*.

<sup>56</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 (1971).

<sup>57</sup> *Id.* § 203.

one most concerned with that person's protection; if it chooses to vest him with contractual capacity, there would be little reason to deprive him of that capacity by application of some other state's law.<sup>58</sup> A case that might initially give pause is one in which a person, vested with contractual capacity by the state of his domicile, enters a contract centered in a second state under whose law he lacks capacity. This second state, however, would have little interest in applying its law to deprive him of capacity since he is not a domiciliary. On the other hand, this second state could hardly justify upholding the contract by reason of its interest in the other party to the contract, since its own rule of incapacity makes clear that it was prepared to sacrifice that party's interest to what it deemed to be a more important principle. Similarly, fairness to the other party could hardly explain a refusal to apply the rule of incapacity of the second state, since this rule would undoubtedly have been applied if the first person had been a local domiciliary. The best, and most convincing, explanation for a refusal to apply the rule of incapacity in this situation is the choice of law policy that the expectations of the parties should be protected whenever the significant interests of the states concerned do not require otherwise.

Workmen's compensation provides an additional example of how the basic policy underlying a field can aid in the formulation of choice of law rules. The policy here is twofold in nature, namely (1) that the employee should be compensated, regardless of fault, for all injuries received in the course of his employment and (2) that as a *quid pro quo* the employer, and sometimes certain other persons as well, should be liable for the employee's injuries only in accordance with a fixed scale of damages and should be relieved from liability in tort or wrongful death.<sup>59</sup> These policies are responsible for the choice of law rule that a state will not apply its law to hold a person liable in tort or wrongful death for an employee's injuries, if that person is declared immune from such liability by the law of a state under which he was required to insure against the particular risk for the employee's benefit, and provided that this is the state (1) where the injury occurred, or (2) where the employment is principally located, or (3) from which the employer supervised the employee's activities, or (4) whose local law governs the employment contract, or (5) whose workmen's compensation statute is stated in the employment contract to be the statute governing the employee's rights.<sup>60</sup>

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<sup>58</sup> Cf. *id.* § 198.

<sup>59</sup> *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (1958).

<sup>60</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 184 (1971).

In contrast to contracts, trusts, and workmen's compensation,<sup>61</sup> formulation of choice of law rules in torts is impeded by the fact that no single policy is commonly recognized as most important. To date, it has been generally believed that all or nearly all tort rules are the product in varying and uncertain degree of at least two policies, compensation for the victim and deterrence of the wrongdoer.<sup>62</sup> In this day of widespread insurance, however, the policy of providing compensation for the victim enjoys increasing importance, and the time may come when it is recognized that this is the basic policy underlying at least the area of unintentional torts. Indeed, it may be noteworthy that the great majority of the recent choice of law decisions involving unintentional tortious injuries have applied a law favorable to the plaintiff. It may be, in other words, that the policy favoring compensation is already *sub silentio* at work.<sup>63</sup> In any event, the time may come when this policy will play an important role in the formulation of precise choice of law rules for torts.

#### CONCLUSION

No attempt has been made in this article to state all the precise choice of law rules that it is currently possible to frame. What has been done is (1) to suggest that the formulation of rules should be as much an objective in choice of law as it is in other areas of the law, and (2) to give some insight into what should be the rule-making process.

Rules are the product of policies, and it is unwise to seek to formulate a rule until the nature and range of the policies it embodies are well understood. One must start with an issue and its underlying policies. As understanding of the policies increases, it may be possible to formulate some general principle which will satisfactorily handle the majority of cases involving this issue but which, for want of sufficient knowledge, must remain subject to one or more indeterminate exceptions. Experience should eventually develop to the point where it is possible to attempt with some confidence to state a precise rule of law.

Development of satisfactory choice of law rules has been greatly impeded by the initial attempt to regulate vast areas by a few all-

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<sup>61</sup> See text accompanying notes 55-60 *supra*.

<sup>62</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 22-23 (4th ed. 1971).

<sup>63</sup> A law favorable to the plaintiff was applied, for example, in all of the tort cases cited in notes 5 and 7-9 with the exception of *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

embracing rules which bore little relation to the underlying policies and worked badly in practice. These rules have now largely been abandoned, and an attempt to construct new rules must be made. In all probability, these rules will be far more numerous and far narrower than their predecessors.

We have probably reached the stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions. We should press on, however, beyond these principles to the formulation of precise rules. A choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results. Good rules, like other advantages, have their price.