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Judicial Method and the 
Policy-Centered Conflict of Laws

By Robert Allen Sedler* 

I. INTRODUCTION

On September 16, 1960, Georgia Babcock and her friends, Mr. and Mrs. William Jackson, all residents of Rochester, New York, left in Mr. Jackson's automobile for a week-end trip. The trip culminated in an accident in Canada which caused Miss Babcock to be seriously injured. Three years later Helen Wessling and Lenice Paris, both residents of Louisville, Kentucky, were riding in the Paris automobile. This trip resulted in an accident in Indiana, and the passenger was once again injured. Each passenger filed suit against her host. Georgia Babcock's suit was filed in the Supreme Court of Monroe County, New York, and Helen Wessling's in the Circuit Court of Jefferson County, Kentucky. Since New York and Kentucky have always permitted a guest passenger to recover against a negligent host, the cases would seem to present little difficulty. However, the legal doctrine created in Georgia Babcock's case and later followed by the Kentucky Court of Appeals in Helen Wessling's case may be said to have started a "veritable revolution," provoking the interest of the numerous outstanding scholars who have tried to assess its impact. For you see, the fact that the accident took place in a jurisdiction other than that in which the suit was brought means that the issue is no

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1 Kentucky had a "guest statute," but the Court of Appeals held that such a statute was violative of the Kentucky Constitution. Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932).

2 It is doubtful that an opinion involving choice of law in tort cases would fail to cite it.

3 Shortly after the decision, the Columbia Law Review invited six outstanding conflicts scholars to comment on the case. Comments on Babcock v. Jackson, 63 Colum. L. Rev. 1212-57 (1963). The availability of these comments has proved very helpful in light of the approach taken in the present writing.
longer a simple negligence question. Indeed, it is necessarily most complex, for it now gives rise to a question of the conflicts of law. An eminent authority has said of the conflict of laws:

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed and entangled in it.4

While this may be so, another writer has observed:

On a generous estimate, one litigated case out of every hundred may involve a question of the conflict of laws. Yet the subject of conflicts has attracted the best thinking and the most diligent research of a host of capable scholars. Magnificent treatises explore its every intricacy; fruitful theories abound by which it may be explained and understood and reshaped; research into the subject is made easy by a vast apparatus of digest topics and index headings.5

Certainly this is true, since legal scholars have never ceased to be fascinated by questions of the conflict of laws. Many theories abound, and it is rare to find any one theorist saying, "I fully agree with my colleague on how conflicts problems should be solved."6 However, courts do not share the same enthusiasm; indeed, as we will see, their attitude is quite the opposite.

A question of the conflict of laws may be said to arise whenever a case contains a foreign element, that is, whenever some or

4 Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953). The perplexing nature of conflicts problems has long troubled the courts. In what must have been one of the first conflicts cases in the United States, the court observed:

This statement of the matter at issue shows, that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different states. Our former experience had taught us, that questions of this kind are the most embarrassing and difficult of decision, that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us, that the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt, as it would have appeared to our own understandings, had we been called upon to decide, without the knowledge of what others had thought and written upon it.

Saul v. His Creditors, 5 Mart. (N.S.) 569, 571-72 (La. 1827).


6 Dean Prosser has observed that "the one thing upon which any four law teachers can be found to agree is that, while the fifth may be a brilliant man and a delightful fellow, his ideas are fundamentally unsound." Prosser, Lighthouse No Good, 1 J. Legal Ed. 257, 264 (1948). No one would dispute the validity of this observation as applied to teachers of the conflict of laws.
all of the legally significant facts occurred in a jurisdiction other than that in which the suit is brought and/or all the parties are not residents of the forum state. Not only did the Babcock and Wessling suits contain foreign elements, but there was also a conflict of laws in the sense that the substantive laws of the forum and the jurisdiction where the accident occurred differed in both cases.

Under Ontario law a guest in an automobile is absolutely precluded from maintaining a suit against his host for personal injuries arising out of the use of the automobile. The Indiana statute is not quite so harsh: it permits the suit, but the passenger cannot recover unless the accident was caused by the "wanton or wilful misconduct" of the host. Since Helen Wessling did not allege that her friend's conduct was "wanton or wilful," she finds herself in a situation identical to Georgia Babcock's. How should this conflict between the laws of the jurisdictions involved be resolved? This was the question that confronted the courts in these cases and in one sense the answer to this question will be the subject of this paper. However, greater attention will be focused on the court that must resolve the question and the process by which the court arrives at its "solution" to the problem. To place the matter in proper perspective, a historical excursion may be helpful.

II. A HISTORICAL EXCURSION: FROM MAGISTER ALDRICUS TO THE RESTATEMENT

Questions of the conflict of laws arose early in recorded legal history. It has been said that the legal order is decentralized among a plurality of sovereign or autonomous authorities, each asserting

7 The term "resident" is intended to refer to a person who is "domiciled in the state" and who actually lives there. Of course, a person may have his technical domicile in a state other than the state in which he is "resident." For purposes of this writing, it is not necessary to pursue the distinction between "residence" and "domicile." Those who are interested might consult Reese and Green, That Elusive Word, "Residence," 6 Vand. L. Rev. 561 (1953). The discussion will not be encumbered with a series of speculations like "what if he was resident there, but had his domicile elsewhere." If such a case should ever arise, the question would be whether the considerations applicable to a resident were equally applicable to (1) a party who had his technical domicile elsewhere or (2) a party who had a technical domicile in the state, but was not resident there.


jurisdiction within a defined territory. Since people do not live their lives within defined territories, disputes will invariably arise involving the territory or people of two or more legal systems. At that time, "the legal order tries to integrate the diversity of laws of which it is composed." The presence of the foreign element must at least be considered, and perhaps such a case must be treated differently from one that is purely domestic. Thus, in the Greek cities of the Hellenic period there were separate courts for foreigners. So too, in Rome, cases involving foreigners were heard before the praetor peregrinus, who applied the ius gentium rather than the Roman citizens' ius civile. Separate courts for cases involving foreigners may be considered the initial step in the development of the conflict of laws.

It is generally agreed that the conflict of laws as we know it—the use of law other than that of the forum to decide a case—began to emerge in the early part of the thirteenth century in Italy. Each of the autonomous city-states had its own system of law, and there was extensive commerce between them. The disputes that arose were truly international, and some way had to be found to solve the conflicts of law. From the very first effort, two salient points emerge. It was an academician who proposed the solution, and the solution was one applicable to all conflicts cases. This concept of an "academic solution of universal application" has persisted to the present day.

The first such solution was proposed by Magister Aldricus, a professor at the University of Padua, who is considered to be the "founder of the conflict of laws." His solution was that the court should look to the substantive content of the differing state's laws connected with the case and resolve the conflict by applying the

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11 Realistically speaking, it is not possible to do so, even if one never sets foot outside his home. At a minimum, some product he uses will have been manufactured in another state. Thus, we are always subject to a potential question of the conflict of laws.
12 Yntema, supra note 10.
13 Id. at 300.
14 Id.
15 In a sense, the merchants courts and the Court of Admiralty in England could be considered as separate courts for cases involving foreigners.
16 G. Stumberg, Cases on Conflicts 2 (1956). This is in accordance with the investigations of Neumeyer. Neumeyer, Die Gemeinrechtliche Entwicklung des International Privatund Strafrechts bis Bartolus (1916).
“more effective and useful law.” It has been suggested that this meant the judge was to choose the law which would promote his own conception of justice in the particular case.\textsuperscript{17} The concept of the “more effective and useful” law may be having a renascence in the views of some commentators\textsuperscript{18} and even in judicial decision.\textsuperscript{19} But much has occurred in between.

The law has always resisted such a general approach. The need for “certainty” gives rise to the establishment of specific rules and internally consistent theories embodying such rules. Thus, a variety of theories arose. The most prominent held that the court should look to the nationality of the parties, and in a case involving a foreign party, it should apply his national or “personal” law. An old gloss to the Code of Justinian—frequently cited as the epitome of judicial tolerance and enlightenment—states that “if a citizen of Bologna be sued in Modena, he is not to be judged according to the statutes of Modena, to which he is not subject.”\textsuperscript{20} The concept was one of personal law which an individual carried with him as he sojourned in alien lands.

However, an individual did not carry all of his personal law with him. Obviously the place where a person engaged in transactions might want to have something to say about regulating such transactions. And furthermore, as has been demonstrated in many contexts, simple solutions do not appear to be quite so simple when they run up against the immense variety of factual situations involving foreign elements. In time, a distinction was drawn between laws (or \textit{statuta}, as they were called) affecting “persons” and those which affected “things.” Only those laws affecting “persons” were applied extraterritorially.\textsuperscript{21}

The essence of the “statuist” theory became the interpretation and classification of statutes to determine whether they were capable of extraterritorial application. It is interesting to note that the result depended on how the statute was classified by the

\begin{itemize}
  \item \textsuperscript{17} G. Stumberg, supra note 16.
  \item \textsuperscript{18} See e.g. Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267, 295-300 (1966); Leflar, Conflicts Law, More on Choice-Influencing Considerations, 54 Calif. L. Rev. 1584, 1585-88 (1966).
  \item \textsuperscript{19} Clark v. Clark, 222 A.2d 207 (N.H. 1966) (guest statute unsound in light of modern conditions).
  \item \textsuperscript{20} Yntema, supra note 10, at 302.
  \item \textsuperscript{21} See the discussion in G. Stumberg, Conflicts of Laws 3-4 (3rd ed. 1963).
\end{itemize}
law of the foreign party’s state rather than how it was classified by
the law of the forum. 22 The wording of the statute was often an in-
sufficient guide, and courts and commentators employed different
formulas and techniques of classification as well as their own
notions of policy and fairness. 23

According to Professor Yntema, by the fourteenth century
certain definite rules of application had been established, largely
due to the commentaries of Bartolus. 24 As frequently happens,
rules perhaps designed to supplement and explain a general theory
soon supersede it, and the rules themselves form a complete
system. The system of Bartolus was based on the nature and sub-
ject matter of the various statutory provisions, and within that
system the following rules were developed. Matters of form were
governed by the law of the place where the parties executed the
document in question (lex loci actus). Substantive questions of
contract law were governed by the law of the place where the
contract was entered into (lex loci contractus), while matters
arising after the execution of the contract were governed by the
law of the place where performance was to take place (lex solu-
tionis). Liability for torts was generally governed by the law of the
place where the tort occurred (lex loci delicti), although a for-
eigner could plead ignorance of an unusual local law. The ques-
tion of rights arising out of “things” was governed by the law of
the situs of the thing (lex rei sitae). The status of persons was
governed by the law of their state of nationality. Matters con-
cerning the conduct of the litigation were governed by the law
of the forum (lex fori). The reader will note the similarity of
the rules contained in this system to those found in the first
Restatement.

Professor Ehrenzweig has contended that these rules of the
statutist system were developed only as an exception to the “basic
rule” of the lex fori. Thus, “if jurisdiction was based on the place
of contracting, a Modena court would adjudicate a Modena con-

22 Cf. RESTATEMENT OF THE CONFLICT OF LAWS § 7(a) (1934), where it
is stated that “in all cases where as a preliminary to determining the choice of
law it is necessary to determine the quality and character of legal ideas, these are
determined by the forum according to its law.”
23 Yntema, supra note 10, at 304.
24 Id. at 302.
tract under Modena law even as to a Bologna citizen." However, even if Professor Ehrenzweig is correct, the fact remains that later scholars thought the rules were independent and treated them as such. They did not consider that the lex fori was the basic law having a greater claim to application than foreign law.

The statutist method was unchallenged until the seventeenth century. It enjoyed a revival in part in Mancini's nationality theory of the nineteenth century. Mancini's essential thesis was that law is personal rather than territorial, and that it is made for a given people rather than for a given territory. This being so, the laws of a sovereign bind his subjects wherever they reside; conversely, they do not bind foreigners within the territory. The only exception was where the requirements of ordre public necessitated the application of territorial law. Mancini's theory has had little influence on continental conflicts law except as regards matters of personal status.

In general, the concept of personal law, the essence of the statutist method, has found little favor in this country. But if the rights of Kentuckians involved in an accident in Indiana were found to be governed by Kentucky law, is this not a variant of "personal law" as some critics have observed? However, is the choice necessarily restricted to personal law as opposed to what may be called the territorial imperative?

The territorial imperative, or, if you wish, the territoriality theory of the conflict of laws, was developed in the seventeenth century as a challenge to the statutist method. Among the French

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26 This summary is taken from G. Stumberg, supra note 16, at 5.
27 Thus, in a number of countries, partially due to the influence of the Napoleonic Code, the law of nationality was substituted in situations where the law of domicile had formerly prevailed. Id. at 5.
28 The court in Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 796 (1965), observed that:

However appealing it might seem to give effect to our own public policy on this issue, merely because the negligent driver of the car in the collision, and his guest, are domiciled here, to do so would be to totally neglect the interests of the jurisdiction where the accident occurred, where the relationship arose and where the parties were dwelling, and to give an overriding significance to a single factor reminiscent of the days when British citizens travelled to the four corners of the world secure in the belief that their conduct would be governed solely by the law of England.

29 For the view that there is a via media, see D. Cavers, The Choice of Law Process 150-59 (1965).
writers, particularly d'Argentre', the tendency was to classify more statutes as "real" so as to preclude their having extraterritorial effect. However, it was left to the Dutch writers to break fully with the statutist method. As early as 1611 the famous Perpetual Edict provided for the unrestricted application of the law of the situs even as to such questions as testamentary capacity (hitherto determined by personal law) and the form of wills (hitherto determined by the lex loci actus). 31 The basis of the territoriality theory, as formulated principally by Voet and Huber, was political, i.e., the power of a sovereign to regulate all activity taking place in territory under his control. It constituted a scientific recognition of the political situation prevailing in the seventeenth century in which assertions of authority by national sovereigns—such as the Netherlands, recently independent from Spain—were recognized. 32 The territoriality theory contained three propositions: (1) the laws of each state have force within the borders of that state, but not beyond those borders; (2) all persons within the borders of a state, whether permanently or temporarily, are subject to those laws so long as they remain there; (3) rights acquired in one state will be recognized in another state when called into question there so long as the interests of the second state are not prejudiced thereby. 33

The continental approach to the conflict of laws is important because in this area of law, unlike practically all other areas of American law, the source of thinking about the law and the approach taken to it did not devolve from England and the common law. No common law of conflicts was "received" from England, 34 and in a sense, it was the continental thinking about the conflicts of law that was "received" in the United States. Until the seventeenth century the rule in England was that "international" cases were not triable at common law. 35

30 See the discussion in G. Stumberg, supra note 21, at 4; Ehrenzweig, supra note 25, at 653-54.
31 Ehrenzweig, supra note 25, at 657.
32 Yntema, supra note 10, at 305.
33 Id. at 306.
34 There has been an indigenous common law for so long that this process of reception may have been forgotten. With the recent independence of many nations of Anglophobic Africa, attention has again been focused on it. See, e.g., A. Allott, Essays in African Law ch. 1 (1960).
trials were held before a jury of the vicanage, i.e., jurors from the neighborhood where the events involved in the trial occurred. It followed that if some or all of the events occurred outside of the neighborhood, venue was lacking. International cases could be brought before the merchant's courts and the court of admiralty, where the "law of the international community of merchants" was applied. Even when the jurisdictional barriers of the common law courts were broken down by fictions, the courts avoided conflicts questions by the simple expedient of applying English law. As Professor Morris has stated:

It was not until the eighteenth century, when the common law courts extended their jurisdiction to cases involving a foreign element, and when the law merchant which has formerly been applied in these cases, became a part of English domestic law, that the need for rules of the conflict of laws arose in England, and the working out of the doctrines now prevalent is essentially the work of the nineteenth and twentieth centuries.

Thus, at the time of our independence, there was no common law of conflicts, as there was a common law of contracts, torts, property and so on. It was the received common law in these areas which enabled American courts to decide cases, as the citation of English authority in earlier opinions and the reliance on Blackstone by early American lawyers indicates. By building on the received common law, the courts were able to develop an indigenous American common law which often departed from English precedent.

However, it is generally agreed that the initial development of an American "law of conflicts" was not through judicial decision, but was the work of Joseph Story, in his role of theorist and commentator rather than as judge. Professor Ehrenzweig suggests that at the time when the first edition of Story's Com-

36 Id. at 3-4.
37 Ehrenzweig, supra note 25, at 661.
38 See the discussion and examples in Sack, supra note 35, at 16-17.
39 A. EHRmFNWEIG, CONFLIcr oF LAWS 5 (1962).
41 See, e.g., Wagner v. Bissell, 3 Coles 395 (Iowa 1856), where the court held that the English rule imposing strict liability on the owner of trespassing cattle would not be applied in Iowa.
mentaries appeared in 1834, American courts had not fully recognized the existence of a body of conflicts law nor were they aware of the need for such law. International conflicts problems were largely governed by international law, and interstate conflicts were minimized by the recognition of a general commercial law and the existence of a nearly uniform common law. Indeed, most of the "early" cases involving choice of law arose after the publication of Story's treatise, but the American and English courts long regarded Story's treatise as authoritative. In this respect the continental pattern was repeated: the courts "found" the solution to conflicts problems in the writings of the leading theorist. The case by case development of a body of decisional law did not take place.

Story was fully conversant with all of the continental writers, and relied primarily upon the ideas of Huber in developing his theory of territoriality and comity as the basis of the conflict of laws. The three basic propositions, as in Huber's territoriality theory, were as follows: (1) every state possesses absolute sovereignty within its own territory and may bind all persons or property located there; (2) no sovereign can give laws beyond his boundaries; and (3) consequently, whatever force the laws of one state have beyond its borders depends on the comity given to those laws by another state. Although Story found a "duty" to give comity in a proper case, he recognized that this duty was one of "imperfect obligation," since there was obviously no way by which one sovereign could be compelled to give comity to the laws of another.

It is immediately evident that there is nothing in the theory itself that tells the court which law should be applied. As a theory it is primarily a juristic explanation after the event: when the forum does decide to give effect to foreign law, it does so on the basis of comity. But relying upon continental sources and some precedents, Story developed a comprehensive body of conflicts

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43 A. EHRENZEIG, supra note 39, at 4.
44 The concern for the recognition of judgments is reflected in the full faith and credit clause. U.S. CONST. art. IV, § 1.
45 G. STUMBERG, supra note 21, at 6.
46 See the discussion in A. EHRENZEIG, supra note 39, at 6.
47 J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 1 (5th ed. 1857).
48 See the discussion of this point in Cheatham, American Theories of Conflict of Laws: Their Role and Utility, 58 HARV. L. REV. 361, 373 (1945).
doctrine which stressed the territorial principle. It is the territorial principle that has had the greatest influence on American conflicts law, and its present influence can be found in a number of contexts.

One example has been the "power myth" of jurisdiction, in which courts justify the exercise of jurisdiction because of their physical power over the defendant following personal service within the state. When this was buttressed by the concept of jurisdiction over commercial entities on the basis of "doing business," it was clear that many cases would arise where the forum was a purely disinterested one, thereby giving rise to conflicts problems. The exercise of jurisdiction on the basis of physical power was never questioned under the territorial principle, but absent such physical power the exercise of jurisdiction on the ground that the harm occurred in the forum has been sustained only after extensive litigation. Even today it is not clear how far a state may go in exercising jurisdiction over a non-resident without physical power.

The territoriality principle also operates negatively in order to avoid what may be called implicit conflict. Legislation is ordinarily construed not to apply extra-territorially so as to

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49 G. Stumberg, supra note 21, at 6.
51 Mr. Justice Holmes, in McDonald v. Mabee, 243 U.S. 90, 91 (1917), said that "the foundation of jurisdiction is physical power..."
52 Although the "doing business" test may have been replaced with "minimum contacts," International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), there is probably a residue of the former concept in cases where the forum is purely disinterested. It is doubtful if jurisdiction would be sustained in a case like McGee v. International Life Insurance Co., 355 U.S. 220 (1957), had the plaintiff not been a resident of the forum. See Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 3 (1959), where the court, through Judge Traynor, observed that although a foreign corporation may have sufficient contacts with a state to justify an assumption of jurisdiction over it to enforce causes of action having no relation to its activities in that state... more contacts are required for the assumption of such extensive jurisdiction than sales and sales promotion within the state by independent nonexclusive sales representatives.
53 The statutes authorizing jurisdiction on the basis of "doing of an act" vary, and not all states go as far as constitutionally permitted.
55 It is said that "all legislation is prima facie territorial." American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909). Examples of such construction will appear throughout the writing.
avoid a conflict between that legislation and the law of a foreign sovereign. This may be evidenced by the body of case law which has grown up around the applicability of anti-trust and trademark law to the activities of American firms abroad and application of the Jones Act to foreign seamen. It has recently been held that the National Labor Relations Act cannot be applied to a ship flying a foreign flag despite extensive connections with the United States. The concept prevalent in continental criminal law of secondary jurisdiction in the case of crimes committed abroad is not generally recognized in the United States. American courts think of the applicability of law in terms of the territorial imperative, and to this extent Story's propositions are recognized.

More significantly, as regards choice of law, it was Story's territoriality principle that formed the basis of the vested rights theory. This may seem paradoxical in the sense that the vested rights theory was developed in reaction to the "defects" in the comity theory, but the defects stemmed from an absence of compulsion to recognize the applicability of foreign law. In practice, courts reluctant to displace the law of the forum, simply refused to "give comity" to a distasteful foreign law. This could not be permitted if a "universal solution" to conflicts problems

61 See the discussion in Cohn, Criminal Law Reform in Israel, 11 Am. U. L. Rev. 1, 4-5 (1962).
62 But see Skiriotes v. Florida, 313 U.S. 69 (1941), where it was held that Florida could constitutionally apply a statute prohibiting sponge fishing to the acts of its domiciliary in foreign waters.
63 See Cheatham, supra note 48, at 363. As Cardozo observed in Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918), "The misleading word 'comity' has been responsible for much of the trouble." See also RESTATEMENT OF THE CONFLICT OF LAWS § 6 (1934).
64 See, e.g., Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374 (1927) (vicarious liability of parents for torts of children). There was also the danger that comity would be confused with reciprocity, so that the forum, for example, would not enforce a foreign judgment if the state of rendition would not likewise enforce a judgment of the forum. Hilton v. Guyot, 159 U.S. 113 (1895). See also Forgan v. Bünbridge, 34 Ariz. 408, 274 P. 155 (1928), where reciprocity was the basis of the decision on an issue of priority of a title acquired in another state.
was to be found. There was no disagreement with Story's first two propositions which developed the territorial principle. However, it was a short step toward taking the territorial principle and turning it into a concept of "jurisdiction"—as Story himself had done in some instances—thereby creating a "true duty" to recognize a right (with the attendant responses this concept produces for the judicial mind) created by foreign law.

Story's first proposition was that every state possessed exclusive sovereignty within its own territory and could bind all persons or property located there, and his second proposition was that no sovereign could give laws beyond his boundaries. This being so, it followed that a sovereign could create a right if and only if it had "jurisdiction" over the subject matter of the right. It had such jurisdiction if the right was "created" within its territory, that is, if the last act necessary to the existence of the right occurred there. Since law is territorial, one state could not enforce the law of another state. Story is correct up to this point, but because one state cannot enforce the law of another state it does not follow that it cannot enforce rights created by the law of another state. Thus, under Story's principles, we have the basis of the vested rights theory as developed by Professor Beale and applied by judges such as Holmes and Cardozo.

According to Beale, a right, once created, exists with its attendant legal consequences until the law that created it ends it and/or the interest out of which it arose is extinguished. It is the purpose of the conflict of laws to determine which state has the power to create a particular right. This must be the state that has legislative jurisdiction, i.e., the state where the last act necessary to the existence of the right occurred. Every other state is under a duty to

66 See A. EHRENZWEIG, supra note 39, at 8-9.
67 Beale's three volume treatise, supra note 65, represents the exposition of his theory. The vested rights theory was favored by Dicey in England and Pillet in France. See A. DICEY, CONFLICT OF LAWS 11 (1896); PILLET, PRINCIPLES 495-571 (1903). See generally 1 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY, 66-69 (2d ed. 1958).
68 Slater v. Mexican National R.R., 194 U.S. 120 (1904); Cuba R.R. v. Crosby, 222 U.S. 473 (1912). Justice Holmes stressed the obligation of the defendant rather than the right of the plaintiff. This is merely the other side of the same coin.
recognize the right when it is called into existence. The territorial principle, which was the basis of the comity theory, has now become the basis of legislative jurisdiction, and hence of the vested rights theory. 70

Closely related to the vested rights theory is the highly homologous right theory propounded by Judge Learned Hand. 71 Under this theory, strictly speaking, the forum does not enforce a right created by the law of another state: it can only enforce a right created by its own law. However, where legally operative facts occurred elsewhere so that the forum's substantive law should not govern, the forum will create a right that is identical—or highly homologous—to the right created by the law of the foreign state. 72

To determine which state can create a right, Hand would also look to the state that had "legislative jurisdiction," and his treatment of this concept is the same as that of the advocates of the vested rights theory. Consequently, the result under this theory will generally be the same as the result that would be reached under the vested rights theory. 73

The concept of legislative jurisdiction forms the basis of the Restatement of the Conflict of Laws. The approach of the Restatement was to identify the one state—in the "plurality of sovereign authorities that make up the legal order"—that could create the particular right in question. If that state was not the

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70 See A. Ehrenzweig, supra note 39, at 8-10.
71 See, e.g., his opinion in Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934); Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938). Professor Morris has substituted this approach for the vested rights approach of his predecessor. See A. Dicey, Conflict of Laws 12 (6th ed. J. Morris 1949).
72 See Cheatham, supra note 48, at 385. In France, Professor Noboyet has proposed a theory of territoriality, which is basically no different in result from the other "rights" theories. See Noboyet, Territoriality and Universal Recognition of Rules in the Conflict of Laws, 65 Harv. L. Rev. 582 (1952). Professor Rabel also classifies Noboyet among the "rights" theorists. E. Rabel, supra note 67, at 67.
73 See A. Ehrenzweig, supra note 39, at 11-12. For some time Hand's theory was confused with the local law theory of Walter Wheeler Cook, to be discussed infra, because both rejected the concept of enforcement of "rights created under foreign law." See Cavers, The Two Local Law Theories, 63 Harv. L. Rev. 124 (1950). There is one situation in which the consistent application of the vested rights approach and the highly homologous right approach will produce a different result. This is when the date on which the rate of exchange for a debt payable in foreign currency is involved. Under the vested rights theory, that date would be the judgment date (the "right" is not relevant in the forum until enforcement is granted there), but under the highly homologous right theory, that date would be the breach date (at the time of the breach a potential "right" arose in the forum under the forum's law). Both views are discussed in Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 (1926).
forum, the forum had a duty to look to the foreign law to determine if it created the right in favor of the plaintiff, and if it did, the forum would have to enforce that right. The Restatement was conceived of as containing a "few simple rules." By the a priori application of these rules any conflicts problem could be resolved. The magic key Aldrichus and his successors had been searching for had at last been found in the concept of legislative jurisdiction.

The foregoing is not preparatory for an attack on the vested rights theory of the conflict of laws and the Restatement which it spawned. To the academic commentator it would seem that such an attack would be "beating a dead horse," so to speak, since the vested rights theory is said to be "generally discredited." In addition, new restaters have substantially completed a Restatement Second, and they do not hesitate to enumerate the deficiencies of the predecessor work. But the academic world is not the world of the courts, and in much of the latter world the rationale of the first Restatement is alive or slowly dying. More significantly, the discussion that follows is equally applicable to the Restatement Second and the entire "rules" theory it too embodies. For, in the long run, the choice is not between the Restatement and the Restatement Second, but between a "rules" approach and the policy-centered conflict of laws. The substitution of the "many complex rules" of the Restatement Second for the "few simple rules" of the original Restatement will not result in the adoption of a policy-centered approach to the solution of conflicts problems. Nor will such a substitution reach the basic problem of judicial method and the conflict of laws.

76 See B. Currie, Selected Essays in the Conflict of Laws 6 (1968). He says that Walter Wheeler Cook discredited it "as thoroughly as the intellect of one man can ever discredit the intellectual product of another."
77 Reese, supra note 74, at 679-80.
78 This is demonstrated by the number of courts that continue to apply the lex loci delicti rule in tort cases. See, e.g., Friday v. Smoot, 211 A.2d 594 (Del. 1965); White v. King, 223 A.2d 763 (Md. 1966).
78 Professor Ehrenzweig has not yet ceased his herculean efforts to prevent the adoption of the Restatement Second. See, e.g., Ehrenzweig, The Second Conflicts Restatement: A Last Appeal for its Withdrawal, 113 U. PA. L. REV. 1290 (1965).
III. CONFLICTS CASES IN AMERICAN COURTS: FROM THE RULES APPROACH TO THE POLICY-CENTERED CONFLICT OF LAWS

Professor Beale believed that the vested rights theory was an "indigenous creation of the common law." This simply is not so, as a comparison with Savigny's location of legal relations theory, for example, will indicate. Apart from this, it seems clear that the "rules approach" to the solution of conflicts problems embodied in the Restatement is directly antithetical to the common law method of judicial decision. The adequacy of any Restatement as setting forth existing law may be questioned, but the Restatement of the Conflict of Laws utterly failed to operate in this manner. Rather it set forth a series of choice of law rules based on the concept of legislative jurisdiction, which were to be applied a priori to designated classes of cases, i.e., all tort cases, all contract cases. Certainly this is not how the common law developed, and as has been pointed out, the common law method of development by judicial decision had never been applied to the conflict of laws.

The common law is said to develop on a case-by-case basis. When faced with a case of first impression—and for many courts, cases involving application of the rules of the Restatement would be cases of first impression—the court would establish principles of law to decide the case, and give reasons for establishing and applying these principles to the particular fact pattern before it. If the court indulged in generalizations not necessary to the decision of the case, these may be dismissed as dicta. If principles are applicable in future cases, but where the fact pattern is significantly similar, they may be adopted as rules. If principles are applicable in future cases, but where the fact pattern is significantly different, they may be discarded as dicta. If the court is unable to determine whether the fact pattern is similar or different, it may be forced to decide the case on a case-by-case basis.

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81 See the discussion of Savigny's theory in Yntema, The Historic Basis of Private International Law, 2 Am. J. Comp. L., 809-10 (1953).
82 See the further criticism of Beale's view in Ehrenzweig, supra note 80, at 668-69.
84 The only safe or reasonable procedure, the only procedure which conforms to common law traditions, is to test each case on its merits. Any realistic or useful analysis must be planned on this basis. The vice of the vested rights theory is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved and so it must perforce obscure the issue.
85 As will be demonstrated, for the courts of an average state the number of conflicts cases is relatively small.
different or other factors necessitate a different result, the first
decision may be distinguished. If the rationale of the first decision
is equally applicable to the new fact pattern, the first decision may
be extended. And so on, as any first year law student knows. The
stare decisis effect of a decision then can only be determined
with reference to the facts of the case in which the decision was
rendered.\textsuperscript{66} Under this system, legal theory develops in response
to principles of decision rather than the converse. The "rules" of
the conflict of laws, however, as embodied in the \textit{Restatement},
find their source in the underlying theory of vested rights. In
this respect the \textit{Restatement} is scarcely distinguishable from a
civilian code,\textsuperscript{87} and like a civilian code, it is designed to supply a
solution in all cases by the a priori application of its rules. With
respect to torts the \textit{Restatement} says:

\textbf{§ 377 The Place of Wrong}

The place of wrong is the state where the last event
necessary to make the actor liable for the alleged tort took
place.

\textbf{§ 378 Law Governing Plaintiff's Injury}

The law of the place of the wrong determines whether a
person has sustained a legal injury.

We may compare the tort rule of the Italian Code:

\textit{Art. 25 Law Governing Obligations}  

\textsuperscript{66}Our reaction to the rigid doctrinal analysis of the past should not blind
us to the utility of stare decisis when holdings are properly limited with reference
to the factual situation. \textit{See generally} Oliphant, \textit{A Return to Stare Decisis}, \textit{6 Am.

\textsuperscript{87}When I was teaching in Ethiopia from 1963 to 1966, I explored the
prospective development of the conflict of laws in that country. My findings and
ideas were set forth in a small book, R. SEDLER, \textit{The Conflict of Laws in
Ethiopia} (1965). Adoption of a "Code of the Conflict of Laws" was proposed,
and a draft code was appended to the book. This was done because all other areas
of Ethiopian law had been codified, and it could be expected that conflicts would
be codified as well. My hope was that the Ethiopian approach to conflicts would
be policy-centered in nature, and the code was developed along these lines. Re-
reading the provisions persuades me that I was not particularly successful in this
endeavor, and I certainly wish that I had drafted some of the provisions dif-
ferently. Professor Ehrenzweig's question in a letter, "Have the experiences of
other countries with their codification of conflicts law really been that favorable
that another codification should be attempted?" was hard to answer, and I did
so only by the observation that conflicts law would be codified there anyway, so
an attempt should be made to guide the codification along policy-centered lines.
In any event, my suggestion has not yet been adopted. Certainly, I would not
favor anything like a code in the United States. With this explanation, an attack
on the "code-like" approach of the \textit{Restatement} can be continued.
Non-contract obligations are governed by the law of the place where the facts from which they arose took place.

Or the Greek Code:

_Art. 26 Delictual Obligations_

Delictual obligations are governed by the law of the state where the delictual act was committed.

There is a substantive difference between the _Restatement_ and these codes because the _Restatement_ looks to the law of the place where the harm was suffered and the Italian and Greek Codes look to the law of the place where the act was committed.88 Who is to say that it is any more "logical" to look to the place of harm (in the absence of harm, there is no tort) or the place of the act (if no act had been committed, there would have been no tort). In terms of methodology, however, the approaches are identical. If a tort has been committed, we reason a priori that the law of a particular state governs. Never mind what kind of a tort, who the parties were, and so on. In short, the rule applies without regard to the particular fact pattern before the court.

Suppose, as in most other areas of law, that the academicians had not preceded the courts. This would mean that when most conflicts cases first came before American courts, there would have been no _Story's Commentaries_, and in more modern times, the _Restatement_ would not have been available to provide the rules. The court would still have had to decide whether in the particular case before it the law of the forum would be displaced in favor of foreign law. It may be safely assumed that the court would have proceeded in the same way that it proceeded in other cases. The case would have been decided with reference to the fact pattern involved, or more accurately, fact-law pattern, and give the reasons for its decision. The decision would be applied or extended in later cases with identical or similar fact patterns. In a case that was distinguishable, new principles would be established. In time a body of conflicts law based on decided cases would emerge in each jurisdiction, and the views of academic commentators on the proper solution of conflicts cases could be

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considered by the courts as in other areas of law. More importantly, courts would not see themselves as compelled to accept the "universal solution" proposed by a particular academic commentator.

Needless to say, this is not what happened. Courts adopted a series of "rules" applicable to all cases coming within general categories such as "tort." From the beginning, as the historical excursion indicates, there has been a search (conducted by the academicians) for a key that would unlock the door to the solution of all conflicts problems. While the rules that result from such an approach may be suitable to the more generalized system of jurisprudence reflected in continental codes, this is not the way common law courts ordinarily proceed. Yet they have so proceeded in conflicts cases. They have abandoned the traditional common law method of case-by-case development of legal principles and have substituted a "system of rules" founded on theoretical consistency, to be deductively applied without regard for the particular fact-law pattern in the case before it. This may be why the conflict of laws appears as a "dismal swamp" and why the ordinary court is "quite lost in it." The court is "lost" because it is departing from the judicial method it employs in other cases. One may wonder what there is about the conflict of laws that has caused courts to abandon the common-law method of judicial decision?

The answer may be found in the reasons behind the conflict of laws. The reason a court should put aside its own substantive law and apply the law of another state has been assumed to relate to the fact that suit may be brought in different states and that the result should not differ from this reason. As the Supreme Court has observed: "the purpose of a conflict-of-laws doctrine is to assure that a case will be treated the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."
It has also been stated that:

the searching question may be put, why should there be any special rules made for cases with foreign facts? The answer to this fundamental question is seldom found stated in the decisions. But it is nevertheless a major premise, even if an unarticulated major premise, upon which many elaborate doctrines are based. The premise, spelled out, must be that fairness to all the parties to a litigation requires a different treatment of a Pennsylvania set of facts presented to a New York court in a New York law suit than is given a New York set of facts identical except that they took place on the other side of a state boundary line. The outcome of litigation involving the former should not be changed by the fact that for one reason or another legal action is instituted somewhere else than at the place where the operative facts are located. Fairness to the parties requires that the fortuitous choice of a geographical place of suit should, as far as is possible, not vary the way in which the suit will be decided.\(^92\)

In other words, uniformity of result is a desirable goal. The plaintiff should not be able to "forum shop" in order to achieve a favorable result.\(^93\) A priori rules applied by all courts in a generalized class of cases remove any incentive to be found in forum-shopping. Since choice of law rules must be uniform, such rules cannot be developed on a case-by-case basis. If every court accepts the "complete system of rules," a uniformity of result, which is the purpose of the conflict of laws, will exist.

If our goal is to discourage forum-shopping, it is evident that we go about it in a very strange way. The incidence of forum shopping reflects the availability of potential fora, available because our law relating to jurisdiction\(^94\) encourages the widest possible forum-shopping. Since the individual defendant may be sued in any place where he can be served with process and the corporate defendant can be sued in any state where it is "doing business," however that is defined, forum-shopping is a most


\(^93\) It was the dire prediction of the dissenting justices in Wessling that "The adoption of the rule in the majority opinion may well lead to 'court hopping' to find a favorable forum." Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967). But quaere, where should a Kentucky plaintiff sue a Kentucky defendant in a case arising out of a single car accident if not in Kentucky?

\(^94\) See the discussion, supra notes 51-52, and accompanying text.
sensible course of action for the plaintiff to follow. If there are many New York cases where all the legally operative facts occurred in Pennsylvania—so that only Pennsylvania law could be constitutionally applied95—does this not suggest that something is wrong with our law of jurisdiction? Rather than making available the widest possible number of fora while assuming that the particular forum in which suit is brought will make no difference, since all courts apply uniform choice of law rules based on consistent theory, would it not make more sense to limit the number of potential fora, thereby reducing the number of cases in which "foreign elements" would be present?

Suits are not instituted in jurisdictions other than that where the operative facts occurred "for one reason or another." It is rare that a choice of forum is fortuitous. Quite likely it has been coolly calculated. The plaintiff in a personal injury action will try to sue in an urban area where juries generally award high verdicts.96 Or, he may sue in a particular state to take advantage of an aspect of "procedural" law, such as a rule that any issue of contributory negligence must be determined by the jury.97 So long as our present law of jurisdiction remains as it is, extensive opportunities for forum-shopping will exist. Uniform choice of law rules will have no effect on this aspect of forum-shopping.

However, the truly objectionable aspect of forum-shopping is when it is done to obtain more favorable law. Uniform choice of law rules are said to be necessary so that the "substantive result" will not depend on the forum in which suit is brought. If the facts giving rise to a tort case are connected with State A, where contributory negligence is a complete bar, and with State B, which has a comparative negligence statute, it is objectionable to permit the plaintiff to sue in one state or another in hopes of obtaining the application of State B law. His claim should be governed by the same law irrespective of where the suit is brought. It should

97 Questions relating to judge-jury allocation should be determined by the law of the forum, because they may be said to represent the forum's strong procedural policy. See Hopkins v. Kurn, 351 Mo. 41, 171 S.W.2d 625 (1943); and the discussion in Sedler, The Erie Outcome Test as a Guide to Substantive and Procedure in the Conflict of Laws, 37 N.Y.U.L. Rev. 813, 874-75 (1962). Moreover, the application of the forum's law on this issue may be constitutionally required. Cf. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).
be noted that there is apparently no objection to a choice of
forum on the ground that in a particular forum, as a matter of
"procedure," contributory negligence is a question for the jury,
which jury may well apply contributory negligence on an ad hoc
basis. There is objection only to a choice based on favorable sub-
stantive law, but none to a choice based on other "outcome-
determinative" considerations.\textsuperscript{98} Even if this is so, and the "com-
plete system of rules" is justified on the ground that it will pro-
duce uniformity of result, forum-shopping will still not be dis-
couraged for the fact remains that uniformity of result has never
been achieved, and cannot be within the framework of the system.

In the first place, the "few simple rules" are not all that simple
to apply to the myriad of fact-law patterns that make up actual
cases. Where is the "place of contracting" when the offeree speaks
his acceptance into the telephone in one state and the offeror
hears the acceptance in another?\textsuperscript{99} Since the rules are "simple" and
the fact situations varied, interpretation is necessary, and courts
may disagree on proper interpretation of conceptual doctrine.
More significantly, the court is not ignorant of the substantive
result that its "choice of law rule" will produce, even though it
may pretend to ignore it. There are enough\textit{manipulative tech-
niques} within the system to enable any court willing to employ
them to achieve the substantive result it wants.\textsuperscript{100} It has long ago
been observed that "often the courts' deliberations will disclose a
happy coincidence between the dictates of justice in the instant
case and the factors decisive of a proper conflicts rule."\textsuperscript{101} Applying
a priori rules without regard to a particular case's fact-law pat-
tern will often result in the displacement of the law of the forum
and produce what the court considers to be an unsound result.
Sometimes this is accepted in silence, other times the court will

\textsuperscript{98} Under the existing "substance-procedure" dichotomy, many "outcome-
determinative" matters are governed by the law of the forum because they are
classified as "procedural." Use of the procedural characterization as a manipula-
tive technique to bring about the application of forum law will be discussed \textit{infra}.

\textsuperscript{99} See \textit{Linn v. Employers Reinsurance Corp.}, 392 Pa. 58, 139 A.2d 638
(1958).

\textsuperscript{100} It has been suggested that the "very vagueness of choice-of-law principles
often makes it easy for the judge to deliberately select one which will lead him
to the domestic rule he prefers to apply." \textit{Hancock, Three Approaches to the
Choice of Law Problem, XXTH Century Comparative and Conflicts Law} 365,
368 (1961).

\textsuperscript{101} \textit{Cavers, supra} note 90, at 181.
gag, but still accept the result, justifying its action on the need for uniformity. However, there are times when—if the court understands how and is willing—it will manipulate the system to achieve the desired result, generally the application of the forum’s law.

One manipulative technique employed is that of “disingenuous characterization.”102 When a Connecticut auto-rental agency rented an automobile to a Connecticut driver who was involved in an accident in Massachusetts, injuring his Connecticut passenger,103 the Connecticut court was most anxious to apply its statute holding the lessor of an automobile liable for the harm caused by the lessee.104 However, the tort occurred in Massachusetts, and the court did not question—and still does not105—the rule that questions of tort are governed by the lex loci delicti, but matters of contract were governed by the law of the place where the contract was made, and this particular contract was made in Connecticut. The court, therefore, concluded that the liability of the lessor under the statute was a question of “contract” and that, as a matter of law, the injured party was the third party beneficiary of the contract between the lessor and lessee. While the reasoning is somewhat incredible, the result is a very sensible one since Massachusetts had no interest in applying its law to deny recovery to a Connecticut victim against a Connecticut auto-rental agency.106 Moreover, the defendant was fully cognizant of Con-

102 For a criticism of the concept of characterization, see Ehrenzweig, Characterization in the Conflict of Laws: An Unwelcome Addition to American Doctrine, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 395 (1961). The criticism of the traditional concept is quite valid. The process by which the court “identifies the problem area involved in a conflicts case, as in others, is quite valuable. This will be the subject of a future paper.

103 It is interesting to note that the residence of the plaintiff is nowhere discussed in the opinion. It appears, however, that it was Connecticut.

104 Probably at this time, 1928, the court was more concerned with the admonitory aspects of the statute than with shifting the loss to a responsible enterprise. The Connecticut rental agency that was “careless” in renting automobiles could rent one to a driver who could cause an accident in Connecticut. For a discussion of the distinction between admonitory torts and enterprise liability from the conflicts perspective, see A. Ehrenzweig, CONFLICT OF LAWS 212 (1962). As regards admonitory torts, see Ehrenzweig, The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement, 36 MINN. L. REV. 1 (1951). As regards enterprise liability, see Ehrenzweig, Guest Statutes in the Conflicts of Laws: Towards a Theory of Enterprise Liability under “Foreseeable and Insurable Laws,” 69 YALE L. J. 595, 794, 978 (1960). (See text supra, at p. 34).

105 See Landers v. Landers, 216 A.2d 183 (Conn. 1966).

106 Professor Currie sees the case as containing a problem that was “wholly artificial, being raised merely by the forum’s choice of law rules.” B. Currie, supra note 75, at 184.
necticut law, and if he insured against liability, he would have insured against liability for the acts of the lessee. Thus, only Connecticut liability insurance rates or auto-rental rates were involved. Since the court was “bound” by conflicts rules of universal application, it had to find a way out within the framework of these rules.

Some years later, after the policy-centered approach had begun to find its way into judicial decision, the Minnesota Supreme Court, in a similar situation, was more realistic. It rejected the Restatement rule and applied its Dram Shop Act to a Minnesota saloon-keeper who served liquor to an intoxicated Minnesota driver, resulting in an accident injuring his Minnesota passenger in Wisconsin.

Another manipulative technique has been to treat the question in issue as one of “procedure” since it is a “universal rule” that all matters of “procedure” are governed by the law of the forum. Even the broadest definition of “procedure” would not include questions such as: whether a suit can be maintained against the estate of a deceased tortfeasor, whether one spouse could sue another for a tort, and the quantum of damages recoverable for personal injury death. But a court, faced with a desire to apply the forum’s law in a particular case in spite of the required rule, has treated each of these as a matter of procedure. Often, courts will quickly withdraw the “procedural” characterization, but

107 See the discussion of the case from this aspect in Ehrenzweig, supra note 104, at 986-88.
108 See B. Currie, supra note 75, at 614.
109 Schmidt v. Driscoll Hotel Inc., 249 Minn. 376, 82 N.W.2d 365 (1957).
110 Restatement of the Conflict of Laws 585 (1934). Although the Restatement Second changes some of the rules, it follows this approach. Cf. Sedler, supra note 97.
111 It is my position that the concept of “procedure” as such is meaningless. If the matter in question materially affects the outcome, it should be governed by the law the forum uses as a model, except where to do so would interfere with the efficient operation of the forum’s judicial system or violate a strong procedural policy of the forum. Id. The statement in the text, however, is equally applicable to the concept of “procedure” under the “outcome determinative” test.
114 See, e.g., Stevens v. Missouri P. R.R., 355 S.W.2d 122 (Mo. 1962).
not until this characterization has served its purpose to decide a case, where application of the forum's substantive law would have been sound and proper.\textsuperscript{117}

Still another technique has been the use of "public policy." The public policy technique is where a court, in a case where foreign law is applicable under its choice of law rule, refuses to apply the \textit{particular} substantive law because it would be against its "public policy" to do so.\textsuperscript{118} It is the content of the foreign law that precludes its application. The public policy technique is recognized by the advocates of the vested rights theory and the restaters,\textsuperscript{119} but within very narrow limits. Cardozo made a classic exposition of the public policy technique in \textit{Loucks v. Standard Oil Company}:

The courts are not free to refuse to enforce a foreign right at the pleasure of judges to suit the individual notion or expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.\textsuperscript{120}

Some eighteen years later, however, the same court Cardozo spoke for viewed "public policy" in a different light. A New York wife brought suit against her husband to recover damages for injuries suffered in a Connecticut automobile accident. New York law prohibited such suits, but Connecticut has abolished spousal immunity. Thus, under the lex loci delicti rule, Connecticut law would apply. It is unlikely that Cardozo would have thought of a spousal suit as "violating some fundamental principle of justice.\textsuperscript{119}"

\textsuperscript{117} In commenting on the opinion in Grant v. McAuliffe, 41 Cal. 2d 839, 284 P.2d 944 (1953), Judge Traynor observed:

\textit{It may not be amiss to add a postscript that although the opinion 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. Traynor, Is This Conflict Really Necessary?, 37 Tex. L. Rev. 657, 670 n. 35 (1959).}

In \textit{Grant} and \textit{Mertz} both parties were residents of the forum state injured in an out-of-state automobile accident. The \textit{Kilberg} case is discussed \textit{infra}, notes 389-400 and accompanying text.

\textsuperscript{118} The public policy technique must be distinguished from "public policy" as reflected in the forum's own law, which is just another way of saying "policy." Note the confusion on this point in the majority opinion in \textit{Wessling}. \textit{See} the discussion, \textit{infra} note 338, and accompanying text. \textit{See} text \textit{supra}, at p. 37.

\textsuperscript{119} \textbf{RESTATEMENT OF THE CONFLICT OF LAWS} 612 (1934).

\textsuperscript{120} 224 N.Y. 99, 120 N.E. 198 (1918).
some prevalent conception of good morals, some deep-rooted
tradition of the common weal.” The New York court, however,
now gave this definition of public policy:

The term “public policy” is frequently used in a very vague,
loose or inaccurate sense. The courts have found it necessary
to define its juridical meaning, and have held that a state can
have no public policy except what is to be found in its Constit-
tution and laws. . . .

Since New York recognized spousal immunity, which, incidentally,
the court characterized as a matter of “procedure,” it was held to
be against New York’s “public policy” to recognize the suit. In
later years, the New York court also used the public policy tech-
nique to avoid applying the locus' limitation of the quantum of
damages recoverable in a wrongful death case.

Of all the techniques to avoid the application of foreign
law, “public policy” can be wielded most effectively. Once it is
said that the content of the foreign law is against the forum’s
public policy, the law of the forum can be applied, at least
negatively. When New York held that the Connecticut law allow-
ing a spousal suit would be against its “public policy,” the result
was that the suit could not be maintained, and thus, New York
reached the same result that would have been reached had New
York law been applied in the first place.

Loucks v. Standard Oil Company involved a suit in New
York for wrongful death, but the death occurred in Massachusetts.
New York substantive law could not have been applied because
the New York wrongful death statute was not applicable to deaths
occurring in another state. However, both New York and Mas-
sachusetts recognized a cause of action for wrongful death, and
their laws “conflicted” only in the sense that recovery was based on
different considerations. Thus, there is no true conflict in the
sense that one jurisdiction, as in Mertz, would not permit the suit.
By the expedient of not recognizing that right on “public policy”
grounds, the Mertz court, in effect, applied New York law to the

\[\text{footnotes:}
121 271 N.Y. 466, 3 N.E.2d 597 (1936).
123 Other manipulative techniques are discussed in Ehrenzweig, supra note
82, at 678-85.
124 Whitford v. Panama R.R., 23 N.Y. 465 (1861).\]
issue in question. In more recent cases involving suits between the forum's spouses resulting from out-of-state accidents, some courts have simply applied their own law to permit\textsuperscript{128} or disallow the suit.\textsuperscript{127}

Thus, if the justification for a system of choice of law rules is that uniformity of decision will result, the system has been a failure. The result may well differ depending on the forum in which suit is brought, since different states have different conflicts "rules." Moreover, it is impossible to predict when a court will use a manipulative technique to reach a desired result.\textsuperscript{128} The rules of the \textit{Restatement Second}, as we will see, are more difficult to apply and give the court even more opportunity to bring about a desired result.

No assistance in bringing about uniform rules can be expected from the Supreme Court. After some early indications that the vested rights theory would be raised to constitutional status,\textsuperscript{129} the Supreme Court has decided to give the states wide latitude in solving conflicts questions.\textsuperscript{130} Actually the crowning blow came in 1940 when the Court held that federal courts would have to apply state conflicts rules in cases governed by state law.\textsuperscript{131} Not only did this mean that the federal courts could not develop uniform rules—if they did, perhaps state courts would follow them as well—but it constituted judicial recognition at the highest level that conflicts rules differed from state to state. It is difficult for a court today to justify its acceptance of a system of rules on the ground that this will insure uniformity of result when such uniformity simply does not exist.

If it is recognized that uniformity of result will not be achieved or even closely approximated, does this mean that the system of rules approach to the solution of conflicts problems will

\textsuperscript{128} See, e.g., Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).
\textsuperscript{127} See, e.g., Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966). The restaters would now look to the law of the domicile rather than the place of injury in all cases. \textit{Restatement (Second) of the Conflict of Laws,} § 390g (Tent. Draft No. 9 1964).
\textsuperscript{129} This casts some doubt on the justification for the rules approach, i.e., that it is "predictable." See the concern of Montgomery, J., dissenting in \textit{Wessling v. Paris}, 417 S.W.2d 259 (Ky. 1967).
\textsuperscript{130} See New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).
readily be abandoned by the courts? The answer would seem to be no, because the quest for uniformity has not been the primary motivating force behind judicial acceptance of the system of rules approach and the unwillingness to fashion a body of conflicts law in the traditional common law manner. The goal of the advocates of the vested rights theory and the restaters may have been uniformity of result, but it must have been evident to the courts that such uniformity was not being achieved. The lack of uniformity can not be doubted today, but many courts are still unwilling to abandon the traditional approach. There must be another reason why this approach has found such favor with the courts. The other reason is elusive and difficult to articulate, but an attempt will be made to analyze it.

Courts have shunned the responsibility for developing a body of conflicts law through decisions. Rules set down by Story, and later the Restatement, were applied “objectively” without regard to the fact-law pattern of the particular case. Solutions to conflicts questions are found by locating the correct rule, and the rule does the rest. The court is not, in any meaningful sense, required to make a choice of law. It is not required to consider the content of the laws, relevant social and economic factors behind those laws, or the position of the parties. In conflicts cases, this method has found favor with the courts even though it is directly antithetical to the common law method of judicial decision, which has for many years been based, to some extent at least, upon considerations of policy, and which has revolved around the factual situation presented in the particular case.

To the extent that the courts have adopted the rules approach, it can be said with fairness that they do not “want” to decide conflicts cases. The resolution of the conflicts issue in a case containing a foreign element is a threshold question that must be disposed of so that the court can get on with the business at hand, i.e., determining the substantive rights of the parties. While the threshold question may ultimately be dispositive of the case, the court is, nonetheless, anxious to get on with a determination on the merits. Cases in which conflicts questions arise are few in

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132 Certainly this is indicated by the early negligence cases which stressed the need to limit the liability of the new enterprises. See, e.g., Winterbottom v. Wright, 152 Eng. Rep. 402 (1842).
number,\textsuperscript{133} and considerations of "judicial economy" may seemingly justify resort to rules contained in an already-existing system.\textsuperscript{134}

The strongest consideration, however, is the "objective" nature of the rules. There is something "political" about the choice of law concept, where a court is asked to "choose" between its own law and that of another state or states.\textsuperscript{135} On what basis should it make its "choice?" Should it look to the content of the laws and choose the "better" law? Should it look to the interests of the states involved and "weigh" those interests? Questions of the "better law" and the "greater interest" have a political aura about them. If a court says that the law of another state is "better," does this not mean that the forum should change its own law, and if the basis of that law is legislation, is this a proper thing for a court to say about its legislature? If it says that the other state has a "greater" interest, is this not somehow a "political judgment," which courts may not be equipped to make? But if it says that the forum's law is "better" or that the forum has the "greater" interest, is it not then subject to the charge of "provincialism" and "expediency?" If these are the alternatives that result from choice, it is not difficult to understand why courts wish to take refuge in rules that are externally established and free from "judicial bias." If the forum's law is to be displaced or preferred, as the case may be, it is because the rules require it. The court's hands are "clean"; it applies the rules "objectively" and "impartially." Moreover, the court can always fall back on the need for uniformity of result.

The purpose of this article is not to set forth a theory of judicial behavior in conflicts cases, but rather it is in an attempt—without empirical data—to explain the courts' long-standing acceptance of an externally established system of rules. The conclusion is that there is a "political aura" surrounding a conflicts question. In order to avoid making what may be conceived to be a "political judgment" as to the choice of law, the courts have

\textsuperscript{133} See the discussion in B. Currie, \textit{Selected Essays in the Conflict of Laws} 629 (1963). As will be indicated, they may often present the same fact-law pattern.

\textsuperscript{134} As to the matter of "judicial economy" in conflicts cases, see id.

\textsuperscript{135} This is perhaps even more true when the forum is in the position of the "disinterested third state." Concerning the "political nature" of a choice of law decision, see id. at 181-83.
taken refuge in "objective" rules. It is the rules that require the choice of law rather than a conscious decision or preference by the courts. Since conflicts cases are relatively few in number when the totality of cases coming before a court is considered, the court may be willing to "sacrifice" a desirable result in a particular case so that it will not have to make a "choice of law" in all cases. Where the result would really be "shocking," manipulative techniques to avoid it are at hand; perhaps they are the "safety valve" of the system, although as has been pointed out, they operate to prevent the achievement of the system's fundamental goal, i.e., uniformity of result.

While a policy-centered approach to the solution of conflicts problems with emphasis on the fact-law pattern in the particular case, and concepts of "basic law," "governmental interest" and "principles of preference" may seem sound to academic commentators, they have been anathema to many courts. In order to avoid the responsibility for making a choice of law in the particular case, courts, have, in effect, accepted a system of rules to be applied deductively in all cases coming within a broad general category. However, the perspective to be gained from a case-by-case analysis of specific questions and the formulation of narrow principles susceptible of future extension or contraction has been lost.

Of course, the above statements do not apply to all courts or all judges or all cases. It is obvious that courts have often been motivated by policy considerations when they were manipulating the system to achieve desired results. It may be that when the language is stripped from the decisions and the cases with no actual conflict of laws are ignored, it would be found that many of the decisions were based upon policy considerations. None-theless, the fact remains that courts have accepted a system of rules approach to problems of the conflict of laws. Enough cases have been decided without reference to policy considerations and have reached results that would not have been reached if considerations of policy had been paramount. Courts are still deciding cases under the rules of the traditional system, and it cannot be

doubted that it is the rules approach that has found the most favor with courts.

Perhaps at this juncture, a definition of the policy-centered conflict of laws would be in order. The policy-centered conflict of laws rejects a priori rules to be applied in all cases of a particular category. Rather it looks to the individual fact-law pattern of each case and would make the choice of law decision in light of relevant social and economic policies found in the various laws and considerations of fairness to the parties. Its genesis goes back to the attacks mounted on the vested rights theory and the Restatement by Lorenzen,137 Yntema,138 and most significantly, Walter Wheeler Cook.139 Today, it is the basis of theories as to the choice of law process propounded by Ehrenzweig,140 Currie,141 Cavers,142 and other commentators.143 It is said that the earlier advocates of the policy-centered approach "spent their careers attacking the Restatement,"144 and were not able to offer a comprehensive approach in its stead.145 Nonetheless, they did propose solutions to a number of conflicts problems on the basis of a policy-centered approach. It is submitted that Walter Wheeler Cook, at least, developed a general theory of the policy-centered approach, on which later writers have built. It must be admitted,

137 See, e.g., Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 YALE L.J. 736 (1924).
140 Although Professor Ehrenzweig has prepared a complete treatise, A. EHRENZWEIG, CONFLICT OF LAWS (1962), it is his numerous articles which develop his thesis most fully.
141 His thesis is set forth in the articles collected in B. CAVES, supra note 133.
142 Professor Cavers was one of the early critics of the traditional approach. See Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173 (1933). After a number of years of reflection, his views have been set forth in D. CAVES, THE CHOICE-OF-LAW PROCESS (1965), which was based on the Cooley Lectures he delivered at the University of Michigan Law School in 1964.
143 See, e.g., Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267 (1966); Leflar, Conflicts Law: More on Choice-Influencing Considerations, 54 CALIF. L. REV. 1584 (1966); Weintraub, A Method for Solving Conflicts Problems—Torts, 46 CORN. L.Q. 215 (1962). This partial listing does not exclude other commentators whose approach may, to a greater or lesser degree, be said to be "policy-centered." Indeed, even Professor Briggs, the most persistent advocate of the "jurisdictional principle," relates the principle to a policy-centered approach. See Briggs, The Utility of the Jurisdictional Principle in a Policy-Centered Conflict of Laws, 6 VAND. L. REV. 667 (1953).
however, that the later writers have gone much further than Cook in elaborating a methodology for the solution of conflicts problems under a policy-centered approach.

A brief discussion of the methodology proposed by Professors Ehrenzweig, Currie and Cavers might be helpful at this point. The following is a summarization of their views in connection with the Babcock case.

**Ehrenzweig:** Professor Ehrenzweig's theory is that of the lex fori. He contends that the basic rule is that the law of the forum governs and foreign law is used only as an exception to this. When foreign law is used, it is because, "as to certain important typical fact situations, courts have in effect developed uniform interpretations which have resulted in generally recognized exceptions from the lex fori principle." These "true rules" of choice of law are based upon considerations of policy and fairness to the parties. It must be remembered that Professor Ehrenzweig favors abolition of our present concept of transient jurisdiction, so that in most cases the forum would have some interest in the transaction and the application of its law would be proper.  As to torts, Professor Ehrenzweig distinguishes between admonitory torts, which generally would be governed by the law of the place where the wrongful act was done, and enterprise liability, which would be determined with reference to reasonable insurability and calculability.

**Currie:** Professor Currie's theory is one of governmental interest. His thesis is that the court must analyze the policy behind various laws and determine, in light of that policy, what state or states have an interest in having their law applied to the issue in question. Frequently, he contends, only one state will have such an interest, and its law should be applied. If the court, after con-
sidering the interests of the various states involved, finds an apparent conflict in that more than one state may have an interest in having its law applied, it should reconsider and ask whether a more moderate and restrained interpretation of the policy or interest of one state may avoid the conflict. If a conflict is unavoidable and one of the states with an interest is the forum, Currie insists that the forum must prefer its own governmental interest and apply its law. If the forum is a disinterested state, it should dismiss the case because there is a conflict of interests between two other states which it cannot resolve. If the case cannot with justice be dismissed, the court should either apply the law that more nearly corresponds with its own, or, as Currie puts it, "decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield." 151

An essential element of Professor Currie's thesis is that a court cannot "weigh" conflicting interests and decide which state has the "superior governmental interest" where there is a true conflict. He asserts that this is simply not a judicial function. Therefore, where two states have an interest in the application of their law to the particular issue, each state, if it were the forum, would apply its own law. Obviously, this would mean that in such a case the result will depend on where suit is brought. 152 The law of the forum—which Currie also considers to be the basic law—is displaced only where another state has an interest in having its law applied to resolve the particular issue and the forum has no such interest.

Cavers: Professor Cavers would be in agreement with Professor Currie up to the point where there is a true conflict of

151 Statement of Professor Currie, in CHEATHAM, supra note 146, at 477-78.
152 But he says this does not imply "the ruthless pursuit of self-interest by the states." B. Cavers, supra note 141, at 185-87. The view that each of two states having an interest in the transaction might apply its own law was also put forth in Rheinstein, The Place of Wrong, 19 Tul. L. Rev. 4, 29-30 (1944). A variant of this is found in the approach of the German Reichsgericht to tort cases where the place of acting and the place of injury differ. The court has held that in such a case the plaintiff may choose the more favorable law. For a summary of a case applying such an approach, see 54 Am. J. Int'l L. 427 (1960). The case, Judgment of Oct. 22, 1957, 11 NJW 752, held that where the plaintiff's restaurant in Germany was damaged by smoke emitted from the defendant's plant on the French side of the Saar, the plaintiff could elect either French or German law. See also Lorenzen, Tort Liability and the Conflict of Laws, 47 L.Q. Rev. 483, 491-93 (1931).
interest. Indeed, there is general agreement as to the necessity to identify the “false conflict.” But at the point where there is a true conflict, Cavers, unlike Currie, would not “give up in despair and apply the law of the forum,” but would resolve the conflict in accordance with “principles of preference.” As he has stated:

affirmative propositions can be developed which, when applied to specific cases, can yield just solutions to choice-of-law questions, solutions which are just not only because they provide a fair accommodation of conflicting state policies but also because they afford fair treatment to the individuals who are caught in the hazards between state policies.

He goes on to say: “Where the conflict is neither false nor readily avoided, agreement upon a limited number of principles of preference that are broader than the specific conflicts posed by particular cases may be easier to reach than agreement upon a set of particularized solutions.” He goes on to formulate a number of principles of preference in various areas of conflicts law, some of which will subsequently be considered in connection with the Babcock case.

There will be frequent reference to the methodologies advocated by these three writers. By doing so, the intention is not to imply that they are the only “policy-centered” theorists. Indeed, it is accurate to say that most present writers are “policy-oriented” to some degree. However, it is necessary to draw the line somewhere, and these three the writer considers to be the “most policy-centered,” if this is a valid expression. There is no intention to “adopt” a particular one as the proper methodology. Nor will this article attempt to formulate a methodology for the policy-centered solution of conflicts problems.

This article is concerned primarily with the place of judicial method in the solution of conflicts problems. There has been an attempt to distinguish between the role of the academician in developing a consistent theory or methodology and the role of the

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153 See D. Cavers, supra note 142, at 72-73.
154 See Traynor, supra note 118.
155 See the discussion of “The Task of Accommodating Conflicting State Laws” in D. Cavers, supra note 142, at 120-21.
156 Id. at 80.
157 Id. at 113.
158 Id. at 89-93.
courts in deciding particular conflicts cases and in so doing, developing a body of conflicts "law." Courts should decide conflicts cases with reference to policy considerations rather than by the application of a priori rules forming part of a complete system, and there is no reason for a court to accept the policy-centered methodology formulated by a particular academic theorist.

The article will attempt to show how a policy-centered approach can be applied in the context of judicial method. This will produce sound decisions which can be applied, extended, or distinguished in future cases which present conflicts questions. In other words, the judicial method, which has served to develop a common law of contracts, torts, and the like, may serve to develop a body of conflicts law as well. Not only is the substitution of a policy-centered approach for a rules approach being advocated, but the application of judicial method to the solution of conflicts problems and an acceptance by the courts of the responsibility for "making" the law in this area is also urged.

For these two reasons any movement toward adoption by the courts of the Restatement Second should be rejected. As with the original Restatement, it represents an externally-established system for the solution of all conflicts problems. It is granted that the rules of the Restatement Second are more flexible, and in some respects seem to carry policy overtones. It is also granted that in deciding to prefer the Restatement Second over the original Restatement, courts may stress some policy considerations. Nonetheless, the approach is still one of a complete system of rules designed to solve all cases of a particular category.

To illustrate, the approach to liability for torts under the Restatement Second has been stated as follows:

The principal changes [over the original Restatement] are (a) that torts are now said to be governed by the local law of the state which has the most significant relationship with the occurrence and with the parties and (b) that separate rules are stated for different kinds of torts.}

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159 In R. SEDLER, CONFLICT OF LAWS IN ETHIOPIA 109-110 (1985), too much emphasis was given to these policy overtones. Perhaps this was a reaction to the departure from the rigid rules of the original Restatement. Nonetheless, the book did not carefully distinguish between a policy-centered and a "rules" approach, as this article attempts to do.

160 As in Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

Thus, while the Restatement Second may substitute the rule of the "state of the most significant relationship" for the rule of the lex loci delicti and may provide separate rules for different kinds of torts, the concepts of rules as the solution to conflicts problems remains. The court has more discretion under the rules of the Restatement Second, which means that they may be manipulated more effectively to produce the application of the desired result. The implication, however, is that every court passing on the question should apply the rule in the same way. Consideration may be given to "the relevant purposes of the tort rules of the interested states," but this is a very narrow consideration, limited to the determination of whether the purpose is primarily not a tort purpose, e.g., a purpose of preventing certain kinds of suits from being brought, or a determination of whether the purpose was primarily to compensate (so as to favor application of the law of the place of injury) or to deter or punish conduct (so as to favor application of the law of the place of acting).

Moreover, the rules are intended to be applicable to all fact-law patterns within their sweep. It is stated that intra-family immunity for tort is governed by the law of the family's domicile. This is true whether suit is brought in the state of injury or the state of domicile, whether an admonitory tort or an ordinary automobile accident is involved, whether it is the domicile or the place of injury that recognizes immunity, and in all situations where the question can be characterized as one of intra-family immunity. Thus, the Restatement Second merely substitutes the rule that the lex domicilii governs in all cases for the rule of the original Restatement that the lex loci deliciti governs in all cases.

Therefore, while the rules of the Restatement Second may be more flexible (and more complex) and permit some consideration of policy, the system, nonetheless, is one of rules. Courts should "leap the bridge" from the system of rules approach to the policy-centered approach rather than "cross the bridge" from the "few simple rules" of the original Restatement to the "many complex" rules of the Restatement Second. In doing so they should also return to the judicial method of decision and accept responsibility

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162 Restatement (Second) of the Conflict of Laws § 379, comment f (Tent. Draft No. 8, 1963).

163 Restatement (Second) of the Conflict of Laws § 390g (Tent. Draft No. 8, 1963).
for the development of a body of conflicts law. Throughout the remainder of this paper, this proposition will be developed through a consideration of the case of Babcock v. Jackson and the problem of guest statutes in the conflict of laws.

IV. BABCOCK v. JACKSON: THE DECISION, ITS JOURNEY TO KENTUCKY AND ITS AFTERMATH

In Babcock v. Jackson, the New York Court of Appeals refused to apply an Ontario statute to bar suit by one New York resident against another, and thus rejected the traditional rule that the lex loci delicti governs all questions of tort. The decision was hailed by all. Professor Reese, Reporter for the Restatement Second, interpreted the decision as adopting the "basic principle of choice of law that the law of the most appropriate state should govern the matter at hand." As Judge Fuld, writing for the majority had said:

The "center of gravity" or "grouping of contacts" doctrine adopted by this court in conflicts cases involving contracts imprints us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multistate contacts. Justice, fairness and "the best practical result" may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest interest with the specific issue raised in the litigation. Following Babcock, a number of courts have substituted the "state of the most significant relationship" rule of the Restatement Second for the lex loci delicti rule of the original Restatement.

The policy-centered theorists also were encouraged by the

165 In Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), the court replaced the lex loci contractus rule with the "center of gravity" rule. A discussion of the soundness of this approach to contract cases is beyond the scope of this paper. Suffice it to say that the considerations are much different and the analogy is questionable.
167 See, e.g., Farbicus v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Balts v. Balts, 142 N.W.2d 66 (Minn. 1966) (quaere); Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
decision. Professor Ehrenzweig, although criticizing the court for adopting the state of the most significant relationship rule and referring to New York’s “interest,” was pleased to see that the court stressed insurability. The court, quoting from Professor Ehrenzweig, stated that “Indeed, such a result, we note, accords with the ‘interest of the host in procuring liability insurance under the applicable law, and the interests of his insurer in reasonable calculability of the premium.” In commenting on the decision, Ehrenzweig says that it, “like the court’s earlier practice, remains reconcilable with a ‘true rule’ based on the lex fori as supplemented by the law of the state in which the car is permanently kept.”

Professor Currie construes the opinion in Babcock as “very different from earlier opinions treating of the center of gravity.” Currie’s theory is that the court determined the center of gravity and thereby decided the case, “in the most reasonable and objective way that seems possible: by reference to the policies and interests of the respective states, by construction and interpretation of the respective laws.” As the court stated:

Comparison of the relative “contacts” and “interests” of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and the more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed, and undoubtedly insured in New York, in the course of a week-end journey which began and which was to end there. In sharp contrast, Ontario’s sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.

This is the classic case of Professor Currie’s “false conflict,” since he believes only New York had an interest in the application of its law and policy relating to host-guest recovery.

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171 Id.
172 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.
Professor Cavers is pleased with Babcock because:

not only is the court ready to separate the issue of the host-driver's immunity to his guest-passenger's suit from any issue regarding the tortiousness of his conduct, but also it approaches the former question by seeking to identify the policies embodied in the particular laws in conflict, to ascertain the interests of the states in the application of their respective policies in the light of their contacts with the case, and thereby to decide which state has "the superior claim for application of its law." \(^{173}\)

Thus, as Professor Currie has observed, "The majority opinion contains items of comfort for almost every critic of the traditional system." \(^{174}\)

As the subsequent discussion will indicate, however, many were disappointed when the New York court re-considered and decided in favor of the rules approach rather than in favor of the policy-centered conflict of laws.

In \textit{Wessling v. Paris}, Babcock came to Kentucky. Its journey was a controversial one. In the first \textit{Wessling} decision, the Court of Appeals, by a vote of 4-3, applied the law of Indiana, the place of injury, and upheld a dismissal of the suit. A petition for rehearing was filed, and in what was a rare instance, the petition was granted, the former opinion withdrawn, and a new opinion reversing delivered. In the new decision, the division was 5-2 for reversal. \(^{175}\) In the first opinion, the retention of the lex loci delicti rule was justified on essentially stare decisis grounds. In the second opinion, however, the court merely observed that it was "time to re-examine the rule." The latter approach is more characteristic of a Court that in recent years has not hesitated to overrule older cases in light of changed conditions. \(^{176}\)

An examination of the history of the lex loci delicti rule in Kentucky is advantageous. An attempt has been made to trace


\(^{174}\) Currie, \textit{ supra} note 170, at 1234.

\(^{175}\) \textit{Wessling v. Paris}, 417 S.W.2d 259 (Ky. 1967). In the original decision Judges Williams, Montgomery, Moremen and Stewart comprised the majority, with Judges Palmore, Milliken and Hill dissenting. By the time of rehearing Judges Moremen and Stewart had been replaced by Judges Steinfield and Osborne. Judge Williams changed his vote—indeed he wrote the new opinion; Judge Steinfield voted with the new majority, and Judge Osborne dissented.

\(^{176}\) See, e.g., \textit{Mullikin v. Jewish Hospital Ass'n of Louisville}, 348 S.W.2d 930 (Ky. 1961) (charitable immunity).
the lex loci delicti rule through the "guest statute" cases since 1950 when they first appeared (they have been the only tort conflicts cases to come before the court in recent years). Thereafter, other tort cases, have been examined in an attempt to find the source of lex loci delicti rule.

At the outset it should be noted that in 1930 the Kentucky legislature enacted a guest statute barring recovery against the host except where the accident "resulted from an intentional act on the part of said owner or operator."\(^{177}\) However, in *Ludwig v. Johnson*,\(^{178}\) the Court of Appeals found that the statute violated three provisions of the Kentucky Constitution.\(^{179}\) The Court concluded its opinion with the following declaration:

> The statute under consideration violates the spirit of our Constitution as well as its letter as found in sections 14, 54, and 241. It was the manifest purpose of the framers of that instrument to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for the injury. The imperative mandate of section 14 is that every person shall have remedy by due course of law. If the allegations of the appellant's petition are true, he has suffered serious injuries occasioned by the negligent acts of the appellee, Darwin Johnson. The Constitution guarantees to him his right to a day in court for the purpose of establishing the alleged wrong perpetrated on him, and recovery of his resultant damages. We conclude that chapter 85 of the Acts of the General Assembly of 1930 is unconstitutional and void.\(^{180}\)

This, then, represents the Court's treatment of guest statutes in a domestic case. However, in foreign cases it was quite a different matter until the final decision in *Wessling*.

In the original *Wessling* opinion, the Court cited three cases as setting forth the lex loci delicti rule. One was *Stewart v. Martin*,\(^{181}\) a 1961 case involving two Kentucky residents injured in an accident in Ohio. The sole question before the Court was whether the plaintiff was a "guest" within the meaning of the Ohio statute.\(^{182}\) The Court never discussed the possibility of ap-

\(^{178}\) 243 Ky. 534, 49 S.W.2d 347 (1932).
\(^{179}\) Ky. Const. §§ 14, 54, 241.
\(^{180}\) 243 Ky. 534, 542-43, 49 S.W.2d 347, 351 (1932).
\(^{181}\) 349 S.W.2d 702 (Ky. 1961).
\(^{182}\) Page's Ohio Rev. Code § 4515.02 (1965).
plying any other law than that of Ohio, citing *Carter v. Driver*\(^{183}\) (a case also cited in the original *Wessling* opinion), for the general proposition that the lex loci delicti governs. *Carter* was a 1958 case involving Kentuckians injured in Illinois, and again the issue was whether the plaintiff was a "guest" within the meaning of the Illinois statute.\(^{184}\) The Court merely assumed that the lex loci delicti applied.

The third case cited was *Workman v. Hargadon*,\(^{185}\) a 1961 case involving Kentucky residents killed in Ohio. The Court stated that the substantive law of the place of wrong applied, citing two cases in which this proposition was enunciated, one of which involved a question of proof of foreign law\(^{186}\) and the other a question of venue.\(^{187}\) Thus, in the three cases cited as authority, there was neither consideration of the soundness of the rule nor discussion of the reasons why it was the rule. The rule was assumed to be applicable without question.\(^{188}\)

In proceeding backwards from the original opinion and the cases cited therein, cases such as *Hugenot v. Scaff*\(^{189}\) (Kentucky residents working in Ohio; accident occurred there while on trip to Kentucky) and *Douglas v. Wood*\(^{190}\) (Kentucky residents, returning from trip were injured in Virginia), where the parties assumed that the law of the state of injury governed, or *Drahmann's Administrator v. Brink's Administrator*\(^{191}\) (Kentucky residents killed in plane crash in Georgia), where the court stated the rule in a sentence, or *Terbovich v. Spack*,\(^{192}\) (Kentucky residents, accident occurred in Indiana), where the court simply proceeded under the substantive law of the place of injury, are to be disregarded.

The first case to discuss the soundness of the lex loci delicti rule as applied to guest statutes was *Ansback v. Greenberg*\(^{193}\)
decided in 1952. The Ansbacks went to Florida with Greenberg in the latter’s automobile. An accident occurred in Georgia, a guest statute state, while Greenberg was driving. The Court of Appeals stated the general rule, which the plaintiffs did not contest, that, “an action for personal injuries must be tried under the law of the state where the injury occurred,” citing the Restatement. 24 The plaintiffs argued, however, that in light of Ludwig v. Johnson, 25 Kentucky’s “public policy” prohibited application of the Georgia statute. The Court rejected this argument, observing:

The Ludwig case, to our mind, is not applicable. The question is whether the Ansbacks have a cause of action under Georgia law. If they have no cause of action there, they have none here, and we don’t reach the question of enforcing a right created by the law of another jurisdiction which might be contrary to the public policy of this state. 26

After assuming the plaintiffs were trying to employ the “public policy technique,” 27 the Court correctly observed that this technique is applicable only to prevent enforcement of a claim arising under foreign law because of the nature of the claim. 28

However, as the Court pointed out in Wessling, the conclusion in Ansback begs the question. The real issue was whether the plaintiff had a cause of action under Kentucky law, i.e., whether Kentucky or Georgia law governed the issue of the host’s liability to his guest. In Ansback, both the plaintiff in his argument and the Court in its analysis confused the public policy technique with the policy-centered approach to the solution of conflicts problems. 29 The plaintiff was contending that Kentucky’s policy against guest statutes—reflected in the Constitution—was equally applicable to foreign guest statutes where Kentucky parties were involved. The Court, following the territorialistic dogma of the Restatement, looked to Georgia law to see if a

194 Id. at 2.
195 243 Ky. 534, 49 S.W.2d 347 (1932).
196 256 S.W.2d 1, 2 (Ky. 1952).
197 See the discussion of this technique, notes 118-20 supra, and accompanying text.
199 This is not uncommon. The court in Wessling also confused the “technique” with “policy,” but in light of the court’s disposition, this error was harmless.
“right” was created under that law, and finding none, refused recovery. Thus, in the one case where an issue as to the policy-centered conflict of laws was raised, the Court and counsel confused the issue by treating it as one involving the public-policy technique. The case, therefore, cannot stand for rejection of the policy-centered conflicts of laws. Rather it only serves to indicate that the Court was so committed to the fullest application of the vested rights theory embodied in the Restatement that it did not understand the nature of a policy-centered approach.

The same fact-law situation was involved in Jones v. Jones,200 where Kentucky residents were injured in Ohio. The plaintiff here also made the “public policy” argument, but the Court, while setting it out as a contention, did not discuss it. Disposition of the conflict of laws question was as follows: “The accident complained of occurred in Ohio. Suit was filed in Kentucky. The law of the forum where the accident occurred applies.”201

The first case involving a foreign guest statute that research disclosed202 was Fischer v. White,203 which, like Wessling, involved Kentucky residents injured in Indiana. The Court did not discuss any conflicts issues and proceeded to decide the case under Indiana law. These few cases represent the “authority” relied on by the Court in the original opinion and the dissent in the final one.

Search for the source of the lex loci delicti rule reveals a dearth of decisions between the guest statute cases and other torts cases, at least insofar as research has been able to disclose. Next in the “chain” is the 1940 case of Feck’s Administrator v. Bell Line, Incorporated,204 involving an Indiana accident. The Court merely observed that “it is conceded by the respective parties that the case is triable under Indiana law. . . .”205 In 1937, a case involving Kentucky residents injured by an Indiana streetcar is reported, but there is no discussion of any conflicts question.206

200 312 Ky. 240, 227 S.W.2d 182 (1950).
201 Id. at 185.
202 My research was aided by the amicus curiae brief filed by Farland Robbins, Esq. Mr. Robbins’ brief contained cases that my research had failed to uncover.
203 312 Ky. 32, 226 S.W.2d 333 (1950).
204 284 Ky. 288, 144 S.W.2d 483 (1940).
205 Id. at 291, 144 S.W.2d at 484.
206 Hauser v. Public Serv. Co. of Indiana, 271 Ky. 206, 111 S.W.2d 657 (1937).
important case of *Stewart's Administrator v. Bacon,* decide in 1934, involved proof of foreign law and will be discussed in that context. However, the Court did state that questions of tort were governed by the lex loci delicti, and cited a number of Kentucky cases to which reference will be made.

At this point no case appears until 1914, when a number of cases leading to the original source of the rule appeared. In *Williamson's Administrator v. Norfolk & Western Railroad,* where the decedent was killed by a locomotive in West Virginia, the Court observed: "It is well-settled that when an action is brought in this state for injuries occurring in a foreign state, the rights and liabilities of the parties are determined by the law of the foreign state," citing *Collins v. Norfolk Railroad Company.*

In *Collins,* where a West Virginia plaintiff was injured in West Virginia, but sued in Kentucky, the Court observed: "It is well-settled that, when an action is brought in this state for injuries occurring in a foreign state, the rights and liabilities of the parties are determined by the law of the foreign state." In this case, the Court cited three earlier cases. The most recent was *Louisville & Nashville Railroad Company v. Moran,* decided in 1912, which involved a railroad accident in Tennessee. The Court stated, "As the accident happened in the state of Tennessee, the rights of the plaintiff and the liability of the company are to be determined by the laws of that State." The Court cited *Louisville & Nashville Railroad Company v. Smith,* one of the cases cited in *Collins.* The other case was *Pittsburgh Railroad Company v. Austin's Administrator,* decided in 1911, involving an Indiana plaintiff struck in Indiana by the defendant's train. The Court stated that Indiana law applied, without citing authority. In *Smith,* decided in 1909, the employee was injured.

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207 253 Ky. 748, 70 S.W.2d 522 (1934).
208 160 Ky. 158, 169 S.W. 613 (1914).
209 152 Ky. 755, 154 S.W. 37 (1913).
210 In view of the fact-law pattern presented, Kentucky was a purely disinterested forum, and the application of West Virginia law was proper.
211 148 Ky. 418, 146 S.W. 1131 (1912).
212 Id. at 419, 146 S.W. at 1131.
213 135 Ky. 462, 122 S.W. 806 (1909).
214 141 Ky. 722, 133 S.W. 780 (1911).
215 Again, note that the application of Indiana law was proper, since Kentucky was a disinterested forum. In *Yellow Poplar Lumber Co. v. Ford,* 141 Ky. 5, 131 S.W. 1010 (1910), the Court assumed that the law of the place of injury applied.
in Alabama, and the Court stated that it was a settled principle that Alabama law applied, citing a number of cases.\textsuperscript{216}

The first was \textit{Illinois Central Railroad Company v. Jordan}^{217} decided in 1904, involving a railroad employee injured in Tennessee. The Court stated, "The disposition of the questions cannot be made under the rules of law which prevail in this jurisdiction, but must be done under the law of Tennessee, where the accident happened."\textsuperscript{218} The Court cited \textit{Louisville & Nashville Railroad Company v. Whitlow's Administrator}^{219} and quoted at length from the opinion. \textit{Whitlow}, cited in \textit{Smith}, was also cited in \textit{Louisville & Nashville Railroad Company v. Harmon}^{220} a 1901 case concerning a passenger injured in Tennessee. In \textit{Harmon}, the Court declared that "the law of the place where the right was acquired governs as to the right of action." Clearly, \textit{Whitlow} is the source of the lex loci delicti rule in Kentucky.

\textit{Whitlow}, a resident of Kentucky, and employee of the railroad, was killed in Tennessee. His personal representative brought suit in Kentucky under the Tennessee wrongful death statute. Earlier decisions had held that a suit could be maintained under a foreign wrongful death statute.\textsuperscript{221} In fact, all prior conflicts cases had involved the question of whether suits under foreign law were "transitory" and, therefore, maintainable in Kentucky.\textsuperscript{222} Thus, \textit{Whitlow} seems to be the first instance in which the choice of law question in tort cases was discussed.\textsuperscript{223} Under Kentucky law, contributory negligence was an absolute bar, but under Tennessee law, contributory negligence of the decedent operated merely to

\begin{footnotes}
\item[216] In Murray's Adm'r v. Louisville & N. R.R., 132 Ky. 336, 110 S.W. 334 (1908), the Court held that the law of the place of injury applied, citing texts and encyclopedia references.
\item[217] 117 Ky. 512, 78 S.W. 426 (1904).
\item[218] Id. at 514, 78 S.W. at 427.
\item[219] 114 Ky. 470, 43 S.W. 711 (1897).
\item[220] 23 Ky. L. Rptr. 871, 64 S.W. 640 (1901).
\item[222] In what must be the first recorded conflicts case in Kentucky, Watts v. Thomas, 5 Ky. 458 (1811), the Court allowed suit for an alleged assault, battery and false imprisonment occurring in Indiana territory on the ground that the action was "transitory."
\item[223] In Louisville & N. R.R. v. Graham's Adm'r, 98 Ky. 688, 34 S.W. 229 (1896), suit was brought to recover for a death occurring in Alabama. The original petition alleged that Alabama and Kentucky law were the same, but the amended petition set out Alabama law. There was no discussion of any conflicts issue.
\end{footnotes}
reduce the amount recoverable. The Court held that Tennessee law applied, observing as follows:

It is a well-settled principle in all civilized countries, so far as we are aware, that in matters ex contractu, the lex loci contractu governs the construction and the validity of the contract, and that the lex fori governs the remedy. The principle is so familiar it would be a waste of time to cite elementary authorities or adjudged cases in support of it .... We can see no reason why the doctrine as established as to actions ex contractu may not be applied to actions ex delicto. There seem to be but few decisions on the question. In the case of Nonce v. Railroad Co., 33 Fed. 434, it was held that there is no distinction on the subject between actions ex contractu and ex delicto. Herrick v. Railway Co., 31 Minn. 11, 16 N.W. 413, was an action ex delicto, and the court held that the law of the place where the right was acquired or the liability incurred governs as to the right of action, while all that pertains merely to the remedy is controlled by the law of the state where the action is brought, thus recognizing the principle as the same where the right of action is ex contractu or ex delicto.224

Further, the Court held that contributory negligence involved the "right rather than the remedy" and was, therefore, controlled by the lex loci, concluding as follows:

At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this state, cannot be applied so as to alter or affect the right of action which arose in Tennessee.225

Thus, the basis of the lex loci delicti rule in Kentucky was an analogy to the law governing contracts.226 The rule developed at the time the vested rights theory was beginning to replace the comity theory227 and strictly followed the rationale of the "new"

225 Id. at 483, 43 S.W. at 718.
226 It is interesting to note that the Court in Babcock likewise drew an analogy to the "proper" rule in contract cases as furnishing the guide for the "proper" rule in tort cases. See the discussion at note 165 supra.
227 Compare the opinions of the Supreme Court in Slater v. Mexican Nat'l Ry., 194 U.S. 120 (1904), and Hilton v. Guyot, 159 U.S. 113 (1895).
theory. Only the state where the injury occurred could create a tort right just as only the state where the contract was made had "jurisdiction" to create a contract right. Since this was a conflicts case, the Court enunciated a general rule to be uncritically applied in future cases perhaps involving entirely different fact-law situations.

It must be remembered that *Whitlow* was a case brought by a Kentucky plaintiff under a foreign wrongful death statute, *a case that could not be brought under Kentucky law*, since the Kentucky wrongful death statute was inapplicable to deaths occurring elsewhere.\(^2\) The only question was whether that part of the statute providing for comparative negligence should be applicable, and it is difficult to see any reason why it should not have been.\(^2\) Indeed the real issue seemed to be whether comparative negligence affected the "right" or the "remedy".\(^2\) Any analogy between this case and a case involving a guest statute, which is designed essentially to regulate insurance relationships, is difficult to understand, but such has been the nature of the conflict of laws. A rule is developed for a class of cases such as torts and applied mechanically in all cases where the plaintiff is suing to recover for a "tort."

Of course, the Court never considered a policy-centered conflict of laws. No such concept existed at that time, and in future years, the Court ignored the question by invoking stare decisis. In the one case where a policy argument was raised, the Court confused considerations of policy with the "public policy technique." The Court never asked whether the policy against guest statutes reflected in the Kentucky Constitution precluded the displacement of Kentucky law notwithstanding that the accident occurred elsewhere. Where a court has carefully considered a problem and decided upon a rule or principle of law, it is proper under the doctrine of stare decisis to rely on its former decision ex-


\(^2\) In some of the earlier cases the courts appear to have had difficulty with the rule that "the law of the forum governs matters of 'procedure'" and construed "remedy" as synonymous with "procedure." Since damages affected the "remedy," they would look to the law of the forum. See, e.g., Dorr Cattle Co. v. Des Moines Nat'l Bank, 127 Iowa 153, 98 N.W. 918 (1903).
cept where new knowledge or new conditions have rendered the rationale of that decision inapplicable.\textsuperscript{231} Stare decisis does not, however, justify a court's refusal to consider new ideas and to perpetuate decisions resting on questionable premises. To apply the Indiana guest statute to Kentucky residents injured there might be justified, depending on the Court's conception of the function of the conflict of laws. However, such application must be justified for a reason other than that as matters of contract are governed by the lex loci contractus, matters of tort must be governed by the lex loci delicti.\textsuperscript{232} In no sense did the parties "rely" on the fact that Indiana law would be applied if they were involved in an accident in Indiana.\textsuperscript{233} The rejection of the stare decisis argument by the Court simply by observing that "the time has come to re-examine the principle of the lex loci delicti" is perfectly in order. Indeed, a less likely case for the application of stare decisis can hardly be imagined.

Having laid the groundwork for \textit{Babcock} in Kentucky—and presumably arriving at the point where the court is deciding just how it will solve the problem—let us leave the Kentucky Court wrestling with that question, and return to New York. The New York Court that has "spawned the veritable revolution" by discarding the rule of the lex loci delicti has not adopted a policy-centered approach in its stead. Rather, a new rule has been substituted for the old, \textit{i.e.}, the "state of the most significant relationship rule" of the \textit{Restatement Second} for the lex loci delicti rule of the \textit{Restatement "First."} Previous discussion illustrated the distinction between the \textit{Restatement Second's} attempt to "localize" the tort, or more accurately, each issue in the tort case, and the policy-centered approach.\textsuperscript{234} This distinction is most cogently demonstrated by the New York court's treatment of the post-\textit{Babcock} cases.

In \textit{Dym v. Gordon},\textsuperscript{235} the passenger and driver were New York students attending the University of Colorado. The driver had

\textsuperscript{231} As pointed out previously, the Kentucky Court does not hesitate to overrule older decisions on these grounds.

\textsuperscript{232} Louisville & N. R.R. v. Whitlow's Adm'r, 114 Ky. 470, 478, 43 S.W. 711, 712 (1897).

\textsuperscript{233} Even where reliance on settled law can be shown, a change can be accomplished by prospective overruling. This is not likely to be necessary in most conflicts situations.

\textsuperscript{234} See the discussion, \textit{supra}, notes 159-63 and accompanying text.

\textsuperscript{235} 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).
brought his New York registered and insured automobile with him, and was driving the passenger in Colorado. The automobile collided with another vehicle, and the plaintiff was injured. After the parties returned to New York, the passenger filed suit, and the defendant (more specifically, his insurer) pleaded the Colorado guest statute.²³⁶

In a 4-3 decision, the New York Court of Appeals held that the Colorado statute was applicable. The opinion of Judge Burke, speaking for the majority, and the dissenting opinions of Judge Fuld and Judge Desmond clearly demonstrate that Babcock must be read as stating a new choice of law rule rather than as adopting a policy-centered approach. As Judge Burke stated: “Our courts now have adopted a rule of choice of law in a conflict situation which looks to reason and justice in its selection of which law should apply and which fits the needs of today's world where long and frequent travel is no longer reserved to a few.”²³⁷ Under this rule, the court would “first isolate the issue, then identify the policies embraced in the laws in conflict, and finally examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its law or policy applied.”²³⁸ Using the rule formulated by Judge Burke and assuming both states have an interest in having their law applied, the conflict is resolved by applying the law of the state which has the more significant contacts with the case so that its interest should be upheld. A consideration of the contacts rather than consideration of the policies determines which law applies. New York has, therefore, adopted the rule of the Restatement Second that the law of the state of “the most significant relationship” governs rather than a policy-centered approach. Policy is relevant only in determining whether both states have an interest in the application of their law; once that has been answered in the affirmative, policy disappears from the case.

The court concluded that one of the purposes of the Colorado

²³⁶ COLO. REV. STATS. § 13-9-1 (1954). Recovery was authorized only where the action was intentional, caused by intoxication, or negligence “consisting of a willful and wanton disregard for the rights of others.”
²³⁸ Id.
guest statute was to give priority to injured persons in the vehicle
of the non-negligent driver, and, therefore,

examining Colorado's interest in light of its public policy,
we find that over and above the usual interest which Colo-
rado may bring to bear on all conduct occurring within its
boundaries, Colorado has an interest in seeing that the negli-
gent defendant's assets are not dissipated in order that the
persons in the car of the blameless driver will not have
their right to recovery diminished by the present suit.239

For what it is worth, the driver of the other automobile was
a resident of Kansas and it may be questioned what "interest"
Colorado had in his recovery.240 Since Colorado had this interest—as opposed to Babcock, where there was no collision and only
New Yorkers were involved in the accident—the case was decided
with reference to the factual contacts that each state had with the
transaction.

The court concluded that Colorado had the "more sig-
nificant contacts" primarily because the parties had "come to
rest in Colorado," and the guest-host relationship, involving a
trip between two points in Colorado, was formed there. The
court went out of its way to make it clear that it was applying an
"objective" rule fairly and impartially. Although rejecting the lex
loci delicti rule, the court would not substitute a policy-centered
approach in its stead, observing that "this analysis is much to be
preferred over an approach which merely looks to the fortuitous
place of the happening of the accident, or simply applies the law
of the domicile, or one which blithely applies the public policy of
the forum under the denomination of 'governmental interests.' "241
The court then demonstrates how "cosmopolitan" it is by observ-
ing further:

Judicial hostility to "guest" statutes and a preoccupation
with New York social welfare problems and the relative
liability of insurers should not be treated as "contacts" which
are found then to outweigh the factual contacts. These views
also depend on the mores of the particular forum and its

239 Id.
240 But see D. Caiters, THE CHOICE OF LAW PROCESS 297-300 (1965).
241 Dym v. Gordon, 16 N.Y.2d 120, 126, 209 N.E.2d 792, 795, 262 N.Y.S.2d
463, 468 (1965).
allied public policy. Such a tack is altogether too provincial.\textsuperscript{242}

Further examples disclaiming a policy-centered approach will also be found in the opinion.\textsuperscript{243} Judge Fuld's dissent stressed that "contacts," as he used the term in \textit{Babcock}, had to be evaluated with respect to the policies of the states involved and not with reference to the place where the relationship was "centered."\textsuperscript{244} Judge Desmond's dissent was simply on the ground that New York's "public policy" was to "protect its own residents from foreign state deprivations of reasonable protection and indemnity" without regard to where the relationship was centered.\textsuperscript{245} \textit{Dym v. Gordon} makes it clear that New York has not adopted a policy-centered approach, at least as the concept is generally understood.

The New York courts have been trying to identify the "most significant contacts" ever since the \textit{Dym} decision. In \textit{Macey v. Rozbicki}\textsuperscript{246} the parties were New Yorkers who had a summer home in Waverly Beach, Ontario, just across the river from Buffalo. The parties were staying at the summer home (the plaintiff was a sister of the defendant-driver and a sister-in-law of the defendant owner) and decided to drive to Niagara Falls, Ontario, and to return to Waverly Beach. The accident occurred during that trip. The court held that the Ontario statute did not apply on the ground that "the relationship of two sisters living permanently in New York was not affected or changed by their temporary meeting together in Canada for a short visit there, especially since the arrangements for that visit had undoubtedly been made in New York State."\textsuperscript{247} Thus, the important contacts were with New York and not Ontario.

These cases make it quite clear that the "grouping of contacts" test is not one susceptible of easy application. The simplicity of the \textit{lex loci delicti} rule is lost, but a policy-centered approach is not substituted. In all three cases—\textit{Babcock}, \textit{Dym}, and \textit{Macey}—the plaintiffs and defendants were New Yorkers, temporarily out

\textsuperscript{242} Id. at 126, 209 N.E.2d at 795-96, 262 N.Y.S.2d at 468.
\textsuperscript{243} Id. See particularly the criticism of "public policy."
\textsuperscript{244} Id. at 129-34, 209 N.E.2d at 797-800, 262 N.Y.S.2d at 470-74.
\textsuperscript{245} Id. at 134-36, 209 N.E.2d at 800-01, 262 N.Y.S.2d at 474-76.
\textsuperscript{247} Id. at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593.
of the state, and the automobiles were insured in New York, which has compulsory insurance. In all cases, recovery would have been from the proceeds of insurance taken out on a vehicle insured in New York for the benefit of a New York plaintiff. It is difficult to see why the all-important question of recovery for personal injuries should be decided differently in any of these cases, but under the "grouping of contacts" rule it was.

An entirely different kind of question is presented when two Ontario residents are involved in an accident in New York. Following Babcock, the "state of the most significant relationship" would seem to be Ontario. This is reverse Babcock—the parties were residents of Ontario, the trip originated there, the relationship was formed there, the parties were returning there, and the accident happened while the parties were temporarily in New York. But in this situation the New York lower courts have held that New York law applies. The majority in the appellate division said that Babcock was not intended to change the established law of New York that a guest had a cause of action against his host for an accident occurring in New York whether or not the parties were New Yorkers. The trial court also emphasized that a car upon the highways of New York "must be subject to New York law." This could be construed as a more policy-centered approach and may be the "tack of provincialism" that Judge Burke criticized in Dym. The court of appeals has not yet passed on the question. If there is anything that Babcock did not do, it was to clarify the law in New York. But so far as the court of appeals is concerned, New York is following the "rules" approach of the Restatement Second rather than any notion of a policy-centered conflict of laws.

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248 Judge Keating, concurring in Macey, took the position that Dym should be overruled.
249 Cases in which the guest would recover in excess of the policy limits should be rather rare.
250 Again, note that Professor Cavers might not agree with this assertion. D. Cavers, supra note 240.
252 The case arose on a question of amendment of pleadings, in which the defendant sought to amend in order to allege the guest statute defense. Two of the judges of the Appellate Division would have permitted the amendment, but two refused to allow it on the ground stated above, and one refused to allow it on the ground that the plaintiff would be "prejudiced." The decision, therefore, does not represent a majority view.
However, the "seeds of policy" planted in Babcock may have found a more nourishing environment elsewhere. If, when the Kentucky Court was deciding Wessling, it wished to find support for a policy-centered approach, it could have looked to the decisions of the Wisconsin, Minnesota, and New Hampshire courts when faced with a Babcock situation. In Wilcox v. Wilcox, the Wisconsin Supreme Court adopted the "most significant relationship" test of the Restatement Second, but interpreted it in a much different light than did the New York court in Dym v. Gordon (and, it is submitted, than the drafters of the Restatement). Wilcox stressed that "contacts" had to be considered "qualitatively rather than quantitatively in light of policy considerations." The weight of the contacts set forth in the Restatement would depend, according to the court, "on their relevancy to the place of the wrong and the forum." The court analyzed the situation solely with reference to the policies of the two states involved, Wisconsin (the domicile of the parties and the place where the insured vehicle was garaged) and Nebraska (where the accident occurred). The Nebraska law, denying recovery, could hardly be said to further the safe use of Nebraska's highways. The purpose of a guest statute under this court's application was to protect the host from suit by an ungrateful guest, to protect the insurance company from collusive suits, or perhaps to protect the host and insurer from any suit. The purpose would be served only if a Nebraska host and a Nebraska insurer were involved, and therefore, Nebraska had no interest in the application of her guest statute to the present case. The insurance had been issued with respect to a Wisconsin-garaged vehicle, so that to the extent law was considered at all, it was Wisconsin law. Therefore, Wisconsin was necessarily the state of the most significant relationship. Although adopting the Restatement "rule," Wisconsin conceives of it in a different way and that court is unlikely to draw the kind of "come to rest" distinctions that the New York court has drawn in subsequent cases.

253 These and other opinions were cited by the court in Wessling.
254 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
255 This would reduce liability insurance rates to the extent that host-guest loss experience would be relevant in their computation. On this point, see Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 Yale L.J. 554, 574-76 (1961).
The Minnesota Supreme Court has also adopted the Restatement approach, at least as to family immunity, but when faced with a Babcock situation has decided the case solely with reference to the interests of the various states. In *Balts v. Balts* 256 a Minnesota mother and son were involved in an automobile accident in Wisconsin. The court held that the question of intra-family immunity was governed by Minnesota law, the state of domicile, rather than by Wisconsin law, and allowed the suit. 257 The decision was based on Section 390g of the *Restatement Second*, which provides that family immunity is determined by the law of the family domicile. However, the court stressed that only Minnesota had an interest in applying its law to this issue, and that in future cases it would render its decision with reference to the interests of the various states involved.

In *Kopp v. Rechtzigel*, 258 decided the same day, the rationale of *Balts* was applied to the case of Minnesota parties involved in an accident in a guest statute-state. After commenting on the present purpose of guest statutes as being to prevent collusive suits against the insurer, the court noted that the owner intended to protect his passenger against negligent injury as well as to secure his own indemnity. Since the parties were Minnesota residents and the automobile was garaged and insured there, it concluded that "Minnesota has an overriding concern in the relationship of the parties and in the adjudication of their rights." 259 Although the extent to which Minnesota has adopted the Restatement test is questionable, it is clear that the court is rendering its decisions with reference to considerations of policy.

The New Hampshire Supreme Court appears to have gone even further in adopting a policy-centered approach, although choosing to express its approach in terms of "relevant choice-in-

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256 273 Minn. 419, 142 N.W.2d 66 (1966).
257 In so doing, it changed the substantive law of Minnesota, which had recognized parental immunity. It also employed the technique of prospective overruling.
258 273 Minn. 441, 141 N.W.2d 526 (1966).
259 Id. at --, 141 N.W.2d at 528. The court also observed that the state of injury's interest lay in promoting highway safety and perhaps providing reimbursement to its medical creditors, and that that interest would be better served by applying Minnesota's law. The point is that before a state can be said to have an interest, it must have a policy, and the policy of the state of injury was not to allow recovery. Since the defendant was not a resident of that state and the automobile was not insured there, it had no interest in applying its policy of denying recovery in the present case.
fluencing considerations." Clark v. Clark\textsuperscript{260} refused to apply the guest statute of the place of injury, Vermont, but unlike Babcock and Wilcox, and perhaps the Minnesota cases, the most significant relationship test of the Restatement Second was not accepted. Instead the New Hampshire Court reviewed what it considered to be the relevant choice of law influencing considerations and relied principally upon those set forth by Professor Leflar. This court also gave great weight to Professor Cavers' "principles of preference."\textsuperscript{261} Applying the choice of law influencing considerations, the court concluded that the most important were those of "governmental interests" and the "preferable rule." The court viewed Vermont as having no interest in the application of its statute to New Hampshire residents and also regarded guest statutes unsound in light of modern conditions. The most important factor is that the court limited its decision to the precise fact-law pattern before it. This fact also stands out most strikingly in the opinion of the Kentucky Court in Wessling v. Paris.\textsuperscript{262} This is what lies at the heart of what the author conceives to be the crucial matter of judicial method. This thesis will now be fully developed, concluding with the actual decision in Wessling v. Paris.

\textsuperscript{260} 107 N.H. 351, 222 A.2d 205 (1966).
\textsuperscript{261} Citing Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267 (1966), and D. Cavers, supra note 240.
\textsuperscript{262} It is not clear whether the Minnesota court is following this approach. In Balts, the court adopted the "rule" that the domicile governed all questions of parental immunity "unless there are unusual circumstances which result in the state of the tort or the forum state's having an overriding interest in particular litigation." However, it reserved consideration on other possible tort cases, saying that "consistent with the rationale we apply to this case, [we] will weigh the interest of the domiciliary state, whether Minnesota or otherwise, to the extent it is constitutionally permissible against any peculiar concern the state of the tort or forum state may have." Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66, 70-71 (1966). In Kopp, it merely discussed the fact-law pattern presented. Perhaps I am influenced by the fact that the Minnesota court seemed to adopt the Restatement rule and did not specifically limit its decision to the particular fact-law pattern. Nonetheless, on the whole, the court's approach is encouraging from the standpoint of judicial method. See also Kuchinic v. McChory, 422 Pa. 620, 222 A.2d 897 (1966), where the Pennsylvania court held that the guest statute of the place of injury would not be applied in a suit arising from an airplane accident involving Pennsylvania parties. The court analyzed the interests of both states and concluded that the case was one presenting a "false conflict." Pennsylvania had previously adopted the "grouping of contacts" rule of the Restatement Second in Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964). The court said that it was applying the Griffith rule. Nonetheless, it analyzed the case from the standpoint of relevant policy considerations, which it also did in Griffith. In time courts that have adopted the Restatement "rule" because of the desire to avoid the application of the lex loci delicti rule, may abandon the new rule in favor of a straight policy-centered approach.
V. Judicial Method and the Solution of Conflicts Problems: The Example of Wessling v. Paris

Throughout this paper it has been submitted that in dealing with conflicts problems, courts have departed from the essential methodology of the judicial process as it has operated in other areas. It cannot be said that a "body of conflicts law" has emerged from principles developed in decided cases. For the most part, cases have been decided in accordance with a priori rules stemming from a particular theory as to the nature of the conflict of laws. Almost from the beginning the goal has been to find a "universal solution" to conflicts problems. In this area, more so than in any other, American courts have accepted the "authority" of the academic commentators and particularly that of the Restatement.

Sometimes courts are able to achieve a desired result by the employment of manipulative techniques. Perhaps, as Professor Ehrenzweig insists, if we look at the results of cases in which an actual conflict of laws question was presented, "true rules" and a "basic lex fori" emerge. Nonetheless, the fact remains that the courts have not, by their decisions in particular cases, developed principles for the solution of conflicts problems. Our ideas about the solution of such problems do not come from the decisions of the courts; rather the court decisions are examined primarily from the standpoint of whether they lend support to a particular theory of the conflict of laws. The "rules" have been looked to for the purpose of providing guidance for the solution of future cases, not principles developed in prior judicial opinions. Judicial method has not been applied to the conflict of laws.

Exploring the reasons for this departure from the ordinary workings of the judicial process reveals that the justification advanced for the acceptance of a "system of rules" approach was that such a system was necessary to insure uniformity of result. This is somewhat difficult to credit in view of our law of jurisdiction, which operates to produce the widest possible forum-shop-

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264 This is also true of Babcock. See Comments on Babcock v. Jackson, 63 Colum. L. Rev. 1212-57 (1963).
ping, which in itself works against uniformity of result. In any event, if the goal was to insure uniformity of result, the system was defective, particularly insofar as it left an opening for the use of manipulative techniques. As regards the goal of uniformity, the system has been a dismal failure. However, we have also concluded that the quest for uniformity was not the primary motivating force behind the judicial acceptance of the rules approach and the unwillingness to fashion a body of conflicts law by judicial decision. Instead, the "political aura" surrounding conflicts questions has caused the court to seek refuge in an externally established system of "objective" rules. There is evidence today that courts are less afraid of "policy" and may be willing to move toward the policy-centered conflict of laws. If this is so, and the system of rules approach will be abandoned, it may also be possible for the courts to reinstate judicial method as applied to the solution of conflicts problems. The time has come to take a new look at the court's function in a conflicts case.

If the reason for the displacement of the law of the forum cannot be found in a search for uniformity, it may be asked whether, in the nature of things, there is any objection to the court's applying its own law in all cases coming before it. What would happen if the courts, as they originally did in England, simply ignored the foreign element and decided the case according to the substantive law of the forum? This might produce technological unemployment among conflicts teachers and remove the fascinating subject from law school curricula, but apart from this deplorable effect, would anything else happen? Would this produce injustice? Would this be violative of the interests of other states in the legal order?

The answer, of course, is that it would in some cases. Even if the concept of transient jurisdiction were abolished, and jurisdiction were limited to a forum conveniens, the application of the forum's law in all cases would not be proper. There are cases where the application of the forum's law would simply be unfair in the sense that it would defeat the legitimate expectations of the parties. There are others where, if the interests of other states are

\[265\text{ See the discussion, supra notes 35-40, and accompanying text.}\]

\[266\text{ See the discussion in Ehrenzweig, A Proper Law in a Proper Forum: A Restatement of the Lex Fori Approach, 18 OKLA. L. REV. 340, 350-52 (1965).}\]
considered relevant, the application of the forum's law would be violative of those interests, which, under the circumstances, it can be said the forum should recognize.

Simply stated, the law of the forum should be displaced where the failure to do so would defeat the legitimate expectations of the parties or would be violative of the interests of other states which, under the circumstances, the forum should recognize. It is submitted that there would be agreement with this as a general proposition, but the question remains how to identify these cases. The traditional view was that this could be done by dividing the legal order into a series of "jurisdictions" with each having the power to create "rights" in certain kinds of cases, which would be recognized when called into question in other states. Experience indicated, however, that the law to be applied under the jurisdiction-selective rule would not necessarily coincide with the expectations of the parties nor necessarily be the law of a state having any interest—when analyzed from the perspective of relevant social and economic policies. This may be the danger that results from approaching the question in terms of "what law governs" rather than in terms of whether the law of the forum should be displaced. The "more realistic rules" approach of the Restatement Second also attempts to solve the problem by examining the law of a particular jurisdiction on each issue. It is submitted this approach may contain the same deficiencies.

Is it not sounder to approach the problem in terms of the basic criteria and try to answer the question contained therein: in the fact-law pattern presented, should the law of the forum be displaced in order to protect the legitimate expectations of the parties or to give proper recognition to the interests of another state? The decision would be based on more realistic considerations if made with reference to the basic criteria and the particular fact-law pattern rather than attempting to fit the case within the framework of a rule. More importantly, it must be remembered that not only are we talking about a threshold question, but about a

267 It must be remembered that among the policy-centered commentators there is disagreement as to just what is meant by "interest" and how relevant this is. See the discussion in D. Cavens, supra note 261, at 98-102. Nonetheless, under each approach, "interest"—however defined—has some relevance.

268 Noting, however, the disagreement on the scope of "interest," as discussed above.
threshold question that is presented in relatively few cases coming before the courts. In searching for a system we have been asking the wrong questions. In the Babcock-Wessling situation it is possible to frame the issue in choice of law terms such as "what law governs liability for torts." On the other hand, if we frame the issue narrowly—the way common law courts ordinarily frame issues—with reference to the fact-law pattern of the particular case, the result is quite different.

Suppose the issue were framed as follows: where two residents of New York (Kentucky), which does not have a guest statute, are involved in an automobile accident in Ontario (Indiana), which does have a guest statute, should the law of the forum be displaced and the law of the place of injury applied? Our consideration is limited to that precise issue; we need not consider what law governs a libel, a battery, a suit between a resident and a non-resident, and so on, because they are not involved. Most important from the perspective of judicial method is that research of the "torts" conflicts cases that have come before the Kentucky Court of Appeals since 1950—and the last one before that which research had disclosed was decided in 1940—reveals that every case involved the identical fact-law pattern. It is not necessary—and in the common law tradition not proper—for the Kentucky Court to decide what law governs liability for tort. The decision should be limited to the question of what law governs a host's liability to his guest where two Kentucky residents are involved in an accident in a state that has a guest statute, because that has been the only question presented in all these cases. The number of fact-law patterns will vary with the state involved, and many more conflicts cases with different patterns will come before a court in a state like New York. But even there the cases will not "run the gamut," so to speak. The courts have misconceived the judicial function in conflicts cases. It is not necessary to adopt a "rule" for all cases, particularly not a comprehensive system of rules designed to solve all conflicts problems that may arise. All that is necessary is to decide whether the law of the forum should be displaced in the particular fact-law pattern before it. The court will decide this question in light of the basic criteria of displacement: the law of the forum will be displaced when protection of the legitimate expectations of the parties or proper recognition of
the interests of another state so requires. The decision will be made with reference to considerations of policy and fairness rather than with reference to abstract and analytical doctrine. The decision in that case would, of course, serve as a precedent when another case involving the identical fact-law pattern came before the court. When a case involving a different fact-law pattern arose, the ratio decidendi of the former decision would be considered and the precedent would be extended, restricted, or distinguished as the court thought proper. To the extent that cases involving different fact-law patterns arose, a body of conflicts "law" based on judicial decision would be developed. What is more likely in states like Kentucky is that few conflicts questions would arise. This is not to be regretted. But whenever a case did arise, the decision would be based on realistic considerations and would not represent an attempt to fit the case within the framework of a system of rules.

Stated simply, this is what is meant by judicial method and the policy-centered conflict of laws. The decision as to displacement would be made by the court in light of policy considerations and with a view toward the basic criteria of fairness to the parties and accommodation of the interests of the various states that make up the legal order. The threshold question would be disposed of on this basis, and the court could proceed with a decision on the merits. Thus, just as a court should reject a system of rules approach, there is no reason for it to accept a particular policy-centered theory. In all fairness, the policy-centered theorists have not contended that the courts should accept their theory as the "ultimate solution" to all conflicts problems. What is necessary is that the court employ the traditional method of judicial decision in a conflicts case as it has done in all other areas of law.

If the reason for a court to apply foreign law rather than its own is that in certain cases, fairness to the parties or the proper recognition of the interests of another state so requires, it makes more sense to approach the problem with reference to the basic justification rather than in terms of specific rules or even in

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269 There is a significant difference between developing a theory that one hopes courts will follow—as to some extent everyone does when he writes—and putting forth an "ultimate solution"—as I think Professor Beale and the drafters of the first Restatement were trying to do. See also the disclaimer of intent in B. Currie, Selected Essays on the Conflict of Laws 585 (1963).
terms of a specific policy-centered theory. Rather than treat the question as one of "choice of law," the court would treat it as one of displacement of the forum's law in the particular case—cases which would be relatively few in number and for some states, such as Kentucky, very few at all. From the standpoint of methodology much can be learned from the local law theory developed by Professor Walter Wheeler Cook many years ago. Cook focused his attention on the processes that a court employed in deciding a conflicts question. Looking to Cook for the methodology and to the modern policy-centered theorists for guides to the substantive solutions of conflicts problems would provide a wise course for courts to follow. In doing so, the court will develop decisions as to the displacement of the law of the forum which will serve as the basis of a *judicially-established* conflict of laws. The propositions on which this concept is based will now be discussed.

The first proposition is that the basic law is the law of the forum, and that law will not be displaced absent valid reasons for such displacement. It is important to recall the thesis of Cook's local law theory, and indeed of the highly homologous right

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270 At this point a comment on Professor Cavers' classic article, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933) is in order. For, in a sense, what I am now proposing—development of a body of conflicts law based on judicial decision—was also proposed by Professor Cavers at that time. His concept, "justice in the individual case," also foresaw "a body of rules, principles and standards of a new sort, developing through the workings of *stare decisis* and the combined efforts of courts and scholars." D. Cavers, *supra* note 240, at 78. He noted at that time that "nothing in the proposed approach is inconsistent with the continuance of the doctrine of *stare decisis*, properly conceived." 47 Harv. L. Rev. at 196. In re-reading that article, done only after completing a draft of this one, I find that many of the points that I have made with respect to the judicial function were also made by Professor Cavers in 1933. Nonetheless, the thesis of the present article has vastly different dimensions. In 1933, Professor Cavers, like Cook, Lorenzen, Yntema, and others, was attacking the choice of law methodology then employed. His proposal was limited in scope, see D. Cavers, *supra* note 240, at 79-80, and he now had developed a complete methodology based on the concept of principles of preference. This methodology is but one example of the policy-centered approach, which has been developed by a number of writers in the years since Professor Cavers first wrote. I propose to take advantage of the policy-centered approach and relate this approach to judicial method. The experience of the thirty-odd years that have passed since the publication of Professor Cavers' article now makes it possible to think in terms of a judicially-established conflict of laws based on considerations of policy and fairness. Thus, I am now trying to do something that Professor Cavers was not trying to do at that time, and I have gone about it in a rather different way than Cavers. It is for this reason that—after some reflection—there was no attempt to "build" this article around the earlier article of Professor Cavers, and perhaps too little reference is made to it. But let it be made clear the path traveled in this article is already lighted.

theory developed by Learned Hand, that theoretically the forum does not "apply" foreign law nor enforce "foreign-created rights." When the law of the forum is displaced, the foreign law is used only as a model for the rule of decision in the particular case. Strictly speaking, one court cannot apply the law of another state, for it cannot authoritatively declare that law. A court can only make a prediction as to what the court of the other state would do. In other words, Kentucky could only "apply" Indiana law as it thinks the Indiana court would apply it; only the Indiana court can apply Indiana law as "law." In the same sense, in cases governed by state law, a federal court is only making a prediction as to the law of the state in which it sits. This point becomes significant in the context of displacement, and when foreign law is used, it is as a model for the rule of decision in the particular case.

If the forum is only using foreign law as a model, the question arises as to what happens when the forum is unable to "make the prediction," because it is unaware of the content of foreign law. Suppose that the case is completely foreign in the sense that all of the legally operative facts occurred outside of the forum, as in the well-known case of Walton v. Arabian-American Oil Company. Suit was brought in a federal court in New York, where the defendant was incorporated, to recover damages for an automobile accident occurring in Saudi Arabia. Neither the plaintiff nor the defendant offered any proof as to Saudi Arabian law. The court held that since the tort occurred in Saudi Arabia, the plaintiff's "rights," if any, "arose under Saudi Arabian law." The plaintiff had the burden of showing that he had a "right" under Arabian law, and since he failed to prove his "right," the suit was dismissed. The case clearly raises the question of what the court should do when no proof of the content of the foreign law is offered, and the court answered the question by dismissing the plaintiff's suit.

Courts have developed a number of ways of dealing with the

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272 See, e.g., Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).
273 It is interesting to note that the Judiciary Act refers to such law as the "rules of decision." 28 U.S.C. § 725, for the federal court cannot apply the "law" that it cannot authoritatively declare.
274 233 F.2d 541 (2d Cir. 1956).
problem in certain cases other than requiring dismissal, but they do not appear to have considered the basic question of when and for what purpose it is necessary to bring information as to the content of the foreign law to the court's attention. In Kentucky, the courts take judicial notice of the law of sister states in accordance with provisions of the Uniform Judicial Notice of Foreign Law Act. However, prior to the enactment of the statute, foreign law (including the law of a sister state) was treated as a question of fact. If that state was a common law jurisdiction, the court was willing to "presume" that its common law was the same as Kentucky's. So, in Yellow Poplar Lumber Company v. Ford, where the plaintiff was injured in Virginia, the Court allowed recovery by looking to the common law of Kentucky. The presumption was not extended to the statutes of a sister state even where Kentucky had the same kind of statute.

In Murray's Administrator v. Louisville & Nashville Railroad Company, suit was brought to recover damages for the wrongful death of a Kentucky resident killed in Tennessee. The plaintiff failed to plead or prove the Tennessee wrongful death statute. Since he failed to do so, and the Court would not presume that the Tennessee statute was the same as that of Kentucky, it looked to the Tennessee common law, presumed that the law was the same as Kentucky's, and denied recovery. Likewise in Stewart's Administrator v. Bacon, where the death occurred in Ontario, the Court upheld a directed verdict for the defendant on the ground that the plaintiff had failed to plead and prove the wrongful death statute of Ontario.

With the enactment of the Uniform Judicial Notice of Foreign Law statute, the plaintiff is no longer required to plead and prove the law of a sister state, but the statute leaves unanswered the question as regards the law of a foreign state. If the foreign state

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275 See the discussion of the various methods in Leary v. Gladhill, 8 N.J. 260, 84 A.2d 725 (1951).
276 In all cases the assumption is made that "foreign law governs," and then the question is how the foreign law is to be proved, and what happens if it is not.
278 141 Ky. 5, 131 S.W. 1010 (1910).
279 132 Ky. 386, 110 S.W. 334 (1908).
280 253 Ky. 748, 70 S.W.2d 522 (1934).
281 See the discussion of the effect of the statute in Vogt v. Power's Adm'r, 291 S.W.2d 840 (Ky. 1956).
follows the common law, the Court will presume the law is the same as that of Kentucky, but as to statutes and the law of a state that does not follow the common law, it would seem that, if past decisions are followed, the plaintiff would have to plead and prove that law. If he fails to do so, the result would be the same as in Walton: the plaintiff's suit would be dismissed.

The question may be asked why the plaintiff is required to raise a conflicts issue by pleading foreign law and why the plaintiff should have the burden of proving the content of that law. As Professor Currie, commenting on Walton, has said, the answer can only be that this is required by the "rights" theory of the conflict of laws and that in a case such as Walton, the law of the forum "is displaced by the logic of the system itself." If the court thinks of Saudi Arabia or Ontario as the only state having "jurisdiction" to create a right, which the forum enforces, it follows that proof of the content of the foreign law is a necessary part of the plaintiff's case. He must prove that law to show that he has a "right" under the law of the only state having "jurisdiction" to create such a right. On the other hand, if the court conceives the basic law as the law of the forum, to be displaced only if there is a specific reason for such displacement, it follows that if no proof is introduced as to the content of foreign law, no conflicts issue can arise.

Let us review Cook's discussion of the "law" of a state. The domestic rule is the rule of decision that a court applies in the absence of a foreign element, i.e., the forum's substantive law. There is also the foreign rule, i.e., the rule of decision that will be applied in a particular case involving a foreign element. The foreign rule of decision may be one that uses the law of a foreign state as a model. However, if there is no knowledge as to the content of the foreign law, foreign law cannot be used as a model for the rule of decision, and the forum's domestic law must be applied.

Theoretical considerations apart, the approach of the court in Walton and the past practice of the Kentucky courts ignores the realistic consideration of why it would be objectionable for the

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282 Stewart's Adm'x v. Bacon, 253 Ky. 746, 70 S.W.2d 522 (1934).  
283 B. Currie, supra note 269, at 4-5.  
284 Cook, supra note 270.
forum to apply its own law in a case before it where the content of any relevant foreign law is unknown. There are situations where the forum’s statutory law cannot be applied to a case involving a foreign element, because the statute has been interpreted as being inapplicable to the foreign situation presented. An example is the Kentucky or New York wrongful death statute, which is not applicable to deaths occurring outside the boundaries of the state. Other than these cases, it may be asked why there should necessarily be an issue as to the applicability of foreign law merely because a foreign element is present. Why should not the law of the forum be applied where neither party is sufficiently interested in the foreign law to raise the question (presumably by his pleadings or according to some other procedure), and more importantly, where neither party demonstrates that the foreign law differs from the law of the forum?

In a number of cases a court under a choice of law rule, "applies" foreign law, but it does not appear that the foreign law differs from the forum’s own law. Since all American states but one follow the common law, it may be questioned just how frequently the substantive laws of the states involved actually differ. They will differ only where the courts of one state have put a different interpretation on a particular aspect of the "common law" or where one state has a statute that the other does not, or where the terms of the two statutes differ. If there is no difference, there is no utility in a court’s “applying” the law of another state, i.e., looking to the other state’s decisions for the same substantive law principles that are found in the forum’s own decisions with which the court is no doubt more familiar. Where there is a difference, it may be asked why the party who will derive the advantage from this difference, and, therefore, who wants foreign law to be used as the rule of decision, should not be required to raise the conflicts issue at the outset and demonstrate the difference to the court. Failing to do so, the forum should decide the case in accordance with its own substantive law or in most

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286 See the suggestions in D. Cavens, supra note 240, at 268-79.
287 These are among the cases Professor Ehrenzweig discounts in searching for the “true rule,” and as his research indicates, they are quite numerous.
288 See the discussion in B. Currie, supra note 269, at 46-48.
cases in accordance with the general principles of the common law applicable to the issue in question.

A leading case in the law of offer and acceptance of contracts is *Fairmount Glass Works v. Cruden-Martin Woodenware Company.*[^289] The plaintiff mailed a letter from St. Louis, Missouri, to the defendant at Fairmount, Indiana. The defendant replied by mail, and telegrams were exchanged. When the defendant failed to ship the goods requested by the plaintiff, the plaintiff sued for breach of contract. The issue was whether the exchange of letters amounted to a valid offer and acceptance. The writer is told that almost invariably first year law students ask what the case was doing in the Kentucky Court (they are not yet familiar with our law of transient jurisdiction) and perhaps what law would "govern" the case. The answer will not be found in the opinion. Although the case was purely "foreign," the Court never indicated that it was treating it other than as a domestic one, where all the legally operative facts occurred in Kentucky.

The Court cited two cases, one from Massachusetts and one from Minnesota, but concluded that in determining whether the exchange of letters amounted to a valid contract, "each case must turn largely upon the language there used." But was the Court "applying" Missouri law, Indiana law, or Kentucky law? The answer is that it was applying general principles of common law, which prevailed in Kentucky, and so far as it knew, since neither party contended otherwise, prevailed in Missouri and Indiana as well.[^290] Neither party nor the Court was concerned about the "governing law," because there was no reason to assume that on the particular issue presented, there was any difference in those "laws." Where neither party raises an issue as to the applicability of foreign law, he may be said to "consent" to the application of the law of the forum. As a practical matter, there is no "conflict of laws," and many cases containing foreign elements, including ones where the court "applies" the law of another state under a jurisdiction-selecting rule, fall into this category.

The result should be the same where a party raises an issue as

[^289]: 106 Ky. 659, 51 S.W. 196 (1899). This case is a textbook favorite.

[^290]: Because such "general principles of law" exist, it is possible for law schools to teach "national law" out of "national casebooks."
to the applicability of foreign law, but fails to prove the content of that law, so that it is impossible to determine whether there is a conflict of laws in the sense that the law of the other state differs from the law of the forum. In *Leary v. Gledhill*, 

suit was brought in New Jersey by an American plaintiff against an American defendant to recover payment for an alleged loan made in France. The New Jersey court assumed that under its choice of law "rule" French law would govern. The plaintiff neither pleaded nor proved French law, and as in *Walton*, the defendant moved that the complaint be dismissed for failure to state a cause of action. This, the court, unlike the court in *Walton*, refused to do. The court did not engage in any "presumptions," since France was not a common law jurisdiction, but took the position that if neither party proved the content of the applicable foreign law, the parties were deemed to "consent" to the application of the law of the forum. Of course, the defendant, who was contending that French law should apply, did not "consent" to the application of New Jersey law. Apparently, the court was saying that since it was the defendant who wished to rely on the foreign law, it was up to him to prove that that law differed from the law of the forum, and as he failed to do so, the law of the forum would not be displaced.

It must be recognized, as did the Kentucky Court implicitly in *Fairmount*, and the New Jersey court in *Leary*, that the primary responsibility of a court is to decide the case before it in accordance with principles of substantive law. Where the case contains a foreign element, there may be a threshold question of whether the law of the forum should be displaced and the law of another state used as a model for the rule of decision in the case. But this is a threshold question only. If a party wishes to raise that question, the burden should be on him to persuade the court that the content of the law of the other state, on which he wishes to rely, differs from the law of the forum. If the court is not apprised of the content of the foreign law, it obviously can-

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292 In commenting on the opinion, Professor Currie observes that, "In this thorough and perceptive opinion, Judge Vanderbilt stopped just short of adopting in its entirety the rule under discussion [that the law of the forum applies in the absence of proof of foreign law], preferring to bolster the application of the law of the forum by the dubious 'acquiescence' theory as well as by some attention to the procedural situation." B. CURRIE, supra note 269, at 49 n. 113.
not know whether there is a conflict of laws at all, and in any event, cannot make a reasoned choice as to whether its law should be displaced. As Professor Currie has observed:

The most shocking aspect of the Walton decision is the holding that Saudi Arabian law displaced the law of the forum although the court presumably had no idea what the relevant provisions of that law—if any—were. The application of foreign law is justified when the law expresses a policy of the foreign state, when the connections of the case with the foreign state are such as to give it a legitimate interest in having its policy applied, and when there is no conflicting interest of the forum state. A court is not justified in holding that foreign law displaces local law as the rule of decision when it cannot make the determination that the interest of the foreign state is entitled to recognition, and it can seldom make that determination when it has no information concerning the foreign law and policy.²⁹³

Furthermore, in any case the parties are seeking to determine their legal rights and obligations. This adjudication must be made under substantive law, and in the absence of proof of foreign law, why should not the substantive law be that of the forum? Again, to quote from Professor Currie:

[L]aw is not an instrument of social control alone. It retains something of the quality and function that were commonly attributed to it before we became so acutely conscious of its sociological role. It is an accumulated body of experience and principle that has served well, on the whole as a guide to the adjudication of disputes between parties in court. Grant that no governmental policy of New York respecting the problem of personal injuries will be advanced by the application of its law to a dispute between two foreigners arising out of a collision in Saudi Arabia; grant also that neither party regulated his conduct or planned his affairs with reference to New York law. The fact remains that there is a lawsuit pending in a New York court. The harsh alternative to deciding it according to New York law is to dismiss it. No conflict of interest among states being apparent, justice between the parties becomes the sole consideration. Justice between the parties requires a decision on the merits. And where should the New York court look for a rule of decision that will do justice between the parties

²⁹³ Id. at 48.
but to the body of principle and experience which has served
that purpose, as well as the ends of governmental policy, for
the people of New York in their domestic affairs?294

The approach of the court in Walton and the approach of the
Kentucky Court in cases such as Murray and Stewart can only
be explained as following from the "system of rules" concept of
the conflict of laws. Once courts accept the view that the basic
law is the law of the forum, which will not be displaced absent
valid reasons for such displacement, no case will be dismissed
because the court is "ignorant" of the content of foreign law. Not-
withstanding provisions for the taking of judicial notice of the
law of sister states, the burden should still be on the party wishing
to rely on foreign law to raise the question of displacement, and
he should have the primary responsibility to provide information
as to the content of the foreign law.295 Where no issue is raised
as to the applicability of foreign law or the content of the
foreign law is not known, the case should be decided in accordance
with the substantive law of the forum.

Closely related is the proposition that there is only a conflict
of laws where the result, were the case heard in the courts of the
state whose law is sought to be used as a model, would be dif-
ferent than the result that would be reached under the sub-
stantive law of the forum.296 It is difficult to justify displacement
of the law of the forum where the state whose law is sought to be
used as a model would, if the very case were brought before it,
decide according to the substantive law of the forum. As pre-
viously stated, Cook's analysis lists two parts to the "law" of a
state, the domestic rule and the foreign rule.297 In a case such as
Wessling, there is an apparent conflict between the "law" of
Kentucky and Indiana, but the apparent conflict is in connection
only with the domestic rules of the two states. Indiana's domestic
rule is that a guest cannot recover from the host in the absence of
wanton or willful conduct, and is to be applied to purely domestic
cases, i.e., an Indiana host and an Indiana guest involved in an

294 Id. at 64-65.
295 The statute provides that the parties shall render assistance to the court
in determining the content of the law, and the party relying on that law will be
fully aware of its content.
296 This is true because that state would either apply its own law or the
law of a third state.
297 Cook, supra note 271.
accident in Indiana. This is a rule of substantive law, but it does not necessarily follow that the domestic rule is the same as the foreign rule which would be applied in cases involving a foreign element, i.e., not all the legally operative facts are connected with Indiana.

By looking to the substantive law of Indiana, the Kentucky Court "knows" how the Indiana court will decide the domestic case, but it cannot "know" the outcome of the case before the Kentucky Court, because that case is foreign to the Indiana court as well. To determine if there is a true conflict of laws in the sense that the result that would be reached by the Indiana courts would differ from the result that would be reached by applying the substantive law of the forum, the Kentucky court must predict how Indiana would decide that very case.

If the same case arose before the Indiana court, would that court hold that the Indiana guest statute was applicable in a suit between two Kentuckians injured in Indiana? There is no decision in point and no recent Indiana decisions involving choice of law in tort cases. However, the Seventh Circuit is of the opinion that, in tort cases, Indiana would not apply the lex loci delicti rule, but some form of "grouping of contacts" rule. Thus, if a suit was brought by the administrator of a Kentucky decedent killed in Illinois by an Indiana defendant, and the decedent's beneficiaries were Indiana residents, the court would apply Indiana law rather than Illinois law on an issue relating to wrongful death. If the Seventh Circuit is accurate in its analysis of Indiana law, it might very well be that if Wessling v. Paris arose in Indiana, the Indiana court would apply Kentucky law.

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298 In Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965), the court found an absence of Indiana conflicts cases involving torts questions. A commentator writing in 1958 stated that Indiana had no case involving choice of law as to guest statutes. Kelso, Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas, 33 Ind. L. J. 297 (1958). My own research has disclosed no cases since that time. His article also indicates that there are relatively few recent cases on choice of law in tort situations. The latest case decided by the Indiana Supreme Court appears to be Louisville & N. R. R. v. Revlett, 224 Ind. 313, 65 N.E.2d 731 (1946), where the court applied the lex loci delicti rule, and the last appellate case research has disclosed was Slinkard v. Babb, 125 Ind. App. 76, 112 N.E.2d 876 (1953), also applying the lex loci delicti. Admittedly the research has not been thorough, but if digest listings are any indication, Indiana has not been a fertile ground for the raising of conflicts questions in the tort area.

299 Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965). The court analogized from Barber v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945), which applied a "grouping of contacts" rule in a contracts situation.
Yet the Kentucky Court never considered the question of what Indiana would do if a similar case arose before it. This is in accordance with the practice of most courts in only looking to the substantive law of the state whose law is sought to be used as a model—to the domestic rule rather than the foreign rule notwithstanding that the case is also foreign to that court. This is because all courts wish to avoid dealing with the delightful problem of the renvoi. The problem of the renvoi arises when the choice of law rule of the forum looks to a state whose choice of law rule looks back to the locus. So, if Kentucky were committed to the lex loci delicti rule and Indiana to the “grouping of contacts” or “state of significant relationship” rule, and Indiana would characterize Kentucky as the state of the most significant relationship, each state would look to the other and the court would find itself in an “inextricable circle.” To avoid the problem, most courts simply look to the substantive law of the state whose law “governs” under its choice of law rule.

This is the theoretical fallacy of the vested rights theory, long ago demonstrated by Cook. It is absurd to say that the plaintiff cannot recover in Kentucky because he has no “right” to recover under Indiana law whereas if the case arose in Indiana, the court would hold that the plaintiff had a “right” to recover, looking to Kentucky law. By ignoring the result that would be reached in the courts of the state to which the forum’s choice of law “rule” refers, the forum is not enforcing a “right” created by the law of that state, but is, in effect, enforcing a “right” created under its own law using the substantive law of the other state as a model.

Where the case is foreign to the other state as well as to the

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300 It is interesting to note that counsel for the appellant in Wessling observed that Indiana rejected the lex loci delicti rule, relying on Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965). However, he did not develop the argument that for this reason Kentucky law should not be displaced.

301 See generally G.尚书兴, Conflict of Laws 10 n. 27 (3d ed. 1963) and the references therein.

302 See RESTATEMENT OF THE CONFLICT OF LAWS § 7(b) (1934). The only exceptions are questions involving title to land and the validity of a decree of divorce. RESTATEMENT OF THE CONFLICT OF LAWS § 8 (1934). The Restatement Second increases the number of references to the “whole law” of a state, but retains the general rule that the conflicts rules of the other state are not considered.


304 Cook, supra note 303, at 469-70.
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forum, Cook says that the forum must predict how that state would decide the case, that is, it must make a prediction as to its foreign rule as well as to its domestic rule. The prediction is made by “observing concrete judicial phenomena,”\(^\text{305}\) namely, the past behavior of judicial officials of the other state, and, based on such behavior, concluding how they would decide this very case. If the prediction results in the conclusion that they would decide the case in accordance with the substantive law of the forum, there is simply not a conflict of laws. There is no need to get involved with the renvoi. The renvoi problem presupposes that the forum and the other state each has “jurisdiction-selecting” rules. If the question is approached from the standpoint of the law of the forum as the basic law, choice of law rules have no place in the analysis. The forum is not “required” to look to the law of any state. Where one party desires the application of the law of another state as the rule of decision, he must persuade the court that if the case arose there, that state would decide the case in accordance with its own law and not in accordance with the law of the forum.\(^\text{306}\) If the law of the forum is the basic law, and the courts of the state whose law is sought to be used as a model would also decide the case in accordance with the substantive law of the forum, there is no reason to displace the law of the forum, for there is no conflict of laws.

Distinguished commentators such as Professors Cavers and Ehrenzweig would disagree with this proposition. However, the former refers to the situation where both the forum and the other state may have an interest in the application of their law—which is not so in the present case—and the forum has concluded that a “moderate interpretation” of its policy and interest would justify the refusal to apply its own law. In such a case it is also possible that the other state, either because of a choice of law “rule” or because of its own “moderate interpretation,” would not

\(^{305}\) Id. at 475-77.

\(^{306}\) To the extent that the other state has also adopted a policy-centered approach, the prediction will result in the conclusion that that state would apply the law of the forum, where, as in \textit{Wessling}, the forum is the only state having any interest in the application of its law. If my assumption, that a great many of the tort cases actually coming before the courts are “false conflicts” cases is correct, the basis of the decision of the forum court would be simply that there was no “conflict of laws.”
apply its own law, or, "the forum finds that the X law doesn't 'want' to be applied." Professor Cavers' answer in this situation is:

Why ought the forum not adhere to its own self-restricting interpretation and apply the law of the other state, even though that law doesn't want to be applied? Useful as it is to take into account the way the other state would apply its own rules, the forum has the responsibility of adjudicating the case. If the forum is satisfied that its domestic rule should not be applied and that the X rule provides an appropriate norm, given its purposes and the connection of the event of transaction with State X, then why should the forum refrain from using the X rule?307

He thus divorces the question from the concept of the renvoi, which, as pointed out earlier, comes into play only when the forum and the other state have rigid choice of law "rules," and the rule of each causes it to look to the law of the other. His point is that the choice of law the other state would make should "neither be ignored nor be controlling."

Professor Ehrenzweig likewise, and correctly, rejects the concept of the renvoi as "unnecessary and misleading." But like Professor Cavers, he takes the position that once the forum has decided to displace its own law for valid reasons, it should in most cases apply the law of the other state, even though that state would not apply its own law. He gives the example of a New York court passing on the applicability of a limitation on recovery existing under the law of Connecticut where the accident occurred, to a New York airplane passenger on a flight originating in New York. He supposes the New York court characterizing the question as one of "tort" and the Connecticut court characterizing it as one of "contract," and then assumes that on this basis New York would apply the law of the place of the accident and Connecticut would apply the law of the place of contracting. He goes on to say:

Assume further that the principal policy of the New York tort conflicts rule is the distribution of inevitable loss rather than the admonition of the wrongdoer, and that this policy is held more properly effected under the law of the place of accident than under the law of the place of the wrongful conduct or

307 D. Cavers, supra note 261, at 106.
the law of the forum. It will be found that once the law of the place of accident has been chosen on this policy ground, a conflicts rule of that law is irrelevant from the standpoint of this policy.\textsuperscript{308}

The author's disagreement with this theory may be due to approaching the question at a different point of time in the choice of law process. The court should not consider the policies of the respective states until it is persuaded that the other state would not decide the case in accordance with the substantive law of the forum for whatever reason. It is not the function of the court to resolve questions of the conflict of laws, nor to adjust the policies of various states, nor decide how losses should be distributed in an interstate accident. Its function is to adjudicate the merits of a dispute before it. The law of the forum, representing the "accumulated body of principle and experience," is suitable for this task. In an appropriate case, fairness to the parties or recognition of the governmental interests of another state may justify the displacement of the law of the forum. But where the state on whose law one party wishes to rely would decide the case in accordance with the substantive law of the forum, there is no reason for the forum to displace its own law. Perhaps, it is possible to conceive of a case where considerations of fairness to the parties might require displacement, even though the other state—because it is committed to jurisdiction-selecting rules—would look to the law of the forum, or where the other state's approach may not take into account the forum's conception of what is fair.\textsuperscript{309} But there is no utility in creating a choice of law issue, where if the case arose in the state whose law is sought to be used as a model, that court would decide in accordance with the substantive law of the forum.

Therefore, if the basic law is assumed to be the law of the forum, there is no conflict of laws and no reason to consider the question of displacement unless the result that would be reached in the courts of the other state, if the same case arose there, is

\textsuperscript{308} Eihrenzweig, Conflict of Laws 235 (1962).

\textsuperscript{309} Suppose that in a contracts case the parties have made an express choice of law, but the state whose law they chose would not recognize their choice. In this situation, the forum should recognize the choice of law, notwithstanding that the other state would not, if the forum concludes that to refuse to recognize the choice would defeat the legitimate expectations of the parties.
different from the result that would be reached by applying the substantive law of the forum. In short, if the other state would decide the case in accordance with the substantive law of the forum, the law of the forum should not be displaced except perhaps in the rare instance where it would be required by considerations of fairness to the parties.

Obviously, an attempt is being made to eliminate the “threshold question” of choice of law whenever this is reasonably possible. Emphasis on the application of the law of the forum may be troubling, but this may be attributed to orientation to the present law of transient jurisdiction, and the “disinterested third state,” i.e., the state that has no interest in the application of its own law to the particular dispute. It is true that the law of transient jurisdiction enables many potential cases to arise where the forum has no interest in the application of its own law; indeed, if it were to make an express choice of law, it could not constitutionally apply its own law. This situation receives too much emphasis. In a state like Kentucky, which does not have the attraction of high jury verdicts and is not a state where a large number of national and international concerns “do business,” most cases will not place the court in the position of a purely disinterested forum. Usually one or both of the parties will be Kentuckians or Kentucky enterprises. If the problem of the “disinterested third state” is to be dealt with, it is sounder to reform the law of transient jurisdiction.

Even where the forum is “disinterested,” however, the application of its law in accordance with our first two propositions is justified. It will be rare when a party wishing to rely on foreign law cannot introduce proof of the content of that law, and it is

310 It should be noted that the other state might apply the law of a third state under its choice of law analysis. In such a case the forum would have to decide whether its law should be displaced in favor of the “whole law” of the other state, or more realistically, whether it should reach the same result as the courts of the other state would reach.


312 As in cases such as John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). See the discussion of these cases in B. Currie, supra note 269, at 232-36.
not unfair to require him to do so. Where no proof is introduced as to the content of foreign law, and the court decides that in justice it cannot dismiss the case,\textsuperscript{313} it must render a decision, and its law as “an accumulated body of principle and experience” is the only law to which it could reasonably be expected to look. Where the other state would decide the case in accordance with the substantive law of the forum, this is because either the “rule” of that state or its interpretation of its policy or interest causes it to do so. Assuming that its looking to the law of the forum would be constitutional,\textsuperscript{314} the refusal to displace the law of the forum, even if the forum can be said to be “disinterested” when relevant policies and interests are considered, is justifiable on the grounds that: (1) the other state disclaims an interest or is not concerned with its interest; (2) it is not ordinarily unfair to reject a party’s “reliance” on foreign law where the very law on which he relies would not support him if suit were brought. It is not the function of the forum court “to police the international legal order” and decide which law should apply in all cases. It should decide the case in accordance with its own law unless there are valid reasons for displacement. Where the state whose law is sought to be used as a model would decide a case in accordance with the substantive law of the forum, there is no valid reason why the law of the forum should be displaced.

When the forum’s prediction is that the other state would not decide the case in accordance with the substantive law of the forum, there is a conflict of laws. To the extent that some courts follow a “rules approach,” this will occur frequently, and the question is how a court committed to the policy-centered approach should resolve the conflict. The third proposition, then, is that the court should make a decision \textit{only with reference to the fact-law pattern presented in the particular case}. Traditionally,

\textsuperscript{313}As, for example, where the plaintiff’s claim would be barred by the statute of limitations of the appropriate forum.

\textsuperscript{314}There is not any doubt that a choice of law rule based on “reasonable contacts” would be fully constitutional notwithstanding the lack of “interest” from a policy standpoint of the state to which the choice of law rule refers. Were this not so, courts would have been acting “unconstitutionally” for quite some time. Emphasis on the constitutionality of choice of law based on interest should not obscure the fact that it is equally constitutional for a state to approach the choice of law problem on another basis. It might be well to recall the attitude of the Supreme Court in Kryger v. Wilson, 242 U.S. 171, 176 (1919), that “a mistaken application of the doctrine of conflict of laws” raises no federal question.
courts framed the issue in the broadest possible terms, adopting a choice of law rule for a category of cases and applying that rule to all cases coming within its scope. In the original opinion in Wessling, the Court found the issue to be "whether or not the substantive law of Kentucky applies in the trial of the case, or as stated in Latin phraseology, does the principle of Lex Loci Delicti apply as against the law of Lex Domicilii?" On rehearing, however, the Court framed the issue with reference to the fact-law pattern of the particular case, observing, after stating the facts: "The sole question is whether the Indiana Guest Statute shall apply."  

The difference in the statement of the issue demonstrates a complete difference in approach. At first, the Court was looking for a "rule" that would govern all conflicts cases where a tort had occurred. On rehearing, the Court was dealing with the problem at hand and rendered its decision with reference to the fact-law pattern presented. The holding of the case, in light of the issue framed, was that where two residents of the forum, which does not have a guest statute, were involved in an automobile accident in a state which had such a statute, the law of the forum would apply on the issue of host-guest liability. The fact-law pattern presented in Wessling was the only fact-law pattern that occurred in tort conflict cases before the Kentucky Court in recent years. The holding would have the effect of stare decisis if the identical fact-law pattern arose before the Court in a subsequent case and would be binding on lower courts in Kentucky when they were presented with the question.

Moreover, the fact that the decision was rendered with reference to the fact-law pattern presented does not mean that it is a "meaningless ad hoc" decision. The precedential value of the decision will be determined by the ratio decidendi found in the Court's opinion. To the extent that the Court has "developed the considerations which it has taken into account in resolving the specific issue, the decision will be helpful to a court that is later

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315 This is also a misstatement of the issue. The argument in favor of Kentucky law was not so much that it was the domicile of the parties as that it was the only state interested in the application of its law to the case.


317 As to a "meaningless" choice of law decision, see D. Cavers, THE CHOICE OF LAW PROCESS 121 n. 8 (1965).
faced by a similar, if distinguishable, issue."318 This is how precedents are employed in other cases, and there is no reason why they may not be employed in conflicts cases as well.

Perhaps the failure of courts to frame the proper issue in conflicts cases has been the most serious deficiency of the traditional system. This deficiency also exists in the approach of the Restatement Second. Courts are asked to decide all "tort" cases in accordance with the "law of the state of the most significant relationship" or in accordance with other specific rules. This causes the court to frame the wrong issue. If only one kind of fact-law pattern comes before the court, as has been the case in Kentucky, there is no need for the court to "anticipate future cases." Where a variety of fact-law patterns presents itself to a court, its decisions in those cases will "coalesce" to form a body of conflicts "law" developed by judicial decision. In either situation, all that is necessary is for the court to decide the precise issue presented in the particular case.

Thus, courts, in conflicts cases, should return to the method of judicial decision from which the common law has evolved. The issue should be framed with reference to the fact-law pattern presented. The holding will be a holding on that issue, and the "rules" or "principles" as enunciated in the court's opinion will serve as a guide for decision in future cases with similar fact-law patterns. Depending on the rationale of the former decision, the precedent may be extended or distinguished, and a new precedent will emerge. As in other areas of the law, a case involving a completely different fact-law pattern will be treated as a case of first impression. If there have been too few cases to form a "complete body of conflicts law," lawyers will simply have to make predictions, as they do in any area of law where there is little decisional authority. As a distinguished jurist, Judge Roger Traynor of the California Supreme Court, has stated:

Cook and Lorenzen and other scholars such as Currie, Ehrenzweig, Cavers and Stumberg have demonstrated that superlaw is the most impractical law on earth. There is compelling logic in the corollary that within constitutional limitations local law is supreme. Judges must then painstakingly

318 Id.
evolve pragmatic exceptions to the local law that will coalesce into a realistic law of conflicts. However hard their task is as they work their way out of the wreckage of meretricious theories, they can at least evaluate competing policies free of the misconceptions which led to mechanical decision. Given a focus properly on local law and vision presumably free of parochialism, judges can apprise the appropriateness of local law for the case in comparison with any plausible exceptions.310

The first step in this direction is for the court to frame the issue, and thereby the resultant holding, with reference to the fact-law pattern presented in the particular case.

Once the court has framed the issue, it must then decide the question of displacement. The fourth proposition is that the law of the forum should be displaced only where considerations of fairness to the parties or proper recognition of the governmental interests of another state so requires. No guide to the court’s decision in a particular case is furnished nor is any intended. The court must, as Judge Traynor has said, “painstakingly evolve pragmatic exceptions to the local law.” The fourth proposition merely restates the justification for the displacement of the law of the forum. With such an orientation, the court will render its decision on displacement with reference to the fact-law pattern presented. It will do so realistically, and upon considerations of fairness and policy.

Guides to choice of law abound in the writings of various theorists, which the court may and should consult. But just as a court should reject the comprehensive rules approach of the Restatement and the Restatement Second, it should not accept in toto the approach advocated by a particular theorist. As pointed out previously, the modern policy-oriented theorists are proposing their theories only as a guide for the solution of conflicts problems. Courts should look to solutions proposed by academic commentators and consider the soundness of a particular solution and the rationale behind it. In time, enough cases may have been decided to enable the court to conclude that it should follow a particular approach, but how likely is this? In any event,

the court's responsibility is to decide the question of displacement in the case before it rather than to decide on a consistent approach to the solution of all conflicts problems.

In areas of law where reliance on the application of the law of a particular state may be present, the court will have to decide whether there has been such reliance on the law of another state that, in fairness to the parties, the law of the forum should be displaced. Here there may be a policy common to all states of protecting the legitimate expectations of the parties so that the displacement of the law of the forum will be more frequent. This is particularly true as long as our law of transient jurisdiction remains in effect. However, the questions of "fairness" and "legitimate expectation" can only be decided with reference to the fact-law pattern of a particular case. Perhaps some of the "localizing" rules of the Restatement Second may furnish a sound basis of solution in some cases. For example, the law of the situs at the time of transfer should govern all transfers of movable property and thus insure security of transactions. But is this assumption sound in a case involving the validity of a repossession where the "situs" of the property at the time of the transfer between a Massachusetts corporation and a New Hampshire corporation pursuant to a contract executed in Massachusetts, was Vermont, with primary use of the property and repossession in New Hampshire? A rule cannot be a substitute for a judicial consideration of the problem presented in a case, and such consideration will promote fairness and security of transactions far more effectively than the application of an a priori rule.

In the absence of reliance on the law of a particular state so that the application of the forum's law would defeat the legitimate

320 A state interested in encouraging commercial transactions might well wish to permit parties a wide latitude in choosing the governing law. This is particularly so in the international sphere, where less-developed nations wish to encourage foreign transactions and recognize that there will be a reluctance on the part of foreign businessmen to have their transactions governed by that state's law. See the discussion of this point in R. Sedler, THE CONFLICT OF LAWS IN ETHIOPIA 82-85 (1965).


expectations of the parties, the decision on displacement should be made with reference to the policies and interests of the respective states. When such policies and interests are considered realistically, it may often appear that only one state has an interest in the application of its policy and law to the particular issue, and if that state is one other than the forum, the law of the forum should be displaced. Where both the forum and the other state have an apparent interest in the application of their law, the forum must resolve this "conflict of interest." The decision must be based on relevant factors, and the court must conclude whether its law should be displaced in the particular fact-law pattern presented. Views of the commentators on how this conflict should be resolved—and this is the point on which they differ—may be helpful, but courts should not adopt a particular theory as to "conflict resolution."

In regard to "fairness" and "policy," court decisions will operate as precedents in future cases where similar questions are presented. On the basis of these decisions, it will be possible to "predict" how the court will decide future cases. These four propositions, it is submitted, are the essence of judicial method as it relates to the policy-centered conflict of laws.

Wessling v. Paris should be considered in the light of this method. The opinion is a clear example of its application in a conflicts case, although it is not likely that a court's opinion will ever fully satisfy an academic commentator. The first proposition was that the basic law is the law of the forum, which will not be displaced absent valid reasons for such displacement. This was accepted by the Court, which observed that "there is no other requirement that the law of a foreign state be applied in

323 But note that even where there could be said to have been reliance, the forum may conclude that its own policy precludes displacement of its law. An example of a displacing choice of law provision may be found in a contract of insurance on the life of the forum's domiciliary, as to which (even disregarding the adhesion aspect) the forum would want its own law to apply. Of. New England Mut. Life Ins. Co. v. Lauffer, 215 F. Supp. 91 (S.D. Cal. 1963).
324 This will be demonstrated in our discussion of guest statutes, infra.
325 It cannot be expected that it will. The court has the opportunity to decide very few conflicts cases, and must prepare many opinions on many subjects each term. The academic commentator has the time for careful reflection on the subject and the particular case. However, the brush of academic criticism should be applied gingerly and with recognition of the "built-in" advantage. See the example given in Currie, supra note 311, at 628 n. 2.
the local forum except the adopted policy of such forum." It was for that reason that the Court concluded it was free to reconsider the "jurisdiction-selective" rule of the lex loci delicti. The Court, of course, did not decide whether it would apply the law of the forum where no issue was raised as to the applicability of foreign law or no proof was introduced as to its content. The defendant moved to dismiss on the basis of the Indiana guest statute, of which the Court was required to take judicial notice, so that question was not presented.

The second proposal, that there is a conflict of laws only where the result that would be reached in the courts of the other state is different than the result that would be reached under the substantive law of the forum, finds no support in the opinion. Typical of most courts anxious to avoid the problem of the renvoi, that question was not considered. Since the Court's conclusion was that the law of the forum should not be displaced, this makes no difference. Nonetheless, the Court should have inquired as to the result that would have been reached in Indiana had the case arisen there. If the basic law is that of the forum and, as the Court said, "there is no requirement that the law of a foreign state be applied," it would seem that if the foreign state would apply the law of the forum as the rule of decision in the case, the forum should not even consider applying the foreign law.

The third proposition, that the court should decide the case only with reference to the particular fact-law pattern presented, is aptly demonstrated in Wessling, particularly by a comparison between the original and substituted opinions. The Court saw the question not as being one of "what law governed in tort cases," but whether the Indiana guest statute should be applied in the case of two Kentuckians injured in Indiana. Although it quoted the "state of the most significant relationship" rule of the Restatement Second along with other "authorities," it did not adopt the rule as one applicable in all tort cases. Ambiguity remains as to exactly what was done with the Restatement approach, but at least it was not adopted as a rule for all cases. The Court specifically observed: "We recognize that an attempt to apply this rule in complex situations might involve an unstable exercise
in legal gymnastics. Consequently, at this time we limit the application of the rule to a very clear case, such as we have here." Thus, the holding is limited to the precise fact-law pattern—the only fact-law pattern presented in Kentucky torts conflicts cases in recent years. This was the same approach followed by the New Hampshire Supreme Court in the Clark case, which carefully limited its decision to the question of whether the guest statute of the place of injury would be applied in a suit between two New Hampshire residents.

The final proposition is that the law of the forum should be displaced only where considerations of fairness to the parties or proper recognition of the governmental interest of another state so requires. The Court concluded that this was a "very clear case" for the application of Kentucky law. And so it is when viewed from the perspective of policy considerations. The first step in deciding whether the law of the forum should be displaced on "policy" grounds is obviously to consider the policies involved, the purpose behind the enactment of guest statutes, and the legitimate policy a state may serve by their enactment. While, at one time, the purpose may have been to protect hosts from suits by "ungrateful guests," it is now generally recognized that the primary purpose is to protect insurance companies from collusive suits. Insurance companies, rather than associations of automobile owners, lobby for the passage of guest statutes. When a guest has been injured, the dispute is between the guest and the host's insurer, which directs the defense, for the host probably favors recovery (within the limits of insurance coverage) by the guest.

The policy-centered theorists whose views have been discussed would all agree that the law of Kentucky should not be displaced. Professor Ehrenzweig would not find justification for a departure

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327 Id. at 261.
328 The inquiry is only as to the "legitimate policy." Perhaps the reason that most members of the legislature voted for a guest statute was that they succumbed to pressure from the insurance lobby and that the "policy" was to enable the insurance companies to realize greater profits. But a legislative policy must be determined with reference to the justification that can be found for the enactment. See the discussion in B. Currie, Selected Essays on the Conflict of Laws 143-44 (1963).
329 See the discussion of the difference between the "policy" and the "theory" in W. Prosser, The Law of Torts 190-91 (1964).
from the "basic rule" of the lex fori. 330 As he points out, the forum will usually be the state where the host and guest reside. More importantly, the state where the host resides will be the state where the insured automobile is permanently kept. It is there that the insurance relationship is "centered," if that term may be used, and there that rates are computed. 331 If that state does not have a guest statute, the host will arrange his insurance protection to include possible liability to a guest; if there is a guest statute, any prospective guest desiring insurance could purchase his own accident insurance. 332 Since the automobile was permanently kept in Kentucky, which is also the forum, there was no reason for displacement of the forum's law.

For Professor Currie this is the classic case of the false conflict, the case where only one state has an interest in the application of its law. In such a case, the court "should apply the law of the only interested state." 333 The purpose of the Indiana guest statute would be to protect Indiana insurers, that is, insurers of automobiles garaged in Indiana. Indiana insurance rates will be based on loss experience of drivers resident in Indiana or a particular part of Indiana. 334 Only the state where the insured is resident and the vehicle is kept has an interest in protecting the insurer from such suits and thereby possibly reducing insurance rates (at least to the extent that recoveries by guests against hosts will not figure in the loss experience of insureds in that state). That state is Kentucky rather than Indiana, so the law of Kentucky should be applied on the issue of guest-host liability.

Professor Cavers stresses the necessity of "separating the issue of host-guest immunity from any issue regarding the tortiousness

330 A. EHRENZWEIG, supra note 308, at 580.
331 Id. at 580-81.
332 Professor Morris has demonstrated rather persuasively that the existence of a guest statute as such does not have actuarial significance; rates will be affected only by the incidence of guest host claims, and if there is a pattern of travel from a guest statute state into a non-guest statute state, loss experience will reflect this fact. See Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L. J. 554, 574-77 (1961). Professor Ehrenzweig concedes that the insurer does not calculate the premium with reference to the existence or absence of a guest statute. A. EHRENZWEIG, supra note 308, at 581. Moreover, he also admits that the guest does not take out first person insurance because of the existence of a guest statute. Ehrenzweig, Comments on Babcock v. Jackson, 63 COLUM. L. REV. 1243, 1246 n. 18 (1963). Rather his position is that insurability considerations furnish the basis of the "true rule."
334 See Morris, supra note 332, at 567-69.
of the host-driver's conduct, and of identifying the policies relevant to host-guest immunity." Upon an analysis of the respective policies in this fact-law situation, it is clear that the state of injury has no interest in applying its policy. He also views this as a false conflict case and one in which there is no reason for the forum to displace its law.

The Kentucky Court likewise viewed *Wessling* as presenting a false conflict. The following language is significant:

> In the present case appellant and appellee were residents of and domiciled in this state. The automobile trip was initiated here. By fortuitous circumstances the accident happened on the other side of the Ohio River instead of on this side. The suit was brought in this state. It would be strange if under Kentucky law the respective rights of the parties should undergo some metamorphosis at a point on the bridge just before reaching the Indiana shore. —

While it might be said that Indiana has a policy of protecting drivers on their highways from claims by passengers, surely this must extend no further than an interest in protecting Indiana residents or those who sue in Indiana courts. No highway safety problem is involved. In fact the State of Indiana has no interest whatsoever in this Kentucky lawsuit and it is hard to discern what interest a Kentucky court would be promoting by applying the Indiana law.

All of the interests involved (other than the fortuitous place of the accident) are Kentucky interests. The guest passenger's right of action against the driver will be determined by Kentucky law, the law of the state in which both are domiciled and to which they intended to and did return.

The Court went on to say that it was against Kentucky's "public policy" to take away the right to recovery for a negligent act, citing *Ludwig v. Johnson*. However, the "public policy" technique is being confused with considerations of policy. The point is that it is Kentucky's policy—as reflected in its Constitution—to permit recovery to all Kentucky plaintiffs where negligence has

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337 Presumably this means those defendants who are sued in Indiana courts. Does this suggest a "procedural policy" against collusive suits, or does it suggest Indiana insurers? The expression is unfortunate.
338 243 Ky. 534, 49 S.W.2d 347 (1932).
occurred, and this policy is no different when the accident "happened on the other side of the river."

Of course, the opinion is not all that the author would like. It is wished that the Court had treated the problem frankly as one involving insurance considerations and recognized that Indiana had no interest in protecting the Kentucky insurer.\textsuperscript{339} The \textit{Restatement} rule, with indications that it might have some applicability in Kentucky, should not have been discussed.\textsuperscript{340} Finally, the "public policy" technique was confused with realistic considerations of policy. But this is cavilling. The basic law was recognized as the law of the forum. The decision was limited to the precise fact-law pattern, as in \textit{Clark v. Clark}, and a new "choice of law rule" was not adopted. The decision was based on relevant policy considerations, with analysis of the policies of the states involved and their interest in the application of their law and policy to the particular issue presented. The Court concluded that only the forum had an interest in having its law applied in the fact-law pattern before it and, therefore, refused to displace the forum's law. In so doing, it adopted a policy-centered approach to the solution of conflicts problems and proceeded in accordance with the method of judicial decision. The decision, along with \textit{Clark v. Clark}, serves to illustrate the concept of judicial method and the policy-centered conflict of laws.\textsuperscript{341}

\textsuperscript{339} The insurance considerations were frankly discussed in Kopp v. Rechzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); and Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

\textsuperscript{340} But this appears to be unavoidable. Courts, looking for "authority," can often find support from the \textit{Restatement} in a "false conflicts case. Note that in Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966), the forerunner of Kopp v. Rechzigel, 273 Minn. 441, 141 N.W.2d 526 (1966), and in Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), the court adopted the \textit{Restatement} "rule." The \textit{Restatement} was also cited as "authority" in the Clark case.

\textsuperscript{341} After the final draft of this article was completed, I discovered the recent New Jersey case of Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967). This opinion likewise furnishes an example of judicial method and the policy-centered conflict of laws. In holding that the Ohio Guest Statute would not be applied in a suit between New Jersey residents injured in Ohio, the court limited its holding to the precise fact-law pattern presented. It discussed the views of various policy-centered commentators, noting that while each had different reasons, all would reach the same conclusion. It quoted the \textit{Restatement} rule, of course, but did not expressly adopt it. It considered the interests of both states, stressing insurance considerations, and concluded that the case presented a false conflict. The same court has also held that its law of spousal immunity governed in a suit between New Jersey spouses involved in an accident in another state before they were married. Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958).
VI. GUEST STATUTES IN THE CONFLICT OF LAWS:
THE PERSPECTIVE OF JUDICIAL METHOD

We have now come full circle. If all the events had occurred in Kentucky, this would have been a simple case: there would have been a trial on the merits under Kentucky substantive law. The case was "complex" only because the accident occurred in Indiana, and because in previous cases the Court had committed itself to a "system of rules" approach to the solution of conflicts problems. The approach now adopted demonstrates that the case is no less "simple" because the accident occurred in Indiana, since as to the issue of host-guest immunity, when viewed from the standpoint of considerations of policy, that fact becomes irrelevant.342 The interest of Kentucky in the application of its law is no different than if the case were purely domestic, so in the fact-law pattern presented, the law of the forum should not be displaced.343

The Court has performed its function when a decision has been rendered on whether the law of the forum should be displaced in the fact-law pattern presented. If experience is any guide, this is likely to be the only kind of fact-law pattern that will come

342 It is hoped that this word can come to replace "fortuitous," a favorite of courts and teachers alike. It is not "fortuitous" that the accident occurred in Indiana. Had the parties not been driving there at the time, the accident would not have "happened." The same accident, in all probability, would not have occurred in Kentucky.

343 An analysis of the "leading" conflicts cases of recent years will reveal that many of them presented false conflicts. These are the cases that involve an automobile accident between two residents of the forum in another state, usually riding in the same vehicle, and perhaps related to each other. Liability exists under the law of the forum, but not under the law of the place of injury. The forum applies its own law imposing liability because it has an interest in doing so, and because the state of injury has no interest in applying its policy of immunity. Cases falling into this category would include: Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (parental immunity); Grant v. McAuliffe, 41 Cal. 2d 559, 264 P.2d 944 (1953) (survival of actions); Fabricus v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965) (capacity to sue and measure of damages for wrongful death); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1958) (Dram Shop Act); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (spousal immunity). Some of these cases have had counterparts. By the same token, where the forum has had no interest, it has applied the law of the only interested state. See, e.g., McGinty v. Ballentine Produce, 241 Ark. 533, 408 S.W.2d 891 (1966) (refusal to apply forum law where automobile accident occurred in Missouri, plaintiff was resident there, and defendant, an Arkansas corporation, did business in Missouri during the course of which the accident arose); Williams v. Rawlings Truck Line, 357 F.2d 581 (D.C.Cir. 1965) (New York parties injured in District of Columbia, New York statute imposing vicarious liability on former owner who failed to change registration of vehicle applied).
before the Kentucky courts. But there may be others, and in such cases the prior decision will serve as a precedent. If the ratio decidendi is equally applicable to the new fact-law pattern, the precedent will be extended. If not, the precedent will be distinguished, and a new one established. Thus, a "common law of conflicts" will develop.

In considering the application of the precedent to other fact-law patterns involving guest statutes so as to further demonstrate the operation of judicial method and the policy-centered conflict of laws, the academic prerogative of "rewriting" the Wessling opinion will be exercised, and then applied to different fact-law patterns. The author would have set forth the following limited "principle," or if you wish "rule," had he written the opinion:

At the present time the purpose of a guest statute is to protect the insurer against collusive suits by the guest against the host, the nominal defendant. Kentucky's policy—as reflected in the Constitution—is to permit full recovery by the guest and not to extend this immunity to the insurer. Indiana's policy is to the contrary. The only state interested in providing immunity to the insurer is the state where the insurance relationship exists, that is, the state where the automobile is kept and where the insured driver resides. If no immunity is given under the law of that state the insurer is not entitled to immunity. Since the automobile is kept in Kentucky, Kentucky is the only state having an interest in providing immunity and it has not done so. Therefore, the law of Kentucky will not be displaced, notwithstanding that the accident occurred in Indiana.

If no immunity is given by the law of the state where the insurance relationship exists, that is, the state where the insured automobile is kept, the insurer is not entitled to immunity. The reason for the "rule" is that only that state has any interest in immunizing the insurer. The insurance relationship was entered into there, the automobile is kept there, and the allowance of recovery would only affect insurance rates there and not in the state of injury. Since the plaintiff was a Kentucky resident, Ken-

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344 "But lawyers are a rule-making sect." Cavers, A Critique of the Choice-of-Law Process, 47 Harv. L. Rev. 193 (1933). "Rules" will emerge from conflicts cases as from all others. To achieve desired flexibility we tend to refer to them as "principles." The terminology does not matter. The important thing is that courts do not resort to broad generalizations and a priori rules.
tucky's interest in providing compensation for him should be stressed. Its policy is to provide such compensation, even against a host, and the interest is the same irrespective of where he was injured. Moreover, the Kentucky host had insured against liability to his guest.

Having "rewritten" the opinion, its application as a precedent to other fact-law patterns involving guest statutes will be considered, as well as the results favored in such cases by Professors Ehrenzweig, Currie, and Cavers. All will be approached from the perspective of judicial method. To borrow a leaf from Professor Currie, the following fact patterns will be charted. In all cases, suit is brought in Kentucky.

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Number one involves what Professor Currie calls the "unprovisioned for case." Indiana is the state with an interest in allowing recovery to the injured plaintiff, who is a resident of that state and was injured there. If he does not recover, there is the danger that he and his family will suffer deprivation. Moreover, he may have incurred hospital and medical expenses to Indiana creditors, and perhaps if he does not recover, they will not be paid. But Indiana's policy is not to allow recovery against a host, and a state's interest must be defined with reference to its policy as expressed in its law. Thus, Indiana law does not provide for recovery here, although it would have an interest in allowing recovery.

Kentucky, on the other hand, would have an interest in immunizing the Kentucky insurer from suits by guests, but its policy is not to do so. From the standpoint of governmental interests, neither state has an interest in the application of its law. Professor Currie would say that Kentucky should apply Ken-

\footnotesize{345 See, e.g., the table in B. CURRIE, supra note 328, at 84.} 
\footnotesize{346 Id. at 152-53.} 
\footnotesize{347 Id. at 366.}
Kentucky law, since it should not discriminate against out-of-state claimants. It allows a Kentucky plaintiff to recover against a Kentucky defendant where the accident occurred in Indiana and would not discriminate against an Indiana plaintiff also injured in Indiana. To do so, he submits, would raise serious constitutional questions. Moreover, Indiana has no general policy against allowing recovery to injured plaintiffs when they are injured while a guest in an automobile. Since an Indiana automobile is not involved, Indiana's restrictive policy in the host-guest situation is inapplicable, and its general policy favoring recovery would come into play. For these reasons Kentucky law should apply.

Professor Ehrenzweig would also say that Kentucky should apply its own law. He is looking to the law of the place where the automobile is kept and insured, i.e., Kentucky. The host would take out insurance to cover his guest; an Indiana guest riding with a Kentucky host would not feel the need to take out accident insurance. This case does not come within Professor Cavers' principles of preference, since they are applicable only to true conflicts, and this case involves essentially a negative conflict, since neither state has any interest in the application of its law. He would probably classify this case as one where any conflict could be readily avoided, and probably for the same reason as Professor Currie. At any rate, all would agree that Kentucky law should not be displaced by the Kentucky court.

This is also an easy case in light of the holding of Wessling v. Paris and the ratio decidendi (as contained in the "rewritten opinion"). The holding or "rule" was that if no immunity is given by the law of the state where the insurance relationship exists, the insurer is not entitled to immunity. That holding is, therefore, applicable and the precedent thereby is extended whenever we have a Kentucky defendant. So, it would also furnish the basis for decision in case two. The important state, in light of the policy behind the enactment of guest statutes, is the state where the insurance relationship exists rather than the state of the plaintiff's residence or the state of injury. The forum should not discriminate against out-of-town residents, whether injured in the forum

348 Id. at 152-55. See generally id. at Chapter 10.
349 A. Ehrenzweig, supra note 308, at 580-81.
or elsewhere. Only the state of the insurance relationship has any interest in providing immunity, and any principle must be applied evenly. So, whenever the fact pattern in a guest statute case has a Kentucky resident as defendant (and this means a Kentucky insured automobile), Kentucky law should not be displaced. \textit{Wessling} can be extended under ordinary principles of stare decisis and provide the basis for solution in cases one and two.

It is clear that the holding in \textit{Wessling} and this aspect of the ratio decidendi will be inapplicable in cases three, four, and five because each has an Indiana defendant (and an Indiana insurance relationship). Remember that the rewritten holding was with reference to the fact-law pattern there presented, and more importantly, a \textit{choice of law rule} was not enunciated. The holding was not that host-guest immunity was \textit{governed} by the law of the state of the insurance relationship;\footnote{\textit{Cf. Restatement (Second) of the Conflict of Laws} § 390g (Tent. Draft No. 8, 1963). “In accordance with the rule of § 379, whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile.”} rather the state of the insurance relationship could provide immunity and if it did not, the defendant was not entitled to such immunity. The fact-law situation wherein immunity existed under the law of the state of the insurance relationship, but not under the law of the state of injury, was not presented, and in the common law tradition, decision on that question is reserved until such a case arises.

Since the accident occurred in Kentucky, and since the traditional rule was that liability was governed by the law of the place of occurrence, Indiana law should first be scrutinized to determine whether there was a conflict of laws in the sense that that term is used here. If Indiana would apply the traditional rule or adopt the center of gravity rule causing it to look to the place of accident, and apply Kentucky law, the conflict would be avoided. This is equally true in cases two and four. The court could take the position that since it was the defendant who was relying on Indiana law, the burden was on him to show that Indiana would not apply Kentucky law there. On the other hand, courts may be unwilling to rest their decision on this basis and ignore the second proposition unless persuaded that the other state would clearly apply the law of the forum. Assume that the Kentucky Court would not base its decision on the fact that Indiana would
apply Kentucky law. Further, assume that the Kentucky Court concludes that Indiana’s position would be the converse of the position taken in *Wessling*: if the defendant has immunity under the law of the state of the insurance relationship, he will be immune notwithstanding that he lacked such immunity under the law of the place of injury. It would now be necessary to decide whether the law of the forum should be displaced.

Professors Ehrenzweig and Currie would disagree. The former would argue that Kentucky law should be displaced. He would look to the law of the state where the insured automobile is permanently kept, since this is the law whose application the host and guest should anticipate.

If the car is permanently kept in a state which has enacted a guest statute, the host could arrange his protection with a view to that statute without fear of being subjected to a broader liability in a common-law state. And the prospective guest, aware of his limited protection, could be expected to purchase his own accident insurance.\(^351\)

Professor Currie, however, would see this as a true conflict of governmental interests, which could not be avoided by a “more moderate and restrained interpretation of the policy or interest of one state.” Kentucky’s policy is that the guest should recover for his injuries, and it obviously has a real interest in applying that policy in favor of a Kentucky plaintiff injured in Kentucky. Indiana’s policy is that the host and his insurer should be immunized, and it likewise has a real interest in applying that policy to Indiana hosts and insurers wherever the accident occurred. His position is that neither court can decide that the interest of the other state “outweighs” its own, so that where there is a true conflict of governmental interests, each state must apply its own law.\(^352\) Since Kentucky has this interest, its law should not be displaced.

Professor Cavers would resolve the conflict under his principles of preference in favor of Kentucky law.

Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury

\(^{351}\) A. EHRENZWEIG, *supra* note 308.

\(^{352}\) See the discussion in B. CURRIE, *supra* note 328, at 181-82. It may be said with fairness that Professor Currie stresses no point more than this one.
than do the laws of the state where the person causing the injury acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be regulated to the law governing their relationship.\textsuperscript{353}

Here Professor Cavers stresses the interest of the state where the injury occurred in maintaining physical and financial protection for persons injured there. His "relationship" exception will be discussed in the next example. While this would not seem to be particularly significant in this case, let us assume the host-guest relationship was created in Kentucky. In this case, Professor Cavers would hold Kentucky law applicable.

Under the approaches of Professors Ehrenzweig and Cavers, it would be expected that Indiana and Kentucky would reach the same result: the former would say that both should apply Indiana law; the latter that both should apply Kentucky law. Professor Currie's approach would admit of Indiana applying Indiana law and Kentucky applying Indiana law. Actually, what Indiana should do does not concern the author, since no attempt is being made to formulate an "approach to the solution of conflicts problems," but only to demonstrate the application of judicial method. Therefore, the approach is solely from the standpoint of the Kentucky Court, where the suit was filed.\textsuperscript{354}

In the rewritten opinion of \textit{Wessling} the absence of immunity under the law of Kentucky was stressed, the basis of the decision being that only the states where the automobile was insured had an interest in immunizing the host and the insurer. However, Kentucky's policy—as reflected in its Constitution—to permit full recovery by the guest and its interest in applying that policy for the benefit of an injured Kentuckian was also discussed. While this is dicta in the sense that it was not necessary for the decision in the case, which turned on the absence of immunity, it may serve as an indication of how Kentucky would decide a case with a different fact-law pattern. Kentucky's interest in providing

\textsuperscript{353} D. Cavers, \textit{supra} note 317, at 139.

\textsuperscript{354} And whose judgment, no matter how the case was decided, would have to be recognized in Indiana. \textit{Fauntleroy v. Lum}, 210 U.S. 230 (1908).
compensation for an injured resident plaintiff is clear, whether injured in the state or elsewhere, and whether injured by a Kentuckian or an Indianan. It is extremely unlikely that a passenger would actually think in terms of taking out accident insurance, and Professor Ehrenzweig would not dispute this. He contends that the "true rule" is based on considerations of insurability. This is particularly true, since it is not unfair to subject the defendant and his insurer to Kentucky law when the accident occurred here. This much of the territorial concept is embodied in our concept of "fairness." The defendant is insured against liability wherever the accident occurs, and the insurer can expect that an accident may occur in a state having a higher standard of liability than the state in which the automobile is insured. This is the case of the true conflict of interest, and the Kentucky forum should not displace its own law. It is submitted that what Indiana would do is not important, and as a practical matter, this question will not arise since the defendant is subject to suit in Kentucky under its non-resident motorist statute. The following holding, therefore, is formulated: where a Kentucky plaintiff is injured in Kentucky by a non-resident from a guest statute state, the Kentucky law allowing recovery should not be displaced.

Thus, Kentucky law should not be displaced whenever: (1) the defendant is a Kentucky resident and his automobile is insured there, and (2) the plaintiff is a Kentucky resident injured in Kentucky. Under this approach, recovery is allowed to a Kentucky plaintiff against an Indiana defendant, and to an Indiana plaintiff against a Kentucky defendant. While there may be "discrimination" in favor of the application of the law of the forum, there is none in favor of Kentuckians against Indianans.

Case four is the most troublesome to the author. It is readily distinguishable from number three because the plaintiff is a non-resident, and Kentucky's interest is not that strong. It is not likely that an Indianan injured in Kentucky will be unable to get back

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356 Ehrenzweig, Comments on Babcock v. Jackson, 63 Colum. L. Rev. 1243, 1246 (1963). He contends that "the fact that the potential traffic victim does not usually calculate his risk and plan his insurance program accordingly hardly detracts from the consideration that he can fairly be made to bear the consequences of not doing so." A. Ehrenzweig, supra note 308, at 575.

356 See the discussion in D. Cavers, supra note 317, at 140-41.

into Indiana and thereby become a "public charge" in Kentucky. On the other hand, there are some similarities. The Indiana plaintiff injured in Kentucky may have incurred medical and hospital expenses to Kentucky creditors, and they may not receive payment unless he is able to recover from the defendant. Furthermore, he was injured in Kentucky, and it is recognized that all states have an interest in providing recovery for a person injured there as a part of its policy of protecting people injured within its boundaries. The fact remains, however, that its interest is not the same as where the plaintiff is a resident.

Professor Ehrenzweig would displace the law of the forum since the vehicle was permanently kept in Indiana. In theory, the Indiana host would not procure liability insurance to protect his guest, who, if he were concerned about protection, would purchase his own accident insurance. How Professor Currie would handle this case may be questioned. He has stressed the interest of the place of injury in allowing recovery so that its residents and institutions who furnished medical assistance to the accident victim can be reimbursed. In later writings, he developed the principle that a "more moderate and restrained interpretation of the policy or interest of one state" might avoid the conflict. Whether he would say that Indiana could avoid the conflict by holding that its policy of protecting the insurer was not applicable to injuries occurring elsewhere or whether it would be Kentucky that could avoid the conflict by holding that its policy allowing recovery was inapplicable to out-of-state plaintiffs injured by a defendant who is a resident of the same state, is open. However, he would probably say that this conflict could not be avoided by a more moderate and restrained interpretation of the policy or interest of either state and, therefore, each should apply its own law.

358 Cf. Pacific Employers Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493 (1939). See also Alaska Packers Ass’n v. Industrial Accident Comm’n of California, 294 U.S. 532 (1935). The concern of the injured worker thirty years ago may have been quite valid, and perhaps may even be valid today. See B. Currie, supra note 328, ch. 7. But it is reasonable to assume that the out-of-state automobile victim will get back home—particularly if it was his host who injured him.

359 See B. Currie, supra note 328, at 366.

360 See the discussion in D. Cavers, supra note 317, at 143-45.

361 See B. Currie, supra note 328, at 368-72.
This case demonstrates very well Professor Cavers' principles of preference approach. Here the state of injury set a higher standard of protection than the state where the defendant had his home.\(^{362}\) The law of that state would be applied unless the person injured was so related to the person causing the injury that the question should be regulated to the law governing their relationship. Under his first tort principle, the higher standard of the state of injury would govern, but under the fifth, if the case should be governed by the law of the state of their relationship, the lower standard of that state would be applied. He does not generally favor the application of the fifth principle,\(^{363}\) and it is clear that he would not favor its applicability in guest statute cases. The principle of preference approach does represent a way of solving this difficult case, and the arguments that Professor Cavers puts forth in support of his first tort principle of preference are impressive.\(^{364}\)

If this case was decided from the perspective of the Kentucky Court, prior decisions would be of little assistance. In Wessling and cases one and two, it was held that if no immunity were granted by the law of the state where the automobile was insured, immunity would not be recognized. But here immunity did exist under the law of that state. While the converse of the proposition—immunity will be recognized if it exists under the law of that state—does not necessarily follow, as in case three, the result in that case was predicated upon Kentucky's strong interest in providing compensation for its injured resident, a weaker interest when a non-resident is involved. Assuming that the court concludes that Indiana would decide the case in accordance with Indiana law, a difficult choice of law question is presented.

The author's difficulty is not lessened by considering the views of the commentators. That the guest could have taken out accident insurance is not persuasive, because the guest never thought about this, and the decision should be based on practical realities rather than on considerations of insurability. While the insurability factor when applied to enterprises is impressive, it

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\(^{362}\) In that the state of injury would allow recovery for ordinary negligence while the home state would allow recovery only if the conduct were "wanton or wilful."

\(^{363}\) D. CAVERS, supra note 317, at 177.

\(^{364}\) Id. at 139-45.
should not be employed in the case of individuals who are not likely to insure. Professor Currie's governmental interest approach is sound in many instances. His view, that in the case of a true conflict, the forum should apply its own law seems to the author to be a more acceptable solution that the proposal to decide in accordance with principles of preference as suggested by Professor Cavers. Professor Currie's argument that a court cannot "balance" conflicting interests is persuasive, and although this is not the methodology employed, this appears to be what Professor Cavers is doing with some of his principles of preference, or more accurately, is the result of the application of those principles. However, this is not the case that presents a conflict between the approaches of these two commentators. Professor Currie would probably say that there is a true conflict of interests and, therefore, the forum should apply its own law, while Professor Cavers would look to the place of injury under his first tort principle of preference. However, both would ultimately agree that Kentucky should apply its own law, and this is the point that is most troublesome.

Somehow the instinctive reaction is that in this case the law of the forum should be displaced. If Kentucky applies Kentucky law when two Kentucky residents are injured in Indiana, it should apply Indiana law when two Indiana residents are injured in Kentucky. There is a difference in the two situations to be sure. In the former case, no policy of Indiana would be served by applying Indiana law to deny recovery to the Kentucky plaintiff, while in the latter, Kentucky's policy of providing compensation for those injured in Kentucky would be affected by applying Indiana law to deny recovery. But how seriously would it be affected? Realistically, the kind of interest Kentucky has in allowing recovery by the injured Indiana plaintiff is questionable. He

365 Perhaps this is because I studied Professor Currie's views before those of Professor Cavers. Since I propose to approach a number of conflicts areas in future writings from the perspective of judicial method, it is not necessary that I make a "choice" between these views.

366 I also think that I can distinguish between "a more moderate and restrained interpretation" and "balancing of interests," although I am not sure how to articulate it. Suffice it to say that I think a court can identify a "true" conflict of interests, and that in such a case it should apply its own law.

will “get back across the river,” and will not become a "public charge" in Kentucky.\footnote{368 See the discussion, note 357 supra, and accompanying text.} Perhaps, what we are trying to say is that Kentucky's interest is more theoretical than real. Although this interest is sufficient to justify Kentucky's constitutionally applying its own law,\footnote{369 Carroll v. Lanza, 349 U.S. 408 (1955).} that is not the end of the matter. In a federal system, it is vitally necessary that one state recognize and accommodate the interests of other states. While a choice of law symmetry is not being advocated, it does seem that if Kentucky applies Kentucky law to a suit involving two Kentuckians injured in Indiana, recognition of the interests of sister states requires that Kentucky apply Indiana law to a suit involving two Indianans injured in Kentucky.

As a practical matter, the injured plaintiff is Indiana's concern. Kentucky's interest in providing compensation for its medical creditors does not seem important enough to justify application of Kentucky law. The primary purpose of permitting recovery by a host against a guest is not to reimburse the medical creditors of the plaintiff; it is to make the plaintiff "whole," particularly when damages for pain and suffering are included, and the amount of medical recovery forms a small part of the award.\footnote{370 See Professor Currie's concern on this point. B. Currie, supra note 328.} If the basis of recovery was a statute rather than a common law rule, could it be said that a purpose of the legislature in enacting the statute was to guarantee recovery by medical creditors?\footnote{371 This would appear in the Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), situation, where the cause of action survived under a statute of the forum. When I posed this example to my class, a student replied, "But you told us to consider the purpose of the legislature in enacting the statute, and the purpose certainly wasn't to protect medical creditors, but to protect the injured plaintiff." This is true and justified; it is very difficult to accept the "medical creditors" rationale for the application of the law of the state of injury in this situation.} This is most doubtful. The same reasoning is applicable, i.e., the portion of the award allocated to medical expenses usually forms too small a part of the total compensation to be significant.

Moreover, regardless of whether the defendant's home state has a guest statute, there is a good possibility that the host would have medical payments coverage, which is becoming much more common.\footnote{372 See Katz, Automobile Medical Payments Coverage—A Changing Concept, 28 INS. COUNSEL J. 276 (1961), for a discussion of this type of insurance.} The availability of medical payments coverage would
lessen the interest of the forum in allowing recovery so that its medical creditors could be reimbursed, since they could be reimbursed from the medical payments the guest would receive, even if the guest himself did not carry first person medical insurance. If medical payments coverage is sold as part of an "automobile insurance package" rather than as a separate endorsement, it may be assumed that wherever there is liability coverage—which gives rise to an issue as to the applicability of the guest statute—there is medical payments coverage as well. Indiana has determined that Indiana insurers should be protected against claims by guests, and, for the most part, loss experience—and resultant insurance rates—reflects an absence of coverage for guests. This kind of case demands a "more moderate and restrained" interpretation of the forum's interest or, looking to principles of preference, one that should be governed by the law of the state of relationship rather than the state of injury. Kentucky has no real interest merely because the injury occurred here.

Applying Indiana law to this case in no way discriminates against the Indiana plaintiff, although if a Kentucky plaintiff and an Indiana defendant were involved, the Court would apply Kentucky law. It is reasonable and non-discriminatory to give an out-of-state plaintiff the same protection that his own law gives him as against a resident of his home state. The Kentucky plaintiff receives protection against an Indiana defendant while the Indiana plaintiff does not. This is because the Court limits each plaintiff to the protection afforded him by his own law. To deny an Indiana plaintiff recovery against a Kentucky defendant while allowing it to the Kentucky plaintiff would be discriminatory against the Indiana plaintiff, because no interest of his home state would be served by denying recovery. Recovery is denied against an Indiana defendant, because Indiana, their home state, has a strong interest in denying recovery. In the suit against the Indiana defendant both the Kentucky plaintiff and the Indiana

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373 Id. at 277-78.
374 If there is no objection to applying the "personal law" concept where two Kentuckians are involved in an accident in Indiana, there should likewise be no objection where two Indianans are involved in an accident in Kentucky.
375 See the discussion in B. Currie, supra note 328, at 508. See also D. Cavers, THE CHOICE OF LAW PROCESS 144 (1965). A contrary result might well violate the equal protection clause of the Fourteenth Amendment and in the case of a resident of a sister state, the Privileges and Immunities clause as well.
plaintiff are given the protection afforded by the laws of their respective states.\footnote{376 This is not a case of persons “needing special protection,” on which basis Professor Currie finds justifiable a reference to the law of the plaintiff’s home state. B. Currie, supra note 328, at 524-25. Nonetheless, the classification is reasonable, since it is designed to give effect to the policy of a sister state in a case where the forum has no real interest in applying its protective policy.}

The author’s result is the same as that Professor Ehrenzweig would reach, although his rationale has been rejected,\footnote{377 This is true to the extent that his rationale is based on considerations of insurability. Nonetheless, I agree with Professor Ehrenzweig to the extent that he sees the problem as basically one of insurance. I would apply the law of the state where the automobile is insured in this case, because there is no real interest on the part of the state of injury. Where, however, the injured plaintiff is a Kentuckian, I would conclude that Kentucky must prefer its own interest in providing compensation over Indiana’s interest in protecting its insurer. The fact that I conceive the problem to be one of insurance insofar as the granting of immunity is concerned does not mean that the law of the state where the automobile is insured should necessarily be applied in all cases.} and opposite from the results of Professors Currie and Cavers, even though some support for the conclusion is found in their theories. This is not paradoxical and may represent an important point in the analysis of judicial method. It is not the function of a court to “adopt” the theory and approach of Professor Ehrenzweig, Professor Currie, Professor Cavers, or any other commentator; rather, it should decide whether the law of the forum will be displaced in a particular case. In making the decision, past precedents must be considered in accordance with principles of stare decisis, and guidance may be found in the writings of the commentators. The decision must be based on the court’s view as to what is the sound result with respect to the particular fact-law pattern before it rather than on theoretical consistency. Thus, where two residents of a state with a guest statute are involved in an accident in Kentucky, Kentucky law will be displaced.

The rationale of the decision would be applicable to future cases involving parties from another state who had an accident in Kentucky, where immunity existed under the law of their home state. Kentucky’s interest in providing compensation in such cases is minimal and it should defer to the immunity policy of the home state. Where spouses from a state in which spousal immunity was recognized were involved in a Kentucky accident, the claim of immunity should be upheld.\footnote{378 See Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966), where the court held that as to Massachusetts spouses injured in New Hampshire, Mas-}

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would not be precedent for cases in which the fact-law pattern gave rise to different policy considerations.

Suppose that a husband and wife are domiciled in a state that recognized spousal immunity, including immunity for the infliction of intentional torts. While they are vacationing in Kentucky, the husband beats the wife unmercifully, throws her unconscious form into the automobile, and returns at break-neck speed to the home state. The wife sues him in Kentucky to recover for her injuries, obtaining personal service there. Kentucky law should not be displaced. This is an admonitory tort, and Kentucky is obviously trying to deter such conduct by allowing recovery for the battery, including punitive damages. The strong interest of the place of acting in applying its law to govern admonitory torts cannot be doubted. There may be a conflict between the interest of the domicile in providing immunity and the place of acting in controlling conduct that occurred there, and this is the clearest case where the forum must prefer its own governmental interest. With a view toward relevant policy considerations and the precise fact-law pattern presented, Kentucky should displace its law in the case of the automobile accident but not in the case of the intentional tort.

In case five, the Kentucky plaintiff was injured by the Indiana defendant in Indiana. This is improbable, since the defendant is

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sachusetts law providing spousal immunity would be applied. I am assuming that the state of the marital domicile would apply its own law. See Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1965); McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966). On the other hand, if that state would allow the suit, applying Kentucky law, i.e., it still followed the lex loci delicti rule, the Kentucky Court should also allow the suit, since there is no “conflict of laws.” The question of spousal immunity inter se must be distinguished from the question of contribution against the spouse. If the accident occurred in Kentucky, and the other party were a Kentuckian, Kentucky should apply its own law with respect to contribution against joint tortfeasors, including a non-resident spouse who enjoyed immunity under the law of his home state. See LaChance v. Service Trucking Co., 215 F. Supp. 162 (D. Md. 1963). But see Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1961), where the court failed to perceive this distinction.

379 “Since battery usually is a matter of the worst kind of intentions, it is a tort which frequently justifies punitive damages.” W. Prosser, Law of Torts 34 (3d ed. 1964).


381 This again points out the distinction between the “jurisdiction-selecting” rules of the Restatement Second and the policy-centered approach. The Restatement requires the application of the law of the marital domicile in all cases. Restatement (Second) of the Conflict of Laws § 390g (Tent. Draft No. 8, 1963).
a non-resident and the tort occurred outside of Kentucky. But under our present law of transient jurisdiction, the case could arise if the defendant were personally served in Kentucky. It will be evident that the fact-law pattern may not be complete, for it has not been stated where the host-guest relationship was formed, and in this case, that factor may be significant. Suppose that the plaintiff was visiting in Indiana, met the defendant there casually, and was offered a ride from one point in Indiana to another. While Kentucky's interest in providing compensation for the Kentucky plaintiff is no different from other cases where a Kentucky plaintiff is also involved, it is doubtful if Kentucky could constitutionally apply its law in this case. That much of the territorial principle remains, i.e., a state may not apply its law to govern liability for events occurring elsewhere on the sole ground that the plaintiff is a resident of that state. The defendant did nothing in Kentucky, and while the concept of "consent to legislative jurisdiction" may be questionable, the causing of injury to a Kentucky resident in Indiana is not a sufficient "contact" to justify Kentucky in applying its law to this case.

Suppose, however, that the Indiana defendant had by pre-arrangement come to Kentucky to take the Kentucky plaintiff to Indiana and back again to Kentucky. Although the accident may have occurred in Indiana, it would now seem that Kentucky has sufficient "contact" with the transaction so as to make it reasonable and, therefore, constitutional for Kentucky to apply its own law. This example demonstrates that it is not always possible to neatly categorize fact-law patterns. In the guest statute situation factors other than the residence of the parties and the place of injury may be relevant. This is all the more reason for a case-by-case analysis of whether the law of the forum should be displaced, or, in a rare case, constitutionally may have to be displaced.

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382 This precludes the taking of jurisdiction under the non-resident motorist statute.
383 Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).
384 I am not aware of any tort case where the forum tried to apply its law on this basis, i.e., where nothing happened in the forum, but the plaintiff was a forum resident.
385 Professor Currie has contended that the results of Supreme Court cases indicate that whenever the forum has an interest in applying its own law, it may constitutionally do so. B. Currie, Selected Essays on the Conflict of Laws 271 (1963). However, he has not explored the question of "whether the power of an interested state to apply its law is qualified if the party adversely affected
VII. SOME FURTHER NOTES ON JUDICIAL METHOD AND THE POLICY-CENTERED CONFLICT OF LAWS

By these examples, an attempt has been made to demonstrate the application of judicial method to the solution of conflicts problems with reference to considerations of fairness and policy. This was done in Wessling v. Paris and Clark v. Clark. It is not necessary nor desirable to formulate "rules of universal application." Conflicts cases are sufficiently few in number that a sound decision can be made with reference to the fact-law pattern of the particular case which can serve as a starting point for judicial reasoning when a later case arises.

Under a policy-centered approach, the law of the forum quite frequently will not be displaced, because in many cases the forum will have a real interest in the application of its law. This will be even more true when jurisdiction is based on more realistic factors than transient presence within the forum. The application of the law of the forum can be anticipated at least in tort cases. It is important to remember that the vast majority of significant conflicts cases in recent years have been cases where tort recovery was sought. This may be a result of the advent of the automobile and the interstate highway, for even in purely domestic cases, personal injury litigation exceeds all other by far. While the policy-centered approach—and the resulting emphasis on the application of the law of the forum—is not limited to tort cases, it is in those cases where it is most significant. Of all the jurisdiction-selecting rules spawned by the vested rights theory, the lex loci delicti has been the most unsound and the one most frequently avoided by the use of manipulative techniques. Also, it is in tort cases that social and economic policies most frequently come into play, and the policies of the different states may conflict.

Moreover, in tort cases, rarely can it be said that there was reliance on the law of a particular state or even on legal rules at all. For this reason, courts have not hesitated to overrule lex loci delicti holdings because of "reliance on settled law,"386 just as

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has not in some fashion 'subjected' himself to that law." Id. at 266, n. 294. If there is a qualification, it may not be in terms of "subjection," but some concept of "contact" remains to limit the application of forum law solely on the basis of "interest." The unlikelihood of such a case arising, as our example indicates, makes further inquiry questionable.

386 See note 179 supra.
there has been little hesitation to radically alter substantive principles of tort liability.\textsuperscript{387} Even where there may have been reliance on settled rules, injustice can be avoided by prospective overruling.\textsuperscript{388} Since tort litigation itself is perhaps the most "policy-centered," it is there that the forum will be most reluctant to displace its own law.

The application of the policy-centered approach in fields such as contracts and property, where reliance on settled law and the need for certainty is more significant, raises different questions. In these areas there may be a policy common to all states of protecting the legitimate expectations of the parties, and this policy, coupled with considerations of fairness, may require the displacement of the law of the forum more frequently.\textsuperscript{389} But even here, "rules" cannot be a substitute for judicial consideration of the problem presented in the particular case. Past decisions represent the "law," the application of which can be anticipated by the parties until changed. Changes will have to be made with reference to possible reliance on past practice, but how often such reliance can be shown is questionable. If law represents "a prophecy of what the court will do in fact,"\textsuperscript{390} lawyers will have to make this prediction in conflicts cases as in all others. Because conflicts cases are still relatively few in number, abandonment of a "rules approach" will not seriously affect the fabric of commercial and contractual relations. Whatever uncertainty results is preferable to the perpetuation of an unsound approach to the solution of all conflicts problems.

One more observation on the policy-centered approach as it relates to the displacement of the forum's law should be made because it becomes relevant in a particular fact-law pattern which has caused some concern to courts. The controversy over the enactment of wrongful death statutes\textsuperscript{391} led to a "compromise" in

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\item \textsuperscript{387} As with products liability, for example. The modern "law" of products liability can be said to be a development of the last ten years.
\item \textsuperscript{388} See Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966), where the court overruled the substantive doctrine of parental immunity prospectively, but the prospective overruling was not extended to the conflicts question.
\item \textsuperscript{389} See note 320 supra. To the extent that courts recognize the principle of party autonomy, the law of the forum may be displaced more frequently, particularly where the forum is a "weak" state in the commercial sense.
\item \textsuperscript{390} Holmes, \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 460-61 (1897).
\item \textsuperscript{391} Professor Currie suggests that "doubt and fear" about the new remedy may have been the reason for the prohibition against suits on wrongful deaths
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some states by which limitations, which have become quite unrealistic in view of present-day awards, were placed on the amount recoverable.\textsuperscript{392} The problem arises when an airplane crashes in a state which has such a limitation, and suit is brought in the state of the decedent, whose law does not contain the limitation. Some courts have used a "grouping of contacts" approach, stressing that the journey began in the forum, the decedent was resident there, and so forth, to justify the application of their wrongful death statute rather than the statute of the place of injury.\textsuperscript{393} However, in some states, \textit{e.g.}, New York\textsuperscript{394} and Kentucky,\textsuperscript{395} the wrongful death statute is not applicable where the death occurred outside the state. The plaintiffs must then recover under the foreign wrongful death statute or not at all. The forum court, however, is reluctant to accept the limitation imposed by the law of the place of death, and the question is whether the court can allow recovery under the foreign statute without including the foreign limitation on recovery.

In this connection, the concept of the law of the forum as the basic law is most helpful. Since the forum is only using foreign law as a model for the rule of decision in the particular case, as Cook long ago pointed out, it is not necessarily required to incorporate the \textit{whole law} of the foreign state.\textsuperscript{396} Some of the law of the foreign state can be used as a model to supplement the basic law of the forum. In a case such as \textit{Kilberg v. Northeast Airlines},\textsuperscript{397} where New York refused to apply the limitation of Mas-

\footnotesize{(Footnote continued from preceding page)}

\textsuperscript{392} Prior to 1959 the maximum amount of recovery in Massachusetts was $15,000. It has been successively raised to $20,000, $30,000 and now $50,000. At the time of the accident involved in the cases we are discussing it was $15,000. \textit{Mass. Ann. Laws} ch. 229 (1965).

\textsuperscript{393} \textit{Griffith v. United Air Lines}, 416 Pa. 1, 203 A.2d 796 (1964). See also \textit{Long v. Pan-American World Airways}, 16 N.Y. 2d 337, 213 N.E.2d 796, 206 N.Y.S. 2d 513 (1965), in which a "disinterested third state" applied the law of the decedent's home state, where the roundtrip ticket was purchased, rather than the law of the state of injury.

\textsuperscript{394} \textit{Whitford v. Panama R.R.}, 23 N.Y. 465, 8 N.Y.S. 466 (1861).


\textsuperscript{397} 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).
sachusetts to a suit by the beneficiaries of a New York decedent on a flight originating from New York and crashing in Massachusetts because it was against its "public policy" to do so, the result may be explained on this basis. New York used the Massachusetts wrongful death act as a model to determine the issue of liability, but refused to incorporate as a model that portion limiting recovery. Since New York had a sufficient interest to justify the application of its law in toto, and since the defendant could not be said to have "relied" on the Massachusetts limitation, use of only part of the Massachusetts law as a model was constitutional.

398 The court also said that damages, which "went to the remedy," could be classified as a matter of "procedure." This was subsequently repudiated in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

399 See the discussion in Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y.U.L. Rev. 813, 828-30 (1962). In Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962), involving the same accident, Judge Kaufman, writing for the majority, explained the result on this basis:

"New York has done nothing more than to apply a traditional choice of law rule which designates the law of Massachusetts as the source of liability for a wrongful death. It has absorbed the Massachusetts rule into the corpus of New York law for purposes of adjudicating this case fairly. ... We believe that in doing so New York is not bound to model all of the rules governing this litigation in which it has a legitimate interest, on Massachusetts law. We are convinced that New York may examine each issue in the litigation ... and by weighing the contacts of various states with the transaction, New York may, without interfering with the Constitution, shape its rules controlling the litigation." 309 F.2d at 560-61.

400 Compare Slater v. Mexican Nat'l Ry., 194 U.S. 120 (1904). Suit was brought in Texas by a Texas resident to recover damages resulting from a railroad accident that occurred in Mexico. Under Mexican law damages for personal injuries were awarded by means of periodic payments subject to modification upon changed circumstances. The court held that the forum could not apply the Mexican law of liability without applying the Mexican law of damages, and since it lacked the "judicial machinery" to award periodic payments, it could not award damages at all. The opinion was written by Justice Holmes in accordance with principles of vested rights. It is interesting to note that Cook, although criticizing this approach, did not disagree with the result in Slater. He says that "it would be unjust for the forum to create a right of a very different character." Cook, supra note 394, at 480. But, then, perhaps we are "out-Cooking Cook," as we have often done with our commentators, using their rationale to support a result different from that which they would favor.

401 Since the defendant carried on its activities in a number of states which, like New York, had no limitation, its insurance coverage would be based on unlimited liability. It is also not likely that its pilots were instructed to "crash in Massachusetts if at all possible." Compare, however, Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938), where in a suit to recover damages for breach of a contract made between a German national and a German corporation in Germany and to be performed there, the plaintiff alleged that to recognize the defense asserted would be against New York's "public policy." The defendant pleaded that it discharged the plaintiff in obedience to German law requiring the discharge of persons of non-Aryan descent. It would
Another case involving the use of part of the law of another state as a model and part of the law of the forum to fashion the rule of decision is Waynick v. Chicago’s Last Department Store. Both Illinois and Michigan had Dram Shop Acts, making the dispenser of liquor liable for harm caused by the sale of liquor to intoxicated persons, but both were applicable only where the sale of liquor and the harm resulting from the sale occurred in that state. The liquor was sold in Illinois, but the accident injuring the plaintiff occurred in Michigan. Strictly speaking, the plaintiff could not recover under the statute of either state, notwithstanding that if both the sale and harm had occurred in Illinois or in Michigan he could have recovered. Suit was instituted in Illinois, and the court quite properly allowed recovery on the theory that there was a “common law” action in Michigan, the place of injury. It would have been sounder to say that the forum could look to both the law of Illinois and Michigan. The forum law was used to determine that the sale which occurred there was wrongful and the Michigan law as a model to hold the seller responsible for the harm that resulted from the intoxication. Our notions of territoriality, reflected in the limited scope of the statutes’ applicability, may make this kind of mental gymnastics necessary.

Nonetheless, this case demonstrates how the concept of the law of the forum as basic law with the law of another state used as a model, in whole or in part, for the rule of decision enables the court to arrive at a sound result. Here both states had an interest in allowing recovery: Illinois to regulate the conduct of the Illinois liquor dispenser, and Michigan to provide compen-
sation for a person injured there. Since the defendant would be liable if both the sale and injury occurred in either state, the result should be no different where the sale occurred in one and the injury in another.

VIII. Conclusion

It has been the thesis of this paper that courts have abandoned their accustomed method of judicial decision when presented with a problem of the conflict of laws. Rather than proceed on a case-by-case basis with reference to the fact-law pattern before them, developing principles to be applied in future cases, a priori rules have been applied based on a consistent theory as to the nature of the conflict of laws. These rules were of a "jurisdiction-selecting" kind and ignored realistic considerations of social and economic policy so prevalent in other areas of law. The embodiment of the rules approach is the Restatement of the Conflict of Laws, and the Restatement Second which is based on the same approach, but changes many of the "rules." The problems and undesirable results perpetuated by judicial acceptance of the original Restatement will not be obviated by acceptance of Restatement Second; it is the rules approach itself that is unsound, for it is antithetical to the judicial method. Academic commentators have been developing policy-centered approaches to the solution of conflicts problems. While each has stressed a particular "approach," there is agreement that these problems should be solved by a consideration of relevant social and economic policies and fairness to the parties.

The choice that courts must make today is not between the "few simple" rules approach of the original Restatement and the "many complex" rules of the Restatement Second, but between the rules approach and the policy-centered conflict of laws. Moreover, courts must decide whether they are now willing to accept responsibility for the establishment of a body of conflicts law in accordance with the traditional principles of judicial method. Past judicial reluctance to deal realistically with conflicts cases may be explained by the courts' sensitivity to the "political aspects" of

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407 The defendant, doing business in both the states, would be aware of both laws. If such liability could be insured against, presumably it would be insured without regard to where the sale or harm occurred.
choice of law among sovereign states. The "dismal swamp" of conflicts law may be the result of this reluctance to discharge the judicial function. There is evidence that this attitude is changing, and the decision in *Wessling v. Paris* represents an assertion of judicial responsibility.

The rules approach should be replaced by a policy-centered conflict of laws, but it should be done in the context of judicial method, by the decisions of courts in particular cases with reference to the fact-law pattern presented therein. In time, in accordance with the normal workings of the common law system, a body of modern conflicts law, policy-centered in nature, would emerge. It is certainly possible and desirable to build on past experience. Perhaps, as Professor Ehrenzweig suggests, the actual results of past judicial decisions—as opposed to the rules enunciated—may have produced "true" choice of law rules. If so, courts can examine the "soundness" of these rules in light of modern conditions. These decisions may then be related to the policy-centered conflict of laws approach. The views of the academic commentators, present and future, can also furnish a fruitful source of guidance.\(^{408}\)

The process of judicial decision in conflicts cases was well described by the New Hampshire Supreme Court in *Clark v. Clark*:

This case is a comparatively easy one, and in cases like it the result will hereafter be reasonably easy for lawyers and trial judges to calculate. Admittedly there will be harder cases, more difficult to decide, cases that will not yield sure answers in terms of proper choice-influencing considerations as readily as this case does. That will not be a new phenomenon in conflict of laws. Nor will it be as bad as choice based on mechanical rules which do not take the relevant considerations into account. In course of time perhaps we will develop 'principles of preference' based upon relevant considerations, to guide us more exactly (citing Cavers, *The Choice of Law Process*). Most of the choice of law rules and results that have been reached in the past were supported by good sense

\(^{408}\) The refusal of courts to accept a particular methodology enables them to consider a wide variety of views. In view of the relatively few conflicts cases that come before courts, the reliance on the views of academic commentators will continue, and this is desirable. Perhaps we will arrive at what Professor Cavers has called "a body of rules, principles and standards of a new sort, developing through the workings of stare decisis and the combined efforts of courts and scholars." D. Cavers, supra note 375, at 78, referring to his forecast in *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 196 (1933).
and sound practical analysis, and will not be affected by reexamination in terms of the relevant choice-influencing considerations.\textsuperscript{409} Some, like the place of injury rule for torts, clearly will be affected. That is as far as this decision need go.\textsuperscript{410}

The essential propositions of the analysis of judicial method and the policy-centered conflict of laws will be briefly reviewed. The first proposition is that the basic law is the law of the forum, and that law will not be displaced absent valid reasons for such displacement. This means that if no issue as to the application of foreign law is raised or no proof of the content of foreign law is introduced, the forum should apply its own law unless it is precluded from doing so by the express terms of its own statutory law or by constitutional limitations if such exist.\textsuperscript{411} Moreover, since the basic law is that of the forum, it follows that if foreign law is used as a model, the forum is not required to use all of that law, but may fashion a rule of decision based in part on the substantive law of the forum and in part on relevant foreign law. Second, there is only a conflict of laws where the result that would be reached if the case were heard in the courts of the state whose law is sought to be used as a model would be different than the result that would be reached under the substantive law of the forum. If the court of that state would decide the case in accordance with the substantive law of the forum, the forum should not even consider the displacement of its own law.

Where there is a conflict of laws, in the sense that term is used here, the court should render a decision on displacement only with reference to the fact-law situation presented in the particular case. The decision in that case will operate as a precedent and decisions in a number of cases will coalesce to form a body of conflict law. The fourth and major proposition is that the law of the forum should be displaced only where considerations of fairness to the parties or proper recognition of the governmental interests of another state so requires. Each case must be decided from the standpoint of fairness and policy without regard to a

\textsuperscript{409} This is doubtful unless a distinction is drawn between "choice of law" rules and "results."\textsuperscript{410} 222 A.2d 205, 210 (1966).
\textsuperscript{411} Where neither party has introduced proof of foreign law, it is difficult to see why it would be unconstitutional for the forum to apply its own law. But if the forum is a "disinterested third state," such an interpretation is possible, though undesirable.
"system of rules" or a methodology favored by a particular commentator. In areas of law where factors of "reliance" and "certainty" are present, the court must consider whether the law of the forum should be displaced to protect the legitimate expectations of the parties. In the absence of these factors, displacement will depend upon a consideration of the policies and interests of the respective states. It will often be clear that only one state will have any interest in the application of its law and policy to the particular issue. Where both the forum and another state may be said to have an apparent interest in the application of their law and policy, the forum must resolve this "conflict of interest." Its decision must be based on the factors that it considers relevant in the particular fact-law pattern presented. These propositions are the essence of judicial method and the policy-centered conflict of laws.

The primary function of courts is to determine the rights and liabilities of the parties before it. The vast majority of cases are "domestic," and decision is rendered in accordance with the forum's substantive law. In the relatively few cases that contain a foreign element, threshold consideration may have to be given to the displacement of the law of the forum and the use of the law of another state as a model for the rule of decision in the case. For most courts this process has been a "distasteful" one, and the inherent "political implications" have deterred courts from following the judicial method of decision. Instead they have substituted a "system of rules" divorced from considerations of policy and fairness. Courts must now return to the judicial method of decision in conflicts cases as in all others, to develop a body of conflicts law by a series of decisions in actual cases. The frequency and complexity of cases will vary from state to state, but when all courts adopt the policy-centered approach, the results in conflicts cases will be more uniform than when courts were allegedly applying uniform rules, but actually employing manipulative techniques to avoid their effect.

The responsibility of the courts in the solution of conflicts problems has been well-stated by a distinguished judge:

For some time to come, therefore, the main responsibility for the rational development of conflict of laws is bound to re-
main with the state courts. The responsible court will have to be on its mettle. It must be prepared to reject unrealistic rules, yet cautious enough not to make formulations that reach too zealously into the future or give too zealous a scope to local policy. It must distinguish between real and spurious conflicts at the outset. It must temper its freedom to declare local policy and its scope with a sense for harmonious interstate relations as well as for the justifiable expectations of the parties.

There are always some to remind us that those who make decisions on our courts, like those who make decisions elsewhere, may sometimes be provincial in outlook. They say no more than that there is always a shortage of wise men. It is answer enough to the misanthrope that the forces against provincialism are strong today and that a judge trained to look through the partisan wrappings of a conflict will be inclined to look through provincial wrappings as well. There is no reason why he should be less dispassionate in a conflicts case than in any other. The hazard is less of impassioned provincialism than of the lingering ills of a passive formalism.

It is on this note that our discussion of judicial method and the policy-centered conflict of laws may be ended.

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412 Because the Supreme Court is not "elevating choice-of-law rules to constitutional rank."