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"PUBLIC POLICY" IN THE CONFLICT OF LAWS

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I. INTRODUCTION

In deciding a conflict of laws question, a judge will sometimes say, "The foreign law ordinarily applicable will not be applied in this case because to do so would violate our public policy." The textwriters, language in the cases, and the *Restatement* agree: the "normal" operation of choice of law rules is subject to a "public policy" limitation. This paper is an attempt to explore the meanings and significance of "public policy," used in this general way, in the conflict of laws.

It is commonly assumed that to reject the application of foreign law on public policy grounds is to assert that somehow the content of the foreign law, when tested by notions at the forum, is seriously deficient in quality. Employed in this sense the forum's public policy sits in judgment over the wisdom and fairness of the foreign law. In this vein Judge Goodrich has written that when a judge rejects the application of foreign law on public policy grounds, "[I]t is not that the foreign law does not seem so reasonable to the judge as his own good homemade precedent, but it must appear 'pernicious and detestable' or, to borrow Mr. Justice Cardozo's always effective language, 'violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'"¹ Professor Stumberg has expressed a similar idea, "Relief may be refused at the forum because of disapproval, on grounds of policy there, of the particular cause of action as such."² Judge Beach reacted to such a definition of public policy when he wrote: "It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the laws of a sister state 'would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law,' or would be of

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1. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 33-34 (1938); see Note, *The Public Policy and the Conflict of Laws*, 33 COLUM. L. REV. 508 (1933), for an attempt to define the public policy concept.

2. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 168 n. 97 (2d ed. 1951).

such evil example as to corrupt the jury or the public."³ Consistent with this conception of the public policy limitation is the formulation of the *Restatement*: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the *strong public policy* of the forum."⁴

Comment *b* to this section of the *Restatement* points out that, "A mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other." However, the *Restatement* does not expressly restrict the application of the public policy limitation to cases involving a qualitatively inferior foreign law.⁵ The idea that there is also a quantitative test for rejecting foreign law finds some support in the cases: a great difference between foreign law and forum law has, on occasion, been enough to persuade a court that foreign law should not be applied, even though there is nothing particularly offensive about it.⁶ Whether foreign law is rejected because it is immoral and vicious or merely because it is sharply different from the law of the forum, the simplest kind of two-state situation is posited. A claim based on a transaction with all its important contacts in State *A* is denied enforcement in State *B* because of the content of State *A*'s law.

Much of the criticism of the public policy exception is in one way or another related to this idea that, under the limitation, foreign law is not used because of what it provides. Judge Goodrich clearly has this idea in mind when he writes, "[A] plaintiff in a Conflict of Laws case does not seek to do something that is against public policy in its local sense. He is asking the court to give legal effect to acts done elsewhere and in accordance with the law there prevailing. The court by responding does not abdicate to foreign law and does not break down local control over local transactions."⁷ Judge Beach, as we have seen, referred to the employment of the rule as an "intolerable affectation of superior virtue."⁸ The *Restatement*⁹ and Professor Beale¹⁰ assert that the

3. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 662 (1918); see Goodrich, *supra* note 1, at 35: "As among our states, the sight of the courts of one state refusing to apply the law of another because the second state's rule shocks the morals of the forum, is one to make the judicious grieve."

4. RESTATEMENT, CONFLICT OF LAWS § 612 (1934).

5. The illustrations appended to § 612 of the *Restatement* do, however, refer only to cases in which foreign law is rejected because it is below the forum's standards. Both cases posited involve foreign gambling transactions.

6. Hudson v. Von Hamm, 85 Cal. App. 323, 259 Pac. 374 (1927); Clough v. Gardiner, 111 Misc. 244, 182 N.Y. Supp. 803 (Sup. Ct.), *aff'd*, 194 App. Div. 923, 184 N.Y. Supp. 914 (2d Dep't 1920); see discussion of "similarity" doctrine in text at note 24 *infra*.

7. GOODRICH, CONFLICT OF LAWS 21-22 (3d ed. 1949); see Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156, 170 (1930): "But as one reads through the decisions on Conflict of Laws there appear too many instances where a foreign solution of a problem is denied local effect because the domestic solution is different."

8. Beach, *supra* note 3.

9. RESTATEMENT, CONFLICT OF LAWS § 612, comment *c* (1934).

10. See BEALE, CONFLICT OF LAWS 1651 (1935).

application of the exception should be very limited at least between states of the Union because differences in policy among them are of minor nature.

The critics, seeing the problem in this light, make with much force the point that the public policy limitation is not simply an exception to the application of a certain conflict of laws rule, but is an idea which threatens the fundamental conceptions underlying the entire conflicts law. The limitation asserts that local policy should control a situation entirely foreign to the concerns of the forum. Furthermore, the public policy rule understood in this way may deprive a deserving claimant of compensation without the gain of any sensible objective of the forum.

Why does a court engage in this silly kind of enterprise—localism without purpose? In an earlier day, when conflict of laws was new and strange to the common law, perhaps it was reasonable to hold fast to a principle which reserved a way out should the passage to decision by reference to foreign law prove too fearful. Early American analyses of conflicts law, depending so heavily on the term "comity," may have encouraged talk about not using foreign law because of public policy. For example, consider this language from a leading old Massachusetts case:

But, as the laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction; for, if they should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected.¹¹

Indeed, Judge Beach countered the talk of comity by offering the theory of vested rights as a way of explaining conflict of laws.¹² He hoped thereby to destroy the public policy principle at least as between the states. But today, when "comity" with its corollary ideas of discretion and reciprocity is no longer the key to conflicts theory and when the conflicts case is no longer a rarity in the courtroom, why do states refuse to apply foreign law simply because of what that law provides? To gain insight into this question we have undertaken a comprehensive review of the case law.

At the outset one is met by a problem of classification. It is difficult to determine in many cases whether the court has refused to apply foreign law on the ground that the foreign law is "repugnant" to the forum by reason of the forum's evaluation of the claim which is recognized abroad, or whether the court has rejected foreign law because, in the forum's view of what the important contacts are, local law should be applied. Only rarely do the reports contain instances in which the forum's sole connection with litigation is serving as the place of trial. In most conflicts cases the domicile or the place of doing

11. *Blanchard v. Russell*, 13 Mass. *1, *6 (1816).

12. See Beach, *supra* note 3.

business of either plaintiff or defendant is in the forum. Discussion of cases in which these contacts have seemed important has been reserved until later in this paper.

II: THE CLASSICAL CONCEPT

Research into the case law establishes at least one solid fact: The reported cases in which foreign law, applicable under the usually appropriate conflicts rule, is not used solely because the law to be applied is "obnoxious" or "repugnant" to the public policy of the forum are few indeed. Examples are much easier to fabricate than to find in the reports.

The argument that an entirely foreign claim should not be enforced because it is repugnant to the forum has undoubtedly been made most often in contract cases, but it has met with surprisingly little success. *Greenwood v. Curtis*¹³ is certainly one of the more striking examples of the tolerance of American courts for "repugnant" foreign contract claims. In that case, a South Carolina domiciliary sold goods to the defendant in Africa in return for a promise to deliver a quantity of slaves. Part of the slaves were delivered, and the defendant stated an account as to the rest, translating the value of the slaves into cash, so that the account stated said nothing about slaves. The defendant then gave a note to the plaintiff's agent in Africa, translating the debt back into slaves and promising to pay "nine four-foot slaves, thirty-seven prime slaves," and a small sum of money. The note was to be paid in Africa where the slave trade was legal. The plaintiff would then have transported the slaves to South Carolina for sale, the trade being legal there too. Defendant failed to perform, and the plaintiff brought suit on the account stated and on the note in Massachusetts. Defendant's counsel relied on a Massachusetts statute prohibiting the slave trade and on the contention that the slave trade was a vicious and immoral practice in his argument that no relief should be granted. The court stated that this objection "may apply" to the attempt to recover on the note, but could not defeat the plaintiff's attempt to recover the cash amount stated in the account, since the payment of cash is not immoral. Both the dissent¹⁴ and the annotator¹⁵ point out that there never really was any intention on the part of either party that the obligation be satisfied in cash, the transaction clearly being one for the acquisition of slaves.

The idea that a court will enforce such a contract as long as it can keep from turning itself into a flesh market also found acceptance in the Supreme Court of Illinois in a suit to recover on a note given for the price of a slave.¹⁶

13. 6 Mass. *358 (1810).

14. *Id.* at *366.

15. *Id.* at *358.

16. *Roundtree v. Baker*, 52 Ill. 241 (1869).

Relief was granted even though Illinois had abolished slavery long before the sale in Kentucky took place and even though the Civil War and the abolition of slavery had intervened between the time of the transaction and suit. The court indicated its abhorrence of slavery, stating that it would not specifically enforce such a contract but that, since the slave had been delivered, it would enforce payment of a note given for him.

It is curious that the sensibilities of the judiciary have been offended in cases involving far less egregious violations of "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." A New Jersey court refused to grant an accounting to a member of a partnership which carried on lotteries, even on the assumption that all of the transactions involved occurred in states where they were legal.¹⁷ The Court of Civil Appeals of Texas refused to grant recovery on notes given for the purchase of stock in a Mexican gambling and liquor establishment.¹⁸ The prohibition laws of Texas and the United States were said to set a public policy forbidding the enforcement of the notes even though the notes were not alleged to be made or to be payable in the United States.¹⁹ Many dicta can be added to these two cases,²⁰ but our research has revealed only one other square holding that a state will refuse to enforce a contract because it is obnoxious to it (although the argument has been made with great frequency) when it has had no significant contact with the transaction or the parties.²¹

17. *Watson v. Murray*, 23 N.J. Eq. 257 (Ch. 1872).

18. *Ayub v. Saloman*, 252 S.W. 291 (Tex. Civ. App. 1923).

19. It is possible that the outcome of this case was influenced by its companion case, *Ayub v. Automobile Mortgage Co.*, 252 S.W. 287 (Tex. Civ. App. 1923), in which the notes were dated and payable in Texas. In this case, Texas clearly had the right to apply its own law to test the validity of the transaction, and it did so. In the course of its decision, the court reasoned that the prohibition laws of Texas and the United States established a public policy which would be violated by enforcing the notes. Public policy was thus being used in the local law sense, *i.e.*, to determine whether the notes were enforceable under Texas' local law. The court then carried its characterization of the prohibition laws as public policy over to *Ayub v. Saloman*, note 18 *supra*, this time using public policy in the conflicts sense, *i.e.*, enforcement of the notes is repugnant to Texas and hence will be denied even though Texas lacks significant contacts with the transaction. *Cf. Matter of Clarkson*, 201 Misc. 943, 107 N.Y.S.2d 289 (Surr. Ct. 1951), discussed in text at note 80 *infra*. Both *Ayub* cases were reversed on appeal. *Automobile Mortgage Co. v. Ayub*, 266 S.W. 134 (Tex. 1924); *Ayub v. Saloman*, 266 S.W. 136 (Tex. 1924).

20. *E.g.*, *Oscanyan v. Arms Co.*, 103 U.S. 261, 278 (1880) (dictum); *Smith v. Union Bank*, 30 U.S. (5 Pet.) 518, 526 (1831) (dictum); *Swann v. Swann*, 21 Fed. 299, 300 (E.D. Ark. 1884) (dictum); *R. S. Barbee & Co. v. Bevins, Hopkins & Co.*, 176 Ky. 113, 115, 195 S.W. 154, 155 (1917) (dictum).

21. *Continental Supply Co. v. Syndicate Trust Co.*, 52 N.D. 209, 202 N.W. 404 (1924), in which the Supreme Court of North Dakota refused to enforce a stipulation in a note providing for the payment of ten percent of interest and principal for attorney's fees in the event that an attorney's services were necessary for collection. The note had been issued in Texas, where such stipulations are lawful, but North Dakota had a statute expressly declaring stipulations for attorney's fees "to be against public policy and void." The court said, "It is elementary, however, that the doctrine of comity does not require the courts of one state to enforce contracts made in another state when such contracts are contrary to the public policy of the forum." *Id.* at 222, 202 N.W. at 409. Even in this case, however, the defendant appears to have been a resident of the forum, and it is at least arguable that

The argument that a foreign claim should not be enforced because of its repugnant nature has not been limited to contract cases. In tort cases, however, it is rare that a grant of relief to an injured party can be considered repugnant to morality or justice. But a tort claim may be based on a law differing sharply from the law of the forum.

The problem of whether to refuse relief for a foreign tort has come up more frequently in cases arising under foreign wrongful death acts than in any other type of case. Some of the early death act cases refusing to apply foreign law were clearly grounded in the notion that statutory law was local in character. It was urged that a statute had no extraterritorial effect and therefore could not be enforced abroad.

[W]here the right of action does not exist except by reason of statute, it can be enforced only in the state where the statute is in existence and where the injury has occurred. That is to say, the cause of action must have arisen and the remedy must be pursued in the same state, and that must be the state where the law was enacted and has effect.²²

The idea that statutory causes of action for tort are non-exportable seems to be a curious corollary of Story's territorial theory of the nature of law. Leg-

the case is explicable in terms of Rabel's "public law" theory. See text at note 123 *infra*. Cf. *Campen Bros. v. Stewart*, 106 W. Va. 247, 145 S.E. 381 (1928), in which the notes involved were executed in the forum state. In *Arden Lumber Co. v. Henderson Iron Works & Supply Co.*, 83 Ark. 240, 103 S.W. 185 (1907), and *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S.W. 208 (1910), the Arkansas court held that provisions for attorney's fees were penalties and hence unenforceable even if valid under foreign law. ARK. STAT. ANN. § 68-910 (Supp. 1955) renders provisions for ten percent attorney's fees valid, in effect overruling these two decisions.

Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460 (1920), should also be mentioned here. In that case Georgia refused to hold a married woman liable upon her contract of suretyship entered into in North Carolina, where such contracts are valid, on the ground that to do so would be contrary to Georgia's public policy. It does not appear whether the defendant was a Georgia domiciliary or not. If she was, then clearly Georgia had a significant connection with the transaction. See text at note 98 *infra*. If she was not, then the case is a holding for the proposition that a state will refuse to enforce a contract repugnant to it even though it lacks contacts with the case. *Ulman, Magill & Jordan Woolen Co. v. Magill*, 155 Ga. 555, 117 S.E. 657 (1923), discussed in text at note 102 *infra*, a similar case involving a nondomiciliary, regarded the *Sally* case as controlling. The *Magill* case had at least a marginal contact in that property situated in Georgia was involved.

See also *Kellogg-Citizen's Nat'l Bank v. Felton*, 145 Fla. 68, 199 So. 50 (1940), in which Florida refused to enforce the contract of a married woman, domiciled in Florida at the time of the suit but not at the time of making the contract.

An enormous number of cases have refused to apply the public policy doctrine to foreign contracts. *E.g.*, *Haase v. First Nat'l Bank*, 203 Ala. 624, 84 So. 761 (1919); *Veytia v. Alvarez*, 30 Ariz. 316, 247 Pac. 117 (1926); *Henning v. Hill*, 80 Ind. App. 363, 141 N.E. 66 (1923). *Veytia v. Alvarez*, *supra*, in which the plaintiff was suing for liquor sold and delivered in Mexico, is especially well reasoned. For example, the court says, "Is there, then, . . . anything inherently wicked, vicious, or immoral in this sale? Not unless our ipse dixit makes it so. It may be that our prohibition laws are expressive of our national moral sense . . . but their origin is in our own experience. Neither expressly nor by fair implication do the laws condemn as inherently wicked the age-old customs of other peoples in the use of intoxicating liquors." *Veytia v. Alvarez supra* at 329, 247 Pac. at 122.

22. *Willis v. Missouri Pac. Ry.*, 61 Tex. 432, 434 (1884). An old treatise, *RORER, AMERICAN INTERSTATE LAW* (1879), is the fountain-head of this sort of argument. See *Id.* at 155-56.

islation can bind only within the territory of the state of enactment, and, therefore, it has no effect abroad. Story, of course, cannot be charged with this particular point of view because his treatise did not speak to the problems of choice of law in torts at all. The argument was made to the Supreme Court of the United States in 1880, but, speaking through Mr. Justice Miller, the Court disposed of the matter by pointing out that tort liability is generally transitory and by characterizing the contention as a "very dangerous doctrine."²³ The localization of tort litigation because the right of action was created by statute survives nowhere.

The late nineteenth century and early twentieth century cases exhibited an analogous problem. A great many opinions took the position that the forum can enforce a foreign death act claim only if the foreign act is substantially similar to the local statute.²⁴ The requirement of similarity could be made so exacting as to forbid recovery under the foreign act unless the local statute was almost identical to the sister state's statute. For example, *St. Louis, I. M. & S. Ry. v. McCormick*,²⁵ a Texas case of 1888, refused recovery on a claim based on an Arkansas wrongful death act which differed from the Texas law only on such matters as who might bring the action, the distribution of the recovery, and whether or not exemplary damages might be awarded. The dismissal of this plaintiff's claim is particularly startling because, on the facts of the case, the identity of the plaintiff, the distribution of recovery, and the damages permitted would have remained the same no matter which act had been used.

Time has drained the substantial similarity requirement of its vitality.²⁶ In a few states plaintiffs' counsel secured the passage of legislation requiring the local courts to entertain foreign causes of action.²⁷ The landmark of *Loucks*

23. *Dennick v. Railroad Co.*, 103 U.S. 11, 18 (1880); see *Cincinnati, H. & D. R.R. v. McMullen*, 117 Ind. 439, 20 N.E. 287 (1889); *Morris v. Chicago, R.I. & P. R.R.*, 65 Iowa 727, 23 N.W. 143 (1885).

24. See, generally, HANCOCK, *TORTS IN THE CONFLICT OF LAWS* 26-29 (1942); Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545 (1935). The source of the similarity requirement seems to be *Leonard v. Columbia Steam Nav. Co.*, 84 N.Y. 48 (1881).

25. 71 Tex. 660, 9 S.W. 540 (1888).

26. "At the present day [the similarity rule] . . . is probably retained only in Texas and Maryland." HANCOCK, *op. cit. supra* note 24, at 29.

The Texas situation is discussed in Paulsen, *Foreign Law in Texas Courts*, 33 TEXAS L. REV. 437, 439-49 (1955). Maryland's *Davis v. Ruzicka*, 170 Md. 112, 183 Atl. 569 (1936), may be the most recent case in which a state refused to apply the law of a sister state on dissimilarity grounds. Fifteen months after the decision Maryland passed a statute having the effect of abolishing the dissimilarity rule in wrongful death cases. MD. ANN. CODE art. 67, § 2 (1951). There is no Maryland authority which ever applied the rule to other than a death act case.

27. *E.g.*, ALA. CODE ANN. tit. 7, § 97 (1940): "Whenever, either by common law or the statutes of another state, a cause of action, either upon contract, or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforceable in the courts of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of

*v. Standard Oil Co.*²⁸ is a splendid example of those opinions in which the courts have done the work unassisted: "The test of similarity has been abandoned [in Massachusetts]. . . . If it has ever been accepted here, we think it should be abandoned now."²⁹ In a few states the courts still play the game of likeness and difference, but it is a game of shadow without substance. The sister state statutes are always found to be similar to the local act.³⁰ Only if the forum is procedurally unable to provide the remedy appropriate to the foreign claim is the plaintiff's action dismissed.³¹

The requirement of similarity has almost nothing to recommend it and, indeed, as between sister states is probably unconstitutional.³² It does serve as a check on the practice of forum shopping, but so would refusing to enforce all foreign causes of action, and it is not nearly so flexible a device as the straightforward use of forum non conveniens. The state of the tort is not necessarily the best place of trial, and jurisdiction over the defendant may be impossible to obtain there. Of course, the similarity rule was a valuable tool in the historical development of extra-state enforcement of death act claims when it was used to justify the taking of an out-of-state case. A cause of action is obviously not "obnoxious" to the forum if that state entertains similar actions locally. As a principle of exclusion, however, the similarity requirement may immunize a defendant from the consequences of his wrongdoing and bar the plaintiff from his right to compensation.

action had arisen in this state"; see also Mo. ANN. STAT. § 507.020 (1952); TEX. REV. CIV. STAT. ANN. art. 4678 (1952). The Texas statute is explained in *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App. 1932). A commentary on the Missouri legislation is found in *Burg v. Knox*, 334 Mo. 329, 67 S.W.2d 96 (1933).

28. 224 N.Y. 99, 120 N.E. 198 (1918).

29. *Id.* at 113, 120 N.E. at 202. The following are some of the leading cases which indicate that a sister state cause of action in tort must be enforced in the forum unless repugnant to good morals or natural justice: *Northern Pac. R.R. v. Babcock*, 154 U.S. 190 (1894); *Kroger Grocery & Baking Co. v. Reddin*, 128 F.2d 787 (8th Cir. 1942); *Rubin v. Schupp*, 127 F.2d 625 (9th Cir. 1942); *Curtis v. Campbell*, 76 F.2d 84 (3d Cir. 1935); *Chubbuck v. Holloway*, 182 Minn. 225, 234 N.W. 314 (1931); *Herrick v. Minneapolis & St. L. Ry.*, 31 Minn. 11, 16 N.W. 413 (1883) (perhaps the most widely cited case of this group); *Miller v. Tennis*, 140 Okla. 185, 282 Pac. 345 (1929); *Chicago, R.I. & P. Ry. v. McIntire*, 29 Okla. 797, 119 Pac. 1008 (1911); *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d 288, 118 P.2d 985 (1941); *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681 (1914); *Bain v. Northern Pac. Ry.*, 120 Wis. 412, 98 N.W. 241 (1904).

Maryland v. Coard, 175 Va. 571, 9 S.E.2d 454 (1940), is especially interesting. In a wrongful death action arising from Maryland facts the Supreme Court of Appeals of Virginia held that the Virginia courts should provide a forum even though that court assumed that Maryland would refuse to decide a similar Virginia case:

And while the rule of comity rests in a measure upon the custom of reciprocity, we do not understand that it by any means is founded solely, or even chiefly, upon such custom, but rather upon what appear to be the just rights of the parties litigant. *Id.* at 579, 9 S.E.2d at 457.

30. *Tyson v. Scartine*, 118 A.2d 795 (Del. Super. Ct. 1955), is a recent example.

31. Texas refuses to apply the Mexican negligence law on that ground. See *Carter v. Tillery*, 257 S.W.2d 465 (Tex. Civ. App. 1953), and the discussion in Paulsen, *supra* note 26, at 439-49.

32. See text at note 171 *infra*.

Among the tort cases other than those involving death acts, *Hudson v. Von Hamm*³³ and *Jacobsen v. Saner*³⁴ stand alone (so far as our research has revealed) as instances in which a state, unconnected with the case by any significant factual contact, has refused recovery on the ground that the applicable law is at odds with the forum's policy.

In *Hudson*, a resident of California (at the time of suit but not at the time of injury) sued a resident of Hawaii in the California courts for injuries caused by the defendant's son. Hawaii was the place of the injury, and under a Hawaiian statute a father is responsible for the torts of his children but not so in California. The California courts refused to entertain the action "on account of the conflict of law which exists between the forum and the foreign territory."³⁵ The *Hudson* opinion does not rest on the idea that the vicarious liability of the parent imposed by the Hawaiian law is immoral, nor does it contain any expression which indicates that recovery would be considered fundamentally unjust. The essay is based upon two misstatements of law as far as actual case holdings are concerned:

[T]he decisions of the courts of America seem to be in harmony to the effect that when the positive law of the forum, represented by its constitution, statutes or current decisions is in *substantial conflict* with the law of the foreign state, country, or territory, upon the subject matter in controversy, the courts of the forum will decline to accept jurisdiction without violation of the doctrine of the comity of nations.³⁶

The court was also persuaded that in a majority of states the doctrine of substantial similarity is accepted as to statutory causes of action. The "substantial conflict" paraphrase of the public policy doctrine is peculiar, like the more commonly used public policy formulation, to cases in which the forum has some contact with the transaction before it. The authorities do not support its use where the transaction has no contacts with the forum. We have already seen that the substantial similarity rule is defunct except for an occasional dictum.³⁷ It is difficult, on the facts as reported in the opinion, to see what policy of California is served by the decision. Its only accomplishment was to deny a California resident the right to recover for an injury which would have been the basis of compensation in Hawaii.

It is not surprising that the case, so ill considered and so hostile to those deserving of compensation, has not attracted a following. The California Supreme Court refused to extend *Hudson* in *Loranger v. Nadeau*,³⁸ which in-

33. 85 Cal. App. 323, 259 Pac. 374 (1927).

34. 72 N.W.2d 900 (Iowa 1955).

35. 85 Cal. App. at 332, 259 Pac. at 378.

36. *Id.* at 331, 259 Pac. at 378.

37. See text at note 26 *supra*.

38. 215 Cal. 362, 10 P.2d 63 (1932).

volved a negligence action by an automobile passenger against the driver for injuries resulting from an Oklahoma accident. The California Legislature had enacted a guest statute which provided that no person who as a guest accepted a ride in any vehicle upon a highway had any right to action for civil damages against the driver unless he established gross negligence. The defendant, citing *Hudson v. Von Hamm*, argued that there was a "substantial conflict" between California and Oklahoma law and that therefore the California court should dismiss the case. The California Supreme Court disagreed, asserting that in taking jurisdiction the courts did not violate any fundamental principle of justice or public policy. The court reasoned that California law had been the same as Oklahoma law before the enactment of the California guest statute, and, furthermore, even with the guest statute, California recognized liability of a host to his guest for some injuries caused by negligence. Courts in other states have reached California's solution to the guest statute problem.³⁹

*Jacobsen v. Saner*⁴⁰ is an example of a state's refusal to enforce a cause of action not because the forum is fundamentally opposed to the claim but rather because the forum is opposed to the claimant. As a result of the alleged acts of Saner while he lived in Minnesota, Mrs. Jacobsen filed a proceeding for divorce against Jacobsen, which was granted in Minnesota by default. Saner moved to Iowa where a statute provides, "When a divorce is decreed the guilty party forfeits all rights acquired by marriage." Under the Iowa decisional law this statute bars the guilty party from prosecuting an action for alienation of affections, at least when that person is divorced in Iowa. Mr. Jacobsen's petition seeking damages for alienation of affections was dismissed and the Supreme Court of Iowa affirmed. The statute as interpreted by the cases was "a clear and positive statement of the public policy of the state and the 'comity' rule is not applicable."⁴¹ Near the beginning of the opinion "comity" was defined as "merely a principle in accordance with which the courts of one state will give effect to the laws and judicial decisions of another, not as a matter of right but out of deference and respect."⁴² The case might serve as a good example for Judge Beach's complaint that much harm has come from the use of that term "comity."

The Iowa court was unwilling to limit the effect of the statute to Iowa

39. *Skillman v. Comer*, 38 Del. 402, 193 Atl. 563 (1937); *Redfern v. Redfern*, 212 Iowa 454, 236 N.W. 399 (1931); *Pool v. Day*, 141 Kan. 195, 40 P.2d 396 (1935); *Hall v. Hamel*, 244 Mass. 464, 138 N.E. 925 (1923); *Eskovitz v. Berger*, 276 Mich. 536, 268 N.W. 883 (1936); *Whitney v. Penrod*, 149 Neb. 636, 32 N.W.2d 131 (1948); *Brown v. Hogan*, 14 Tenn. App. 251 (1931). The argument that public policy forbids application of the guest statute in force at the place of the injury was rejected in *Pringle v. Gibson*, 135 Me. 297, 195 Atl. 695 (1937); *Kaiser v. North*, 292 Mich. 49, 289 N.W. 325 (1939).

40. 72 N.W.2d 900 (Iowa 1955).

41. *Id.* at 901.

42. *Ibid.*

divorces because non-residents would then have a forum for alienation of affections recovery when residents would not. But it is often the case that occurrences outside the state will be ground for relief when similar happenings inside will not. What advantages does Iowa gain by barring non-residents from remedies which they could have in another state, even granting that the remedy will be given in the face of the inability of Iowa domiciliaries to obtain similar relief? The Iowa court concedes that the law of another state would control the question but for the public policy principle, and so the ideal of equality between resident and non-resident is purchased at the price of denying a remedy for what, by the admittedly applicable law, is a very real wrong.

We have been dealing thus far with cases in which courts have refused to take jurisdiction because to do so would violate the forum's public policy. There is, in addition, authority for the proposition that public policy can be used by the plaintiff to strike down a defense even though the forum has no contact with the transaction before it. In *Fox v. Postal Tel. Cable Co.*,⁴³ Wisconsin was the forum for a claim resulting from delayed delivery of a telegram from New York to Illinois. The telegraph blank contained language both saving the company harmless for delay in transmission and limiting its liability for such delay in special circumstances. "[T]he fact, if it be a fact, that an action on the claimed liability could not be maintained in the courts of New York or those of Illinois . . ." was held not to control. The Wisconsin Supreme Court refused to dismiss the action because the stipulation in the telegraph blank was invalid under Wisconsin common law "supposed to be reasonably necessary for the protection of our citizens and all persons submitting to our laws or invoking their aid through the instrumentality of our courts."⁴⁴ The court believed that, "[C]ourts have uniformly regarded the public policy of the place of the forum as superseding the right of a defendant to the benefit of a defense which he might have at the place of the contract. . . ."⁴⁵ It was apparently felt that this proposition was so widely accepted that it needed no citation to support it.

In one famous instance, however, the Court of Appeals of New York refused to ignore a racist decree of Nazi Germany.⁴⁶ Plaintiff, a Jew, sued the de-

43. 138 Wis. 648, 120 N.W. 399 (1909). *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145 (S.D. Fla. 1944); *Jeffrey v. Whitworth College*, 128 F. Supp. 219 (E.D. Wash. 1955); *Williamson v. Weyerhaeuser Timber Co.*, 221 F.2d 5 (9th Cir. 1955), are cases refusing to strike down defenses on the ground of public policy.

In *Aboitz & Co. v. Price*, 99 F. Supp. 602 (D. Utah 1951), Judge Willis Ritter refused to recognize a Japanese wartime regulation in the Philippines forbidding loans of money to Americans held captive. The loans were made to give the prisoner money which enabled him to survive his imprisonment. The judge feared that to recognize the defense might discourage other lenders at another time and penalize brave and loyal friends. The effect of the decision was to require payment by the prisoner after the war.

44. 138 Wis. at 653, 120 N.W. at 401.

45. *Ibid.*

46. *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938);

fendant German corporation on a German contract to be performed by plaintiff's services in Germany. The plaintiff alleged as his first cause of action discharge from his employment and asked damages in the amount of \$50,000. The company responded that it was forced to discharge the plaintiff by the non-Aryan decrees of the Hitler regime. The argument that New York should not consider the effect of these unjust provisions was met by the proposition that New York was not competent to review the actions of the German government applicable within its own territory "however objectionable" the action might be. If "natural justice" is to be reason for refusing to look to foreign law, it is hard to imagine a more suitable case for the application of the doctrine.

An appealing case can be made to support the proposition that a state should be able to override ordinarily applicable foreign law in the name of justice.⁴⁷ The giving of remedies in the light of out-of-state law may not be the fairest way to dispose of controversy. Our courts properly should deny effect to a foreign contract of slavery or an agreement to subvert the integrity of the governmental processes of a friendly foreign government.⁴⁸ In a world in which despotic governments exist, our courts should not become the handmaidens of tyrants. Yet if we admit a principle of reservation from the normal choice of law rules on the grounds of fundamental ideas of justice, we must also assert such cases almost never arise to be decided on this ground alone.

Indeed, as we have just seen, when they do arise our courts have sometimes refused to disregard the most brutal foreign law provisions imaginable.

III. THE CHOICE OF LAW FUNCTION

A favorite *bête noir* of some conflict of laws commentators, the alleged provincialism of American courts in refusing to recognize in one state a markedly different or objectionable cause of action centered wholly in another state, thus finds little support in the cases. If in an attempt to understand the role of public policy we return to consider some of the other commentators, we find "public policy" cast in a wholly different light. In 1924 Professor Lorenzen wrote, "The notion that the rules of the Conflict of Laws can be derived from some general formula or theory is responsible for another doctrine—that of

cf. *Bloch v. Basler, Lebens-Versicherungs Gesellschaft*, 73 N.Y.S.2d 523 (Sup. Ct. 1947); *David v. Veitscher, Magnesitwerke Gesellschaft*, 348 Pa. 335, 35 A.2d 346 (1944).

47. See Bodenheimer, *The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy*, 12 SEMINAR 51, 63-66 (1954).

48. *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880), contains a famous dictum: "[A] contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country,—not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people." *Id.* at 277.

'public policy.'"⁴⁹ Professor Cavers placed the public policy exception in his list of avenues of escape for courts wishing to do justice rather than to follow mechanical choice of law rules.⁵⁰ Professor Nussbaum, in speaking of whether the public policy doctrine will be used, gives us an important insight: "[A]ll depends on the circumstances, or, more precisely, on the importance of the 'contacts' of the case with the territory of the forum."⁵¹

In short, "public policy" is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule. Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds to apply the law to which the rule makes reference. The closer the tie between the forum and the facts of a given transaction the more readily we may expect the forum to use its own law to judge the matter before it. In such a view the "public policy" doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function. It is a way of saying, "In these circumstances this forum makes reference to its internal law rather than to the law of another state to which our 'normal' choice of law rule would direct us."

The overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection. It is apparent, then, that in most cases the choice of local rather than foreign law cannot be regarded simply as a matter of parochialism. The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it.

49. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 746 (1924).

50. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 183 (1933).

51. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027, 1031 (1940). "Practically all of the English and American public policy cases exhibit a 'weighing' of the contacts involved." *Id.* at 1031 n.28. See LLOYD, *PUBLIC POLICY* 83-84 (1953): "In considering whether a foreign contract is to be struck at on ground [*sic*] of public policy it would seem natural that the court should have regard not so much to the nature of the foreign rule. . . but to the consequences which result or which are likely to result from its application. From this point of view it is obviously of cardinal importance to see whether the agreement involves or contemplates any activity within the country in which the court determining the dispute is situated. For a court may well take different views of the policy applicable in a case where an agreement is entirely unconnected with its own jurisdiction and in one where the agreement is made or involves the effecting of its purpose within that jurisdiction." The fifth chapter of Mr. Lloyd's book is entitled "Public Policy in Private International Law."

Public policy has been given as a reason to refuse application of out of state law when the forum obviously felt the foreign state did not have sufficient contact with the parties to bind them by the law in question. *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938). "New York will not recognize as a model for any liability which she will impose, a liability imposed by another state upon an absentee non-resident." *Id.* at 368; cf. *Dalton v. McLean*, 137 Me. 4, 14 A.2d 13 (1940) (retroactive statute of state of tort not applied in forum).

A. *Situs of Property*

The use of "public policy" as a choice of law device can be seen clearly in a series of property cases in which the forum is also the situs. The cases share an assumption that a law other than situs law is applicable to solve the problems with which they deal; yet, occasionally, a court will wish to apply situs law and will justify its choice on grounds of public policy. One group of such cases involves security interests in personality.

In *Mackey v. Pettijohn*,⁵² a Missouri domiciliary executed in Missouri a mortgage of movables located in Kansas to a Kansas domiciliary. A suit was instituted in Kansas against the mortgagee to have him declared a trustee for the benefit of creditors on the theory that Missouri law converted the mortgage into an assignment for the benefit of creditors. Kansas law would permit the mortgagee to retain the property for his own benefit. The court first came out squarely for the principle that Kansas law should govern the mortgage because the property was located there, the mortgagee was a Kansas resident, and the mortgage was to be performed there. But, unfortunately, it did not stop there, going on to say:

The rule of decision in the State of Missouri cannot be permitted to have application to this contract in the State of Kansas, because it contravenes the policy of the State of Kansas . . . and is in conflict with the express statute of the State. Our statute is, in effect, that a chattel mortgage made by a resident of another state, on property situated in this State, when filed in the office of the register of deeds . . . is a valid mortgage, and gives notice to all the world. . . . To allow the rule of decision in Missouri to prevail here would be to overturn our own policy with respect to mortgages on personal property, and to render nugatory the provision of our statute.⁵³

There is not a doubt in the world that the Kansas statute relied upon was never intended to apply to this problem. Its obvious purpose was to require recordation of chattel mortgages on property located within the state in order to provide notice to third parties of the mortgagee's interest, and not to provide that if the law of the place where a mortgage is made declares it to be a general assignment, that law should not be applied in Kansas. The public policy talk here serves to apply situs law in fact, but shifts responsibility to the legislature for refusing to apply the law of the place in which the mortgage was made.

Public policy language substituting bombastic localism for analysis is well illustrated in *Chambers v. Consolidated Garage Co.*⁵⁴ In that case the conditional

52. 6 Kan. App. 57, 49 Pac. 636 (1897).

53. *Id.* at 60, 49 Pac. at 637 (text in unofficial reporter slightly different).

54. 210 S.W. 565 (Tex. Civ. App. 1919), *aff'd*, 111 Tex. 293, 231 S.W. 1072 (1921). See *Willys-Overland Co. v. Chapman*, 206 S.W. 978 (Tex. Civ. App. 1918), for a similar treatment of the same problem.

vendee of an automobile wrongfully took the car from California, where the conditional sale was made, to Texas and there sold it to a bona fide purchaser for value. The vendor exercised due diligence in trying to locate the car and, immediately upon discovering what had happened, instituted proceedings in Texas to recover it. Under California law the vendor's interest in the automobile is superior to that of subsequent bona fide purchasers without filing or recordation; under Texas law it is not. The problem before the court was not an easy one. California had important contacts with the controversy: the conditional sale took place there; the automobile was located in California at the time; and the conditional vendor was a California corporation. Texas, too, had significant connections with the case: the second purchase was made there, the property was located in Texas at the time, and the purchaser was a resident of Texas. If the conditional vendor were to contend that a decision for the purchaser would mean that there is no way for the vendor to protect himself short of recordation in every state requiring recordation for perfection, the purchaser could answer that a decision for the lienor would mean that there would be no way for the purchaser to protect himself short of checking the records in every state, and even that would not have sufficed in this case since California does not require recordation of conditional sales contracts.

It is clear that Texas could have applied either its own or California law and justified the result in accordance with an ordinary reference to *situs* law.⁵⁵ It is equally clear that the court of civil appeals was not addressing itself to the problem when it said:

In our opinion the settled policy of Texas jurisprudence has sternly frowned upon and set its face against the enforcement, against innocent purchasers for value, of secret undisclosed liens upon and reservations of title to personalty, the possession of which has been voluntarily surrendered and the possessor clothed with apparent full and unincumbered title. . . . Shall the courts of Texas recognize and extend to citizens of California rights which are denied to its own citizens and which prejudice the interests of innocent citizens of Texas?⁵⁶

If that is the test, foreign law that differs from forum law will never be applied when to do so would be to the disadvantage of residents of the forum.

55. Cf. *Olivier v. Townes*, 2 Mart. (n.s.) *93 (La. 1824). The significance of the *situs* contact is well illustrated by *Personal Finance Co. v. General Finance Co.*, 133 Pa. Super. 582, 3 A.2d 174 (1938), where a New York chattel mortgagee prevailed over a Pennsylvania corporation which was the holder of a later acquired security interest in the same chattel. Both the mortgagee and the Pennsylvania corporation had acquired their interests in New York while the chattel was located there. The court rejected the public policy contention of the Pennsylvania corporation and distinguished an earlier Pennsylvania case upholding a creditor who attached in Pennsylvania over a New York chattel mortgagee, saying, "Upon entry into our borders, the chattel, although previously validly mortgaged in another state, becomes subject to our laws." *Id.* at 586, 3 A.2d at 176. Since the chattel in the *Personal Finance Co.* case was never in Pennsylvania, to enforce the plaintiff's claim would not violate Pennsylvania's public policy.

56. 210 S.W. at 567.

The Texas courts have reacted in the same way even where filing is necessary under the law of the place where the security was given and the filing requirements were met.⁵⁷ Only filing in Texas can protect the security holder against a bona fide purchase made in Texas. If the Texas courts had faced the problem squarely and evolved a meaningful choice of law rule, even if that resulted in the application of Texas law, perhaps we would have been spared the spectacle of the Supreme Court of Wyoming, which had held that a security interest valid in the state where given is superior to the interest of a Wyoming bona fide purchaser, refusing to apply that rule in favor of a Texas chattel mortgagee.⁵⁸ The Wyoming court was admirably reluctant to "limit the doctrine of comity," but felt obliged to retaliate against the parochialism of the Texas courts.

Texas' public policy method of disposing of this question also came home to roost in the famous case of *Forgan v. Bainbridge*⁵⁹ in which the Supreme Court of Arizona had to decide whether an Illinois chattel mortgagee should prevail over a Texas bona fide purchaser. In cases in which Arizona had had to decide whether an Arizona purchaser would defeat a foreign mortgagee, Arizona had held for the foreign mortgagee. In such cases, however, Arizona is free to apply her own law or the law of the place of the mortgage transaction because she has a substantial connection with the transaction—the sale and the situs of the chattel at the time of the sale being in the state. When she has no connection with the transaction, it can at least be argued that she should look to the law of the place in which the sale took place and apply the law to which that law refers. Thus, the argument would run, she should have looked to Texas law, and when Texas referred to her own law for the result, should have applied Texas law. But the reasoning of the Texas cases looking to Texas law for the solution of this problem is generally unpersuasive, and so it was easy for the Arizona court to accept the Wyoming retaliatory principle:

[W]hen a sister state does not recognize and will not enforce in her courts our rule of law in regard to a certain class of contracts having their inception in this state, we are not required under the doctrine of comity to enforce similar contracts according to her rule, when such rule is directly opposed to our public policy.⁶⁰

The Arizona court, in upholding the Illinois mortgagee, committed the

57. *E.g.*, *Farmer v. Evans*, 111 Tex. 283, 233 S.W. 101 (1921); *Best v. Farmers' & Merchants' Bank*, 141 S.W. 334 (Tex. Civ. App. 1911).

58. *Union Securities Co. v. Adams*, 33 Wyo. 45, 236 Pac. 513 (1925). It is only fair to point out, however, that not all of the Texas opinions on this subject are as weak as that of the court of civil appeals in *Chambers v. Consolidated Garage Co.* For example, the Supreme Court of Texas, in affirming that decision, makes some attempt at analysis. See *Chambers v. Consolidated Garage Co.*, 111 Tex. 293, 231 S.W. 1072 (1921).

59. 34 Ariz. 408, 274 Pac. 155 (1928).

60. *Id.* at 415-16, 274 Pac. at 158.

same sin as the Texas courts, resting the decision in part on Arizona public policy rather than basing the result squarely on a reasoned defense of the proposition that the place where the mortgage was given has the greatest right to have its law applied.

A group of older cases involves general assignments. A financially embarrassed debtor has executed a general assignment at his domicile in State X; the assignment purports to convey to the assignee for the benefit of creditors all property of the debtor wherever situated and contains a provision valid under the law of State X preferring certain creditors out of the proceeds of the assigned property; the debtor owns personalty in the state of the forum, and subsequent to the making of the assignment this personalty has been attached by a non-preferred creditor. When the assignee intervenes claiming the property under the assignment, the attaching creditor concedes that normally the law of the place of making governs a transfer of personalty executed at the place of the owner's domicile but argues that to recognize the interest of the assignee here would contravene the forum's public policy because general assignments containing preferences are invalid under the forum's law. Many states will sustain the attaching creditor in this contention, at least if he is a citizen of the forum.⁶¹

The same basic fact situation occasionally appears where the property attached is realty. Thus, in *Williams v. Kemper, Hundley & McDonald Dry Goods Co.*,⁶² the Supreme Court of Oklahoma stated:

[I]f the deed of assignment meets all the requirements of a deed of conveyance in the country where the land is situated, it will convey whatever of interest the assignor has. This rule is subject to the same exceptions that apply to personal property. If the deed of assignment is in its general effect repugnant to the law of the jurisdiction where the land is situated, it will be void as against creditors residing in the state or territory where the land is situated. . . .⁶³

The difference between this kind of case and those discussed in Section II is

61. Authorities on this subject are collected in Annot., 111 A.L.R. 787 (1937); Annot., 23 L.R.A. 33 (1894); see GOODRICH, CONFLICT OF LAWS 488-90 (3d ed. 1949); MINOR, CONFLICT OF LAWS 14 (1901); cf. *Dearing v. McKinnon Dash & Hardware Co.*, 165 N.Y. 78, 58 N.E. 773 (1900). The assignment for the benefit of creditors was frequently used by insolvent debtors in the years before the adoption of the Bankruptcy Act of 1898, 30 STAT. 544, 11 U.S.C. §§ 1-1103 (1952). It is still occasionally resorted to, but few modern general assignment cases involve the problem discussed in the text. This is probably because such a problem cannot arise under the Bankruptcy Act, which confers upon the trustee in bankruptcy title to the debtor's property wherever located, 30 STAT. 565 (1898), as amended, 11 U.S.C. § 110 (1952), and, of course, that federal mandate cannot be overridden by state law. Consequently, when an embarrassed debtor owns property in a state other than his home or place of doing business, sound counseling dictates use of the Bankruptcy Act rather than the general assignment in order to avoid the problem discussed in the text. The cases are, nevertheless, important for the light they shed upon the use of the public policy doctrine.

62. 4 Okla. 145, 43 Pac. 1148 (1896).

63. *Id.* at 154, 43 Pac. at 1151.

readily apparent: the forum here has a substantial connection with the question before it because the property in issue is located within its boundaries. Indeed, it is a connection of sufficient dignity that the Supreme Court of the United States has held that it is a denial of full faith and credit for a state in which a transfer of property is made and in which the parties involved are domiciled to ignore a subsequent attachment at the situs.⁶⁴ It is now generally recognized that it is the law of the situs of personalty that controls its disposition,⁶⁵ and this has long been so with respect to realty.⁶⁶ Often, however, at least with respect to movables, the situs' conflict of laws rule will be applied and that rule may look to the law of the place of transfer or the transferor's domicile for the governing law.⁶⁷ It should be emphasized that that law is arrived at not by a determination that the law of the domicile or the place of transfer is the "proper law," but by a reference to situs law, which in turn refers to the law of the domicile or the place of transfer. In effect, the situs in making its choice of law rule recognizes that, at least where personalty is involved, the mere fact of location is not terribly significant and that it may be better in certain circumstances to refer to the law of a state having a closer connection with the transaction involved. But this does not negate the fact that no violence is done to traditional conflicts conceptions if, in some situations, the situs elects to apply its own rather than some other law. And, in fact, this is all that has happened in the general assignment cases. Where the attaching creditor is a citizen of the forum, a number of courts apparently are of the view that this gives the forum a sufficient interest to warrant referring to the law of the situs rather than to the law of some other place. Absent a local creditor, some courts will defer to the law of the place of making; others reason that it would be an unfair discrimination to refuse to accord to out-of-state creditors the same rights accorded to local citizens and will consequently permit attack by any creditor but a citizen of the state in which the assignment was made.⁶⁸

That the problem presented by these cases is really being resolved in accordance with orthodox choice of law principles is especially well illustrated by *Guillander v. Howell*.⁶⁹ In that case a preferential general assignment was made in New York, where it was valid, and included movables in New Jersey. A creditor in New Jersey, where a preferential assignment is invalid, attached the movables there and bought them when they were sold to satisfy his claim. The assignee brought an action for conversion in New York against the at-

64. *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307 (1866); *Green v. Van Buskirk*, 74 U.S. (7 Wall.) 139 (1868).

65. See GOODRICH, *CONFLICT OF LAWS* 470 (3d ed. 1949).

66. See *id.* at 453.

67. See Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1195 (1938).

68. See note 61 *supra*.

69. 35 N.Y. 657 (1866).

taching creditor. The Court of Appeals of New York denied recovery, pointing out that the property is within New Jersey's "exclusive jurisdiction: She protects and regulates it; though we may differ as to the policy or principles of her laws, we must admit their validity."⁷⁰ If New Jersey's refusal to uphold the assignment against subsequent attaching creditors was an abandonment of ordinary choice of law principles in favor of her own policy, as were the cases discussed in Section II, we would not expect to see the highest court of the state in which the assignment was made and the assignor domiciled accepting New Jersey law as controlling.⁷¹

Why do the courts of the situs find it necessary to rely on public policy reasoning? First, public policy can serve as a substitute for thinking. Every law teacher has at one time or another, in response to the question, "Why this result?" been met with, "For public policy reasons!" Notwithstanding our efforts, it is reasonable to suppose that the intellectual laziness occasionally demonstrated by students will occasionally be demonstrated by judges. For example, the question presented by the general assignment cases is not an easy one. Many factors may be relevant to a determination of what law should govern the validity of a general assignment. A court can choose the law of the place in which the assignment was made, which is also usually the place of the debtor's domicile; it can choose the law of the place in which the property involved is located or the law of the domicile or place of doing business of the attacking creditor; it can even look beyond the assignment transaction and inquire into the law of the place where the debt owing to the attacking creditor

70. *Id.* at 660.

71. The assignment for the benefit of creditors must be distinguished from transfers made pursuant to state insolvency laws and assignments compelled by a court. The commonly stated rule that transfers or assignments of personal property are governed by the law of the place in which the transfer is made unless contrary to the policy of the state where the property is situated applies only to voluntary assignments and not to assignments by operation of law or those made under legal compulsion. Cases involving transfers of the latter type almost universally hold that the assignee does not prevail against subsequent attaching creditors even if they are not residents of the forum. *E.g.*, *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N.E. 250 (1890); *Sturtevant v. Armsby Co.*, 66 N.H. 557, 23 Atl. 368 (1891). Whether the forum has a similar insolvency law or not is immaterial. See authorities collected in Annot., 23 A.L.R. 33 (1894). The theory of the insolvency law cases is based on a territoriality of laws rationale: the statute compelling the transfer operates only on property of the debtor within the state. Nevertheless, most courts hold that residents of the state in which the insolvency assignment occurred cannot prevail over the assignee as to the property in another state. *E.g.*, *Einer v. Beste*, 32 Mo. 240 (1862); *Hoag v. Hunt*, 21 N.H. 106 (1950). *Contra*, *McClure v. Campbell*, 71 Wis. 350 (1888).

The insolvency law cases are unimportant now because state insolvency laws have been held to be suspended by the federal Bankruptcy Act. *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929). But there are some cases which fail to make the distinction between general assignments and insolvency transfers and subordinate the assignee under a general assignment to local creditors even though the assignment cannot be said to be contrary to the forum's public policy. In other words, the assignment will be treated as invalid against local creditors even though if the assignment had been made in the forum it would defeat them. *E.g.*, *Heyer v. Alexander*, 108 Ill. 385 (1884); *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528 (1901).

arose. The de facto solution of a majority of courts that have considered the problem is to accord greatest weight to a combination of situs and attacking creditor's domicile: if both of those contacts are in the same state, its law will govern the validity of the assignment. Where the attacking creditor's domicile is the same as the place of making, that combination will control and the law of that state will be applied. Where the attacking creditor's domicile is different from both the situs and the debtor's domicile and the place of making, the authorities are split, some holding the law of the situs to be controlling, others deferring to the law of the debtor's domicile and the place of making.⁷² The cases never inquire into the law of the attacking creditor's domicile unless it is the same as the debtor's or the situs; nor do the cases ever look beyond the assignment for other possible contacts. In any event, it should be clear that the problem is a relatively complex one requiring some intellectual exertion for its solution. Unfortunately, that exertion has often been evaded by recourse to public policy theorizing.

Second, public policy can serve as a means of shifting responsibility for a decision. The statement, "Public policy requires," has an aura of predestination that cannot be matched by "I decide." This is especially so when the source of public policy is found in a statute. Thus, in the general assignment cases, the court may refer to the local statute prohibiting preferences in assignments to find that the state's public policy is contrary to preferences. The court is tossing the ball to the legislature, even though it is probable that the legislators never considered the problem of whether the statute should apply to assignments made in other states.⁷³

Third, the opinions seem to reveal that public policy is a term of greater intensity than "our law." The fact that "our law" is different from the law of the place having all the contacts with this transaction is not enough to warrant a holding that foreign law should not be applied; the transaction must be against public policy. Greater intensity is needed when a court feels that it is reaching a result that is contrary to generally operative principles.⁷⁴ Looking

72. See note 61 *supra*.

73. See note 78 *infra*.

74. The proposition that "public policy" is a loaded term, a term of stronger content than something like "our law," should not be confused with Hoff's intensity principle. See Hoff, *The Intensity Principle in the Conflict of Laws*, 39 VA. L. REV. 437 (1953). Hoff there takes the position that courts should not and occasionally do not restrict themselves to evaluating the significance of the various contacts which a transaction may have with more than one jurisdiction, but should and occasionally do take into account the comparative force or intensity of the laws of the jurisdictions with which the transaction is connected. "If a court finds little or no difference between the significance of the competing connecting ties, but does find a marked difference in the strength of the competing rules, it should then decide the case by the legal order containing the stronger rule in point." *Id.* at 438. It is readily apparent that this is something very different from our guess about the psychological impact of the phrase "public policy." It should be pointed out in passing, however, that some of the public policy cases do tend to support Hoff's thesis. Hoff cites *Milliken v. Pratt*, 125 Mass. 374 (1878). He might have added, *e.g.*, *Medway v. Needham*, 16 Mass.

again to the general assignment cases, the customary practice in chattel transfer cases is for the situs to look to the law of the domicil or of the place of transfer; a refusal to make the reference must be justified on public policy grounds. A reasoned retreat from the choice of law rule governing ordinary chattel transfers in favor of a different rule when a unique kind of transfer—the general assignment—is involved, apparently will not suffice.⁷⁵

B. Trusts

Determining what law shall govern the validity and incidents of a trust when more than one state has significant connections with it is a problem that has given courts some difficulty. And, not surprisingly, public policy argumentation has crept in from time to time. It is only fair to say, though, that the courts have more dutifully stayed close to the real problem in this area than in others previously discussed, rejecting public policy contentions as often as not.⁷⁶ The outcome of several cases apparently has, however, been affected by the public policy doctrine, and we must turn our attention to those to see whether they should properly be classed with cases in which public policy talk merely serves as a screen for a choice of law decision.

In *Hutchison v. Ross*,⁷⁷ the Court of Appeals of New York had to decide whether an inter vivos trust with its contacts scrambled between New York and Canada was valid when New York law would uphold it and Canadian law would strike it down. The settlor and beneficiaries were Canadian citizens and residents; the securities constituting the trust property were located in New York at the time the trust instrument was executed and thereafter, and so was the trustee; the trust instrument was executed in Canada, but the trustee's agreement to act as trustee took place in New York. The court carefully considered the significance of the various contacts and decided that the situs of

*157(1819); *King v. Klemp*, 26 N.J. Misc. 140, 57 A.2d 530 (Ch. 1947); *Case v. Dodge*, 18 R.I. 661, 29 Atl. 785 (1894).

75. See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 747 (1924): "Most frequently the doctrine of public policy is regarded as having merely a negative function, that of justifying the non-application of a 'foreign' law, which ought to govern 'on principle.' Others assign to it also a positive function, according to which duties may be imposed contrary to those that would result from the application of the general rule. In this view . . . the doctrine of public policy is not merely a convenient safety-valve to prevent the application of 'foreign' law, but a method whereby old rules are modified and new rules established. In England and the United States the doctrine of public policy is generally limited to its negative function, and no attempt has been made by the Anglo-American writers to reduce the cases falling within this doctrine to any system or order." Our attempt leads us to the conclusion that Lorenzen's assessment of the Anglo-American law is erroneous: public policy does serve what he calls "a positive function," although the language of the cases seems superbly designed to disguise that fact.

76. *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (5th Cir. 1947); *Shannon v. Irving Trust Co.*, 275 N.Y. 95, 9 N.E.2d 792 (1937); *Cross v. United States Trust Co.*, 131 N.Y. 330, 30 N.E. 125 (1892), are instances in which the public policy contention was rejected.

77. 262 N.Y. 381, 187 N.E. 65 (1933).

the trust property should control. An interesting use of public policy was made. Subsequent to the creation of the trust involved, the New York Legislature had passed a statute providing that when an instrument creating a trust of personalty located in New York at the time of creation declared that the trust should be construed and regulated by New York law, New York law should govern the validity and effect of the trust regardless of where the settlor lived. The court found this to be a declaration of New York's public policy, extending to trust instruments in which the intent to be governed by New York law could be implied as well as those in which such intent was expressed.

There is certainly no objection to New York's courts finding aids to decision in the acts of her legislature. The use of the public policy formulation when a court is reasoning from a statute that cannot be directly applied to the case before it is fairly common.⁷⁸ It would be better if judges eschewed the protean "public policy" in favor of a simple statement recognizing the importance of legislation as embodying principles from which help may be derived in determining choice of law rules.

78. More typical than the use of a statute that is inapplicable because passed after the transaction occurred is resort to statutes from which can be derived a general legislative intention. Thus, in *Hinds v. Brazeele*, 3 Miss. (2 How.) 837 (1838), the validity of a deed of emancipation of a slave was in question. The slave's owner, a domiciliary of Mississippi, had made a special trip to Ohio to execute the deed, apparently aware that the deed would be no good if executed in Mississippi. The court held the deed invalid, relying heavily on the fact that Mississippi had a number of statutes directed against free Negroes. "The policy of a state is indicated by the general course of legislation on a given subject, and we find that free negroes are deemed offensive, because they are not permitted to emigrate to, or remain in the state." *Id.* at 842; *accord, e.g.*, *Ciampittello v. Campitello*, 134 Conn. 51, 54 A.2d 669 (1947); *Ulman, Magill & Jordan Woolen Co. v. Magill*, 155 Ga. 555, 117 S.E. 657 (1923); *Ayub v. Automobile Mortgage Co.*, 252 S.W. 287 (Tex. Civ. App. 1923), *rev'd*, 266 S.W. 134 (Tex. 1924).

The willingness of courts to treat a statute as a source of law extending beyond its literal meaning is certainly commendable. See Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS 213 (1934). It must be recognized, however, that the practice has its dangers. There is the obvious risk of plain misinterpretation, illustrated by *Mackey v. Pettijohn*, discussed in text at note 52 *supra*. There is the subtler danger, discussed in text at note 73 *supra*, to which many courts succumb, of taking a statute that was probably aimed at local transactions, characterizing it as an embodiment of public policy, and applying it to a foreign transaction without giving due weight to the transaction's foreign contacts.

Analogous to the use of statutes not directly applicable to the transaction before the court as a source of public policy is the use of such statutes to demonstrate that the forum's public policy would not be contravened by granting relief. The best known instance is *Milliken v. Pratt*, 125 Mass. 374 (1878), in which it was held that Massachusetts had no public policy against enforcing the contractual liability of a married woman, even though at the time the contract was made it would have been unenforceable if made in Massachusetts, because married women had been given full contractual capacity by a statute enacted subsequent to the transaction. *Accord*, *Kentucky v. Bassford*, 6 Hill 526 (N.Y. Sup. Ct. 1844) ("Indeed, the policy of raising money by lottery for public purposes, such as for literary and benevolent institutions, continued to prevail in this state until 1833. . . . It would be rather ungracious for our courts, under these circumstances, to refuse to uphold the contract in question, within the rule of comity, on the ground that it was founded in moral turpitude." *Id.* at 530.); *Case v. Dodge*, 18 R.I. 661, 29 Atl. 785 (1894) ("The policy of our law relating to married women having thus been changed, such a contract made elsewhere, though prior in date to the passage of the statute, would no longer contravene the policy of our law. . . ." *Id.* at 663, 29 Atl. at 786.); *cf.* the use of the substantial similarity doctrine, discussed in text at note 32 *supra*, to reach a holding that the forum's public policy is not infringed.

Like many of the cases we have already considered in this section, *Hutchinson v. Ross* could undoubtedly have reached the same result without any reference at all to public policy. The court of appeals frankly treated it as a make-weight, saying, "We may throw in the balance also expressions of public policy by the Legislature of this State."⁷⁹ And, again like many of the cases we have considered in this Section, our serious quarrel with the case is the unfortunate use of a phrase which provides no help in ascertaining what was done.

A curious mixture of choice of law thinking and public policy appears in *Matter of Clarkson*.⁸⁰ In that case a California domiciliary's will set up a trust providing for an accumulation that was invalid under New York law but valid under California law. The trustees were appointed by the New York Surrogate's Court and were administering the trust in New York by virtue of a California decree ordering a transfer to those trustees. The court decided that the accumulation was "contrary to the public policy of this State as enunciated in its statutes." "However," the court proceeded, "since the deceased at the time of her death was a resident of the State of California, the second question presented is whether this court should follow the law of California, the domicil of the testatrix, or the law of New York State."⁸¹

The court had thus been using public policy in a local law sense to determine whether New York law would uphold the trust if all of its contacts were in New York. Then it turned to the conflicts problem:

Since the petitioning trustees have been appointed by this court and are administering the trust within this jurisdiction, by virtue of a decree of the California court ordering a transfer to such trustees, this court believes the law of this State to be controlling.

This court is not bound by comity to effectuate a foreign law which would contravene the positive policy of the law of the forum and when one person sends property into another jurisdiction he subjects it to laws of the foreign forum. . . . Similarly the New York courts have held that comity does not require them to substitute the policy and laws of a foreign State in place of its own.⁸²

The court thus used public policy in the conflicts sense, but carried its local law characterization of public policy over to the conflicts problem without giving it a thought. Apparently, at the time of the testatrix's death the property subject to the trust was located in California, which was also the testatrix's domicil, giving the trust significant contacts with California. Nevertheless, the place of administration of a trust has received recognition as an important con-

79. 262 N.Y. at 394, 187 N.E. at 71.

80. 201 Misc. 943, 107 N.Y.S.2d 289 (Surr. Ct. 1951).

81. *Id.* at 945, 107 N.Y.S.2d at 292.

82. *Id.* at 945-46, 107 N.Y.S.2d at 292-93.

tact,⁸³ and so application of New York's law can be justified. But it is impossible to see how the court's use of public policy aided it in reaching a sound decision, and it certainly impeded giving due weight to the transaction's close connections with California.⁸⁴

C. Place of Performance and Place of Tort

In a number of older cases the out-of-state effect of a release from liability for negligence on the part of a carrier or telegraph company was before the courts. Similar cases presented the problem of the validity of contractual limitations on the amount of liability. Frequently the forum refused to use the supposedly applicable place of making rule by invoking the public policy doctrine and applied local law. Sometimes, as in *Lake Shore & M. S. Ry. v. Teeters*,⁸⁵ the same result could have been reached by classifying the problem as a tort matter and making use of the place of the tort rule. In that case, Teeters was injured in a wreck on defendant's railroad in Indiana while he was accompanying a shipment of livestock from New York State to Chicago. He had signed a contract which exonerated the carrier from liability for negligence. The Indiana court chose to analyze the problem in terms of contract law by stating that a contract was governed by the law of the place of making, subject to the exception that if the contract violated the public policy of the forum it would not be enforced. Teeters was permitted to recover in spite of the contract because the limitation on liability violated the public policy of Indiana. The court's opinion shows the importance, in its thinking, of the place of the tort contact:

This state is concerned in the protection of the lives and limbs of all persons within its borders, whether interstate passengers or otherwise, and, as respects responsibility for torts committed within the jurisdiction of its laws, its courts will . . . assume to determine the common law for themselves and will not permit parties to contravene

83. See *Cavers, Trusts Inter Vivos and the Conflict of Laws*, 44 HARV. L. REV. 161, 165, 190 (1930).

84. The court in *Clarkson* struck down the accumulation and ordered the trustee to pay all the income to the beneficiary. Compare the disposition made in *Despard v. Churchill*, 53 N.Y. 192 (1873), where a California domiciliary had made a will in his home state which violated the New York statute on perpetuities and accumulations. The court found that statute to embody the New York policy on perpetuities and accumulations. "As this sovereignty will not uphold a devise or bequest by one of its citizens in contravention of that policy, it will not give its direct aid to sustain, enforce or administer here such a devise or bequest made by a citizen of another sovereignty. . . . Yet it is no part of the policy of this State to interdict perpetuities or accumulations in another State." *Id.* at 198. Consequently, the court ordered the assets to be remitted to the executors in California to be administered there. It need hardly be pointed out that *Despard*, like *Clarkson*, could have reached the same result without public policy talk. See *Cross v. United States Trust Co.*, 131 N.Y. 330, 30 N.E. 125 (1892), where, referring to *Despard*, the court says, "This course was adopted, not on the ground of policy, but because it was always the law in such cases to remit personal estate to the domicile of the owner, in the exercise of a sound judicial discretion." *Id.* at 347, 30 N.E. at 129.

85. 166 Ind. 335, 77 N.E. 599 (1906).

the domestic policy of the state by invidious contract for exemptions from liability for negligence.⁸⁶

In other cases the courts have pointed to the importance of the forum's law because the contract was to be performed there. In a famous statement the United States Supreme Court said:

The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even though to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it.⁸⁷

It would certainly seem that the state in which a contract of shipment (or of the transmission of a telegram) is to be partially performed has a connection with the transaction sufficiently important to permit the state's law to control a term of the agreement respecting the consequences of imperfect performance. This may be true even if the failure in performance occurs outside the state.⁸⁸ The argument would be that it is necessary to deny effect to liability-limiting contractual provisions in order to prevent a lowering of standards of care.

86. *Id.* at 342-43, 77 N.E. at 601; see *International & Great No. R.R. v. Vandeventer*, 107 S.W. 560 (Tex. Civ. App. 1908).

87. *The Kensington*, 183 U.S. 263, 269 (1902); see *Western Union Telegraph Co. v. Hill*, 163 Ala. 18, 50 So. 248 (1909); *Atlanta & W.P.R.R. v. Broome*, 3 Ga. App. 641, 60 S.E. 355 (1908); *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N.E. 893 (1912); *Williamson v. Postal Tel. Co.*, 151 N.C. 223, 65 S.E. 974 (1909); *Hanson v. Great No. Ry.*, 18 N.D. 324, 121 N.W. 78 (1909); *St. Louis Southwestern Ry. v. Texas*, 36 Tex. Civ. App. 399, 82 S.W. 346 (1904); *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613 (1910). In all these cases the public policy doctrine was used to strike down a contractual limitation on tort liability valid at the place of contracting. In each case the forum was the state of at least part of the defendant's performance.

Cf. *Faulkner v. Hart*, 82 N.Y. 413 (1880), which achieved an application of the forum's law by an interesting method. In that case goods had been shipped from New York to Boston, where they were destroyed by fire in the defendant's warehouse. Under the law merchant, which was the law of New York, the defendant was liable; Massachusetts case law was to the contrary. The court seemed willing to assume that Massachusetts law would normally govern, but relied upon *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), for the proposition that, "[W]hile the decisions of local courts in reference to matters purely local in the States are obligatory throughout the country, they are not conclusive and final as to questions of commercial law." 82 N.Y. at 418. "From the authorities cited it follows that if the higher court in the State of Massachusetts has made an erroneous decision, wrong in principle and contrary to a well-settled rule of commercial law in the English courts, in the Supreme Court of the United States, and many of the State courts, and especially adverse to the decisions of this court, it should not be followed here. . . ." *Id.* at 419. "Like an unconstitutional law, void of itself, the decision [of the Massachusetts court] was not the law, and is not to be regarded as authority for that reason." *Id.* at 423.

88. See *F. A. Straus & Co. v. Canadian Pac. Ry.*, 254 N.Y. 407, 173 N.E. 564 (1930). In *Straus*, silk was to be shipped from Shanghai to Vancouver, B.C. by defendant's ship and thence by defendant's railroad to New York. Three bales of silk were discovered stolen upon arrival of the shipment in Vancouver. The contract of shipment was governed by British law under which the limitation of liability for negligence was valid. The Court of Appeals of New York held the limitation inapplicable in New York because it violated public policy there.

Since the carrier is not likely to vary its standards as it passes over state boundaries, any state in which the contract is to be partially performed can validly insist that it has the right to strike down such provisions regardless of where the injury occurs, a requirement of reasonable care over the whole route being necessary in order to insure that reasonable care is taken within its own boundaries.⁸⁹

In these cases the important problem is whether the local law respecting the illegality of contracts should provide the answer. The question is a question of policy but of policy about the conflict of laws. Is it more important to choose the local law rather than the law of the place of contract because the injury caused by the negligence actually occurred in the forum or the contract was to be partially performed there? To answer the question requires hard thinking about the purposes of choice of law rules. Little but the unhappy ingredient of local pride is added by analyses in terms of public policy.

D. Domicil

In another group of cases public policy language serves to cover a choice of law based on the importance of the domicil contact in matters of personal status. For example, when the domicil of parties to a marriage celebrated elsewhere is the forum and its courts refuse to recognize the validity of the marriage on public policy grounds, the forum is merely asserting its right as domicil to have its law control the transaction.⁹⁰ A marriage valid when made

89. A similar argument can be made with respect to *Fox v. Postal Telegraph Cable Co.*, discussed in text at note 43 *supra*. In other words, it might be said that in order for Wisconsin to be sure that reasonable care is exercised when Wisconsin is the place of sending or delivery of a telegram, it must strike down limitations on liability even in cases in which the particular transaction before the Wisconsin court did not involve either receipt or delivery in Wisconsin. The difficulty with the argument as applied to a case like *Fox*, in which even partial performance within the state is lacking, is that it proves too much. It would entitle a forum to apply its law to a tort, no matter where committed, so long as the defendant was also carrying on activities within the forum state.

90. The rules are described in RESTATEMENT, CONFLICT OF LAWS § 132 (1934). In general, domiciliary states have been quite liberal in recognizing marriages celebrated in other states. *E.g.*, *In re Miller's Estate*, 239 Mich. 455, 214 N.W. 428 (1927). Compare *Commonwealth v. Lane*, 113 Mass. 458 (1873) (remarriage of Massachusetts domiciliary, who was guilty party to divorce, in New Hampshire, where such marriage was valid, upheld in Massachusetts, even though Massachusetts law prohibits such remarriage); *Medway v. Needham*, 16 Mass. *157 (1819) (negro-white marriage of Massachusetts domiciliaries in Rhode Island, where such marriages are valid, upheld in Massachusetts, even though Massachusetts law prohibits such marriages); *Matter of May*, 305 N.Y. 486, 114 N.E.2d 4 (1953) (marriage of New York uncle and niece in Rhode Island, where marriage was valid, upheld in New York, even though in New York such a marriage is incestuous), with *Pennegar v. State*, 87 Tenn. 244, 10 S.W. 305 (1889) (remarriage of Tennessee domiciliary, who was guilty party to divorce, in Alabama, where such marriage was valid, denied recognition in Tennessee); *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) *858 (1878) (negro-white marriage of Virginia domiciliaries in District of Columbia, where such marriages are valid, denied recognition in Virginia); *Brook v. Brook*, 9 H.L.C. 193, 11 Eng. Rep. 703 (1861) (marriage of English widower and the sister of his deceased wife in Denmark, where such marriage was valid, denied recognition in England). Cf. *Dupre v. Executor of Boulard*, 10 La. Ann. 411 (1855), in which the court was so outraged by the marriage of a negro and a white in France that it refused to give any further

both at the place of celebration and at the domicile of the parties may possibly be disregarded on public policy grounds if the parties move to a new domiciliary state.⁹¹ The state of the domicile has a proper interest in a continuing relationship within its borders so that domiciliary law may be employed (within constitutional limitations) to determine whether a "marriage" of local people is one which the domicile can recognize. In a similar way, a contract, valid where made, may be unenforceable at the domicile if in restraint of marriage.⁹²

The importance of the domicile contact is illustrated in the very well known *Mertz v. Mertz*.⁹³ A wife brought an action in New York against her husband because of injuries sustained in Connecticut. In Connecticut spouses may sue each other in tort, but they cannot in New York, which was the domicile state as well as the forum. The wife's suit was dismissed, the opinion first giving the public policy of New York as a reason for dismissal. Yet there is more to the essay. The wife is without remedy because, "The law of this State attaches to the marriage status a reciprocal disability." In sum, after a public policy discussion containing, as it does, a famous definition of the term,⁹⁴ the opinion characterizes the question as a family law matter appropriately referred to the law of the domicile.⁹⁵

facts. It is consequently impossible to tell whether the parties were domiciliaries of Louisiana or not.

91. United States *ex rel.* Devine v. Rodgers, 109 Fed. 886 (E.D. Pa. 1901); see *In re* Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942). On the miscegenation problem, compare State v. Ross, 76 N.C. 242 (1877) (upholding marriage), with State v. Bell, 66 Tenn. 9 (1872) (refusing to recognize marriage). As a general matter, of course, the new domiciliary state of a married couple recognizes the status created under another state's law. A leading case is Sutton v. Warren, 51 Mass. (10 Met.) 451 (1845). In Lederkremer v. Lederkremer, 173 Misc. 587, 18 N.Y.S.2d 725 (Sup. Ct. 1940), the New York court refused, on public policy grounds, to apply the Polish conception of duress in a proceeding to annul a Polish marriage. The court said:

The institution of marriage in this state is based upon mutual consent and reciprocal love and affection. There was no legal consent by plaintiff; no love or affection in fact by defendant. Under the circumstances, New York law and not Polish law should be applied because the latter (according to defendant) would give validity to a marriage of two New York residents to which one party has not consented, thereby contravening violently the Public policy of this state. *Id.* at 590, 18 N.Y.S.2d at 729.

92. Lobek v. Gross, 2 N.J. 100, 65 A.2d 744 (1949). The contract was an Illinois contract calling for the woman to be a man's close companion and pledging her to abstain from marriage while her employer lived. The domicile contact ought to be sufficient reason for a court to use its law to test the validity of a contract in restraint of marriage. The employer was domiciled in New Jersey; therefore one may be permitted to guess that his constant companion was also domiciled there.

93. 271 N.Y. 466, 3 N.E.2d 597 (1936); accord, Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935); see Annot., 22 A.L.R.2d 1248 (1952).

94. "Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or judicial records." 271 N.Y. at 472, 3 N.E.2d at 599.

95. In a recent opinion, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), the California Supreme Court held that the question whether a daughter might sue her father for personal injuries was subject to the law of their domicile, not the place of the tort:

We think that disabilities to sue and immunities from suit because of a family

There is another cluster of cases in which domicile is a more important contact than the traditionally stated choice of law rule would allow: the cases concerning the capacity of married women to contract. In these cases, as in so many of the others we have already considered, the basic choice of law rule—the place of contracting governs matters of capacity—was deemed by a number of courts to be unsatisfactory. But rather than boldly reject the generally accepted rule, they used the public policy doctrine to undercut it, thereby achieving the desired effect by a misleading route.

The classical case runs like this: A married woman, domiciled in a state that limits the capacity of married women, enters into a contract, which by the law of her domicile she lacks capacity to make, in a state that permits married women to make such contracts; she defaults, and suit is brought against her in her home state. *Armstrong v. Best*⁹⁶ is a fairly typical response to the problem:

[T]he general current of English and American authorities is in favor of holding that a contract which, by the law of the place, is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of the domicile, be deemed capable of making it. . . . But quite a different question is presented when the action is brought in the forum of the domicile. In such a case a very important qualification of private international law is to be considered; and this is, that no state or nation will enforce a foreign law which is contrary to its fixed and settled policy. . . . [T]he enforcement of the present contract is wholly repugnant to our domestic policy. . . .⁹⁷

A good case can be made in support of the result in *Armstrong v. Best*. Professor Cook stoutly defended a reference to the domiciliary law in cases in which the parties to the contract know or ought to know that the married woman's domicile is outside the state of making.⁹⁸ But the refusal to tackle the

relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist. *Id.* at 428, 289 P.2d at 223.

Emery is the subject of a comment by Professor Ehrenzweig, 23 U. CHI. L. REV. 474 (1956).

96. 112 N.C. 59, 17 S.E. 14 (1893).

97. *Id.* at 62-65, 17 S.E. at 15-16; see *Taylor v. Leonard*, 275 S.W. 134 (Tex. Civ. App. 1925); cf. *King v. Bruce*, 145 Tex. 647, 201 S.W.2d 803 (1947). A leading case reaching a result contrary to *Armstrong v. Best* is *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N.W. 1042 (1910). The opinion is rich with the citation of authority; see also *Cloud v. Hug*, 281 S.W.2d 911 (Ky. 1955).

98. See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 436-38, (1942).

choice of law rule head on is quite unwise. In effect, the domicil is asserting its significance as a contact only when suit happens to be brought in that state. Not only is this an invitation to forum shopping, since when suit is brought in a state other than the domicil a different law will be applied, but it is an unnecessary subordination of what may, in some circumstances, be the most significant contact for the purpose of determining contractual capacity. In the leading case of *Union Trust Co. v. Grossman*,⁹⁹ the Supreme Court of the United States recognized the possibility that a forum other than the domicil might refuse to enforce a contract when the law of the defendant's domicil denied her capacity to enter the contract sued upon. Even in that case, however, the emphasis on the fact that the forum was the domicil was quite strong.

There is another defect in the public policy approach to the problem of choosing the law governing a married woman's capacity to contract. The failure of the courts which refuse to enforce their domiciliaries' contractual liability to question the generally stated choice of law rule makes it more probable that courts that are reluctant to use the parochial-seeming public policy doctrine will continue to apply the law of the place of making to determine the liability of their domiciliaries. A re-examination of the choice of law rule is thus neglected because of the willingness of some courts to achieve the desired result by evading that rule. The Kentucky Supreme Court in *R. S. Barbee & Co. v. Bevins, Hopkins & Co.*¹⁰⁰ quite properly rejected the public policy argument, saying, "It is true that it is against the public policy of this state . . . to permit a married woman by a contract made and to be performed here to bind her property as surety for the debt of another, except by mortgage or other conveyance, but it does not follow necessarily that it is against the public policy of this state to enforce such a contract when valid where made. . . ."¹⁰¹ The court went on to enforce the contract without ever considering the possibility that a married woman's domicil may have a genuine claim, because of its interest in its citizens, to have its law applied when a question of contractual capacity is under consideration.

It is possible, too, that a barbarity like *Ulman, Magill & Jordan Woolen Co. v. Magill*¹⁰² might have been avoided if a frank acceptance of the domicil as a controlling contact had replaced all the public policy talk in the married woman cases. The question in *Magill* was:

Will the statute law of Missouri, providing that where a married

99. 245 U.S. 412 (1918). The *Grossman* case has been followed in several cases among which are: *Lloyd v. Cooper Corp.*, 101 Fla. 533, 134 So. 562 (1931); *Bramwell v. Conquest*, 2 S.W.2d 995 (Tex. Civ. App. 1928), as well as cases discussed in the text.

100. 176 Ky. 113, 195 S.W. 154 (1917).

101. *Id.* at 114-15, 195 S.W. at 155 (text in unofficial reporter slightly different).

102. 155 Ga. 555, 117 S.E. 657 (1923); see *Sally v. Bank of Union*, 150 Ga. 281, 103 S.E. 460 (1920), discussed in note 21 *supra*. *Contra*, *Robinson v. Queen*, 87 Tenn. 445 (1889).

woman signs a promissory note as surety for her husband she is liable for the amount of the note, be enforced in this State, in a case where a married woman living in Missouri signs in Missouri a promissory note as surety for her husband, the contract to be performed in Missouri, and while she is still domiciled in Missouri she is sued by attachment in Georgia . . . ?¹⁰³

The Supreme Court of Georgia refused to enforce the defendant's liability because, "[T]here is no matter of public policy more firmly fixed in this state than that which outlaws a contract of suretyship on the part of a wife in behalf of her husband. . . ." ¹⁰⁴ It is readily apparent that the *Magill* case is very different from those previously considered in this subsection: Georgia's only claim to have its law applied is the fact that the attached property was located there. Considering the nature of the transaction, it is clear that this is a contact of little importance.

As we have seen, "public policy" may be the instrument by which the state of the situs applies its own law in a property case or by which the state of the domicile does so in appropriate cases. In *Herzog v. Stern*,¹⁰⁵ a Virginia fact situation giving rise to a personal injury claim against a deceased tortfeasor's estate, New York was both the domicile of the decedent and the situs of his property. With two such important contacts it is not surprising to find the Court of Appeals of New York saying that the Virginia survival statute contravened the public policy of New York. The court clearly saw the problem as a descent and distribution question properly subject to New York law.¹⁰⁶

E. Place of Trial

There is undoubtedly a connection between the public policy exception and the procedure-substance distinction employed in conflict of laws cases. A decision that a particular problem is procedural, like many decisions that foreign law violates the forum's public policy, results in an application of forum law. Furthermore, some of the cases which refuse to apply out-of-state law on public policy grounds can properly be seen as an attempt by the forum to protect the integrity of its own processes of decision. A private agreement as to the admissibility of evidence or the mode of procedure will not be given effect contrary to the forum's law regardless of the validity of the contract abroad.¹⁰⁷

103. 155 Ga. at 555-56, 117 S.E. at 657 (text in unofficial reporter slightly different).

104. *Ibid.*

105. 264 N.Y. 379, 191 N.E. 23 (1934).

106. "A rule that would permit the depletion of the estate of a deceased resident through enforcement of claims for damages for personal injuries sustained outside of the State, where the Legislature has denied such remedy for injuries within the State, seems to me unreasonable. . . ." *Id.* at 384, 191 N.E. at 25 (text in unofficial reporter slightly different). Wallan v. Rankin, 173 F.2d 488 (9th Cir. 1949), and Kertson v. Johnson, 185 Minn. 591, 242 N.W. 329 (1932), reach results contrary to *Herzog v. Stern*.

107. See 6 CORBIN, CONTRACTS § 1432 n.76 (1951). In addition to the cases discussed

By the common law of some states local agreements to arbitrate are against public policy as a matter of internal law. A court in such a state will ignore contractual provisions calling for arbitration, will proceed to decide any controversy arising between the parties, and, of course, will not affirmatively enforce the arbitration clause. Some of these courts have refused to give effect to arbitration agreements even where the contract has been made and is to be performed abroad. The result can be achieved by saying that the arbitration clause violates the "public policy" of the forum or by asserting that such contracts relate to the remedy or the jurisdiction of courts and that these matters are determined by the law of the forum.¹⁰⁸

Under the law of some states a liability insurance company can be joined with the tortfeasor or the insurance company can be sued directly without the insured. In Louisiana the company can be sued directly even if the contract was made abroad between non-citizens, provided the tort occurred in Louisiana.¹⁰⁹ These results are reached by statutes rendering invalid contractual provisions which do not impose liability on the company until the responsibility of the insured has been fixed by judgment or until judgment has been satisfied.

In *Lieberthal v. Glens Falls Indemnity Co.*,¹¹⁰ the Michigan Supreme Court refused to entertain a suit against the insurance company of a Wisconsin tortfeasor. The suit would have been permitted in Wisconsin, the place of plaintiff's personal injury. There was no doubt that the contract of insurance was subject to Wisconsin law. The majority of the court felt bound by a Michigan statute which provided:

in the text, *Mount Ida School for Girls, Inc. v. Rood*, 253 Mich. 482, 235 N.W. 227 (1931), is an example of the place of trial contact overriding the usual conflicts rule. The forum's rule on proof of damages was used, in part, on the ground that the Massachusetts rule violated Michigan public policy. The *Restatement* recognizes the use of public policy in the sense discussed herein: "A distinction is to be noted between such a policy and the policy which, while it does not require denial of access to the courts of the forum, nevertheless requires the courts to apply certain local rules in the course of the litigation to enforce the local notions concerning the manner and method in which the courts of that state should function. This latter policy may be called the procedural policy of the forum." *RESTATEMENT, CONFLICT OF LAWS* § 612, comment *a* (1934).

108. See *Meachan v. Jamestown, F. & C.R.R.*, 211 N.Y. 346, 105 N.E. 653 (1914).

Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts . . . shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state. *Id.* at 351, 352, 105 N.E. at 655.

Cf. Miller v. American Ins. Co., 124 F. Supp. 160 (W.D. Ark. 1954); see Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716, 728-51 (1934); Philips, *Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion*, 19 CORNELL L.Q. 197 (1934); Note, *Commercial Arbitration and the Conflict of Laws*, 56 COLUM. L. REV. 902 (1956).

109. LA. REV. STAT. ANN. § 22:655 (1951). The statute was held constitutional against an attack on due process grounds in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1955).

110. 316 Mich. 37, 24 N.W.2d 547 (1946); *cf. Kertson v. Johnson*, 185 Minn. 591, 242 N.W. 329 (1932).

In such original action (including personal injuries caused by a motor vehicle), such insurance company (authorized to do business in Michigan), or other insurer, shall not be made, or joined as a party defendant, nor shall any reference whatever be made to such an insurance company, or other insurer, or to the question of carrying of such insurance during the course of trial.¹¹¹

Justice North of the Michigan Supreme Court explained the purpose of the statute:

The public policy sought to be sustained in this State by the statute and judicial decisions is that a plaintiff shall not be permitted to inject into his suit the element of insurance and thereby obtain an excessive and unjust verdict.¹¹²

The dissenting judges interpreted the statute as applying only to actions based on insurance policies issued in Michigan.

Here, indeed, are some troublesome issues. Does the fact of insurance, if revealed to the jury, make it so difficult for a Michigan tribunal to arrive at a fair verdict that plaintiffs must be denied a direct action against insurers which would be available in the state in which the tort occurred? Has the legislature foreclosed judicial inquiry into what the proper rule should be? The solution of these problems is not advanced by argument about whether the law of Wisconsin is so different from the law of Michigan as to amount to a difference of "public policy." Yet both majority and dissent debate whether the "public policy" exception should rule out the use of the place of the tort rule. The real questions, what did the legislature intend and what does the operation of our court system require, do not receive the direct and careful attention they deserve.

The Appellate Division of the Supreme Court of New York recently decided a case under the Louisiana direct action statute.¹¹³ Plaintiff, a resident of Brooklyn, was injured in Louisiana and brought suit against a Maryland insurance company qualified to do business in New York and Louisiana. The policy had been issued in the State of Louisiana for Louisiana State University. The court refused to entertain the action on the ground that New York's public policy was violated in not one, but two, ways. First, to give relief would be inconsistent with cases emphasizing "the great importance . . . of keeping from a jury any inkling that the defendant is insured."¹¹⁴ Just how great that

111. MICH. COMP. LAWS § 522.33 (1948).

112. 316 Mich. at 41-42, 24 N.W.2d at 549.

113. *Morton v. Maryland Cas. Co.*, 1 App. Div. 2d 116, 148 N.Y.S.2d 524 (2d Dep't 1955).

114. *Id.* at 124, 148 N.Y.S.2d at 531. If the primary factor establishing New York's public policy is the keeping of information concerning the existence of insurance from the jury, the opinion of the appellate division should have a short life. After January 1, 1957, an automobile may not be registered in New York without evidence of liability insurance

importance really is, is demonstrated only by quotations from New York opinions repeating the rule that evidence of the fact of insurance is ordinarily inadmissible and by noting that the New York direct action statute which permits the injured party to sue the insurance company if the judgment remains unsatisfied for thirty days has been strictly construed. Second, the Louisiana statute is "diametrically opposed to our law" and, therefore, a direct action against the company can be maintained only when the conditions of a New York statute are met. The court is particularly hostile to the Louisiana statute as it has been interpreted in Louisiana because "none of the defenses established by the contract of insurance which the casualty company might have against the insured are available . . ." ¹¹⁵ (such as the failure to give prompt notice or failure to cooperate in the defense of the action). Insofar as the second factor moved the court, this decision belongs in that rare category of cases which refuse to grant recovery on the ground of "repugnancy" to the forum's law even when the forum has no close contact with the case. It is interesting to note that in a similar case, apparently decided without knowledge of the appellate division's opinion, the United States Court of Appeals for the Second Circuit decided that the Louisiana statute did not violate New York's public policy. ¹¹⁶

Decisions have sometimes spoken in terms of public policy when the forum was clearly not a fair place in which to try a case. For example, in *Southern Surety Co. v. Illinois Powder Mfg. Co.*, ¹¹⁷ the powder company sued the surety of a Mississippi contractor to recover payment for goods supplied. The bond between the surety and the contractor provided only for indemnity to a Mississippi Drainage District in the event of default by the contractor. However, a Mississippi statute which required that the bond secure payment to suppliers was made a part of the contract by Mississippi law. Under the statute the company was required to answer only in a single action brought after publication of notice in the county or town where the contract was performed. The Texas court refused to entertain the suit on the ground of "public policy." The policy was found in considerations of fairness to possible Mississippi claimants under the bond and to the surety company. Mississippians should not be forced into Texas courts nor should the company be subject to more than one action. "[T]he attempted enforcement of the statute by a foreign jurisdiction will subject the citizens of the state of its creation to serious

or of qualification as a self insurer. Every juror will, thus, have reason to believe that any defendant has something in his pocket. N.Y. Sess. Laws 1956, c. 655, § 93-6.

115. *Id.* at 126, 148 N.Y.S.2d at 533

116. *Collins v. American Automobile Ins. Co.*, 230 F.2d 416 (2d Cir. 1956).

117. 31 S.W.2d 314 (Tex. Civ. App. 1930). *Accord*, *United States Gypsum Co. v. American Surety Co.*, 14 Tenn. App. 367 (1931).

injustice or inconvenience."¹¹⁸ In this sense the public policy doctrine is a form of *forum non conveniens*.

The very fact that a state is the place of trial gives it a special reason to apply its own law in cases arising under the so-called "Anti-Heart Balm" acts. Some states have abolished actions for breach of promise, alienation of affections, seduction, and criminal conversation. The actions were abolished largely because they were supposedly misused as a basis for conduct tantamount to blackmail. Not only are the actions themselves abolished, but lawyers are forbidden by criminal sanctions to file claims of that sort. In the face of such local prohibition, at least two courts have refused to hear claims arising in states in which the actions still exist.¹¹⁹ Although the cases speak of the great difference between local law and foreign law and say that therefore the public policy of the forum forbids entertaining the action, the argument about the extent and seriousness of the difference between the law of two states is hardly necessary. The plain fact is that if a state's court system is being used as part of an extortion scheme, its legislature has the power to stop it. Since the possibility of such misuse of the courts does not depend on where the cause of action arises, but on where suit is brought, the forum can justifiably ignore the law of the place of the tort and insist upon the application of its own law.¹²⁰

California law provides an interesting problem concerning the protection which ought to be given the local remedial system and the extent to which the California courts should properly guard against the misuse of legal process. A California statute provides that in a libel action against a newspaper or in a slander action against a radio station the plaintiff shall recover no more than special (actual) damages unless he files notice of the statement and a demand for correction upon the publisher within twenty days after he has knowledge of the publication. A 1954 case arising in a California federal district court held that the California Supreme Court had determined that the enactment declared the public policy of the state.¹²¹ The supreme court had said, "It is for the Legislature, however, to choose between conflicting policies. . . ."¹²² This

118. 31 S.W.2d at 317.

119. *Fahy v. Lloyd*, 57 F. Supp. 156 (D. Mass. 1944); *Thome v. Macken*, 58 Cal. App. 2d 76, 136 P.2d 116 (1943).

120. Perhaps a state's use of public policy to guard against oppression through the use of its legal system is the real basis of *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350 (1941). *Morris*, a domiciliary of Georgia, there executed a note containing a waiver of all rights to exemptions. The provision was valid in Georgia. Later *Morris* became a domiciliary of Tennessee, in which state action was brought against him and judgment recovered. The waiver was not enforced against him on the ground that a waiver of exemption violates Tennessee public policy.

121. *Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850 (S.D. Cal. 1954). *Anderson* is the subject of a perceptive piece of student work, Comment, *Public Policy and the Conflict of Laws*, 7 STAN. L. REV. 275 (1955).

122. *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 129, 216 P.2d 825, 830 (1950).

language was not directed to a conflict of laws situation but rather to the question whether the statute, in local application, was constitutional.

At least three reasons for enacting such legislation can be given. The legislature could have decided that fairness in respect to damages in libel actions cannot be achieved within the remedial system of California unless the right to recover is limited to pecuniary harm. Perhaps the legislators were anxious to limit the actions because of the serious possibility of extortion. The law makers may have been moved to encourage the greatest possible freedom of expression in public discussion by removing some of the deterrence of the law of libel. The first two reasons could properly lead the California courts in conflicts cases to characterize the statute as establishing requirements to protect the adjectival system of the state. In respect to the third reason the State of California has no proper concern with publications taking place wholly outside California. In any event, the aim of the legislature in respect to an out-of-state case is not revealed by reference to an opinion which is concerned with the question whether the statute has a reasonable basis for purposes of constitutional law. Nor is light thrown on the question by asking about the state's public policy. To solve the problem the courts should meet the question directly and decide whether the dangers of miscarriage of justice before a local court are sufficient to bar a plaintiff from asserting a claim which he could make in another state.

IV. THE IMPACT OF PUBLIC LAW

The great conflicts scholar, Dr. Ernst Rabel, in discussing public policy in the area of contracts conflicts law, points up a distinction which gives us an insight into a number of American cases. He separates public law, which is characterized by interference with private law for purposes of the welfare of the state and of the population generally, from private law itself, which is designed to serve the interests of individuals or organizations rather than the government.¹²³ Dr. Rabel recognizes that this is an imperfect formulation, since, obviously, individuals benefit when the population benefits generally and, of course, the state flourishes only to the extent that its citizens do. Basically, what is meant by public law is legislation of a regulatory nature. The Sherman Act, minimum wage legislation, and the eighteenth amendment would all be examples of public law. Dr. Rabel then goes on to say that:

[T]he rules of private international law are limited to a part of the entire legal system. They have no power over the rules of domestic pub-

123. See 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, 558-60 (1947):

If a state, not contented with the broad inroads of modern public law into the former spheres of private law, considers every substantive rule as mingled with considerations of community interests, it is logical to deny the existence of private law as the National-Socialist writers have done; they detested even the name of "Civil Code." *Id.* at 560.

lic law, including all rules serving the interests of the state itself and the general welfare. These rules are, or should be, accompanied by their own territorial delimitations. In their domain, they enjoy at the forum unconditional precedence over private international law. . . . But the boundaries should and may very well be chosen, quite as for our ordinary conflicts rules, so as to include in principle only the contracts centered within the forum.¹²⁴

In effect, Dr. Rabel is pleading for explicit recognition of the impact of public law on the choice of law rules usually considered applicable to contracts. He offers this idea in place of the public policy exception.¹²⁵ The principal question, then, is not how to define public policy—but how to delimit the reach of the forum's public law.¹²⁶

Although no mention of public policy is made in the Court's opinion, *Bothwell v. Buckbee Mears Co.*¹²⁷ is a leading case which Dr. Rabel might have used to illustrate his point. The plaintiff sued in Minnesota to recover an assessment on a Maryland insurance policy which had been solicited in Minnesota and which contemplated some acts of performance in that state. The insurance company was not licensed to do business in Minnesota, and therefore the solicitation and performance were illegal under Minnesota law. In view of these facts, the Supreme Court of the United States affirmed Minnesota's refusal to permit recovery: "Under rules of law generally applicable a State may refuse to enforce a contract which provides for doing within it an act prohibited by its laws."¹²⁸

A defense for the outcomes of other business regulation cases that do speak of public policy can be found in the propriety of protecting a local scheme of business regulation. The Louisiana appellate court refused to permit recovery of a brokerage fee on a contract made in Mississippi for the service of selling Mississippi real estate adjoining Louisiana.¹²⁹ Although unlicensed, plaintiff

124. *Id.* at 582. Dr. Rabel's proposition has much in common with the suggestion that the public policy doctrine should be limited to policy declarations by the legislature. See Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935).

125. See 2 RABEL, *op. cit. supra* note 123, at 584.

126. "[A]dministrative and fiscal rules have their own scope to be delimited for each according to its specific purpose." *Id.* at 560.

127. 275 U.S. 274 (1927).

128. *Id.* at 278. *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N.W. 922 (1900), is similar to *Bothwell*:

[T]he principle of judicial comity does not require our courts to actively aid in the enforcement of contracts which interfere with, and tend to frustrate, the policy established by the legislature. *Id.* at 638, 83 N.W. at 923.

See *Seamans v. Temple Co.*, 105 Mich. 400, 63 N.W. 408 (1845):

[T]he contract was made in Wisconsin and . . . is as much in contravention of the policy of this state as though it had been made . . . here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state. *Id.* at 404, 63 N.W. at 410.

Isaac Fass, Inc. v. Pink, 178 Va. 357, 17 S.E.2d 379 (1941), should also be consulted.

129. *Moore v. Burdine*, 174 So. 279 (La. App. 1937).

conducted his business in New Orleans. Further it was "a matter of common knowledge that New Orleans affords the principal market for the disposal of Mississippi Gulf Coast properties."¹³⁰ Therefore, it was clear that the parties expected the broker to perform his contract in Louisiana. With such an important set of connecting factors relating to its public law it is little wonder that the Louisiana court felt free to apply its law to judge whether the plaintiff could use its courts.

A weaker example is *Reed v. Kelly*,¹³¹ in which a Chicago real estate broker sued in Wisconsin to recover commissions under an Illinois listing agreement for the sale of a hotel in Superior, Wisconsin, for a Wisconsin seller. The Wisconsin statutes provided that real estate brokers had to be licensed and, further, that no action for commissions could be brought by a broker unless he alleged and proved that he was licensed. The broker failed because he was not licensed in Wisconsin, and enforcement of the contract would hence violate Wisconsin's public policy. The case supports Rabel's distinction when it points out (by quoting a dictum taken from a non-conflicts case), "The mischief at which the legislation . . . was aimed was the advantage that persons engaged in that business were taking of members of the public."¹³²

So also, it would appear that the question whether an Indiana employee may recover, in an Indiana action, wage deductions paid to a relief benefit association illegal under Indiana law is a public law question.¹³³ Recovery was

130. *Id.* at 281.

131. 81 F. Supp. 755 (W.D. Wis. 1948), *aff'd*, 177 F.2d 473 (7th Cir. 1949); cf. *Copellman v. Rabinowitz*, 208 Misc. 274, 143 N.Y.S.2d 496 (1955).

132. 81 F. Supp. at 758. Cf. *Henning v. Hill*, 80 Ind. App. 363, 141 N.E. 66 (1923), in which public policy was held to be no bar to the enforcement in the Indiana courts of an oral brokerage contract made in Illinois by Illinois residents concerning Illinois land even though an Indiana statute requires such contracts to be in writing in order to be valid. The defendant had become a resident of Indiana after the sale of the land, but Indiana obviously had no reason to apply her regulatory legislation since she had no contacts with the transaction either at the time it was entered into or when it was executed.

In *FDIC v. Stensland*, 70 S.D. 103, 15 N.W.2d 8 (1944), suit was brought in South Dakota to enforce personal liability on a North Dakota purchase money note given in a transaction involving South Dakota land. The notes were in violation of a South Dakota statute, and the court held that the claim violated South Dakota public policy. The opinion clearly indicates the court's conviction that South Dakota public law was involved:

We notice the fact that the law was passed at a time when actions based upon purchase money notes, deficiency judgments and the like, were causing many citizens of this state great hardship and the drastic effect of such actions on our overall economy was apparent. . . . [T]his legislation declared the enforcement of the type of contracts therein described to be against the public interest. *Id.* at 107, 15 N.W.2d at 10.

The *Strathearn*, 256 Fed. 631 (5th Cir. 1919), is an example of federal public law overriding the provisions of a British contract. In an appropriate case, of course, "public policy" may be a federal rather than a state concept. For example, a foreign contract calling for payment in gold may not be enforced in a state court because contrary to federal monetary policy. *Compania de Inversiones Internacionales v. Industrial Mortgage Bank*, 269 N.Y. 22, 198 N.E. 617 (1935). A state may not have a public policy which is inconsistent with constitutionally valid federal legislation. *Testa v. Katt*, 330 U.S. 386 (1947).

133. *Vandalia R.R. v. Kelly*, 187 Ind. 323, 119 N.E. 257 (1918).

permitted in Indiana even though technically the contract was made in Ohio. The contract, which would not permit recoupment of money paid to the association, was said to be against Indiana's public policy.

Some states have refused to enforce foreign contracts restricting competition on the ground that the forum's public policy in respect to trade regulation has been violated by such agreements.¹³⁴ The decisions have involved local businesses or territorial restrictions embracing the forum. These cases clearly involve the choice of the forum's internal regulatory law as the test of the validity of the contract. The significance as a contact of the place in which competition is restricted is illustrated by the action of a Texas court, when faced with a Louisiana contract forbidding competition by an ex-employee. The decree quite properly enjoined the competition in Texas where the contract was valid but refused to enjoin defendant's Louisiana activity because there such agreements are illegal.¹³⁵

New Jersey¹³⁶ and Nebraska¹³⁷ have denied recovery on a small loan usurious by forum law when the application for the loan was made in the forum. Some dry states have refused to enforce money claims arising out of the sale of liquor if both parties were aware that the transaction was aimed at subverting the local prohibition laws.¹³⁸

134. *Davis v. Jointless Fire Brick Co.*, 300 Fed. 1 (9th Cir. 1924); *May v. Mulligan*, 36 F. Supp. 596 (W.D. Mich. 1939), *aff'd*, 117 F.2d 259 (6th Cir. 1940); *Standard Fashion Co. v. Grant*, 165 N.C. 453, 81 S.E. 606 (1914); *Byrd v. Crazy Water Co.*, 140 S.W.2d 334 (Tex. Civ. App. 1940); *cf. J. R. Watkins Co. v. McMullan*, 6 S.W.2d 823 (Tex. Civ. App. 1928). *Sunbeam Corp. v. Masters of Miami*, 225 F.2d 191 (5th Cir. 1955), held that, because fair trade laws are unconstitutional in Florida, a cause of action against a Florida business concern, on a theory of its interference with fair trade contracts entered into out of state, would be against Florida public policy.

135. *Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279 (Tex. Civ. App. 1953).

136. *Continental Adjustment Co. v. Klause*, 174 Atl. 246 (N.J. Dist. Ct. 1934). *But see* *Personal Finance Co. v. Gibson*, 26 Ala. App. 18, 152 So. 462 (1933).

137. *Personal Finance Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 255 N.W. 558 (1934). Section 18 of the UNIFORM SMALL LOAN ACT contains a curious return to the similarity doctrine, providing that, "No loan of the amount . . . of \$300 or less for which a greater rate of interest . . . than is permitted by this Act has been charged . . . , wherever made, shall be enforced in this State . . . provided that the foregoing shall not apply to loans legally made in any state which then has in effect a regulatory small loan law similar in principle to this Act." Nebraska is among the states which have adopted the act; it was applied in *Kinney Loan & Finance Co. v. Sumner*, 159 Neb. 57, 65 N.W.2d 240 (1954).

Where the interest is attacked as usurious in cases that do not involve small loans, the public policy defense generally makes no headway. A rule of alternative reference is usually applied; if the interest rate is permissible under either the law of the place of making or the law of the place of performance, it will be upheld. See GOODRICH, *CONFLICT OF LAWS* 334 (3d ed. 1949); STUMBERG, *CONFLICT OF LAWS* 237 (2d ed. 1951). The contrast between small loan cases and other kinds of borrowing cases can be seen by comparing *Mirgon v. Sherk*, 196 Wash. 690, 84 P.2d 362 (1938), with *Bank v. Doherty*, 42 Wash. 317, 84 Pac. 872 (1906).

138. *Feineman v. Sachs*, 33 Kan. 621, 7 Pac. 222 (1885); *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131 (1905); other cases are collected in Annot., 166 A.L.R. 1353 (1947); Annot., 49 A.L.R. 1002 (1927); *cf. Klein v. Keller*, 42 Okla. 592, 141 Pac. 1117 (1914), in which an Ohio contract for the sale of liquor to a Texas buyer was enforced in prohibitionist Oklahoma. In *Theokistou v. Panama R.R.*, 6 F.2d 116 (5th Cir. 1925), the court properly rejected defendant's contention that to hold it liable for injury done to

One of the most famous public policy cases, *Ciampittiello v. Campitello*,¹³⁹ in spite of language in the opinion which speaks of "ancient and deep-rooted public policy," is a fine illustration of the impact of public law upon the conflict of laws. Two brothers had gone from Connecticut to Rhode Island and there agreed to set up a pool of \$300 for purposes of betting at the pari-mutuel machines at the Pascoag, Rhode Island, track. While on the way home, one brother, the stake-holder, was killed in an accident. The Connecticut courts refused to allow the survivor to recover his share of the winnings from his brother's administrator on the ground that the gambling contract violated Connecticut policy. Betting on horse races is a criminal offense in Connecticut, and contracts to do so are void. These rules are clearly police regulations of the state designed to advance the public and governmental interests in the morality of the citizenry. This policy of the public law is fairly implemented by refusing to restore the fruits of gambling derived from an out-of-state wagering agreement between domiciliaries.¹⁴⁰

There is little doubt, then, that Dr. Rabel was on sound ground when he noted a departure from traditional choice of law rules on public policy grounds in contracts cases having a public law element. But, as our earlier discussion illustrates, he was probably amiss in limiting his thesis to public law cases. In other words, this departure from traditional choice of law rules occurs in what Dr. Rabel would consider the private law area too.¹⁴¹ Recognition of this fact

plaintiff's saloon in Panama, where the sale of liquor was legal, would violate the public policy established by American constitutional and statutory prohibition provisions.

139. 134 Conn. 51, 54 A.2d 669 (1947).

140. Gambling cases in the conflicts law are collected in Annot., 173 A.L.R. 695 (1948); Annot., 64 L.R.A. 160 (1904). The gambling case that probably substantiates Rabel's point most strongly is *Savings Bank v. National Bank of Commerce*, 38 Fed. 800 (W.D. Mo. 1889), where, in effect, the court refused to recognize as a legal obligation a gambling debt owing from a resident of the forum to a resident of Kansas, even though the gambling took place in Kansas, where the court assumes, arguendo, that the debt would be enforceable. Forum law declared the kind of gambling involved to be a crime and all bills and notes given for a gambling debt void. The court says, *id.* at 804.

Maltby established his gambling house just across the state line in Kansas City, Kan., with but a street or block separating it from Kansas City, Mo.; so close that the immoral atmosphere of his establishment can be breathed by the people of Missouri, and its demoralizing influence be felt in the adjacent community. It does seem to me that the courts of justice in this jurisdiction ought to close their doors against such a suitor when he brings his transactions, growing out of his nefarious calling, to her temples for arbitrament.

Windt v. Lindy, 169 Tenn. 210, 84 S.W.2d 99 (1935), involved a suit on a note given in consideration of an agreement not to prosecute a felony. The notes were executed in Pennsylvania but here also the forum had a strong interest and Dr. Rabel's analysis is relevant. The felony (if any) had arisen from obtaining money by false pretenses in Florida.

141. This means, of course, that the significance of the imprecision of Rabel's public law concept is minimized. While he seems to include only legislative regulation in the public law concept, it is probable that the idea can be used with respect to judge made law. For example, in *Dial v. Fisk*, 197 S.W.2d 598 (Tex. Civ. App. 1946), it was held that a divorced wife of an insured would not be permitted to recover the proceeds of the insurance policy in which she had been named as beneficiary. The policy had been issued by a Massachusetts company to the insured when he and the plaintiff were still married and living in Oklahoma. The insured later resided in Texas, where he died without changing

is implicit in the conviction held by Professor Ehrenzweig and others "that a 'Restatement' of conflict of laws should remain limited to a painstaking analysis of the law governing narrow fact situations and avoid broad formulas."¹⁴²

V. JUSTICE IN THE INDIVIDUAL CASE

The defense of public policy in a conflicts case may be raised because the provisions of the foreign law are pernicious or sharply different from those of the forum. The public policy principle may be, in reality, a choice of law rule which makes reference to the forum law because of the importance of the action's contacts with the state in which proceedings are brought or because of the impact of public law on private contracts. Perhaps we can add one more to the list of the uses of public policy. The principle may be invoked because of injustice in a particular case. Long ago Professor Cavers argued that fairness of result in an individual case is a factor too often overlooked in the conflicts area.¹⁴³ Professor Rabel puts the point this way, "[A] court holding that in no case should a debtor be forced to utter ruin by the enforcement of a contract, may admit such defense, thus far unknown to American law, against an American contract."¹⁴⁴

"Public policy" thus could serve as a kind of residual equity principle to relieve against the harshness of a general rule as it applies to a specific situation involving important foreign facts. Our research has uncovered no cases which employ public policy in precisely that way. Two cases come close to the idea. In both, a plaintiff attempts to impose a liability which comes as a great surprise to the defendant.

In *Farmers' & Merchants' Nat'l Bank v. Anderson*,¹⁴⁵ the defendant, an Iowan, invested in a Texas business trust under the terms of which the investors were not to be personally liable for any of the business debts. After defendant

the beneficiary. Both Oklahoma and Massachusetts permit a divorced wife to collect the proceeds of her ex-husband's insurance if she is named as beneficiary in the policy. The Texas common law rule is that divorce terminates the insurable interest which each spouse has in the life of the other. The court notes that the insurance policy must have been renewed in Texas, but declines to decide the case on the question of where the contract was made or the policy issued, basing its decision instead on the ground that it is contrary to Texas public policy to permit a person to be the beneficiary of a life insurance policy when such person has no insurable interest in the life of the insured. The insurable interest requirement must be based either on the justification that it tends to prevent the murder of the insured or on the theory that otherwise an insurance contract is merely a gambling arrangement. In either event the insurable interest requirement would seem to be fulfilling a public law function, and the public law of the forum would have a claim to govern when the insured becomes a resident of the forum. Cf. *Haase v. First National Bank*, 203 Ala. 624, 84 So. 761 (1919), in which the public policy argument was rejected.

142. Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474 n.* (1955).

143. See Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

144. 2 Rabel, *op. cit. supra* note 123, at 583.

145. 216 Iowa 988, 250 N.W. 214 (1933).

had invested in the enterprise and after plaintiff had become a creditor, the courts of Texas held that the investors, in spite of the terms of the trust, were liable as partners. The Iowa Supreme Court decided in favor of the defendant in a suit on a note of the trust asking \$48,786.62 plus interest, attorney's fees, and costs. The amount of defendant's investment does not appear, although it could have been quite small because the trust was capitalized at \$1,000,000 with 100,000 shares at a par value of ten dollars each. The court rested its decision, in part, on the ground that it would be unfair in the case at hand to grant recovery:

The doctrine to which we adhere is founded upon principles of justice and fair dealing. Where a man has contributed his money to and taken the risk of losing it in an enterprise, with the distinct understanding and agreement that he shall not be liable for any greater amount than the money thus contributed, we are unable to see the justice or reasonableness of a doctrine which says that he must nevertheless be held liable to one who has dealt with such enterprise, with full knowledge of the terms of the agreement. . . .¹⁴⁶

Although much of the opinion is drafted in rather conventional public policy terms the result may be justifiable because of the special equitable factors in the defendant's favor: (a) the change in the Texas law after defendant's investments, (b) the knowledge of the plaintiff concerning the original nature of the enterprise, and (c) the large potential liability on what may have been a rather small investment.

In *Citizens Bank v. Hibernia Bank & Trust Co.*,¹⁴⁷ an assessment under a Georgia statute on shares in a Georgia bank was refused enforcement in Louisiana. The defendant's mother had purchased the shares in 1911 and they had passed to the defendant after her death. The statute under which the assessment was made was passed in 1919. The Louisiana court held that the liability was not "contracted" because "to say that subsequent statutory enactments form a part of the contract [of purchase] . . . is inconsistent with the primary requisite of conventional obligations, consent of the parties."¹⁴⁸ The obligation was "statutory" and the statute violated Louisiana public policy. Again, the defendant can make a claim to our sympathy because of the attempt to hold him liable on inherited stock not subject to assessment on the date of purchase.

146. *Id.* at 996, 250 N.W. at 218. *Maxey v. Railey & Bros. Banking Co.*, 57 S.W.2d 1091 (Mo. App. 1933), is a striking case in which the public policy defense protected a defendant from an outrageous transaction. The defendant gave a note after being cheated at cards, given an overdose of spirits, and kept imprisoned in a hotel room for several days. It is very probable that he had defenses, as well, under the Kansas law, the place of making of the obligation, but the Kansas law was not proved. *Cf. Gardner v. Lewis*, 7 Gill 377 (Md. 1848).

147. 19 La. App. 461, 140 So. 705 (1932).

148. *Id.* at 465, 140 So. at 708; *cf. Paper Products Co. v. Doggrell*, 195 Tenn. 581, 261 S.W.2d 127 (1953).

The recognition of public policy as a tool for doing substantial justice in particular cases is a dangerous matter. Applied without the strictest limitations it could undermine the usual conflicts rules by causing refusals to grant recovery against a local defendant every time he makes an improvident bargain. But it need not be so. The business of the courts is to do justice, and, as a general matter, proceeding according to rule will give the best results. Most courts will approve and follow the sentiments of Pennsylvania's *In re McCurdy's Estate*:¹⁴⁹

When our people went to Florida to buy land and there made their agreements, they submitted themselves to the control of that state's laws. In returning to this State, they cannot escape responsibility when sued by taking advantage of our law which required such contracts to be in a specified form. The state will protect its citizens against fraud, imposition, and unconscionable conduct, but not against the consequences of acts done in good faith, lawful where done, and not contrary to the public policy of this State.

VI. RES JUDICATA

We have been dealing thus far with the various kinds of judicial action that may be masked by public policy theorizing. Whatever the judicial action, though, there is no doubt that once a court has disposed of a claim or defense on public policy grounds, that claim or defense can never again be raised in that state. The problem remains: What effect should a court in another state give to the public policy disposition made in the first state? At this point, there is no way for the second court to duck an inquiry into what was actually done under the guise of public policy.

Most courts, when they dismiss on public policy grounds, have proceeded on the theory that if a cause of action violates public policy, they lack jurisdiction over the case. Hence, it would follow that the decision to dismiss the out-of-state claim is not a decision on the merits. Supposedly, the effect of a court's dismissal is simply to remit the plaintiff to a forum where his claim is consistent with public policy. There the defendant would not be protected by *res judicata*.¹⁵⁰

We believe that this is an accurate description of a very small percentage of the public policy decisions. It should not even be applied to all cases in which the forum has little connection with the transaction before it. It seems applicable to cases like *Reed v. Kelly*,¹⁵¹ and *Jacobsen v. Saner*,¹⁵² where the plaintiff was simply denied access to the courts of the forum state. Similarly, the application of local law to protect a state's system of remedies should not prevent

149. 303 Pa. 453, 462, 154 Atl. 707, 709 (1931).

150. RESTATEMENT, JUDGMENTS § 49, comment *a* (1942). The result would be similar to that reached in a well known case, *Warner v. Buffalo Drydock Co.*, 67 F.2d 540 (2d Cir. 1933), which held that a dismissal by one court on account of laches did not bar recovery in another court.

151. Discussed in text at note 131 *supra*.

152. Discussed in text at note 40 *supra*.

a second state from using its procedure should that state wish to do so. But the description is inapplicable to a case like *Farmers' & Merchants' Nat'l Bank v. Anderson*,¹⁵³ where the Iowa Supreme Court held that a Texas-based claim was unjust. The *Anderson* opinion concludes with this language, "[W]e hold that the petition does not state a cause of action against the defendants." In deciding that the plaintiff's claim was contrary to the public policy of the state, the forum was actually adjudicating whether the plaintiff should have a claim against the defendant and making a decision on the merits of the case.

When a court holds that it will not grant relief because to do so would be unfair in the particular case or because the law on which the plaintiff's claim is based is pernicious or brutal, is this not a declaration of rights between the parties as much as a holding that the plaintiff may not recover because the contract lacked consideration? In most countries dismissals on public policy grounds are considered entitled to full *res judicata* effect.¹⁵⁴ This rule has the advantage of making it clear to judges that a dismissal on public policy grounds really does deprive a claimant of compensation.¹⁵⁵ If a comparable rule were followed in this country, the courts could no longer make the assumption, in practice often so contrary to fact, that the plaintiff is not irreparably harmed by the public policy dismissal because he can press his claim elsewhere.¹⁵⁶

Without going so far as other nations we should modify our assertions about the *res judicata* effect of a public policy dismissal when the forum has little connection with the case before it. *Res judicata* should depend upon what the deciding court has, in fact, decided. Has it decided that *A* has no claim against *B*, or has it decided that *A* may not, in this state, make his claim against *B*? It may well be difficult to determine what a court has done, but that should not stand in the way of making the proper attempt.

In cases in which the forum has contacts with the suit in its courts and is, in fact, making a choice of law decision and applying its own law to the controversy, there is no doubt that such a decision should be given *res judicata* effect in another jurisdiction. This is especially clear in the situs of property cases discussed earlier.¹⁵⁷ When Texas says that to enforce a foreign secret lien against a bona fide purchaser is contrary to her public policy, she is not inviting the lienor to try his hand in another state where such liens will receive better

153. Discussed in text at note 145 *supra*.

154. See 2 RABEL, *op. cit. supra* note 123, at 583-84.

155. "It would be rather dangerous to open an easy middle road for provincial minds." *Id.* at 584.

156. When an individual or single-state corporation is the defendant, obtaining jurisdiction in another state may be impossible. If the trial of the action took place in one of our larger cities with congested calendars, it is likely that by the time the appeal has run its course, the statute of limitations will have run.

157. See text at note 52 *supra*.

treatment; she is adjudicating the rights of the lienor and the purchaser for all time.

Again, of course, a court in a second jurisdiction has the problem of deciding what was actually done by the first court, and it is probably here that the danger of using the blunderbuss public policy is most clearly underlined. By resorting to public policy theorizing instead of analyzing the problem before it, the first court gives a second court little help in deciding what course to take when the same claim is presented to it.

The easy case is that in which a defense is struck down because it violates public policy. Such a decision is inevitably entitled to *res judicata* effect.¹⁵⁸ It is worth pointing out here that almost all of the cases which have refused to recognize a defense on public policy grounds have involved contacts with the forum of sufficient importance to justify the choice of the forum's law and hence were, in reality, choice of law decisions.

VII. CONSTITUTIONAL LIMITATIONS

When a state refuses to entertain a cause of action recognized by a sister state on the ground that the content of the sister law violates public policy, a constitutional question is raised under the full faith and credit clause. Most frequently it is assumed that full faith and credit only lays down requirements for the out-of-state enforcement of statutory causes of action, but that assumption is by no means established. The full faith and credit clause speaks of "Public Acts, Records and Judicial Proceedings." Clearly a statute is a public act, a term difficult to apply to judge made law. Yet the Supreme Court could place case law within the constitutional language.¹⁵⁹ Because the question does not affect full faith and credit principles but only the extent of their application, the discussion that follows is pertinent whether or not case law is entitled to full faith and credit respect.

*Hughes v. Fetter*¹⁶⁰ is the most important case concerning the refusal to apply sister state law on public policy grounds even though the forum has no significant contacts with the case. In that case an administrator sought recovery in Wisconsin, relying on the Illinois wrongful death statute, for Hughes' death in Illinois. Both Hughes and the tortfeasor were citizens of Wisconsin. The Wisconsin courts dismissed the complaint, holding that a Wisconsin

158. See the discussion in *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145, 147 (S.D. Fla. 1944).

159. See 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 545-48 (1953); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 12 (1945); Sumner, *The Status of Public Acts in Sister States*, 3 U.C.L.A. L. REV. 1, 7 (1955); comment, 13 ILL. L. REV. 43, 56 (1918).

160. 341 U.S. 609 (1951). In the narrow area of the enforcement of statutory liability against shareholders of an insolvent state bank a state must grant relief on a sister state claim. *Broderick v. Rosner*, 294 U.S. 629 (1935).

statute established a local public policy against entertaining suits brought under the wrongful death acts of other states. The Supreme Court of the United States reversed. The "strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states"¹⁶¹ required Wisconsin policy to give way. Wisconsin had "no real feeling of antagonism against wrongful death suits in general."¹⁶² That state permitted such actions when litigation arose from Wisconsin facts. Differences were noted between the Wisconsin law and the Illinois law, but a footnote to Mr. Justice Black's opinion says :

It may well be that the wrongful death acts of Wisconsin and Illinois contain different provisions in regard to such matters as maximum recovery and disposition of the proceeds of suit. Such differences, however, are generally considered unimportant.¹⁶³

Whether the result in the *Hughes* case would have been otherwise if the differences had been greater is an open question.

To assess the present authority of *Hughes v. Fetter* is difficult because the Court was divided five to four. The result could be changed by a newly introduced factor moving only a single justice. The problem is even more troublesome because of changes in the Court's personnel since 1951, Chief Justice Warren having replaced Chief Justice Vinson, who voted with the majority in *Hughes*, Justice Harlan having replaced Justice Jackson, a dissenter, and Mr. Justice Brennan having replaced Mr. Justice Minton, another dissenter.

The *Hughes* opinion noted that Wisconsin might be the only forum having jurisdiction over the defendant. However, one may not conclude that full faith and credit is satisfied by limiting the refusal to decide to those out-of-state death cases which may be maintained in other states. In *First Nat'l Bank v. United Air Lines, Inc.*,¹⁶⁴ written during the term of court following the *Hughes* case, the Supreme Court invalidated an Illinois statute similar to the Wisconsin act.

The reasons supporting our invalidation of Wisconsin's statute apply with equal force to that of Illinois. This is true although Illinois agrees to try cases where service cannot be obtained in another state. While we said in *Hughes v. Fetter* that it was relevant that Wisconsin might be the only state in which service could be had on one of the defendants, we were careful to point out that this fact was not crucial.¹⁶⁵

161. 341 U.S. at 612.

162. *Ibid.*

163. *Id.* at 612 n.11.

164. 342 U.S. 396 (1952).

165. *Id.* at 398.

Save for *First Nat'l Bank v. United Air Lines, Inc.*, the Supreme Court has refused to extend *Hughes v. Fetter*. In *Wells v. Simonds Abrasive Co.*,¹⁶⁶ a case not involving the public policy defense, the Court refused to require Pennsylvania to apply an Alabama statute of limitations in a wrongful death action based on Alabama facts instead of the shorter statute of Pennsylvania. *Hughes v. Fetter* and the *First Nat'l Bank* case had no application. "The crucial factor in those two cases was that the forum laid an uneven hand on causes of action arising within and without the forum state."¹⁶⁷ If *Hughes* only forbids discrimination against sister state causes similar to those recognized locally, its impact is limited indeed. It would have no bearing on a refusal to apply sister state law repugnant to the forum or law not at all similar to any of the forum's local law.

The *Wells* case is interesting in one more respect in regard to *Hughes v. Fetter*'s influence on the public policy doctrine. *Wells* looks to history and the general conflicts rules in the states today. The Pennsylvania statute of limitations can be applied without violating full faith and credit because old cases have so held. The rule that the forum applies its own statute of limitations is "the usual conflicts rule of the states."¹⁶⁸ *Hughes v. Fetter* does not call for a "change in the well-established rule."¹⁶⁹ A look to history or to expressions of current state law to determine the constitutional limits on public policy means, of course, that the doctrine will not be changed by constitutional mandate.¹⁷⁰

Hughes v. Fetter does at least stand for the proposition that a sister state's claim may not be dismissed simply because the local law differs in some detail from out-of-state law. To that extent, the requirement of "substantial similarity" between the law of the forum and a sister state is unconstitutional.¹⁷¹ Yet the case falls far short of obliterating the public policy defense. The opinion leaves open the question whether sister state law may be disregarded when

166. 345 U.S. 514 (1953).

167. *Id.* at 518.

168. *Id.* at 517.

169. *Id.* at 518.

170. The public policy doctrine has been recognized by the Supreme Court in diversity cases. A famous quotation is found in *Bond v. Hume*, 243 U.S. 15, 21 (1917), in which it was said to be rudimentary that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought." See the statement in *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932), "[A] plaintiff . . . might be denied relief . . . because the enforcement of the right conferred would be obnoxious to the public policy of the forum." In *Griffin v. McCoach*, 313 U.S. 498 (1941), the Court decided that, under the *Erie* doctrine a federal court must follow the public policy doctrine of the state in which it sits. Of course, *Erie* would not apply if the state's rule were unconstitutional.

171. Some of the language in Justice Frankfurter's opinion, which speaks for the four-judge minority, supports the argument that the substantial similarity rule is constitutional. After calling attention to the differences between the Wisconsin and Illinois death acts he said, "These diversities reasonably suggest application by local judges versed in them." 341 U.S. at 619.

the differences are very great or when the forum has "real feelings of antagonism" against it. What we learn from *Hughes* is that states are not completely free to dismiss on policy grounds. "[I]t is for this Court to choose in each case between the competing public policies involved."¹⁷² The freedom which the court will permit is, nevertheless, very great.

Where the public policy doctrine is really only the occasion for a choice of local law in a conflict of laws situation, the same constitutional questions are raised under the due process and full faith and credit clauses that would be presented by any other choice of law rule adopted by the forum. The forum may not choose a law completely unrelated to the transaction before the court even if the law chosen is its own.¹⁷³ In the narrow area of fraternal benefit association cases full faith and credit requires the application of the law of the state of incorporation.¹⁷⁴ Aside from these limitations a state may adopt such choice of law rule as it pleases. Professor Reese has written of the constitutional limitations on a state's choice of law: "Due process no longer forbids a state from applying its own law unless it has no reasonable contact with the transaction, and, where such a reasonable contact exists, full faith and credit does not compel a state to apply another's law in preference to its own."¹⁷⁵

It is thus highly improbable that the Supreme Court will, by use of federal materials, interfere significantly with the public policy doctrine in conflict of laws cases. If improvement is to come, it must come from the state judges themselves.

VIII. CONCLUSION

All the commentators would retain the public policy principle in conflicts to the extent that it is grounded in basic moral conceptions or in ideas of fundamental justice, and we agree. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, the law should not be applied. The principle can be defended on the ground that, above all, any court's job is to aim at the just accommodation of controversy or, perhaps, with the notion that the decisions of courts should not "exhibit to the citizens of the state an example pernicious and detestable."¹⁷⁶ Yet

172. *Id.* at 611.

173. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

174. *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947).

175. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 342 (1952). There has been a great deal of discussion about the full faith and credit clause and the role of public policy in the field of workmen's compensation. See Stone, *The Forum's Policy and the Defense of Faith and Credit to Workmen's Compensation Acts*, 41 IOWA L. REV. 558 (1956).

176. *Greenwood v. Curtis*, 6 Mass. 358, 378 (1810). For an interesting formulation as to when foreign law is sufficiently outrageous to warrant a refusal to apply it, see *Adams v. Gay*, 19 Vt. 358, 367 (1847): "[W]e must be able to find but one pervading

such cases, between countries of the civilized world and certainly between the states, will be few indeed. Perhaps the public policy idea can be used to achieve justice in a particular case if the strictest limitations are observed.¹

The most troublesome use of public policy comes when it is employed as a cloak for the selection of local law to govern a transaction having important local contacts. Resort to the concept is beguilingly easy and does not demand the hard thinking which the careful formulation of narrower, more realistic, choice of law rules would require. Most of the critics have argued for a narrowing of the area in which opinions resort to public policy. They contend that foreign transactions will otherwise be judged according to "local fancies" and subjected to judicial parochialism. On the other hand Nussbaum has urged the greater use of public policy on the ground that the retreat of liberalism requires more self-defensive measures at the forum.¹⁷⁷ We urge that courts make the proper distinctions. We urge that courts take a second look and ask, "In what sense are we applying the public policy doctrine?" If judges honestly put the question whether the foreign law is barbarous in its provisions or frightfully unjust in the particular case, few cases will provide an affirmative answer. If a judge sees that, in a given case, public policy doctrine substitutes for choice of law, he should address himself directly to questions concerning choice of law policy. What are the most important contacts with respect to the matter at hand? Will the reference to local law be made only in the forum state so that it achieves a result not obtainable in other possible places of trial? Should a broadly-stated choice of law rule, supposedly applicable to the problem at hand, be narrowed to take into account the significance of differences in detail? What policies are served by one choice of law rule rather than another? Can our judicial system accommodate this case without serious dislocation?

The principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws.

feeling upon that subject,—so much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions." This language is quoted with approval in *Swann v. Swann*, 21 Fed. 299, 305 (E.D. Ark. 1884).

177. "Practicing liberalism becomes preposterous where it is exercised towards a foreign law which is plainly directed against the interests of the forum." Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027, 1049 (1940). An even more extreme position urging wider use of public policy is found in Kronstein, *Crisis of "Conflict of Laws"*, 37 GEO. L.J. 483, 511 (1949):

We cannot sustain our present method of finding the applicable law on a basis of a bridge between facts and an artificial legal concept, subject to the moulding of the parties, and then try to protect public policy in extreme cases. Instead, the *public order* has to be given the primary consideration.