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Enlightened Territorialism and Professor Cavers—The Pennsylvania Method

Aaron D. Twerski*

A nice thing happened to "territorialism" one day. It had the good luck to run into Professor David Cavers. Prior to this encounter it had suffered a cruel fate. From relative obscurity it was touted by Professor Beale and the "vested righters"¹ as the "only" solution to choice-of-law problems worthy of intellectual respect. It was quickly encased and enshrined in Restatement I² for all to adore and admire. Having been placed on an undeserved pedestal it was not long before this child prodigy began throwing its weight around. The inevitable happened. Under the onslaught of truly brilliant legal thinking and writing "territorialism" was destroyed.³ Like all child prodigies, it was not equal to its press releases. From there it was but a short step to obscurity and ignominy. It was the most striking "rags to riches to rags" story that the law had to offer in this century. And then the meeting with Professor Cavers. *The Choice-of-Law Process*⁴ brought to territorialism a new-found respect. It was neither to be deified nor ignored. It has a place in choice-of-law.

In *Cipolla v. Shaposka*,⁵ the "enlightened territorialism" of Cavers has received its first clear judicial expression. It is a welcome addition to the already distinguished Pennsylvania set of choice-of-law decisions.⁶

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1. J. Beale, *Treatise On The Conflict Of Laws* §§ 1.1, 1.4, 1.6, 4.12, 4.13 (1935); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

2. RESTATEMENT OF CONFLICTS (1934).

3. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933); B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); A. EHRENZWEIG, *TREATISE ON CONFLICT OF LAWS* (1962).

4. D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965) [hereinafter cited as Cavers] has been aptly described by Professor Ehrenzweig as "the most important contribution of our era in this field." Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966). The choice of law process evolved from the Cooley lectures at the University of Michigan Law School delivered by Professor David Cavers in 1964.

5. 439 Pa. 563, 267 A.2d 854 (1970).

6. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *McSwain v. Mc-*

But, why territorialism? Why indeed should "departures from the territorial view of torts not be likely undertaken."⁷ To all those initiated into the new policy-centered methodology⁸ of conflicts law, it is all too clear that the mere occurrence of an event on a piece of real estate called Pennsylvania, Ohio or New York is not ipso facto significant. It bears significance only if some policy of the state in which the event occurred is furthered by the application of its law. In cases in which a conflict is denoted as "false" the locus of the accident has little or no significance.⁹ By what feat of legerdemain does territorialism become important once we have decided that there is a "true" clash of the policies of two concerned jurisdictions? This is the enigma created by Cavers' territorially oriented principles of preference and is the puzzle which the *Cipolla* court did not solve.

At first blush there appears only one way out of this dilemma. Neither Cavers nor *Cipolla* are talking about naked territorialism. Rather they made their choice-of-law first and then found that it pointed to the locus of the accident.¹⁰ The result—would seem to be "by-product territorialism". To determine then, what are the true choice-influencing considerations in Cavers' territorial principles a brief look at his first two principles of preference—the ones with the "territorial cast" becomes necessary. Principle I declares:

Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the

Swain, 420 Pa. 86, 215 A.2d 677 (1966); *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *Elston v. Industrial Lift Truck Company*, 420 Pa. 97, 216 A.2d 318 (1966).

7. *Cipolla*, 267 A.2d 854, at 857 quoting from Judge Wyzanski's opinion in *Gordon v. Parker*, 83 F. Supp. 40, 42 (1949).

8. This terminology is borrowed from Sedler, *Characterization, Identification of the Problem Area, and The Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 *RUTGERS-CAMDEN L.J.* 8 (1970) [hereinafter cited as Sedler].

9. Cavers maintains that his principles of preference are to be applied when after a preliminary analysis, a true conflict is discovered. By hypothesis in a false conflict case there is only one interested jurisdiction and the law of the interested jurisdiction should govern. Cavers, note 4, at 137, 141, 167.

10. It can easily be argued that this was, in fact, the approach of the *Cipolla* court. First, the court supported the application of Delaware law because the car was garaged and insured in Delaware thus affecting insurance rates in Delaware. Then the court buttressed its argument by saying that "[It] seems only fair to permit a defendant to rely on his home state law when he is acting within that state." *Cipolla* at 856. For a further discussion of "by-product territorialism" as it affects the *Cipolla* case see text accompanying footnotes 21-29.

injury that the question should be relegated to the law governing the relationship.¹¹

Cavers reasons that a state's system of tort law is designed to safeguard the health and safety of people within its bounds and that the system of physical and financial protection would be impaired if a person who enters the territory were not subject to its laws. He then argues that since a state's plan of financial protection for the victims of violations of its standards includes the civil liability of the violator, the fact that the violator would be held to a lower standard of care or of damages in his home state are matters of little consequence to the state of injury. Since all states realize this need to maintain the integrity of their rules providing for physical and financial protection each state would wisely defer to the state of injury in a true conflict case, if the state of injury had a higher standard of conduct or financial protection.¹²

Now, all this sounds fine and quite reasonable but I'm afraid it won't wash out. The arguments simply don't support a territorial principle. Under traditional analysis a state has two reasons for enforcing its tort law: (1) deterrence and (2) compensation.¹³ In the vast majority of conflict cases the argument that a state's higher standard of financial protection deters negligent conduct is fatuous.¹⁴ I thought the Pennsylvania court in *McSwain v. McSwain*¹⁵ did a rather nice job of laying that argument to rest. Commenting on the need to apply Colorado's non-immunity rule to a Pennsylvania husband-wife the court said:

Unlike resort to a standard of care less rigorous than that demanded by Colorado of those who use its highways, resort to the law of Pennsylvania to bar the instant suit would have no adverse affect on any deterrence sought by Colorado through the use of tort liability. Since negligent operation of a motor vehicle invariably involves some hazard to persons beyond the family relationship, potential liability remains to deter unreasonable conduct on

11. Cavers, *supra* note 4, at 139.

12. *Id.* at 140-141.

13. See W. PROSSER, *THE LAW OF TORTS*, §§ 1-2 (3d ed. 1964).

14. Weintraub, *A Method For Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 228 (1963) suggest that the deterrent interest is weak because the "accident prone" highway menace is hardly deterred by rules governing civil liability. See James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950) and KEETON AND O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 15-22 (1965). For a contrary view see Blum and Klaven, *Public Law Perspectives On A Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964).

15. *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

the part of those able to insulate themselves from intrafamily immunity.¹⁶

With regard to the superior interest of the state of injury in compensation for the plaintiff so that he has adequate funds to pay his doctor and hospital bills (affectionately known as the "medical creditor" interest), it is indeed difficult to make this point the kingpin of a territorial principle for several reasons.¹⁷ First of all, the presence of first party insurance (Blue Cross, Blue Shield, medical pay etc.) has weakened this argument substantially. Furthermore, Cavers himself has decided that his first territorial principle survives even in the absence of a strong compensation interest on the part of the state of injury. Cavers raises the problem of what ought a court to do with a plaintiff who is a visitor from out of state who seeks the protection of the higher standard of financial protection of the state of injury which would be denied to him in his home state.¹⁸ In a situation where the state of injury would satisfy its need for payment of medical and hospital costs it is hard to see why the state of injury has any interest in providing more liberal compensation to the out-of-state plaintiff at the expense of its own citizen. To respond to this most difficult question, Cavers makes the following observation:

This contention neglects the consideration that the financial protection a state has prescribed, being a part of its provision for the

16. *Id.* at 96, 215 A.2d at 683.

17. The direct compensation interest of the state of injury for its own plaintiff, who is a domiciliary of the state can be a substantial one. If the plaintiff goes without compensation he could become a ward of the state. There is little question that this interest of a state for a domiciliary plaintiff is legitimate and has received early judicial recognition. *Alaska Packer's Association v. Industrial Accident Commission of California*, 294 U.S. 532 (1935). See also Currie, *The Constitution and The Choice of Law: Governmental Interests and The Judicial Function*, 26 U. CHI. L. REV. 9, 19 (1958) reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAW* 201 (1963). However, the argument proves too much. If the compensatory interest is so important then why limit it to a case where the injury occurred in the state with the higher financial standard. To rebut this, one must go the rationale behind Cavers' second principle which is based on the unfairness to a party acting in his own home state in being subjected to the law of another jurisdiction with a differing (in the second principle—a lower) standard. It is interesting that the unfair surprise argument is created by Cavers only for his second principle and is not utilized in the first. Is the plaintiff injured in his own home state not entitled to his expectation of recovery?

As long as we insist on dealing with tort expectations as affecting conduct we shall be deluding ourselves. To make the expectancy interest work for the defendant in Principle II we must argue that he has provided inadequately for his self-protection. The same could be said for the plaintiff in Principle I. The difficulty with this approach is that it does not ring true. Be that as it may, if the expectation argument has validity, it should apply to both Principles I and II. That Cavers has created the interest for Principle II only, indicates that the theory of expectation interest is inadequately explained. For this author's suggestion as to its meaning, see text accompanying footnote 35.

18. Cavers, *supra* note 4, at 143.

general security, is in part a sanction for wrongfully causing harm. As a consequence its purposes include elements of deterrence and retribution even though it may be couched in essentially compensatory terms.¹⁹

I believe we have now come full circle. In the absence of a compensatory interest in the state of injury we must view its compensatory scheme as furthering deterrent goals. But, the deterrent goals are not really meaningful since we have plenty of deterrent clout in the absence of this particular plaintiff's recovery.²⁰ Is then Cavers' first principle of preference built on a foundation of quicksand? I think not, but one can hardly be satisfied with the rationale offered in its defense.

The second Principle of Preference was directly relied on by the *Cipolla* court.²¹ It provides:

Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.²²

The facts in *Cipolla* concerned a Pennsylvania plaintiff-passenger injured in Delaware by a Delaware host. The court analyzed the case before it as a "real conflict" case since Delaware had a defendant-protecting host-guest rule and Pennsylvania the domicile of the plaintiff sought to protect its domiciliaries by granting them compensation from negligent defendants.²³ It would appear that the facts in *Cipolla* are tailor made for this second principle. Yet, when we probe to find the rationale behind this liability-denying principle the reasons given are rather unsatisfying:

Consider the response that would be accorded a proposal that was the opposite of this principle if it were advanced against a person living in the state of injury on behalf of a person coming there from a state having a higher standard of care or of financial protection. The proposal thus advanced would require the community the visitor entered to step up its standards of behavior for his

19. *Id.* at 144

20. See note 15.

21. 439 Pa. at 567, 267 A.2d at 856.

22. Cavers, *supra* note 4, at 146.

23. See note 21.

greater safety or lift its financial protection to the level to which he was accustomed. Such a proposal would be rejected as unfair.²⁴

Unfair? Why? The answer must be because a Delaware citizen ought not to be exposed to greater liability than he planned on. He would be surprised even shocked to find that while driving in Delaware he is subject to Pennsylvania law. But, now we are far afield from an interest analysis. Lest we forget, this case deals with a host-guest conflict. Assume for the moment that the policy expressed by the Delaware host-guest rule is the fear that the guest and host may collude to defraud the insurer.²⁵ Since the purpose of Delaware law is not to affect the level of defendant's conduct by encouraging him to take risks with his passenger guests, we remain with our concern that the Delaware insurer may be defrauded by collusion between the guest and host. However, our concern now is for the insurer and not the principal defendant. And to be consistent we must say that it is "unfair" to the insurer (not the defendant) to subject him to this surprise liability. It would seem that Justice Roberts has much the better argument on this point:

[If] the majority means that the insurance company, here Allstate, relied on not being held liable when setting its rates, I agree with Professor Morris that (t)he theory . . . is tautological. The rules of liability are to be dictated by insurance practices which are in turn, dictated by the rules of liability. All that can be concluded from such a premise is that whatever is, should be."²⁶

Even if we agree with Justice Roberts that the purpose behind the Delaware host-guest rule is to protect the generous host from an ungrateful guest²⁷ it is difficult to generate much enthusiasm for an "unfair surprise" argument when the host was driving a Pennsylvanian to his home in Pennsylvania. Had the accident taken place after the crossing of the state lines in Pennsylvania I rather think the court would

24. Cavers, *supra* note 4, at 146.

25. One can only guess how the majority read the purpose behind the Delaware host-guest rule. Only the dissent indulges in an in-depth analysis as to the policy behind the statute. In the discussion no question is raised as to the applicability of Delaware law in a totally domestic Delaware case where the motorist is uninsured. Although Delaware law will undoubtedly apply, if host-guest collusion is the policy behind the host-guest rule it has no relevance to the uninsured motorist case. This leads to the curious situation that Delaware will apply its law to a domestic situation when it furthers no rational purpose to do so. This author categorically rejects such nonsense. For an analysis of this problem see text accompanying footnotes 36-40.

26. 439 Pa. at 572, 267 A.2d at 859.

27. *Id.* at 858.

have found for plaintiff and would not have been overly concerned with the surprise of the defendant. And even, if the court would have seen fit to adopt Cavers' fifth principle of preference²⁸ favoring the law of the state in which the host-guest relationship was entered into; it would have done so to further values other than those of unfair surprise to the defendant.²⁹ If the unfairness which troubles Cavers and the *Cipolla* court stems from the fear that a defendant should have the right to plan for his liability exposure we must assume that he is uninsured (for if he is insured the concern belongs to the insurer). Surely, territorialism is not built on the back of the uninsured motorist.

If I may hazard an educated guess, it would be that Cavers' territorialism is more potent than the rationale offered to support it.³⁰ To support my "guesstimate" I should like to draw on a much discussed choice-of-law case arising from the embattled New York Court of Appeals, *Tooker v. Lopez*.³¹ It will be recalled that the tragic events of that case arose entirely in the state of Michigan. Plaintiff's and Defendant's deceased daughters, both New York residents, were co-eds attending Michigan State University. They and a third fellow student, a resident of Michigan embarked on a local Michigan trip which ended in the death of the two New Yorkers. The students were all in residence at the University and the trip was "intrinsically and exclusively a Michigan trip, concerned only with Michigan places, roads and conditions".³² The choice-of-law problem arose because New York has no host-guest rule and Michigan denies recovery in host-guest cases in the absence of "gross negligence or willful misconduct" on the part of the defendant.

The New York Court, in this case found for plaintiff and saddled the New York defendant with its higher standard of financial protection.

28. Cavers, *supra* note 4, at 177.

29. Cavers has serious qualms about Principle V. In certain instances such as husband-wife domiciled in a marital-immunity state who have an accident in a non-immunity state, Cavers is willing to recognize the validity of his fifth principle of preference favoring the law of the marital domicile which denies recovery. Although in *McSwain v. McSwain*, *supra* note 15, the court analyzed the case as a false conflict by negating Colorado's interests it is possible to read the case as a true conflict situation in which the court has decided the case in accordance with Cavers' Principle V. See discussion of *Elston v. Industrial Lift Truck Co.* *infra* at text accompanying footnotes 55-57. For another instance in which the Pennsylvania Supreme Court applied a Cavers' principle of preference without specifically alluding to it.

30. The author recalls Professor Cavers' presentation at a round table discussion during the Association of American Law School convention in December 1969. He intimated at that time that his principles of preference might well apply in a false conflict setting.

31. 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969).

32. *Id.* at 593, 301 N.Y.S.2d at 539, 249 N.E.2d at 409.

In doing so, the court found it necessary to determine whether this case was a true or false conflict case. In a case almost exactly on point, *Dym v. Gordon*,³³ the New York court had determined that this law-fact pattern was a true conflict. In *Tooker*, the court changed its mind:

"The teleological argument advanced by some (see Cavers, Choice-of-law Process, p. 298) that the guest statute was intended to assure the priority of injured nonguests in the assests of a negligent host, in addition to the prevention of fraudulent claims overlooks not only the statutory history but the fact that the statute permits recovery by a guest who can establish that the accident was due to the gross negligence of the driver. . . . The only justification for discrimination between injured guests which can withstand logical as well as constitutional scrutiny. . . . is that the legitimate purpose of the statute prevention of fraudulent claims against local insurers or the protection of local automobile owners—is furthered by increasing the guests' burden of proof. This purpose can never be vindicated when the insurer is a New York carrier and the defendant is sued in the courts of this state. Under such circumstances, the jurisdiction enacting such a guest statute has absolutely no interest in the application of its law."³⁴

Thus, New York has in this case on the basis of an interest analysis negated the Colorado interests which it had conjured up in *Dym*. The result—a false conflict case. I should like to create a hypothetical variant to this case by supposing that the Michigan court had spoken in the interim between *Dym* and *Tooker* and had made it crystal clear that the only policy reason supporting its host-guest rule was the "fraud on insurer" rationale. Michigan's Supreme Court being the highest appellate court of the state is presumptively the final authority when it comes to the interpretation of statutes passed by the Michigan legislature. It will do no good to rail at the Michigan court for failing to perceive Caver's teleological arguments. They have spoken with finality. Michigan's statute has one purpose and one purpose only—the prevention of fraud against insurance companies by a colluding host and guest.

Query. Now that this is a false conflict will Cavers argue for the application of New York law? I think not. Cavers has made it altogether too clear that he is greatly concerned with the development of a "statute personal" as the method for resolving conflicts problems.³⁵ One does not, except in the rarest of situations, travel in the United States with

33. 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965).

34. 24 N.Y.2d at 575, 301 N.Y.S.2d at 523, 249 N.E.2d at 397.

35. Cavers, *supra* note 4, at 150-157.

the tough tort-law of his home state on his back. But, if we are to apply a territorial rule even in a false conflict setting, then we must openly admit a naked territorial bias unsupported by an interest analysis. Have we returned (heaven forbid) to Restatement I?

ENLIGHTENED TERRITORIALISM

What is missing today in choice-of-law analysis is a little bit of "soul." In the process of destroying Restatement I there was a heavy intellectual investment made . . . too heavy. Rules of law either furthered a particular policy or didn't—it was as simple as all that. We created categories called "false conflict" and "true conflict"—useful analytical tools to be sure—but they have gotten away from us. They have become our masters rather than our servants. A reappraisal as to the multitude of functions which law plays in our society is in order.

EXPECTATION AND SCHIZOPHRENIA

When I wake in the morning I expect the sun to shine. In the evening, I expect darkness to fall. Do these expectations have juridical significance? I believe they do. Those positing an interest analysis would argue that their significance arises from the fact that expectations affect conduct.³⁶ I undertake certain activities with an awareness of the amount of light that will be available to me. I suggest, however, that expectations play a far more potent role in our life style. There is a regularity and rhythm to life in which the familiar—the habitual plays a vital role. At times it affects conduct but even when it does not

36. It is clear that Mr. Justice Roberts believes that choice-of-law expectancies in the tort area have value only as a planning tool. If it would not lead to an alteration of either of the parties' behavior the expectancies are irrelevant. *Cipolla* at 859. In this assumption Justice Roberts is in good company. See Weintraub, *A Method For Solving Conflict Problems—Torts*, 48 CORNELL L.Q., 215, 238 (1963); CURTIE, CONFLICT, CRISIS AND CONFUSION IN NEW YORK, 1963 DUKE L.J. 1, Reprinted in B. CURRIE, SELECTED ESSAY ON THE CONFLICT OF LAWS 690-705 (1963); LEFLAR, AMERICA CONFLICTS LAW §§ 106, 111 (1959); Leflar, *Conflict Law, More On Choice Influencing Consideration*, 54 CALIF. L. REV. 1584, 1594 (1966). For judicial approval of this theme see *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966) and *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

After completion of this article the author was pleased to find that Professor Amos Shapira has placed the "expectancy" problem in a broader perspective. He argues that the crucial question in assessing private interests in choice-of-law litigation should be the following:

"[c]an one justly charge a party with a timely prior notice regarding the potential transnational ramifications of the relationship at bar?" Shapira, *Protection of Private Interests In the Choice-Of-Law Process: The Principle Of Rational Connection Between Parties And Laws*, 24 SW. L.J. 574, (1970).

affect conduct, it affects our sense of tranquillity. A meteor streaking along in the sky thousands of miles from us is of interest because it is a departure from the norm. We can take this departure from the norm with a fair degree of equanimity. If, however, we should go outside on a clear night in which the moon is clearly visible and find no stars it would upset us no end. It would upset us not because we depend on starlight, but because we have the right to believe in the regularity of nature.

Law is no stranger to human activity. If we live in a world of nature—we also live in a world of law. A Delaware driver, on a trip in Delaware expects Delaware law to apply. He may be driving a Pennsylvania guest to his home in Pennsylvania but his expectations prior and subsequent to any accident is that whatever the Delaware law may be it will apply to him. It is immaterial whether it affects his conduct. People have a right to expect a regularity and rhythm from the law. If this is what those who argue for certainty as a conflict of law value are concerned with then they have a point in their favor.

It appears to me that this is not the standard *stare decisis* type of argument. Change is part and parcel of the common law and the populace has learned to live with it. What is difficult to accept is the notion that "time and space elements" play no role whatsoever in the legal framework of choice-of-law. I think we rather underestimate the embarrassment of the lawyer in the *Cipolla* case who had to explain to the defendant that he was being dragged through a trial because no one was quite sure which law governed his activities. The essence of a normal human existence is the ability to integrate ones experience. We can provide for the throwout and the bizarre but it must be just that—bizarre. To demean "time and space" in the law of conflicts is to deny an important facet of the human experience. Delaware drivers driving in Delaware deserve Delaware law—for better or for worse. When the bizarre becomes the norm—we destroy the norm. The schizophrenic is the human symbol of this distorted point of view. It behooves those who advocate fragmented choice-of-law theory to reconsider normal expectancies as an appropriate function of the law.

Lest it be said that I am attacking the "interesters" as the cause of mental disease in this country (some of my students swear it is true) let me emphasize again that I am only advocating territorialism as a normal operating principle. We can and will provide for the throwout and

will do so honestly, reflecting the teaching of the interest analysis. But, the base rule should be a territorial one.

LAW AND THE HUMAN RESPONSE

The "false conflict" dogma has another glaring fault. It has been said and it bears repeating that determining the interests or policies behind both common law and statutory rules is a risky business.³⁷ Jurisprudence becomes a deadly game rather than a philosopher's musings. But, if we are to become jurisprudes we had better be good ones. It appears to me that the governmental interest analysis has missed some rather basic jurisprudential points in the development of its theory.

Let me spin a tale for you. If you are married and have married friends, I would expect that you have experienced something like this. You invite a young married couple over to dinner. During the conversation the husband makes a not so funny remark about his mother-in-law. No one laughs. Before very long the young bride is in tears and the husband enraged. After the young guests leave the host husband and wife carry on the argument—each taking sides. The next morning the host-wife calls the young bride and offers quasi-motherly advice. It is a topic of conversation in the host's home for at least a week.

Now let me vary the hypothetical just a little. Instead of the argument between the young bride and her husband taking place in the home of the host it takes place at another friends house. After the quarrel Mrs. Friend waits until the young couple leaves and then calls her best friend Mrs. X who also knows the young bride and relates the story to her. Mrs. X may or may not relate the story to her husband. It certainly won't be the basis of discussion in the X household for a week. And Mrs. X will definitely not get on the phone and call the young bride to offer motherly advice.

I would suggest that in conflicts parlance the first hypothetical I presented was a false conflict. Why should a husband and wife involve themselves in the marital problems of dinner guests. It would seem to be "none of their business" or "officious intermeddling." And if it is their business why in Case Two do the very same friends remain uninvolved when the story is related to them second hand?

37. Rosenberg, *Two Views On Kell v. Henderson, An Opinion For The New York Court Of Appeals*, 67 COLUM. L. REV. 459, 464 (1967) and Cavers, *supra* note 4, at 96-101.

To me the answer to this problem is charmingly simple. Human beings are by nature "officious intermeddlers." If we ask what engages human beings in the process of intermeddling, I think we should find a host of causes. In some instances, it is the relationship between the people involved, in others the problem is one which touches not only the combatants but also has tangential affects on others not directly involved. But, clearly one factor which leads human beings to react is the very sight of an injustice. "Seeing is believing" and "seeing is reacting." When we react we need tools of justice to react with. This is the law in all its glory.

It has become an article of faith that in a false conflicts case the law of only one state has any claim to application. Yet, if we view some of the basic false conflict situations it would seem to me that this principle is open to serious question. Assume a husband-wife from a no immunity state who have an accident in an immunity state or a host-guest who started their trip in a non host-guest (common law) jurisdiction who have an accident in a host guest jurisdiction. The interest dogma teaches that since the state that imposes the immunity or disability on recovery in each instance has no interest in denying recovery it should not intermeddle and impose its law since it furthers no state policy to do so. In a recently published article, Professor Sedler in dealing with the problems of characterization aptly described many of the immunity type statutes and policies as "anti-tort."³⁸ In other words the conflict between the policies of the competing laws are not conflicts arising from differing resolution to tort problems but because one state has seen fit to foster policies over and above normal tort-compensatory policies—they are thus "anti-tort." He then reasons:

Since the defenses of family immunity, charitable immunity and guest relationship are grounded in policies other than those to be advanced by that area of the law we call tort and are in fact directly antithetical to those policies, the state of injury has no interest in granting that kind of immunity. This issue does not involve a tort problem, and the state of primary reference—the state having an interest in granting the immunity claimed—is elsewhere. The law of that state should be consulted first and if immunity is not given by the law of that state, there is no reason to allow the defense.³⁹

I disagree. When a state makes an "anti-tort" policy determination it

38. Sedler, *supra* note 8, at 49-78.

39. *Id.* at 54.

is making a policy judgment of the highest order. Whether its judgment is that the family order will be disturbed or that parties will collude against insurance companies—its judgment is a moral one. To say that it is a localized judgment and that this high priority moral statement is for local consumption only is to deny the potency of the very decision to negate normal compensatory policies.

When an accident occurs within a state's boundaries it would seem presumptuous to tell the state that its sense of morality is irrelevant to events that have transpired within. Family harmony and insurance fraud are national; not local, problems. If a problem arises in which the human tendency to react has been called upon, we can have little to say if the human tendency to impose one's own notion of right or wrong to the problem is engaged. We have negated the experiential in the law and because of it our conflicts law is the poorer. Edmund Cahn in his classic work *The Sense of Injustice* put it very well:

"Why do we speak of the "sense of injustice" rather than the sense of justice?" Because "justice" has been so beclouded by natural-law writings that it almost inevitably brings to mind some ideal relation or static condition or set of perceptual standards, while *we are concerned, on the contrary with what is active, vital, and experiential in the reactions of human beings*. Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative and contemplation bakes no loaves. *But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism.*

I do not mean to imply that the false conflict category is meaningless. Its input is important but not conclusive on the resolution of conflict problems. It tells us that in certain instances it would be far wiser for a court to say this is "less my business" than "yours." However, as the "time and space" aspects of the case become more related to the state of injury, it becomes more "their" business in that the human reaction to the case becomes more vital. I rather agree with Professor Cavers that *Dym v. Gordon*⁴⁰ was a good case and express my dismay at its demise.⁴¹ Because writ all over the case was the inability of the majority to wrench itself away from its human reaction to a case which was more a "Colorado" case than a "New York" case.

40. See note 32.

41. See Cavers, *supra* note 4, Appendix at 293.

LAW AS AN EDUCATOR

The pure "interest analysis" theorists have failed to perceive another fundamental function of the law. Its educational dimension is a matter of rather substantial significance. To demonstrate this function in a conflicts setting I propose to call on an excellent Cavers' hypothetical. It will be recalled that in the famous case of *Bernkrant v. Fowler*⁴² the California court was faced with an oral contract to make a will which was negotiated in Nevada in favor of a Nevada plaintiff. The consideration for the promise to make the will was that the plaintiff refinance his obligation and pay a substantial part of the indebtedness on a piece of Nevada land before the due date of the debt. In return the decedent promised forgiveness if there was any amount due and owing at the time of his death. The decedent died domiciled in California, a state, whose Statute of Frauds declares oral contracts to make a will invalid. The Nevada rule is to the contrary. Justice Traynor, in a landmark opinion, decided that it was not the purpose of the California Statute of Frauds to reach a contract so heavily centered in Nevada.

Professor Cavers' hypothetical twists the facts somewhat so that plaintiff is a Californian,⁴³ the promise made and the property located there, and the decedent-vendor a California domiciliary at the time of the refinancing. If the decedent had become a Nevadan shortly before his death whose law would apply? Would we argue that since the decedent died domiciled in a state which enforces oral contracts to make a will that the case is a false conflict? Cavers concludes that California law should apply thus denying the enforcement of the contract. His reasoning is most interesting:

"Surely the California statute is designed not merely to balk frauds and perjuries after the testator's death but also to exert pressure upon people to put their testamentary promises in signed writings, to discourage people from cherishing hopes, making plans, and taking action on the strength of oral promises of this sort. If these purposes are to be effectuated, the statute must have a present impact; the undertaking is born defective and remains so unless and until the promise is reduced to writing and signed or an estoppel is worked.⁴⁴

How does one assess the above argument? Does it really make that much

42. 55 Cal. 2d 588, 360 P.2d 906 (1961).

43. D. Cavers, *Oral Contracts To Provide By Will and the Choice-of-Law Process: Some notes on Bernkrant* published in *PERSPECTIVES OF LAW, ESSAYS FOR AUSTIN WAKEMAN* SCOTT 38, 60 (1964).

44. *Id.* at 60.

difference to California that this individual contract be denied enforcement? Will the impact on plans, hopes and expectations be altered throughout that great state simply because of the enforcement of this isolated contract? I think not. Yet, I believe Cavers to be correct.

The law is a teacher and an educator. No teacher is able to instruct in a vacuum. And the law does not do its teaching in a vacuum. It calls upon the events which transpire before it for its instruction—they are its primer. To say that a contract made totally in California and invalid under its law is not part of California jurisprudence is to utter an absurdity. I believe the same applies to an accident in Ontario between a New York host-guest. The statement by Ontario law that the evils of insurance fraud are so great that they dwarf the normal compensatory rule of tort liability is a powerful one indeed. I do not see that Ontario has lost the right to make the statement merely because the case deals with New York residents. I do not think that they should impose their solution on this particular problem. But, to argue that a false conflict case has due process and full faith and credit implications is to presume too much.⁴⁵

Again, even if we conclude that in the classic false conflict setting Ontario ought not to apply its law, I think it rather clear that with regard to the educational dimension of law as the "time and space" elements gravitate to Ontario it is no longer unfair for Ontario to do so. And the point comes when the opposite is true. Not only does Ontario have the right to do so but it becomes the proper thing to do. It is proper not only for Ontario, but for New York as well since each state should be willing to recognize the educational function of law in another jurisdiction.

It goes without saying that I disagree strongly with the Cavers critics who argue that a retrenching on his Principles of Preferences is in order.⁴⁶ The task is now to learn to work with the tools which he has provided for us. This is a substantial task; because as Cavers suggests his method does not call for agreement on the particular principles or

45. Currie, *The Constitution And The Choice Of Law: Governmental Interests And The Judicial Function*, 26 U. CHI. L. REV. 9, 21 (1958) reprinted in B. CURRIE, *SELECTED ESSAY ON THE CONFLICT OF LAWS* 188,200 (1963). There may indeed be instances when a false conflict may have due process implications but overuse of this argument in a standard F-X type case is, in the author's view, unsupportable.

46. Baade, *Counter-Revolution or Alliance For Progress? Reflections On Reading Cavers, The Choice-Of-Law Process*, 46 TEX. L. REV. 141 (1967), and Ehrenzweig, *A Counter-Revolution In Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

their applicability to given fact situations.⁴⁷ There is much work to be done. The next question I shall now address some very brief remarks.

CIPOLLA AND THE LOCUS OF THE RELATIONSHIP

Cipolla v. Shaposka has relationship problems. Given the state of the record in the case it is not at all clear that by focussing more heavily on the factual context of the relationship that the court could have reached a different result. It should have, however, explored the possibility. The decision to apply Delaware law would have been all the more meaningful. Even if the majority could afford the luxury of less than careful examination of the facts, it seems clear that the lone dissenter, Mr. Justice Roberts, could have milked the facts of this case to support his result on more traditional grounds.

The relationship between the host and guest is the focal point of *Cipolla*. Where and how the relationship was entered into cannot be irrelevant to the resolution of the case. These facts not only affect this author's predilections on how to resolve this conflict problem but are crucial to a court which has openly embraced Cavers' principles of preference as the Pennsylvania court has done. When the court adopted Cavers' territorial principle favoring the lower standard of liability of the state of conduct and injury it was certainly aware of the caveat built into that principle viz. that it only applied "where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship."⁴⁸ Where the "seat of the relationship" is a state which has a higher standard of financial protection than the state of injury, Cavers' fourth principle of preference selects that law to govern.⁴⁹

Admittedly seeking the "seat of the relationship" is a difficult task. Some have dispaired of ever determining its locus.⁵⁰ And if it could be found, it is argued, that it is of questionable relevance.⁵¹ Having argued so strongly in favor of a territorial bias earlier in this article it might appear unseemly to favor the anti-territorial "relationship" principle. However, the "time and space" elements of a conflict case can make the relationship between the parties the dominant influence in deciding

47. Cavers, *supra* note 4, at 136.

48. *Id.* at 146.

49. *Id.* at 166.

50. Rosenberg, *supra* note 36, at 463.

51. *Id.*

between two interested jurisdictions.⁵² As such, even an anti-territorial "relationship" principle takes on a territorial cast—but now it is the "territory" in which the relationship is centered.

Now back to *Cipolla*. In this case the record indicates that the defendant, Shaposka, drove the plaintiff-Cipolla home on the fateful day because defendant wanted to pick up some tools he had lent the plaintiff.⁵³ It is also clear that defendant drove the plaintiff home on numerous occasions when he had difficulty getting a ride home.⁵⁴ Is this sufficient to invoke the anti-territorial "relationship" principle and thus apply the Pennsylvania higher standard of financial protection? I think not. But, in all honesty one must admit that there is a slight tug toward finding a Pennsylvania relationship. Assume, however, that defendant Shaposka has come to Pennsylvania to study for final exams with plaintiff-Cipolla. If Shaposka had driven back to school and the accident had occurred in Delaware, a stronger case could be made out for the Pennsylvania relationship so that Pennsylvania law might govern. It might well be that Cavers would support such a conclusion. One can only guess since Cavers leaves that question somewhat open. He raises the following question:

Suppose, however, that one or both of the parties came from the state of injury or from another state with a guest-passenger statute. Does the fact that the relationship was created in New York (a common law jurisdiction) override this circumstance? Ought New York law still to be viewed as controlling a guest passenger relationship created in New York between two Ontario citizens in view of that province's refusal to allow a guest to recover under any circumstances? I should think an affirmative answer to that question very doubtful, despite the fact the principle may in terms appear to cover it. More however can be said for applying New York law to a New York driver who injures an Ontario guest in Ontario or even for giving its benefit to a new York guest who is in Ontario by his Ontario driver, the relationship having in both cases begun in New York. (Parentheses, explanations and emphasis added.)⁵⁵

Translating the above into *Cipolla* facts it appears that Cavers would

52. In certain cases, such as in *Dym v. Gordon* or *Tooker v. Lopez*, the "time and space" elements may so dominate the case that even if the case is analytically a false conflict, the territorial law should govern. See text accompanying footnote 36.

53. Deposition of M. F. Cipolla, Record, Vol. 1, at 16a, *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970).

54. Deposition of John Shaposka, *Id.* at 37.

55. Cavers, *supra* note 4, at 175.

suggest that if a nominal Pennsylvania relationship between Cipolla and Shaposka could be established then it might be fair to apply Pennsylvania law to the case. If the mere fact that the parties entered into the car to make a trip together from Pennsylvania is enough to build a Pennsylvania relationship then perhaps the fact that the purpose of the trip was a Pennsylvania act (the returning of defendant's tools in Pennsylvania) is sufficient to establish a Pennsylvania relationship.

At this point, I find myself pushed to an even stronger territorial bias than Cavers. It seems to me that the "seat of the relationship" rule requires stronger "time and space" considerations than Cavers allows. *If the territorial considerations which I have developed earlier have any validity then they cannot be side-tracked by synthetic relationships which have no "time and space" dimensions.* I am unwilling to support the application of anything but Delaware law when a Delaware driver is driving in his own home state unless the Pennsylvania relationship between the plaintiff and defendant has true depth and dimension to it. I can envisage a case where a Delaware citizen drives into Pennsylvania and requests a Pennsylvania doctor to come to his home for an emergency house call. The Delawarean drives the doctor to his home and on the way back before crossing the Delaware line is involved in an accident in which the doctor is injured. To argue for the application of Pennsylvania law in this instance does not upset me since the case is essentially a "Pennsylvania case." The Pennsylvania relationship has time and space dimensions and can be defended as being crucial to the resolution of the case.

Notwithstanding my own bias as to how to handle the "relationship" issue and my conclusion that on any reading of the facts in this case Delaware law should apply. I am genuinely sorry that the decision did not focus in on this problem. As precedent, it would have made the decision a far more potent one. For the majority it would have meant shaping the contours of Cavers' second principle of preference upon which they relied. It would have said that unless the relationship between plaintiff and defendant is more clearly a Pennsylvania one, Delaware law will apply. The dissent could have argued for the application of Pennsylvania law on something more than—equal interest + better law = common law liability. At the very least, the dissent should have sought to wrench this case from the strong Delaware ties which appear on its face. The pattern and practice of driving the plaintiff home to Pennsylvania and the trip in this instance to pick up tools from the

plaintiff in Pennsylvania would go a long way toward making the dissent's conclusion to apply Pennsylvania law a credible one. Furthermore, it would have permitted Mr. Justice Roberts greater leeway in future cases to apply the territorial law where the out of state factors are not so clearly visible.

THE FORGOTTEN ELSTON CASE

The Pennsylvania court correctly characterized *Cipolla* as a true conflict case. It also concluded that it could seek little direction from prior Pennsylvania conflict cases since they were false conflict cases. I am puzzled. In 1966 the Pennsylvania Supreme Court decided a rather important true conflict case. For some inexplicable reason it did not even rate a footnote citation in *Cipolla*. Tis a shame that the only clearly relevant authority was so blatantly ignored.

The case is *Elston v. Industrial Lift Truck Co.*⁵⁶ A Pennsylvania resident working in New Jersey was injured there while operating a fork-lift truck purchased from a Pennsylvania corporation. Elston, the injured workman sought and received workmen's compensation benefits pursuant to the New Jersey Workmen's Compensation Act. Subsequently, Elston filed suit for negligence in Pennsylvania against Industrial Lift Truck Co., the manufacturer of the lift-truck. Industrial then sought to join Elston's New Jersey employer by filing a third-party complaint alleging that the employer by reason of its conduct was jointly and severally liable. The New Jersey employer sought to resist the joinder claiming that New Jersey law insulated him from liability since it provides that when an employee entitled to workmen's compensation benefit pursues a common law action against a third party based upon negligence, the third party is barred from joining and claiming contribution from the plaintiff's statutory employer. Industrial, the Pennsylvania corporation seeking the joinder, argued that Pennsylvania law should govern since it permits a joinder limiting the contribution of the statutory employer to the extent of his liability under workmen's compensation.

Mr. Justice Roberts, put the issue very clearly in focus:

In the instant case, however, Industrial, the party asserting a right to contribution, is a stranger to the compensation system. And, in a narrow sense, unlike an employee covered by New Jersey's com-

56. 420 Pa. 97, 216 A.2d 318 (1966).

pensation program it received no quid pro quo from that state to compensate for the loss of its right to contribution.⁵⁷

The issue then very simply is, that a Pennsylvania domiciliary seeks recovery (contribution) from a New Jersey defendant. New Jersey law will not permit contribution because it has provided for a compensation plan which does not load the cost of contribution on the employer even if he is negligent. On the other hand the plaintiff seeking the contribution is not a New Jerseyite. New Jersey's workmen's compensation problems are not his concern and his state has sought to spread the cost of industrial accidents in a different manner. How resolve this conflict?

The Pennsylvania court concluded that New Jersey law must govern. Why?

[W]ere Industrial to prevail, the Pennsylvania policy of permitting contribution would be imposed upon the New Jersey program of workmen's compensation. Pennsylvania thus, would interject a limitation on the manner by which New Jersey could determine to meet the social costs of its industrial accidents. Such an approach, in our view would be unsound. The extent to which the New Jersey program of workmen's compensation should assimilate the equities underlying contribution is a determination more appropriately to be made by that state.⁵⁸

Are we truly to believe that an occasional third party contribution suit will throw the costing of New Jersey Workmen's Compensation program out of kilter? I suggest that what the Pennsylvania court did in *Elston* is adopt Cavers' second principle of preference just as they did in *Cipolla*. The court viewed it as unfair for a New Jersey employer who acted and caused injury in New Jersey to be subjected to Pennsylvania law simply because a Pennsylvania corporation would be adversely affected if New Jersey law would apply. Since the *Elston* facts did not indicate any special Pennsylvania relationship which would take the case out of the operation of Cavers' second territorial principle the court decided to apply the New Jersey law which denied liability. The principle applied seems to be a rational one. The integrity of any state's system of law should not be tampered with merely because there are out-of-state side effects. Very special circumstances must exist for an anti-territorial principle to operate and when they are not clearly in focus the territorial bias stands firm.

57. 216 A.2d at 323.

58. *Id.* at 324.

In failing to draw the *Elston* analogy the majority missed a golden opportunity to place the *Cipolla* case in a broader context thus demonstrating the overall utility of principles of preferences not only as an analytical tool but also as method of effectively predicting results in conflicts cases. *Elston* strengthened their position considerably. Mr. Justice Roberts who authored all of the very excellent pre-*Cipolla* Pennsylvania conflict opinions including *Elston*, in failing to discuss the impact of *Elston* has left us guessing as to his future choice-of-law methodology. The two cases can without doubt be distinguished. I do not believe, however, that they are poles apart. Though expectancy and reliance interests differ in the two cases I am unwilling to accept these arguments as the basis of the territorial preference in *Elston* over the domiciliary interest to *Cipolla*. Something more must support the differing results.

CONCLUSION

Cipolla v. Shaposka is a good case. It is strong not because it adopted a Cavers' principle of preference or because it indulged in a rigorous interest analysis. The strength of *Cipolla* lies in the willingness of the court to trust its judicial instincts of fairness and justice to the parties over the overly sophisticated attempts of the scholars to intellectualize legal concepts to the point of absurdity. Having attempted to support with argumentation that the territorial bias is based on some rather common sense notions about law and its functions in our complex world, I revel in the courts decision. Even handed justice had a good day in Pennsylvania.