Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes

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Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes

JOHN BERNARD CORR*

The author critically evaluates the adoption of the modern learning model in choice of law analysis. After evaluating the judiciary’s use of this model in seven jurisdictions, the author concludes that the traditional learning is better suited to resolving choice of law issues.

I. INTRODUCTION

In most states, courts now apply modern approaches to choice of law. Their application is disparaging because of the scholarship

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1. For the purpose of this article, the “modern approaches” to choice of law will denote those techniques by which courts identify states with interests in a particular issue before a court, and then decide which of the interested states has the greatest interest in having its law applied. See R. LEFLAR, AMERICAN CONFLICTS LAW § 92, at 185-86 (3d ed. 1977).
upon which these modern approaches to choice of law rest. When traditional approaches² still predominated in American courts, critics of the traditional learning inadvertently enjoyed a special advantage. Years of experience with older choice of law rules offered ample opportunity to expose the presumed weaknesses of the traditional learning as it actually operated. Moreover, until modern approaches substantially supplanted the traditional rules, no body of experience existed by which to test the quality of the modern scholarship’s proffered alternatives. In short, advocates of the modern learning were for many years as well placed as a fencer who is allowed to thrust without the burden of having to parry.

Now that the modern approaches have held wide sway for a decade or more, however, the opportunity exists to determine if the new techniques achieve the superior blend of justice, predictability, and consistency their proponents have claimed for them.³ One

Although legal scholars have made efforts to draw meaningful distinctions between the various strains of modern learning that have appeared over the years, it never has been clear that those distinctions have made much practical difference to the courts. Id. § 99, at 100 ("[A]ll the modern theories are being bundled together by the Courts, to make up the new law of choice of law."); E. SCOLLS & P. HAY, CONFLICT OF LAWS § 17.11, at 567-68 (1982): "The case law which employs [modern approaches] presents a confusing picture. Imprecise and over-zealous citations to sundry authorities often make it difficult to determine with any kind of certainty on what theory a case may be said to have been decided, if indeed the theories are fully distinguishable." (Footnote omitted).

2. For the purpose of this article, the “traditional approaches” to choice of law will denote the method that the Restatement establishes. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934). This method does not rest upon a determination of the most interested state. Instead, the traditional approaches typically apply the law of the situs, i.e., the state in which events giving rise to a cause of action occurred. In tort actions, this rule of lex loci commonly results in the application of the law of the state in which the last event necessary to constitute a tort occurred; in contract actions, lex loci usually looks to the law of the place of contracting for questions that go to the validity of a contract, and to the law of the place where the contract will be performed for questions that go to contract performance. For a further development of the traditional approaches, see id., §§ 377-90.

3. Advocates of modern learning recognize that when traditional rules are applied without regard to just results, they will operate in a rather predictable, uniform way. See B. CURRIE, Married Women's Contracts: A Study in Conflict-of-Laws Method, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 100 (1963) ("The most forceful affirmative defense that can be made for the traditional method is that it leads to uniformity of result, regardless of the state in which the action is brought."). Advocates of modern learning often point out, however, that courts operating under traditional rules tend not to apply those rules without regard to results. Instead, when faced with the prospect that application of traditional rules will produce unjust results, such courts may manipulate the traditional rule through devices such as public policy. Such manipulation, of course, undermines predictability and uniformity. See B. CURRIE, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 159 (1963) ("The uniformity and certainty promised by the system are therefore to a large extent illusory."). Advocates of modern learning, therefore, promote their systems as not only operating well, but also as sometimes more predictable than the traditional rules. See, e.g., LEFAR, Choice of Law: A Well-
way to make this determination is to examine the way the doctrine of "public policy" actually operates in selected states that utilize modern choice of law thinking as well as in those jurisdictions that adhere to the traditional rules.

For the purpose of choice of law, one may define public policy as that doctrine which permits a court to reject a cause of action based on the law of a different jurisdiction on the ground that the other jurisdiction's law is not only different from but also offensive to generally accepted values within the forum.4 The doctrine is an especially useful vehicle for evaluating the merits of modern and traditional learning, because it is one of the few features of the old learning to have survived the last generation's surge into modern choice of law thinking. Indeed, it appears that no matter which variation of modern learning a state may have adopted, public policy is retained as an instrument for adjudicating choice of law issues.8 Public policy, therefore, is a rare point of common ground upon which one may directly compare the actual operation of traditional and modern approaches.

Based on the examination that will follow, the thesis of this article is that proponents, at best, have greatly overstated their claims of success for the modern approaches. In fact, the recent application of public policy doctrine in American courts demonstrates that modern approaches have failed completely to use public policy in a manner superior to the way in which the traditional learning uses it. Because the legitimacy of modern approaches rests

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4. A standard source has described public policy in the following manner:
   Under the traditional approach to choice of law, the forum's territorially-oriented rule might refer to a law, the enforcement of which would be offensive to the public policy of the forum. In these circumstances, the forum might then refuse to entertain the foreign cause of action and, in effect, deny the plaintiff access to its courts.

E. Scoles & P. Hay, Supra note 1, § 3.15, at 72-73.

heavily on the assumption that those approaches are superior to older rules, the failure of modern approaches to make any headway with public policy indicates, if it does not prove, that modern learning is a fortress built over a sinkhole — superficially formidable, but prone to collapse under the additional weight of close examination of its actual operation.

The article will begin with a summary of the typical objections advocates of modern approaches have to the use of public policy as applied in traditional choice of law. Then, using some forty-odd cases decided since 1976 in which public policy was an issue, the article will assess and compare the application of public policy in courts still operating under traditional rules with the way courts that have adopted modern approaches have applied it. That comparison will demonstrate that the public policy doctrine is not significantly different under either approach. The conclusion will offer suggestions for extricating choice of law doctrine from the conundrum in which it is currently trapped, and assess the weaknesses public policy exposes in modern systems.

II. PUBLIC POLICY AND THE COMMENTATORS

Opponents of traditional approaches have zeroed in on the public policy doctrine with regularity. In the 1920s, before modern learning had made any progress, Professor Lorenzen wrote that “[t]he doctrine of public policy in the Conflict of Laws ought to have been a warning that there was something the matter with the reasoning upon which the rules to which it is the exception were supposed to be based.” 6 Professor Cavers had a more measured approach, but he still struck at public policy for “its somewhat cavalier dismissal of a foreign law, [dispensing] with the necessity for close analysis.” 7 The triumph of the modern learning did not end the criticism. Professors Reese and Rosenberg have characterized

7. Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173, 184 (1933). Professors Paulsen and Sovern had some qualified words of defense for the doctrine. See Paulsen & Sovern, “Public Policy” in the Conflict of Laws, 56 Columbia L. Rev. 969, 980-88 (1956) (courts usually apply public policy only when the forum has an important interest in the outcome of the case). At the same time, Professors Paulsen and Sovern also describe public policy as a potential “substitute for thinking” or a “means of shifting responsibility for a decision.” Id. at 987, 988. One conclusion they reach is that in tort actions, “[l]ittle but the unhappy ingredient of local pride is added by analyses in terms of public policy.” Id. at 994.
public policy as "a brute force type of . . . argument," and Professor Weintraub has encapsulated resistance to public policy in a single sentence:

The danger of the traditional view of public policy is that its operation is likely to be haphazard and that, if utilized to avoid a result on the merits, the forum is more likely to deny enforcement to foreign law than if the forum faces the issue squarely and applies either forum law or foreign law to dispose of the case on the merits.⁹

The focal point of the criticism, then, is the failure of courts using public policy to identify and adhere consistently to an articulated standard against which scholars and practitioners could measure arguments for the application of public policy. Failure to use such a standard, the reasoning goes, releases courts from their obligation to refrain from arbitrary decision-making based on a judge's highly personalized notion of justice: thus, Professors Reese and Rosenberg's characterization of public policy as mere "brute force." A string of judicial decisions often cited in support of that sort of arbitrariness comes from the courts of New York, which have scuffled with questions of public policy about as long as anyone.

This line of authority began with *Loucks v. Standard Oil Co.*,¹⁰ a suit arising from the death of a New York domiciliary in a Massachusetts highway accident. The Massachusetts wrongful death statute differed from comparable New York law, because Massachusetts established both a minimum and a maximum award that plaintiffs could recover. Judge Cardozo concluded that the court should apply Massachusetts law, because it did not "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹¹

In the eyes of the commentators, Judge Cardozo established an admirably high threshold that had to be attained before the court would invoke a public policy exception.¹²

Some subsequent New York decisions, however, indicate that there was less to the *Loucks* standard than met the eye. In *Mertz*

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9. R. Weintraub, Commentary on the Conflict of Laws § 3.6, at 84 (2d ed. 1980).
11. Id. at 111, 120 N.E. at 202.
12. See, e.g., R. Leflar, supra note 1, § 48, at 91. (Judge Cardozo afforded "enlightened hospitality to extrastate causes of action.").
v. Mertz, the court of appeals refused to enforce Connecticut law permitting a wife to sue her husband in tort. The court reasoned that, because New York law afforded spouses immunity from such liability, it would violate New York public policy to enforce the Connecticut cause of action. Mertz's reasoning identified a side of Loucks that the commentators did not highlight. If determination of public policy were left wholly to judicial identifications of "fundamental values," there would be a distinct risk that a judge with different views might ignore constitutional and legislative declarations of the forum that were important to a state. Mertz tried to assure appropriate deference to forum law.

The courts may not read into the law a limitation created by a supposed public policy, founded on [their] own notion of expediency and justice . . . . [T]he courts [may not] disregard a limitation, contained in the law of the state, established by authority and tradition, because the court could not discern a sound public policy back of the law. 14

The commentators, however, saw something else in Mertz's assertion that "a state can have no public policy except what is to be found in its Constitutions and law." 15 Scholarly comments protested that invocation of the Mertz public policy test would preclude application of foreign law in the large number of choice of law cases where foreign law differed from forum statutes. As commentators saw the situation, the result would be that public policy, intended to be no more than an exception to general choice of law rules, would actually supplant those rules in the majority of cases. 16

14. Id. at 473, 3 N.E.2d at 599. Judge Lehman did not think the forum's common law was entitled to as much deference as its constitution and statutes. "Only the unwritten law resting upon judicial precedent is plastic . . . . [I]n formulating a rule, individual notions of public policy may be given effect only where the court finds that its own notion of public policy is so generally held and so obviously sound that it is in fact a part of the law of the state." Id. at 471-72, 3 N.E.2d at 599.
15. Id. at 472, 3 N.E.2d at 599.
16. See, e.g., R. Weintraub, supra note 9, § 3.6, at 83 ("Judge Lehman's definition of public policy was so parochial that, if applied literally, all conflicts analysis would be ended. No foreign rule that differed from local law could be applied at the forum."); W. Rees & M. Rosenberg, supra note 8, at 391 (quoting with apparent approval Curtis v. Campbell, 76 F.2d 84 (3d Cir. 1935), cert. denied, 295 U.S. 737 (1935) for the notion that if the forum refuses to apply foreign law on public policy grounds, because foreign law contradicts forum law, then courts could rarely enforce foreign law). But see R. Weintraub, supra note 9, § 3.6, at 84 ("There is, however, nothing wrong with Judge Lehman's definition of public policy as everything found in the laws of the forum if the policies underlying those laws are utilized to assist in articulating a reasoned choice between the law of the forum and the law..."
Commentators just as strongly criticized the more recent opinion in Kilberg v. Northeast Airlines, Inc., 17 which involved facts very similar to those in Loucks. In Kilberg, a New York domiciliary bought an airplane ticket in New York for a trip between New York and Massachusetts. The New Yorker was killed when the plane crashed in Massachusetts. The choice of law issue before the court was whether to apply Massachusetts's limitation on recovery in wrongful death actions. This time, unlike Loucks, the New York Court of Appeals concluded that the Massachusetts limitation violated New York public policy. Noting that the New York constitution had long prohibited any limitation on recovery, 18 Chief Judge Desmond staked out the court's position in no uncertain terms:

The absurdity and injustice [of limitations on recovery in wrongful death actions] have become increasingly apparent in the six decades that have followed [enactment of the constitutional prohibition]. For our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law. 19

As in Mertz, the commentators' quarrel with Kilberg is with the reasoning, not the decision. As Professor Weintraub saw it, "a wise and desirable resolution of the true conflict . . . was made to appear an unfortunate step backward to the narrowly provincial thinking that relied upon the epithets of 'procedural' and 'public policy' to avoid applying a rule different from that of the forum." 20 Professors Reese and Rosenberg took issue with the court's

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18. Judge Cardozo, in the Loucks opinion, never mentioned that the New York constitution prohibited limitations on recovery in wrongful death actions. By disregarding that prohibition, the court in Loucks gives credence to Judge Lehman's concern expressed in Mertz that a literal reading of Loucks affords judges—public officials who may be appointed instead of elected and who may not be intended to serve as community representatives in the same way that legislators are representative—almost unbridled discretion to apply their personal notions of "good morals" and "deep-rooted traditions." Loucks, 224 N.Y. at 111, 120 N.E. at 202.
19. 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.
20. R. Weintraub, supra note 9, § 6.15, at 300-01.
"sledgehammer use of the 'public policy' argument." Still another source considered Kilberg an example of the "abuses of the public policy exception." A final widely cited New York public policy case is Intercontinental Hotels Corp. v. Golden, in which a Puerto Rican gambling establishment sought to enforce gambling debts incurred by a New York domiciliary in Puerto Rico. The debts, and the underlying gambling activity, were lawful in Puerto Rico. In New York, people who gambled in such a manner were outlaws, "and all gambling contracts made with them are void." Rejecting a public policy defense to the Puerto Rican debt, the court of appeals also repudiated the Mertz standard of public policy and returned to the test enunciated in Loucks:

Public policy is not determinable by mere reference to the laws of the forum alone. Strong public policy is found in prevailing social and moral attitudes of the community . . . . [W]e should measure [public policy] by the prevailing social and moral attitudes of the community which is [sic] reflected not only in the decisions of our courts in the Victorian era but sharply illustrated in the changing attitudes of the people of the State of New York. The legalization of pari-mutual betting and the operation of bingo games, as well as a strong movement for legalized off-track betting, indicate that the New York public does not consider authorized gambling a violation of "some prevalent conception of good morals [or], some deep-rooted tradition of the common weal." [citing Loucks].

Golden has enjoyed immunity from the criticism that attaches to Mertz and Kilberg. In fact, commentators even have praised Golden. The pattern of praise for Loucks and Golden and of criticism of Mertz and Kilberg discloses an interesting correlation. Commentators have praised decisions that reject the public policy argument but have criticized decisions that uphold public policy exceptions. A suspicious individual might conclude that commentators who advocate modern approaches simply do not like public policy,

24. Id. at 14, 203 N.E.2d at 212, 254 N.Y.S.2d at 530.
26. See R. LeFlar, supra note 1, § 48, at 91 (In Golden, Judge "Cardozo's enlightened hospitality to extrastate causes of action has . . . been reinstated.")
at least as applied in traditional systems. Of course, correlation and causation are not always the same, and in any event, it may be unfair to base any conclusion about commentator bias on a data base containing only four samples. It is, however, the cited commentators — all advocates of at least one of the modern approaches — who chose those New York decisions as the foundation for so much of their assessments of public policy as it operated in the traditional systems. It is, therefore, not unfair to ask why commentators, who defend the modern approaches, have so much difficulty approving traditional-approach decisions in which application of public policy exceptions worked well.27 Perhaps it is, as the commentators would have us believe, that public policy simply does not work well in the traditional scheme. But sometimes failure appears because that is what the viewer wants to see.28 Failure may also be relative; one may excuse a jockey who finishes second in a two-horse race for characterizing his own performance as “second-best” and his opponent’s arrival at the wire as “next to last.” Similarly, defenders of the modern approaches have largely left undone any serious effort to compare the operation of public policy under the old scheme with its operation under the modern approaches.

That comparison is now overdue. Before turning to an assessment of public policy under traditional and modern approaches, however, a reader should store one fact gleaned from the commentators’ dissection of public policy cases in New York: commentators have strongly criticized courts in New York operating under traditional rules for invoking public policy as identified in (1) state law at least nominally intended to further a state’s policy of fostering stability in families29 and (2) a provision of the state constitution.30 When this article proceeds to a discussion of the use of pub-

27. The author has used two of the standard conflict of laws casebooks, inter alia, as sources of commentary about public policy in the traditional learning. Although both casebooks devote substantial space to analysis and criticism of the application of traditional approach public policy, neither book identifies a single case in which invocation of public policy under the traditional rules has worked well. See W. REESE & M. ROSENBERG, supra note 8, at 384-96; R. CRAMTON, D. CURRIE & H. KAY, supra note 22, at 126-31, 135-45.

28. Cf. Speech by Winston Churchill, House of Commons (Jan. 22, 1941), quoted in J. BARTLETT, FAMILIAR QUOTATIONS 744 (1980) (“I do not resent criticism, even when, for the sake of emphasis, it parts for the time with reality.”).

29. See supra notes 13-16 and accompanying text; see also W. PROSSER & W. KEETON, ON THE LAW OF TORTS 902 (5th ed. 1984) (One reason offered for interspousal immunity is that interspousal actions “would destroy the peace and harmony of the home.”).

30. See supra notes 17-22 and accompanying text.
lic policy in the modern learning, that fact will be a useful benchmark by which to measure the improvement modern learning has allegedly brought to choice of law.

III. PUBLIC POLICY AND THE TRADITIONAL LEARNING

A. General Standards for Identifying Public Policy

Of twenty-one cases in which courts operating under traditional choice of law rules addressed public policy issues, thirteen of the courts invoked public policy and refused to apply foreign law. Among the courts that addressed the sources of forum public policy, a general consensus exists on one point: mere dissimilarity between foreign and forum law should not in and of itself give rise to the invocation of forum public policy. Beyond that point of agreement, views as to the sources of public policy are both sweeping and notably fluid. The Supreme Court of Tennessee found

31. See infra notes 118-218 and accompanying text.

Federal courts sitting in diversity are obligated to apply the choice of law rules of the state in which they sit. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Therefore, they should reach the same choice of law result that a state court would reach: For this reason, the author, in this study, cites federal decisions interchangeably with state court decisions.

33. The general rule is that a court considering a public policy issue will evaluate only the public policy of the forum. See, e.g., Norris v. Kunes, 166 Ga. App. 686, 305 S.E.2d 426 (1983) (The court did not consider the public policy of Maine.). The same approach applies in states that have submitted to the modern learning. See National Starch and Chemical Corp. v. Newman, 577 S.W.2d 99 (Mo. Ct. App. 1978) (New York and Georgia public policy is no defense to the application of Missouri law.). But see International Aircraft Sales, Inc. v. Betancourt, 582 S.W.2d 632 (Tex. Civ. App. 1979) (The court refused to enforce contracts that parties formulated to violate the law of another country, even if the contracts were not contrary to the public policy of the forum or of the jurisdiction in which the parties enter into them.).

Tennessee's public policy in the state's "constitution, its statutes, and the decisions of its courts." Other courts provided standards for determining public policy that are even broader and less precise. Very often such standards appear to vest great discretion in the courts. The Maryland Court of Special Appeals, for example, stated Maryland's standards with respect to public policy:

[Public policy is no more and no less than what is believed by the courts and the legislature to be in the best interests of the citizens of this State. Anything that tends to undermine or erode either the declared or the undeclared best interest of the general health or moral welfare is said to be against public policy.]

The first sentence of this declaration evokes the Tennessee standard; but, the second sentence indicates that Maryland's courts are free to find public policy in arguably subjective values not reached by Maryland's constitution, statutes, or courts. The North Carolina Court of Appeals used a single disjunctive conjunction to afford itself the same broad discretion: "Comity will not be so extended where the situs rule is abhorrent to the public policy of our state . . . or where it would operate in opposition to settled statutory policy or override express statutory provisions of this state." In a case involving covenants not to disclose information

35. Hyde v. Hyde, 562 S.W.2d 194, 196 (Tenn. 1978). See also State ex rel. Meierhenry v. Spiegel, Inc., 277 N.W.2d 298, 300 (S.D. 1979), appeal dismissed for lack of a fed. question, 444 U.S. 804 (1979) ("The primary sources for declarations of the South Dakota public policy in areas such as the one presently under consideration are the constitution, statutory law and judicial decisions.").

A year before the cutoff date for this study, the Michigan Court of Appeals defined public policy in a way that anticipated Hyde. Branyan v. Alpena Flying Serv., Inc., 65 Mich. App. 1, 236 N.W.2d 739, 743 (1975) ("The public policy of a state is fixed by its constitution, its statutory law, and the decisions of its courts; and when the Legislature enacts a law within the limits of the constitution, the enactment insofar as it bears upon the matter of public policy is conclusive."). Only a few years later, however, the same Michigan court applied a somewhat different public policy standard. Deciding to apply a Georgia statute of limitations rather than its own, the Michigan Court of Appeals rejected a public policy argument. "We see nothing immoral, unjust to, or inconsistent with the interests of our citizens in applying this statute of limitations." Turner v. Ford Motor Co. 81 Mich. App. 521, 526, 265 N.W.2d 400, 403 (1978) (per curiam).

36. Linton v. Linton, 46 Md. App. 660, 661, 420 A.2d 1249, 1251 (Md. Ct. Spec. App. 1980). In contrast to the central role Maryland courts may play in identifying public policy, Tennessee courts are assigned a role that is distinctly secondary to the preeminent legislative responsibility for identifying public policy. See Hyde v. Hyde, 562 S.W.2d 194, 196 (Tenn. 1978) ("Primarily, it is for the legislature to determine the public policy of the state, and if there is a statute that addresses the subject in question, the policy reflected therein must prevail.").

and not to compete, the Supreme Court of Georgia held that covenants that detrimentally "affect the interests of this state" implicate public policy.38

These few cases are representative of most opinions in which courts using traditional rules tried to identify general public policy standards. Taken together, these cases suggest several common characteristics: first, courts using traditional rules do not appear to have established a consensus on a suitable standard for applying public policy; moreover, at least some courts appear determined to define public policy in a manner that preserves for the courts almost absolute discretion in determining what may constitute public policy in a particular case;39 and finally, whatever praise the commentators may heap on the public policy standard Judge Cardozo declared in Loucks,40 it remains a standard that traditional-approach states have not generally adopted. Declared law and applied law, however, are not necessarily coterminous; and it remains to be seen how or if these public policy characteristics, as enunciated, translate into issues of public policy in particular cases.

B. Public Policy as Applied Under the Traditional Approaches

1. SOURCES OF PUBLIC POLICY

When courts operating under traditional rules decide to invoke a forum public policy, among the sources of public policy that they cite are the following kinds of statutes: wrongful death legislation affording broader possibilities of recovery than the situs state would have allowed;41 legislation permitting the enforcement of


The laws of other states and foreign nations shall have no force and effect of themselves within this state further than is provided by the Constitution of the United States and is recognized by the comity of the states. The courts shall enforce this comity, unless restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state. [Emphasis added].


39. Indeed, advocates of modern approaches are opposed to almost any use of the public policy exception. It also may be true that many traditional approach courts prefer to keep standards of public policy as broad and as vague as possible. The result is that a court could simply pull public policy off the shelf and use it to reach a particular result, without having to explain the result in terms of a principled methodology.

40. See supra notes 10-12 and accompanying text. See also J. Martin, Conflict of Laws: Cases and Materials 134 (2d ed. 1984) (Loucks is the "classic definition" of public policy.).

covenants not to compete that are reasonable as to duration and geographic area; prohibition on termination of parental rights except when approved in a judicial proceeding; criminal prohibitions on gambling; civil legislation making gambling debts void; state antitrust law making unenforceable agreements granting exclusive sales rights; and a forum rule of procedure permitting a third party to prove an employer's negligence if the employer sued the third party to recover sums paid through worker's compensation to an injured employee.

Other cases invoking public policy identify case law as their source. These courts deem judicial decisions in the following areas as a source of public policy sufficient to justify not applying contrary foreign law: holdings that unreasonable covenants not to compete are unenforceable; a declaration that parents are no longer immune to suits by their children; a decision making unenforceable an insurance contract clause restricting the insurer's liability to the period in which insured products were manufactured, rather than to the period in which they produced injury, and a decision that gambling debts were unenforceable.

42. Temporarily Yours-Temporary Help Serv., Inc. v. Manpower, Inc., 377 So. 2d 825 (Fla. 1st DCA 1979).
51. Condado Aruba Caribbean Hotel, N.V. v. Tickel, 39 Colo. App. 51, 561 P.2d 23 (1977). In this case, the court cited both statutes and case law as sources of public policy. See supra note 44 and accompanying text. Condado Aruba is a most unusual case, however, because the court invoked public policy to prevent enforcement of gambling debts, notwithstanding the fact that the Colorado legislature had repealed a statute that prohibited their enforcement. The court reasoned that existing criminal gambling statutes and a prerepeal Supreme Court of Colorado decision that declared enforcement of gambling debts a violation of public policy constituted a sufficient basis for concluding that public policy prevented enforcement of the gambling debt. The Colorado appellate court dismissed the repeal itself with more than a touch of insouciance. "[R]epeal . . . does not necessarily evidence an intent by the legislature to change the existing policy." 39 Colo. App. at 53, 561 P.2d at 24. As well as any case, Condado Aruba demonstrates what a court can do when it is
In the decisions in which courts refused to invoke public policy, parties pleaded unsuccessfully for the use of forum public policy on the basis of the following statutes: legislation prohibiting a clause in an uninsured motorist insurance policy discharging the insurer's obligation to pay if the insured settled with an uninsured motorist without the insurer's consent; a statute of limitations on loss of consortium more restrictive than the foreign statute; a no-fault divorce law very similar to that of the foreign jurisdiction; forum estate statutes permitting a testator to bequeath more than a third of his estate to a charitable institution; and usury legislation. Courts found that the following kinds of forum case law did not implicate public policy: decisions enforcing covenants not to compete that are reasonable as to duration, geographic area, and purpose; a holding that owners of leased vehicles could be liable in tort to employees of the lessor who drive the leased vehicles; and forum case law upholding interspousal tort immunity.

The range and breadth of laws that courts have used to justify the invocation of public policy is striking. In fact, these laws are so diverse that they may even exceed the sweep of the laws in which courts, operating under the traditional approaches, have found no public policy implications. At least superficially, this phenomenon supports two criticisms of public policy in the traditional system: first, courts apply public policy so widely that it becomes the rule rather than the exception; second, courts apply public policy so randomly that no one is able to predict when and where a court will implicate public policy. Discussion of the first criticism unbridled by standards of public policy and free to follow its individual predilections. See supra notes 10-16 and accompanying text.

56. Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 ( Fla. 1981) (enforcing 396 So. 2d 1230 (Fla. 3d DCA 1981)).
60. See supra note 16 and accompanying text.
61. See supra notes 7-9 and accompanying text. In some measure, of course, those criticisms are contradictory; when courts apply an exception routinely, they no longer apply it unpredictably. The apparent contradiction is of little consequence, however, because even if only one of those two criticisms is correct, the legitimacy of public policy as courts apply it under the traditional approaches is seriously undermined.
should probably await the sense of perspective that a similar survey of public policy as applied under modern approaches will afford.\textsuperscript{62} Assessment of the second criticism also may benefit by such a comparison. In the meantime, however, one must assess whether the traditional system's use of public policy is as unpredictable as it first appears.

Until this point, the survey of public policy in traditional courts treated all public policy decisions interchangeably, irrespective of the court from which they came. Such an approach can mislead. While it may be desirable to achieve uniformity in law across the country, it is certainly possible for an individual state to stand back from the mainstream and still enjoy efficient and just law. Another test of the predictability of public policy in the traditional system, therefore, is the manner in which public policy operates within a particular jurisdiction. Fortunately, the courts of two traditional approach states, Michigan\textsuperscript{63} and Georgia, have had enough recent experience with public policy cases to provide a reasonable sample of the workings of public policy within a state.

2. PUBLIC POLICY IN MICHIGAN

In a recent study, Professor Sedler, one of the more enthusiastic advocates of the modern learning, chronicled the experience of Michigan courts with traditional choice of law rules in tort actions.\textsuperscript{64} Professor Sedler's conclusion was highly critical of the way the traditional approaches, including the exception for public policy, had operated in Michigan:

Choice of law in Michigan is in a shambles. It is impossible to predict when the Michigan Court of Appeals or the federal courts in Michigan will again decide to resort to "manipulative techniques," or when one panel of the court of appeals will refuse to follow the lead of another panel; or of the federal courts in employing them . . . . The results in conflicts torts cases are neither sound nor predictable. It is all one big mess.\textsuperscript{65}

\textsuperscript{62} See infra notes 119-218 and accompanying text.

\textsuperscript{63} Michigan has adopted a modern approach to choice of law in recent years. See Sexton v. Ryder Truck Rental, Inc., 413 Mich. 406, 320 N.W.2d 843 (1982). Nevertheless, Michigan's prior extensive experience with traditional public policy is a useful source of data.

\textsuperscript{64} Sedler, supra note 3.

\textsuperscript{65} Id. at 847.
Cases implicating public policy were among the prominent targets of Professor Sedler's criticism. The Michigan courts invoked public policy in two decisions to bar the application of foreign law in providing interspousal tort immunity. In a third holding, the court used public policy to prohibit a limitation on recovery in wrongful death actions. Professor Sedler dismissed all of these cases as employing "manipulative techniques" to do "good work;" in other words, the courts in these cases attempted to achieve just results without providing a principled, predictable justification for the result achieved. Professor Sedler also criticized less directly a fourth case in which a Michigan court refused to use public policy to permit a suit between spouses that the law of the jurisdiction in which the cause of action had arisen would have barred. Professor Sedler did not criticize that case for failing to invoke public policy; rather, he was critical of the court's analysis as well as its result. He would prefer that Michigan law apply to a suit between Michigan spouses, no matter where the cause of action arose, because Michigan's interest in the matter was greater than that of any other state.

Three decisions of the same genre appeared in the years immediately following Professor Sedler's article. In *Turner v. Ford Motor Co.*, the Michigan Court of Appeals rejected a defendant's argument that Michigan's public policy should bar the application of a foreign statute of limitations affording more time to bring a suit for loss of consortium than Michigan law provided:

It is contended that Michigan's policy is to apply the same statute of limitations to all claims arising from a single tortious transaction. Assuming that to be true, it merely shows that Georgia law is different, not that its enforcement would violate public policy. We see nothing immoral, unjust to, or inconsistent with the interests of our citizens in applying this statute of limitations.

66. Id. at 843-44, 854.
67. Id. at 844.
68. Id. at 847-49. Neither Professor Sedler nor other advocates of the modern approaches seem interested in determining whether domiciliary status describes a current (and perhaps highly transient) legal status, or whether it is evidence of a long-run state interest in domiciliaries as they would like it to be. See Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 Utah L. Rev. 651 (documenting that domicile is commonly a flawed and misleading indicator of a state's long-run interest in having its law applied).
70. Id. at 526, 265 N.W.2d at 403.
In *Sexton v. Ryder Truck Rental, Inc.*, the same court reasoned that *stare decisis* precluded the use of Michigan public policy to bar application of foreign law immunizing the owner of a leased vehicle from suit. Similarly, in *Shaheen v. Schoenberger*, the court of appeals used *stare decisis* to conclude that Michigan public policy barred use of a foreign limitation on recovery in a wrongful death action. These fragile sprouts of *stare decisis* may seem to offer hope that the Michigan courts might eventually make the traditional rules work well enough to provide some of the predictability that any body of law should offer; yet, this optimism would be misplaced. At some point, someone would be certain to notice the weakness of the distinction between foreign law limiting recovery in wrongful death actions (barred by Michigan's public policy) and foreign law immunizing certain classes of potential tortfeasors (not barred by Michigan's public policy). At that point, *stare decisis* based on such weak reasoning would likely break down. Professor Sedler is right. In Michigan, public policy as applied under the traditional rules was "one big mess."

Consensus on the confusion of the Michigan courts, however, should only beget more questions. Is the Michigan experience typical? Is it possible that the subject matter of the Michigan decisions, causes of action arising in tort, may be less amenable to rational public policy analysis than other substantive areas of law? Finally, have the modern approaches achieved the success that the traditional approaches cannot reach? Fortunately, data is available to begin answering such questions. The Georgia courts, which use traditional rules, recently have decided enough public policy cases to offer a comparison with the Michigan experience. Moreover, the Georgia cases arise chiefly in the area of contract, an area of law that the Michigan courts did not have before them. Finally, and perhaps most importantly, the judiciary has had enough experi-

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72. The court of appeals considered the issue settled by the Supreme Court of Michigan's decision in *Kaiser v. North*, 292 Mich. 49, 289 N.W. 325 (1939) (applying a foreign automobile guest statute that completely barred a passenger's cause of action). In *Kaiser*, the court specifically rejected a public policy argument in favor of applying Michigan law. *Id.* at 57, 289 N.W.2d at 328. The court in *Sexton v. Ryder Truck Rental, Inc.* described the argument in favor of invoking public policy as "logical and persuasive," but it treated the matter as entirely closed. 84 Mich. App. at 72-74, 269 N.W.2d at 310.


74. *Id.* at 493-94, 285 N.W.2d at 344 (citing *Branyan v. Alpena Flying Service, Inc.*, 65 Mich. App. 1, 236 N.W.2d 739 (1975), one of the cases that Professor Sedler analyzed in his study).
ence with the modern approaches to see how results in courts using modern rules compare with results achieved in traditional states. Let us begin with Georgia's recent experience.

3. PUBLIC POLICY IN GEORGIA

Between 1977 and 1981, the Supreme Court of Georgia and the United States Court of Appeals for the Fifth Circuit decided three choice of law cases involving the broad area of covenants not to compete. In *Nasco, Inc. v. Gimbert*, an employment contract between a Tennessee corporation and a Georgia employee, to be performed in Georgia, contained a covenant prohibiting "disclosure of 'any information concerning any matters affecting or relating to the business of employer' including but not limited to the identity of any of employer's customers, its prices, (including the prices at which it sells its products), and its production, manufacturing, sales promotion and merchandising methods and systems." The contract also contained a clause directing that it be construed under Tennessee law. The Supreme Court of Georgia, however, held that Georgia law overrides such a clause "where application of the chosen law would contravene the policy of, or would be prejudicial to the interest of, this state." The court then concluded that it should not enforce the covenant, because the nondisclosure provision was excessively broad and unreasonable.

In *Dothan Aviation Corp. v. Miller*, the Fifth Circuit considered a contract between an Alabama corporation and a Georgia employee that contained a covenant not to compete. The parties to the contract had chosen Alabama law. Under Georgia law, the contract was unenforceable, because Georgia law deemed the territorial restriction on the employee unreasonable. Alabama law, on the other hand, arguably vested the court with authority to rewrite the territorial restriction to make it more reasonable and, therefore, unenforceable. The court cited *Nasco* as a directive to construe the contract under Georgia law and concluded that settled Georgia case law stripped the court of any authority to rewrite the contract.

The third covenant not to compete decision was *Barnes*

75. 239 Ga. 675, 238 S.E.2d 368 (1977).
76. Id. at 676, 238 S.E.2d at 369.
77. Id.
78. 620 F.2d 504 (5th Cir. 1980).
79. Id. at 506-07.
Group, Inc. v. Harper,\textsuperscript{80} where the Fifth Circuit enforced the contract, but only after applying Georgia law. The employer in Barnes was a Delaware corporation with a principal place of business in Connecticut, and the defendant was apparently a Georgia resident. The parties to the contract chose the law of Ohio, but the court disregarded the reference: "Georgia law holds that restrictive covenants, which contravene the public policy of the State, are construed under Georgia law if they are to be applied in Georgia."

The Georgia Court of Appeals added two additional public policy cases to the recent Georgia record. In Commercial Credit Plan, Inc. v. Parker,\textsuperscript{82} the court did not invoke public policy to bar enforcement of a contract that was usurious under Georgia law, because the Georgia statute by its terms applied only to loans made in Georgia.\textsuperscript{83} Similarly, in Terry v. Mays,\textsuperscript{84} the court of appeals enforced a South Carolina insurance contract not enforceable under Georgia law. The court explained that Georgia public policy was not implicated, because no prejudice to Georgia's public interest arose from enforcing a contract made in South Carolina and to be performed primarily in South Carolina.\textsuperscript{85} Even before beginning a closer analysis of the five preceding decisions, it already may be clear that the state of public policy in Georgia is something other than the "big mess" that characterizes Michigan's public policy experience. In the three Georgia cases implicating covenants restricting competition, courts followed the rule of \textit{stare decisis} faithfully,\textsuperscript{86} and in a manner more defensible than the Michigan practice.\textsuperscript{87} The adherence to precedent alone suggests at least some predictability in the way Georgia will approach public policy questions. Moreover, those three decisions seem entirely in harmony with repeated statements of the sources of public policy in Georgia. The long-standing judicial rule is that foreign "laws will be enforced by comity in Georgia unless they are contrary to public pol-

\textsuperscript{80.} 653 F.2d 175 (5th Cir. 1981), \textit{cert. denied}, 455 U.S. 921 (1982).
\textsuperscript{81.} \textit{Barnes}, 653 F.2d at 178 n.4 (citing Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E.2d 368 (1977)). The Fifth Circuit enforced the covenant not to compete, because the covenant was reasonable in terms of duration and territorial breadth. \textit{Id.} at 179.
\textsuperscript{83.} \textit{Id.} at 412, 263 S.E.2d at 223.
\textsuperscript{85.} \textit{Id.} at 329, 291 S.E.2d at 45.
\textsuperscript{86.} See \textit{supra} notes 75-81 and accompanying text. Failure to follow \textit{stare decisis} was one of Professor Sedler's major criticisms of the Michigan courts. See \textit{supra} note 65 and accompanying text.
\textsuperscript{87.} See \textit{supra} notes 71-74 and accompanying text.
icy or prejudicial to the interests of Georgia." 88 Superficially, that pronouncement seems to contain enough play in the joints to arouse the concerns that Judge Lehman discussed in Mertz. 89 In practice, the Georgia courts have been circumspect in invoking public policy. As to covenants affecting competition, for example, all the important sources of Georgia law demonstrate a long-standing and continuing aversion to contracts that restrict competition. The Georgia constitution declares: "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." 90

Similarly, the Georgia legislature has decreed that covenants "in general restraint of trade" violate the public policy and are unenforceable. 91 Finally, in domestic cases that do not give rise to choice of law issues, the Supreme Court of Georgia has consistently held that these constitutional and statutory public policy provisions apply to covenants not to compete that are unreasonable "in terms of time, territory, and activities protected." 92 If that combined, long-standing opposition by all the institutions of Georgia that have primary responsibility for the care of the community does not satisfy even Judge Cardozo's requirement of "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," 93 one may wonder if the courts would ever invoke public policy. That Georgia courts did not invoke public policy in circumstances where judges could not identify similar state interests 94 also points to the same conclusion; in recent contract decisions implicating public policy issues, the record of the Georgia courts is both rational and predictable.

It does not fit well with much of the criticism of traditional learning that courts occasionally demonstrate consistent and pre-

88. Rohner, Gehrig & Co. v. Capital City Bank, 655 F.2d 571, 579 (5th Cir. 1981). Rohner could have been a public policy case, but the Fifth Circuit precluded consideration of choice of law issues by disallowing any amendments to the pleadings. Id. at 516.
89. See supra notes 14-16 and accompanying text.
90. GA. CONST. art. 3, § 6, ¶ 5(c) (1981).
93. See supra notes 10-11 and accompanying text.
94. See supra notes 82-85 and accompanying text.
dictable use of the traditional approaches. In and of themselves, however, such demonstrations do not necessarily fend off criticism. Often they merely divert critical comment into other channels. One assessment adopted by advocates of modern approaches in such circumstance is to depict such phenomena as the happy but purely fortuitous outcome of an individual court's determination to reach the "right" result, even if the court had to torture the traditional rules to achieve it. An example of that reasoning is Professor Sedler's dismissal of the use of public policy in Michigan as a mere "manipulative technique" that the courts used to circumvent traditional rules to achieve just results that could have been achieved through the principled use of a modern approach. A second, related criticism comes in the suggestion that when traditional learning courts achieve happy results, it is because they have surreptitiously adopted a modern analysis. Professor Sedler also provided an example of that criticism. Analyzing one of the Michigan decisions that reached a "good" result, he remarked: "The Michigan Court of Appeals ... concluded that it would be against Michigan's 'public policy' to limit the amount of damages recoverable for wrongful death. It then proceeded to employ interest analysis, which in this case of false conflict led to the application of Michigan law." implicit in such criticism is the suggestion that modern approaches can offer the same results that traditional rules often strain to achieve, and that modern learning achieves these results in a different and more principled fashion. Further analysis of the Georgia decisions, however, indicates that the suggestion is not always well founded.

In the cases addressing covenants restricting competition, the application of modern techniques without invoking a "manipulative technique" of public policy probably would not have produced results identical to those that the Georgia courts achieved. The difference is that courts applying modern approaches typically have adopted the principle of party autonomy in matters of contract.

95. Sedler, supra note 3, at 839-47; See also R. Weintraub, supra note 9, § 3.6, at 83 (suggesting that Mertz could have achieved the same result using interest analysis). Speaking of another "manipulative technique," Professor Leflar wrote:

It is apparent that the characterization technique is being used to achieve results that must be justified, if at all, by other real reasons. That other real reasons may exist cannot be doubted. The valid questions are as to what the real reasons are, and why a cover-up device should be manipulated to conceal them.

R. LEFLAR, supra note 1, § 88, at 178.

96. Sedler, supra note 3, at 843.
That is, when the parties insert in their contract a provision that the courts are to apply the law of a particular jurisdiction, modern approaches normally direct the court to respect the parties' choice of law.\textsuperscript{97} Absent considerations of public policy, the only important exception to that deference to party autonomy arises when the state chosen "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."\textsuperscript{98} The Georgia cases demonstrate how different would be the use of such a rule without the "manipulative technique" of public policy.

In \textit{Nasco, Inc. v. Gimbert},\textsuperscript{99} one of the parties was a Tennessee corporation, and the parties agreed that Tennessee law would govern. The Supreme Court of Georgia said the contract raised public policy questions and therefore applied Georgia law.\textsuperscript{100} Under a modern approach not using public policy, however, the court would have had to use Tennessee law, because Tennessee had a reasonable relationship to one of the parties. In \textit{Dothan Aviation Corp. v. Miller},\textsuperscript{101} one of the parties was apparently an Alabama corporation, and the contract provided for application of Alabama law. The Fifth Circuit cited Georgia public policy and applied Georgia law; but under a modern approach, without public policy, the court would have had to apply Alabama law. Only in \textit{Barnes Group, Inc. v. Harper},\textsuperscript{102} would the result have been the same under either approach. A court using traditional approaches would (and did) use Georgia public policy to apply Georgia law; absent a "manipulative technique," a modern approach would have justified use of Georgia law, because the contract specified the application of the law of a state (Ohio) that had no apparent relation to either the parties or the subject of the contract.

In short, in the three recent Georgia decisions that used traditional approach public policy, and apparently applied it in both a just and doctrinally principled fashion,\textsuperscript{103} the courts achieved results that were substantially different from the results a modern approach court would reach without the use of public policy. Only by adopting a "manipulative technique" of public policy could a

\textsuperscript{97} \textit{Restatement (Second) of Conflict of Laws} § 187 (1971).
\textsuperscript{98} Id.
\textsuperscript{99} See \textit{supra} note 75.
\textsuperscript{100} See \textit{supra} notes 76-77 and accompanying text.
\textsuperscript{101} See \textit{supra} note 78.
\textsuperscript{102} See \textit{supra} note 80.
\textsuperscript{103} See \textit{supra} notes 76-81 and accompanying text.
modern approach court free itself from party autonomy and achieve the same result the Georgia courts achieved under the traditional learning. 104

The second criticism of the successful application of traditional approaches to choice of law — that traditional learning decisions based on a public policy exception are sometimes just a modern approach in disguise — has at least some superficial validity. Nearly thirty years ago, Professors Paulsen and Sovern demonstrated that the public policy exception was usually invoked only when a forum had an important interest in the outcome of a case before it. 106 Moreover, some states, Georgia included, have explicitly identified their public policy rule with distinctive state interests. 106

Although the identification of a state interest may also be relevant in both modern analysis as well as public policy in the traditional learning, what does this criticism really teach us? Is it a serious argument of the advocates of the modern learning that a forum should invoke its public policy exception when the case before the court will not affect the best interests of the forum? Surely Judge Cardozo had the well-being of New York and its citizens in mind when he wrote that public policy could indeed bar foreign law if it violate[d] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.” 107 The alternative to applying the public policy bar — even to litigation that does not affect the basic values of the forum — would be no more than judicial interference in the affairs of another state. The point is that public policy in the traditional sys-

104. The adoption of a “manipulative technique,” of course, is precisely what has occurred under the Second Restatement. See Restatement (Second) of Conflict of Laws § 187(2)(b) (1971) (recommending that party choice control, unless “application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue”). It is true, of course, that the Second Restatement nominally distinguishes between a state’s “fundamental policy” in contractual choice of law cases and the sort of public policy analysis both traditional approaches and the Second Restatement otherwise discuss. See id. comment f. (“To be ‘fundamental’ within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90 [the Second Restatement section that most nearly approximates public policy under the traditional approach].”) That attempt at a distinction, however, does not appear to have much practical consequence. See infra notes 119-218 and accompanying text. For additional examples of modern learning courts that still employ the public policy doctrine, see supra note 5.

105. See supra note 7.

106. See supra notes 88-92 and accompanying text.

107. See supra note 11 and accompanying text.
term is (or should be) an exception to the general principle of terri-
torialism that underlies the traditional learning. As such, it is en-
tirely reasonable that it rest on identification of some basic interest
of the forum. That it does so, and thereby converges momentarily
with an interest that also might have relevance to an analysis con-
ducted under modern learning, does not represent a surreptitious
surrender to the modern learning. Indeed, the difference between
public policy and the modern learning becomes obvious upon con-
sideration of one fact: traditional approach public policy is an ex-
ception to the rule that courts invoke infrequently, whereas mod-
ern approaches routinely depend upon identification of state
interests.

That Georgia courts may have succeeded in reaching just re-
results though principled application of traditional choice of law
rules does not in and of itself offer any basis for weighing the rela-
tive merits of the traditional and modern approaches. It does not
even prove that public policy in the traditional system will rou-
tinely work as well as any legal doctrine should work. Perhaps it is
easier to work with public policy in contract matters; or perhaps
the Georgia courts merely have more facility with public policy
than their Michigan counterparts were able to achieve; or perhaps
the Georgia courts were just lucky. Whatever the apparent success
of the Georgia courts may not prove, however, that success does
suggest that the apparent failure of traditional rules should not be
as clear a conclusion as advocates of modern learning are prone to
reach. Success and failure are rarely measured in absolutes. Do not
lose sight of the jockey riding in the two-horse race;\textsuperscript{108} success
should be measured by the available alternatives. How well have
the available alternatives, the modern approaches, worked in
application?

IV. PUBLIC POLICY IN THE MODERN LEARNING

After all the harsh words advocates of the modern learning
have directed at public policy,\textsuperscript{109} it is surprising that public policy
has survived the transition from the traditional approaches to the
dominance of the modern learning. It is a fact, however, that pub-
lic policy is a firmly rooted feature of modern choice of law doc-

\textsuperscript{108} See supra text following note 28.

\textsuperscript{109} See Cavers, supra note 7, at 184 and accompanying text (a “cavalier dismissal of a
foreign law”; a “substitute for thinking”); R. Weintraub, supra note 9, at 84 and accompa-
nying text (a rule whose “operation is likely to be haphazard”).
Commentators explain the apparent anomaly by suggesting that public policy under modern approaches — what one might call “good” public policy — differs significantly from the “bad” public policy those commentators so often decried. Professor Weintraub, for example, wrote: “There is . . . nothing wrong with [a traditional] definition of public policy as everything found in the laws of the forum if the policies underlying those laws are utilized to assist in articulating a reasoned choice between the law of the forum and the law of some foreign jurisdiction.”111

As a justification for using a public policy rule, however, it is unclear exactly what statements like that mean. In fact, they look very much like mere restatements of the modern view that state interests should predominate in choice of law analysis, without any need to consider public policy. What is clear, however, is that at least some advocates of the modern learning claim to see a difference between “good” public policy and the “bad” public policy of traditional learning. A test of the legitimacy of the modern learning, therefore, is to examine public policy in modern approach states to determine how much different it is from the public policy that operated under the traditional rules.

A. General Standards for Identifying Modern-Learning Public Policy

Of the twenty cases that the author found in which courts operating under modern choice of law approaches addressed issues of public policy, ten of the decisions invoked public policy and refused to apply foreign law.112 As with the courts operating under


111. R. Weintraub, supra note 9, § 3.6, at 84; see also E. Scoles & P. Hay, supra note 4, § 3.16, at 74-75 (noting that forum may use local public policy when its interests in the case at bar are sufficient).

112. A word of caution is in order here. Sometimes it is not possible to be completely confident about the nature of the choice of law rule under which a court has decided a case. In Sexton v. Ryder Truck Rental, Inc., for example, the Supreme Court of Michigan seemed to adopt a modern approach, at least where the case originated in tort and the parties were from Michigan. 413 Mich. 406, 433, 320 N.W.2d 843, 854 (1982). The court’s analysis was stunningly opaque about what precisely it was doing. See id. (“We do not here adopt the law of dominant contracts [sic] or any other particular methodology, although any such reasoning may, of course, be argued where persuasive and appropriate.”). Shortly after Sexton, a federal district court in Michigan sitting in diversity decided a choice of law issue. Muma v. Financial Guardian, Inc., 581 F. Supp. 119 (E.D. Mich. 1982).
traditional rules, modern learning jurisdictions agree that mere dissimilarity between foreign and forum law is not a sufficient justification to invoke forum public policy. General statements about the sources of public policy also struck a familiar note. In modern approach states, favored sources of public policy are the constitution, statutes, and the case law of the forum. Only the emphasis among those sources slightly varies. The New York Court of Appeals said "courts of course are not free to indulge in mere individual notions of expediency and fairness but must look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community." After finding public policy in state statutes and in a decision of the state supreme court, a California appellate court remarked:

[i]t is an equally well-established principle that courts "will

The court did not precisely describe the choice of law method that it used. It is possible, and perhaps even probable, that the district court continued to act as though traditional choice of law rules were still dominant in Michigan. Sexton may have played no role in the decision, because the court did not cite it at any point (although it did cite earlier decisions using Michigan's traditional approach). Thus, although modern approach courts decided those two cases, the author does not rely upon them heavily in this study. For whatever it may be worth, although the Sexton court rejected an argument to invoke public policy, in Muma a public policy argument prevailed.

Another category of cases that occasionally crops up is that group of cases in which a court used a choice of law rule at odds with the jurisdiction's adopted choice of law rule. In Gulf Collateral, Inc. v. Morgan, for example, a federal court in Georgia hearing a diversity case used both Restatements in its analysis. 415 F. Supp. 319 (S.D. Ga. 1976). One categorizes such cases as a traditional or modern approach depending on which rule appears to have most influenced the court in its decision, irrespective of which rule the court should have used. For that reason, commentators categorize Gulf Collateral as a modern approach decision.


113. See, e.g., Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979) ("It is true that the laws of Texas and Mexico still differ in several aspects. . . . However, these differences by no means render the laws of Mexico violative of public policy. Each must be considered on its own merits."); Untersteiner v. Untersteiner, 32 Wash. App. 859, 863 n.3, 650 P.2d 256, 259 n.3 (1982) ("[J]ust because there is a difference between the laws of a foreign state and this state is not sufficient by itself to establish a violation of this state's public policy.").

never give effect to a foreign law when to do so would prejudice that state's own rights or the rights of its citizens, or when the enforcement of the foreign law would contravene the positive policy of the law of the forum whether that policy be reflected in statutory enactment or not."

The Supreme Court of Texas, a fairly recent convert to the Second Restatement, held: "Texas courts will not enforce a foreign law that violates good morals, natural justice or is prejudicial to the general interests of our citizens . . . . This is a limitation recognized by all jurisdictions."

One small difference between the way traditional approach and modern approach courts generally address the sources of public policy is the willingness of courts operating under modern learning to cite as their own, Judge Cardozo's standard in Loucks. That is not much of a difference, however, for many modern learning courts then go on to cite precisely the same sources of public policy as do the traditional approach states that have not cited Loucks.

B. Public Policy As Applied Under the Modern Approaches

1. SOURCES OF PUBLIC POLICY

When courts operating under modern rules have invoked a forum public policy, the sources of public policy that they have cited include the following kinds of statutes: legislation rendering certain categories of covenants not to compete null and void; prohibitions on the enforcement of gambling debts; a statute

117. See supra note 11 and accompanying text.
118. See, e.g., Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 580, 404 N.E.2d 726, 730, 427 N.Y.S.2d 604, 608 (1980) (citing Loucks for the proposition that when seeking standards of public policy, courts "must look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community"); Untersteiner v. Untersteiner, 32 Wash. App. 869, 863 n.3, 650 P.2d 256, 259 n.3 (1982) (citing Loucks but declaring, "[t]he public policy of this state is found in its constitution, statutes and settled rules laid down by its courts.").
protecting creditors while a corporation is "winding up;"\textsuperscript{121} a law prohibiting waiver of a right to file a mechanic's lien;\textsuperscript{122} a local statute permitting a judgment creditor seeking child and spousal support to attach the military pension of a judgment debtor;\textsuperscript{123} a local law governing venue in civil litigation;\textsuperscript{124} and legislation permitting anyone to own land, regardless of citizenship.\textsuperscript{125}

Some courts that invoked public policy in their decisions under the modern learning approach identified case law as their source. Such courts deemed case law as a source of public policy sufficient to justify not applying contrary foreign law in the following instances: a state supreme court decision declaring gambling debts contrary to public policy;\textsuperscript{126} a state supreme court decision protecting creditors during the "winding up" of a corporation;\textsuperscript{127} and a state intermediate appellate court's decision declaring a statute regulating covenants not to compete a statement of public policy.\textsuperscript{128} These statutory and common law sources of public policy bear striking similarity to the kinds of public policy sources advocates of the modern learning found so distasteful in the early New York decisions.\textsuperscript{129}

In the ten cases where modern learning courts refused to invoke public policy, the following kinds of statutes proved not to be sufficient sources of public policy: legislation protecting a buyer from waiver of his right to avoid a sale because the product contained a substantial defect;\textsuperscript{130} state law governing shareholders' derivative suits;\textsuperscript{131} a requirement that in-state real estate sales personnel hold state licenses;\textsuperscript{132} a tavernkeeper's liability statute;\textsuperscript{133} a

\begin{footnotesize}
\begin{enumerate}
\item[123.] In Re Marriage of DeLotel, 73 Cal. App. 3d 21, 140 Cal. Rptr. 553 (1977).
\item[125.] Wong v. Tenneco, Inc., 151 Cal. App. 3d 376, 198 Cal. Rptr. 526 (1984). The Wong court also found public policy in a California constitutional provision declaring that noncitizens and citizens were equally entitled to own land.
\item[126.] Resorts Int'l, Inc. v. Zonis, 577 F. Supp. 876 (N.D. Ill. 1984). This case also demonstrated that courts may find public policy in statutes governing gambling. See supra note 120. As Zonis indicates, some courts have used statutes and judicial decisions as complementary sources of public policy. 577 F. Supp. at 577.
\item[128.] Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324 (9th Cir. 1980).
\item[129.] See supra notes 29-30 and accompanying text.
\item[130.] Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049 (5th Cir. 1982).
\item[131.] Fleeger v. Clarkson Co., 86 F.R.D. 388 (N.D. Tex. 1980).
\item[132.] Coldwell Banker & Co. v. Karlock, 686 F.2d 596 (7th Cir. 1982).
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\end{footnotesize}
prohibition on indemnification clauses in construction contracts;\textsuperscript{134} statutory authority to record telephone conversations surreptitiously;\textsuperscript{135} and legislation establishing interspousal tort immunity.\textsuperscript{136} The modern learning courts also deemed the following kinds of case law insufficient sources of public policy: a requirement that alimony awards take into account a wife’s current financial status and future employment prospects, along with a requirement that the award establish a definite termination date;\textsuperscript{137} prohibitions on tort immunity for owners of leased vehicles;\textsuperscript{138} and case law limiting damages in personal injury suits.\textsuperscript{138}

One may draw several conclusions from the survey of laws that courts have used to justify invoking public policy in states that have adopted the modern learning. The first conclusion is that the kinds of laws that courts have used have a great deal in common with the kinds of laws that justified invoking forum public policy under the traditional learning;\textsuperscript{140} in particular, their randomness is of precisely the same order as that which, in the traditional learning, seemed to offer no basis for predicting when a court might invoke a public policy exception.\textsuperscript{141}

Another characteristic modern learning public policy seems to share with traditional learning public policy is the consequence of a decision not to invoke public policy. In traditional learning cases, such a decision normally meant that foreign law would apply. Courts reached that same outcome in eight of the ten modern learning decisions in which the court rejected a public policy argument.\textsuperscript{142}

Comparing all available modern learning public policy cases to all of their traditional learning counterparts suggests a superficial


\textsuperscript{136} Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980).


\textsuperscript{139} Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979).

\textsuperscript{140} Compare supra notes 41-59 and accompanying text with supra notes 119-39 and accompanying text.

\textsuperscript{141} See supra note 61 and accompanying text. The random manner in which traditional learning courts have used public policy, of course, was a major source of the commentator’s criticism. See R. Weintraub, supra note 9, at 84 and accompanying text (“The danger of the traditional view of public policy is that its operation is likely to be haphazard.”).

\textsuperscript{142} The two exceptions were: Champagnie v. W.E. O’Neil Constr. Co., 77 Ill. App. 3d 136, 395 N.E.2d 990 (1979); and, Becker v. Computer Sciences Corp. 541 F. Supp. 694 (S.D. Tex. 1982). The courts in these cases applied forum law, because they viewed the forum state as having the greatest interest in the matter.
similarity that calls into question assertions that modern learning public policy is superior. Surveys, however, may emphasize points of similarity and gloss over details that can mark real differences. To protect against that possibility, one must examine decisions from modern learning states in the same manner that this article examined Michigan and Georgia public policy cases earlier. The next portion of this paper will, therefore, begin by comparing in greater detail two cases involving the identical plaintiff and similar claims, but which were litigated in different states. The paper then will examine recent public policy decisions in three modern learning states: New York, the state that has already provided such nutritious fodder for scholarly comment on public policy; California; and Texas.

2. ENFORCEMENT OF FOREIGN GAMBLING DEBTS IN VIRGINIA AND ILLINOIS

A New Jersey gambling casino recently achieved the dubious distinction of being on the losing end of two reported cases involving attempts to enforce gambling debts. Resorts International Hotel, Inc. v. Agresta was a suit in Virginia to enforce a gambling debt enforceable under the law of New Jersey, but null and void if subject to the law of Virginia. In Virginia, a traditional learning state, the court refused to enforce the debt. The court reasoned that a Virginia statute and a state supreme court decision constituted public policy sufficient to justify non-enforcement. In  

143. See supra notes 64-108 and accompanying text.
144. See supra notes 10-25 and accompanying text. This study only uncovered two recent New York public policy cases. These cases take on added significance, however, because earlier New York cases played such an important role in the evolution of public policy doctrine.

The author selected judicial decisions from California for more detailed analysis for two reasons: (1) in his research for this paper, the author uncovered five recent California decisions involving public policy, which was a sufficient number to constitute a distinct sample; and, (2) California employs a variant of the modern learning called "comparative impairment," which is at least nominally different from the system employed in many other modern approach jurisdictions. See infra note 182. Whether comparative impairment in fact departs significantly from other modern learning approaches, however, is open to question. See supra note 1; infra notes 176-206 and accompanying text.

Similarly, the author chose Texas decisions for additional analysis because the author found a sufficient number (four), and because Texas employs still another form of the modern learning that is embodied in the Second Restatement. See supra note 5. The same doubts about the novelty of California's approach have similar applicability to the system adopted by Texas. See infra notes 207-18 and accompanying text.
146. Id. at 25.
sorts International Hotel, Inc. v. Zonis, in which the court applied the modern learning rules of Illinois, the result was the same. The court refused to enforce the debt, citing Illinois legislation and case law as sources of public policy.\(^{148}\)

Identical results in similar cases decided under allegedly different rules might be happenstance, but the similarities between Agresta and Zonis are not only in their results. In Agresta, a court operating under traditional rules identified forum law contrary to the law of New Jersey where the gambling debt arose. Once the Agresta court identified such forum law, it simply declared that Virginia public policy barred enforcement of the gambling debts and dismissed the complaint. The court did not attempt, at any time, to identify any interests Virginia might have in the case to justify the application of Virginia law. That failure of analysis, of course, is central to the criticism that advocates of modern learning have leveled against the courts' application of traditional public policy.\(^{149}\)

The Agresta opinion, however, differs in no significant detail from the modern learning analysis a court used in Illinois. Like Agresta, Zonis contains only the bare conclusion that Illinois's differing law constitutes a public policy that should bar enforcement of the New Jersey debt. Modern learning commentators believe that the Zonis court did not identify any "underlying policies" that are necessary to a proper public policy analysis.\(^{150}\) There is, in short, no difference in the way the two courts, operating under different choice of law rules, analyzed and decided these two similar cases.

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148. Id. at 877-78. A choice of law problem existed in Agresta and Zonis only because New Jersey would have enforced the gambling debts. This suggests that the casino misplayed its hand in both cases. If, instead of suing in Virginia and Illinois, the casino had brought suit in New Jersey, then it could have used that state's long-arm statute to obtain in personam jurisdiction; thus, the casino could have reduced the gambling debts to judgments. Having obtained final judgments, the casino then could have gone to states where the defendants had assets and used the judgments to levy on the assets. The defense of public policy, so effective in barring a cause of action based on a gambling debt, is no defense to a state’s constitutional obligation to give full faith and credit to the judgment of a sister-state. See R. LEFLAR, supra note 1, at 150-51 (public policy not available as a defense to sister-state judgments).

There is no need, however, to shed tears for gambling establishments. Even in Nevada, which does not permit its courts to enforce gambling debts, casinos have a startlingly successful collection rate. See Flamingo Resort, Inc. v. United States, 485 F. Supp. 926, 928 (D. Nev. 1980), aff'd, 664 F.2d 1387 (9th Cir.), cert. denied, 459 U.S. 1036 (1982) (casino collects on as much as 96 percent of its outstanding receivables).

149. See supra notes 7-9 and accompanying text.
150. See supra note 111 and accompanying text.
cases.

3. PUBLIC POLICY IN RECENT NEW YORK DECISIONS

The New York courts, now operating under a modern approach to choice of law, recently decided two public policy cases. Both decisions held, inter alia, that New York public policy barred application of foreign law. The older of the two decisions is Erlich-Bober & Co. v. University of Houston, in which a New York securities brokerage firm sued a Texas state university to recover on loans the New York company had made to the defendant. The parties conducted their transactions in part by letter and by telephone. Nonetheless, New York's contacts with the case were greater than those of Texas, because the parties formulated the loan contracts in New York. Texas law provided that plaintiffs could only sue defendants "in two specified counties in Texas." New York law contained no such provision.

The New York Court of Appeals concluded that Texas law should not apply. An advocate of modern approaches might try to justify that conclusion by noting the greater number and higher quality of New York's contacts with the litigation, but the court apparently did not have enough confidence in its modern approach to base its decision solely on this ground. Instead, the court tried to reinforce its "superior interest" analysis by fusing it with public policy arguments. The resulting language is a fascinating example of how tortured the reasoning becomes when a court tries to accommodate a modern choice of law approach with public policy. "Today in New York the determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict." The court then retreated far enough to acknowledge that New York public policy would not apply if New York had no interest in a matter:

151. See Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). New York is clearly a modern learning jurisdiction. Yet, several years ago, the New York Court of Appeals noted that "[i]t is true that lex loci delicti [a traditional approach] remains the general rule in tort cases to be displaced only in extraordinary circumstances." Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915, 405 N.Y.S.2d 441, 442 (1978). Whether that comment is a harbinger of retreat in New York is not at all clear. What is clear, however, is that the court of appeals said this in the context of tort cases, and presumably the traditional approach has no applicability to the two New York contract decisions that the author analyzes at this point in the study of public policy.

153. Id. at 579, 404 N.E.2d at 769, 427 N.Y.S.2d at 607.
154. Id. at 580, 404 N.E.2d at 730, 427 N.Y.S.2d at 608.
[W]e might, for example, choose to defer to the assertion of interest by another jurisdiction where the interest in question goes to the very heart of the governmental function. This is not such a case . . . .

...[The Texas statute is a mere] restrictive venue provision put in place to serve the administrative convenience of the State . . . .

Arrayed against the policy which essentially serves administrative convenience, is New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world. That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here . . . .

. . .

We conclude, therefore, that when an action concerns a wholly commercial transaction centered in New York, and it is one of which the New York courts would otherwise properly have jurisdiction, they are not precluded from the exercise of that jurisdiction by an assertion of governmental immunity as a matter of comity.156

Several comments are in order. First, the standard that the court used to identify public policy in *Erlich-Bober* is something quite different from the "fundamental values" standard Judge Cardozo identified in *Loucks*, and much more like the often-criticized deference to forum law that the *Mertz* court exhibited. Yet, the *Erlich-Bober* court cited *Loucks* as the source of public policy standards.156 To the extent that *Erlich-Bober* represents *Loucks* in action under modern approaches, it is clear that a court applying modern learning does not manifest any of the circumspection in applying public policy that modern learning advocates would like.157

Second, as the *Erlich-Bober* court applied public policy, it is impossible to determine where public policy ends and a modern learning assertion of New York's superior interest begins. The two concepts seem hopelessly tangled. By the lights of the modern learning, the results may be just, but such doctrinally confused and haphazard approaches are just what the critics of the traditional

155. *Id.* at 580-82, 404 N.E.2d at 730-31, 427 N.Y.S.2d at 608-09.
156. *Id.* at 580, 404 N.E.2d at 730, 427 N.Y.S.2d at 608.
157. *See supra* notes 12 & 16 and accompanying text (When properly used, public policy exceptions to application of foreign law should rarely be invoked.).
application of public policy have criticized so forcefully.\textsuperscript{158}

Finally, and ironically, the traditional approaches offered the same result that the \textit{Erlich-Bober} court achieved, but through a much less tangled analysis. The parties formulated the loan agreements in New York and were to perform them at least partially in New York.\textsuperscript{159} If the court of appeals had employed the traditional learning, it might reasonably have concluded that those two facts were sufficient to justify the application of New York law.\textsuperscript{160} Had it done so, the court never would have had to engage in the "haphazard, brute force type of argument"\textsuperscript{161} that the court's employment of New York public policy in a modern learning approach forced upon it.

In the second New York public policy decision, \textit{Clifton Steel Corp. v. General Electric Co.},\textsuperscript{162} the plaintiff was a subcontractor on a construction project in New York. As part of the subcontract, the plaintiff waived its right to place a mechanic's lien on the project in the event that the contractor did not pay the plaintiff. The subcontract also provided for the application of Connecticut law, which presumably permitted such a waiver.\textsuperscript{163} When litigation commenced, the defendant sought to use the waiver clause to resist the filing of a mechanic's lien. The appellate division, however, held that New York law, which prohibited such a waiver, applied:

The issue as to whether or not the contract was governed by Connecticut law is academic as it related to the filing of a mechanic's lien. New York law specifically prohibits any waiver of the right to file or enforce such liens as against public policy (Lien law, §34). It is axiomatic that: "[e]ven if [a] contract is valid where made, it will not be enforced in another State if it is repugnant to positive statutory enactment and the public policy of that State."\textsuperscript{164}

Nowhere does the \textit{Clifton} court cite \textit{Loucks}. More importantly, the \textit{Clifton} court identified public policy in a single forum.

\begin{footnotesize}
\begin{enumerate}
\item[158.] See supra notes 7-9 and accompanying text.
\item[159.] \textit{Erlich-Bober}, 49 N.Y.2d at 578, 404 N.E.2d at 728, 427 N.Y.S.2d at 606.
\item[160.] \textit{Restatement (First) of Conflict of Laws} §§ 355, 358 (1934).
\item[161.] See supra notes 8-9 and accompanying text (using that language to criticize public policy as applied in the traditional learning).
\item[163.] The court did not explain what relationship, if any, the parties had to Connecticut. Because the court did not reject Connecticut law on the ground that Connecticut had no relationship to the parties or the transaction, it may be reasonable to assume that at least one of the parties had a strong Connecticut affiliation.
\item[164.] \textit{Clifton}, 80 A.D.2d at 715, 437 N.Y.S.2d at 735.
\end{enumerate}
\end{footnotesize}
statute, which happened to contain a legislative declaration of public policy. As a justification for invoking public policy, the source compares poorly with the sources that Georgia courts used in applying traditional learning public policy to covenants restricting competition.\textsuperscript{166} It also falls far short of the standard that advocates of the modern learning thought they had identified in \textit{Loucks}.\textsuperscript{166}

There are other problems with the \textit{Clifton} court's analysis. For example, under the modern learning, the court should not have invoked forum public policy until it identified forum interests in the matter justifying its refusal to apply foreign law.\textsuperscript{167} The fact that the construction site was located in New York suggests that an advocate of the modern approaches might have been able to identify such interests; but this modern learning court named none. Instead, it identified and applied a New York statute declaring a New York prohibition on waiver of mechanic's liens to be New York public policy. That is precisely the analysis a traditional learning court would have made—and of which proponents of modern approaches would have been critical.

A last defense an advocate of modern learning might make for \textit{Clifton} is that, although the court did not explain its decision well, the court's reasoning was sound and consistent with the modern approaches. One rule in the Second Restatement might seem to justify that rationalization, but closer scrutiny will expose the flaw. The Second Restatement, a modern approach analogous to New York's technique,\textsuperscript{168} permits a forum to reject the parties' contractual choice of law if the forum has a "fundamental" policy in opposition to the other forum's law.\textsuperscript{168} The Second Restatement defines such a policy in the following manner:

\begin{quote}
To be "fundamental," a policy must in any event be a substantial one . . . . [A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power . . . . To be "fundamental" within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of §90.\textsuperscript{170}
\end{quote}

\textsuperscript{165} See \textit{supra} notes 90-92 and accompanying text.
\textsuperscript{166} See \textit{supra} notes 11-12 and accompanying text.
\textsuperscript{167} See \textit{supra} note 111 and accompanying text.
\textsuperscript{168} See Rendleman, \textit{supra} note 3, at 320-22 (similarity of New York's approach and Second Restatement); see also \textit{supra} note 1.
\textsuperscript{169} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 187(2)(b) (1971).
\textsuperscript{170} Id. comment g.
One might excuse a person possessed of no additional facts for believing that such a thought process was at work in Clifton, but it was not. A clue to the thought process actually operating is the language that the Clifton court quoted when it invoked public policy. The Clifton court declared: "It is axiomatic that: 'Even if [a] contract is valid where made, it will not be enforced in another State if it is repugnant to positive statutory enactment and the public policy of that State.'"\(^{171}\)

"A contract valid where made" evokes memories of the traditional learning. The Clifton court was quoting Lynch v. Bailey,\(^{172}\) a New York case decided in 1949, years before the New York courts abandoned the traditional approaches. One may draw two conclusions from that reliance on the traditional learning. First, Clifton is aberrational, because the court somehow simply forgot which choice of law rules it was supposed to use. Such an explanation might be plausible if New York had recently switched to a modern approach,\(^{173}\) but that is not the case. New York became a modern learning state many years ago. In fact, it was one of the first states to abandon the traditional rules.\(^{174}\) It is, therefore, not credible to assert that an appellate court in New York does not know by now which choice of law rules are supposed to be at work in New York.

The second conclusion is that the Clifton court cited an old case like Lynch, because the court was unable to discern a meaningful difference between public policy in the traditional learning and public policy under New York's current rules. That conclusion is much more likely to be correct. Moreover, it suggests that in the two recent New York public policy cases modern public policy analysis was either identical to that of traditional approaches (Clifton), or produced a tangle of confused reasoning that a traditional learning court might never have had to enter (Ehrlich-Bober).\(^{175}\)

4. PUBLIC POLICY IN CALIFORNIA

Five recent California decisions addressed questions of public policy. These decisions include four intermediate state appellate courts and one United States Court of Appeals for the Ninth Cir-

\(^{171}\) Clifton, 80 A.D.2d at 715, 437 N.Y.S.2d at 735.

\(^{172}\) 275 A.D. 527, 90 N.Y.S.2d 359, aff'd, 300 N.Y. 615, 90 N.E.2d 484 (1949).

\(^{173}\) Cf. supra note 112 (recent change in Michigan's choice of law rules may have caused confusion in Michigan courts).

\(^{174}\) See Rendleman, supra note 3, at 325 (suggesting New York's new choice of law rules were a "judicial innovation").

\(^{175}\) See supra notes 159-61 and accompanying text.
circuit decisions. In four of the five cases, the court successfully invoked public policy to bar application of foreign law.

The first decision was *In Re Marriage of DeLotel*, where a California plaintiff sought to attach a portion of her ex-husband's military pension in satisfaction of support payments due under an earlier California decree. The ex-husband was an Oregon domiciliary at the time of the suit. Oregon law exempted his pension from such attachment, as had California law at the time he had moved from California to Oregon. After his move and before this suit, however, the California legislature eliminated the exemption. The appellate court chose to apply California law, thereby making the ex-husband's pension subject to attachment. The court reasoned that it could only apply foreign law as a matter of comity, but it could not consider comity "where to do so would be contrary to the statutory law or the policy of the state of the forum." 177

In *Cable v. Sahara Tahoe Corp.* a California plaintiff sued a Nevada casino for injuries allegedly arising out of the casino's negligent sale of alcohol to a third party. The injury-producing accident occurred in Nevada. California law permitted recovery. Nevada law, on the other hand, contained a criminal prohibition on such sales but afforded no civil cause of action. The defendant had substantial business contacts with California, including: a bank account; purchases of equipment and supplies; and, large expenditures on advertising and promotional activity, intended to solicit the California customers who made up the bulk of the casino's business. 178 In short, *Cable* replicated the facts of the supreme court's famous decision in *Bernhard v. Harrah's Club*, with one important exception; in *Bernhard*, the highway accident took place in California. 179

This single distinction between *Bernhard* and *Cable* proved dispositive. In *Bernhard*, the court applied California law, because it concluded that California's regulatory interest in "prevent[ing] tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state" was paramount. 180 In *Cable*, by contrast, the appellate court

177. Id. at 24, 140 Cal. Rptr. at 555.
179. Id. at 387, 155 Cal. Rptr. at 772.
181. Id. at 316, 128 Cal. Rptr. at 216, 546 P.2d at 725.
182. California uses a modern choice of law approach which the *Cable* court described as "Governmental Interest Analysis' Employing the 'Comparative Impairment Approach.'"
concluded that Nevada law should apply, because the state policy so central to Bernhard protected Californians only when their accidents occurred within the state:

The California policy so delimited [in Bernhard] relates only to Nevada conduct causing injury in California. Our Supreme Court neither declared nor justified any policy purporting to protect California residents injured in Nevada. Consequently, the application of a Nevada rule denying recovery in a case where both the wrong and the injury occurred in Nevada could not impair this California policy.\textsuperscript{188}

After Cable, however, the three remaining California decisions invoked public policy to prevent the application of foreign law. In Hollingsworth Solderless Terminal Co. v. Turley,\textsuperscript{184} an employer sought to enforce a covenant not to compete against a former employee. The contract contained a provision that required the application of Pennsylvania law, but the Court of Appeals for the Ninth Circuit concluded that California public policy could, nevertheless, prevent enforcement of the restrictive covenant.\textsuperscript{186} The court found California public policy in a statute declaring such covenants void and in a holding by a California appellate court that the legislation constituted "a strong public policy."\textsuperscript{186}

In Muth v. Educators Security Insurance Co.,\textsuperscript{187} California creditors sought to attach land they had sold to a Nebraska insurance company that had become insolvent. The land was located in California. Pursuant to Nebraska law, a conservator then transferred those assets (including title to the California land) to an-
other insurance company, receiving in return a promise from the second insurance company to assume the insurance obligations of the first company. Only a nominal share of the insolvent company’s assets remained with the conservator as a fund with which to wind up corporate affairs and make payments to the company’s creditors. Thus, the conservator had protected the interests of parties holding policies with the insolvent company, but at the expense of the insolvent company’s creditors. The asset transfers and insurance agreement were apparently lawful under Nebraska law.

In California, however, elaborate provisions existed for the protection of creditors: “The winding up, dissolution, liquidation, or reinsurance of an insolvent insurance company is of special concern to the people of this state . . . . By statute, when California’s insurance commissioner becomes the conservator of an insurance company in a ‘hazardous condition,’ he becomes a ‘trustee for the benefit of all creditors.’”

The court decided that California law should apply for two reasons. First, the Nebraska conservator’s actions constituted “a practice [that] is contrary to the law and well-established public policy of this state.” It should come as no surprise that the court’s finding of public policy rested upon state statutes and case law that conflicted with the Nebraska approach of favoring holders of insurance policies over other claimants.

When the court in Muth finished explaining why public policy barred the application of Nebraska law, it added that “[t]here are other apposite policies and principles [justifying the application of California law]. It is a universal rule ‘that realty is exclusively subject to the lex loci rei sitae — to the law of the state within which it is situated.’” The use of a traditional learning situs rule when the issue before the court relates to realty is, of course, not surprising. A situs rule for most choice of law questions affecting realty is one feature of the traditional approach that the courts have routinely carried over to the modern approaches. Its use in Muth, thus, would be uneventful but for the way in which a modern learning California court decided the most recent of the California public policy cases and to which we now turn.

188. Id. at 758, 170 Cal. Rptr. at 853-54 (emphasis in the original).
189. Id. at 758, 170 Cal. Rptr. at 853.
190. Id. at 759, 170 Cal. Rptr. at 854.
191. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971) (suggesting situs law most frequently applies because the situs state is usually the most interested state).
In *Wong v. Tenneco, Inc.*, a California farmer who controlled some land in Mexico sued to recover for breach of contract and tortious interference with business relationships. The dispute arose from a transaction in which the defendant had agreed to market some of the farmer's crops. The farmer's interest in the Mexican land was what the court described as de facto; he was not the legal owner of record, because both the constitution and the laws of Mexico prohibited foreign ownership of Mexican soil. The farmer, therefore, had concealed his interest in the land behind some cooperative Mexican citizens. "They took legal title to the real and personal property in Mexico with the understanding that Wong remained the 'true owner.'"

After *Muth*, one might have expected the court to apply Mexican law and refuse to enforce the plaintiff's cause of action given the situs of the land in Mexico and the importance of the issue of ownership to Mexican national interests. Instead, the court concluded that application of Mexican law would violate a California public policy. "California's public policy, as expressed in its constitution and statutes, is to allow ownership of property without regard to citizenship." In other words, California public policy now extended to title in Mexican land.

Taken as a whole, the five California decisions do not evidence

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193. Mexican law also made unenforceable contracts based upon such foreign ownership, and provided civil and criminal sanctions against those who violated the constitutional and statutory prohibition. *Id.* at 380, 384 n.6, 198 Cal. Rptr. at 528, 530 n.6.
194. *Id.* at 380, 198 Cal. Rptr. at 529.
195. *Id.* at 383-84, 198 Cal. Rptr. at 530-31. To be on the safe side, the *Wong* court also concluded that under California's approach to interest analysis California law was the appropriate choice. One passage summed up the court's reasoning:
"Application of Mexican law in this case would completely impair California's interests in compensation, punishment and deterrence. Application of California law, however, would only partially impair Mexico's interests. Violations of the Mexican law applied below carry civil and criminal penalties in addition to the sanction of unenforceability. Mexico can advance its interests by imposing those additional penalties even without our upholding the sanction of unenforceability in this case. Thus California law, whose underlying interests would be the most impaired, should be applied.*

*Id.* at 380-84, 198 Cal. Rptr. at 530-31. In other words, if Mexico had viewed its interest as less important and had not enacted civil and criminal sanctions to enforce its prohibition, then it would have had a greater chance to have a foreign court apply its law. Conversely, under California's interest analysis, if California had viewed its interest as important enough to justify imposing a criminal sanction, then there would have been a greater chance that the court would not have applied California's law enforcing the contract.

Discussion of such reasoning is not central to an investigation of public policy doctrine in traditional and modern learning, but it does suggest just how manipulative the allegedly "certain" and "predictable" modern approaches can be. See *supra* note 3.
the superiority of modern learning public policy doctrine. In fact, those decisions at best indicate a great deal of similarity between the application of public policy in the traditional and modern learning. At their worst, they suggest a degree of arbitrariness in modern learning public policy that one does not find in traditional learning states.

In three of the California cases — DeLotel, Hollingsworth, and Muth — the courts applied an analysis that is similar to the traditional learning. The DeLotel court, in a suit to attach a military pension, concluded that foreign law could not apply, because it conflicted with forum statutory law. This mere difference in law was sufficient. Moreover, because the DeLotel court did not identify the policy behind California's attachment law that justified a rejection of the foreign law, one may criticize DeLotel for the same reason commentators have been critical of the traditional approach to public policy.

In Hollingsworth, the similarity between modern and traditional approaches is even more striking. Not only did the court make the sort of cursory public policy analysis that infected DeLotel, it also found public policy in a forum law prohibiting many restrictive covenants. Courts have routinely cited statutes as a source of public policy in both traditional and modern learning states.

Muth also reminds one of traditional learning, but with a twist. One justification for the decision to apply forum law was that the land at issue was located within California, but that was not the court’s primary reason for the decision. The court was explicit in using the situs of the land as among “other apposite policies and principles” justifying application of forum law. As the court explained it, the primary reason for its decision to apply California law was the forum’s public policy of protecting creditors of insolvent insurance companies in a way that foreign law would not.

In the traditional learning, by contrast, courts invoke public policy, if at all, only when other choice of law rules do not mandate

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196. See supra note 177 and accompanying text. Indeed, many traditional learning states have declared they would not do what the DeLotel court did. See supra note 33 and accompanying text (suggesting mere dissimilarity does not justify invocation of forum public policy).
197. See supra notes 7-9 and accompanying text.
198. See supra notes 42 & 119 and accompanying text.
200. Id. at 758-59, 170 Cal. Rptr. at 853-54.
application of forum law.\textsuperscript{201} Indeed, this is why Professor Sedler denounced traditional learning public policy as a "manipulative technique," intended to achieve justice in individual cases at the price of doing violence to the predictability that consistent application of sound choice of law rules should achieve.\textsuperscript{202} In \textit{Muth}, however, a modern learning court carried that "manipulative" practice one step further. Apparently lacking sufficient confidence in the analytical tools that the modern approach provides — ironically, a set of tools in this case very similar to those available in the traditional learning — the court rejected an opportunity to rest its decision primarily on the result of a modern interest analysis. Instead, it reached first for public policy doctrine, and used modern learning analysis only as a backdrop. If public policy, as an exception to the traditional learning, is a "manipulative device," how much worse is it when the "manipulative device" actually displaces the primary rule?

\textit{DeLotel, Hollingsworth,} and \textit{Muth} suggest that California courts do not apply public policy any better than their traditional learning counterparts. \textit{Wong} indicates that California courts also can do much worse. The court in \textit{Wong} refused to apply the law of the sovereign in which realty was located, notwithstanding the apparently profound importance that Mexico attaches to preventing foreign ownership of its soil. This result alone seems to make \textit{Wong} inconsistent with and probably inferior to \textit{Muth}\textsuperscript{203} — a not particularly distinguished decision itself. Yet, \textit{Wong} is worse, because it uses California's policy toward its own land as cause to second-guess Mexican policy toward Mexican land. One cannot conjure a better example of the "brute force" use of public policy that advocates of the modern learning so dislike than the examples

\textsuperscript{201} See supra note 4.

\textsuperscript{202} See supra notes 65-69 and accompanying text; see also supra notes 7-9 and accompanying text.

\textsuperscript{203} The only escape from the conclusion that the court poorly decided \textit{Wong}, even by the standard of \textit{Muth}, may lie in the assertion that \textit{Wong} is not a property case at all, but a dispute over a contract relating to property. If one accepts that proposition, it might follow that the situs of the affected land is less important than the preponderant interest in the contract which California might have had. Such a rationale, of course, requires a characterization of \textit{Wong} as a contract action. Commentators, however, have criticized precisely that sort of characterization (when it has appeared in the traditional learning) as another result-oriented "manipulative technique," as arbitrary as public policy. See R. LEFLAR, supra note 1, § 88, at 178 ("[T]he characterization technique is being used to achieve results that must be justified, if at all, by other real reasons. That other real reasons may exist cannot be doubted. The valid questions are as to what the real reasons are, and why a cover-up device should be manipulated to conceal them.")
that appear in modern approach states.\textsuperscript{204}

Of the five California cases, only \textit{Cable} seems to shelter modern learning advocates, and even there, the refuge is a mirage. Although devout advocates of modern theories might divine a demonstration of the success of a modern approach in \textit{Cable}, one can see that the court strained in its application of modern learning techniques — techniques that do not adjust well to real-world problems. As we saw earlier, with the single exception of the situs of the accident, \textit{Cable} is identical on its facts to the more famous California case of \textit{Bernhard v. Harrah’s Club}.\textsuperscript{205} In both cases, California had a substantial interest in furthering a California plaintiff’s recovery in order to avoid a burdensome increase in the welfare rolls. In both cases, the Nevada defendant had substantial contacts with California, including the solicitation of California citizens’ business. Moreover, in both cases, the defendants’ business operations were located close enough to the California border so that they could have foreseen that serving alcohol to already overindulged customers could have tragic consequences in California. In \textit{Bernhard}, those facts, combined with the situs of the ensuing accident in California, produced a decision to apply California law. In \textit{Cable}, the court acknowledged the force of the policy behind the decision in \textit{Bernhard}, but concluded that the Supreme Court of California could not have intended to extend the \textit{Bernhard} policy of discouraging service to drunken customers into the territorial confines of other states.

This conclusion seems reasonable; the alternative would raise the possibility that California policy, as expressed in \textit{Bernhard}, might sweep across the land, not to say the world. Nonetheless, the rationale of \textit{Bernhard} does not rest on the happenstance of situs. As long as the defendant has contacts with California and can foresee potential consequences in California, \textit{Bernhard} requires the application of California law. In short, although \textit{Cable}’s result is reasonable, one cannot explain it through the use of the \textit{Bernhard} approach. One can only understand \textit{Cable} by acknowledging the importance of situs in its own right — without allowing situs to falsely aggrandize the interests of either California or Nevada. As a rational retreat to situs law, the decision is sound; yet, if there is something wrong with \textit{Cable}, it is the court’s inability to completely jettison \textit{Bernhard} and more frankly recognize the overrid-

\textsuperscript{204} See supra notes 7-9 and accompanying text.

\textsuperscript{205} See supra notes 180-81 and accompanying text.
ing importance of situs as manifested in the traditional learning.
In short, not all of the California decisions are absolutely wrong. Moreover, reasonable people may differ about the quality of analysis in a few of the decisions. Yet, even if one gives the California courts the benefit of all reasonable doubt, their public policy decisions are not obviously better than traditional learning public policy decisions. At their worst, the California cases may be, in the words Professor Sedler used to describe Michigan public policy cases, one “big mess.”

Thus, neither California nor New York has vindicated the assessment that public policy works better in the modern systems. Surprisingly, it appears that Texas courts have done better.

5. PUBLIC POLICY IN TEXAS

In 1979, the Supreme Court of Texas adopted the modern approach embodied in the Restatement (Second) of Conflict of Laws in Gutierrez v. Collins, a suit between two Texas residents arising from an automobile accident in Mexico. The Gutierrez court also described how public policy doctrine would operate within Texas’s new choice of law rules: “Texas courts will not enforce a foreign law that violates good morals, natural justice or is prejudicial to the general interests of our own citizens.” That standard seemed to afford a great deal of flexibility in the use of public policy, and probably does not meet the ideal of Loucks that choice of law commentators often praise. In Gutierrez, however, the court applied the standard rather circumspectly.

Mexican law provided measures of damages different from those in Texas, but the Supreme Court of Texas held that mere dissimilarity would not justify the court’s invocation of public policy. After identifying the differences in detail, the court held that

206. See supra note 65 and accompanying text.
207. Restatement (Second) of Conflict of Laws (1971).
208. 583 S.W.2d 312 (Tex. 1979).
209. Id. at 321. Interestingly, the Supreme Court of Texas cited to one of its decisions from 1967, thereby suggesting that it did not believe the change from traditional learning to modern learning would have any significant impact on the way public policy doctrine would operate in Texas. The court also made the following comment about the use of public policy generally: “This [the court’s standard for invoking public policy] is a limitation recognized by all jurisdictions.” Id. If that disarming statement from the Supreme Court of Texas is accurate—and the data developed in this article suggests that the court was not far from the mark—all the straining that advocates of the modern learning have done to disassociate their doctrines from traditional learning public policy appears to be a wasted effort.
210. See supra notes 10-11 and accompanying text.
“the mere fact that these aspects of the law differ from ours does not render them violative of public policy. . . . [T]here is nothing in the substance of these laws inimical to good morals, natural justice, or the general interests of the citizens of this state.” 211 Although the Gutierrez court’s view of public policy was conclusory, it apparently established a practice of circumspection in using the doctrine that other courts in Texas have followed.

After Gutierrez, three other Texas courts addressed public policy questions; each time, the court refused to invoke forum public policy. In Fleeger v. Clarkson Co., 212 a Texas plaintiff sued over a Canadian receiver’s settlement of claims against a bankrupt Canadian corporation in which the plaintiff had stock. A Canadian court had previously approved the transactions at issue. The plaintiff, however, argued that the United States District Court for the Northern District of Texas should not afford comity to that judicial decision, because differing Canadian judicial procedures violated Texas public policy. The court had little difficulty brushing aside that argument. Citing to the same definition of public policy that the Supreme Court of Texas had cited in Gutierrez, the court concluded that Canadian procedures were merely different, “not abhorrent to a United States court and . . . not against ‘good morals or natural justice . . . or prejudicial to the general interests of [U.S.] citizens.’” 213

In Robertson v. Estate of McKnight, 214 the Supreme Court of Texas applied foreign law over a public policy objection. A Texas air crash killed a New Mexico husband and wife, and the wife’s estate brought suit against the husband’s estate. Texas legislation established interspousal tort immunity, but New Mexico would have allowed the suit. After concluding that New Mexico had the most significant relationship to the parties, the court reversed the lower court’s holding that New Mexico law violated Texas public policy. The court also utilized the definition of public policy that it had approved in Gutierrez, and concluded: “While Texas does not permit spouses to recover from each other for negligently inflicted injuries, a rule which does permit such a suit does not violate good morals or natural justice. We note that a large number of states do

211. Gutierrez, 583 S.W.2d at 322.
212. 86 F.R.D. 388 (N.D. Tex. 1980).
213. Id. at 394. The brackets within the quote are in the original. For reasons not entirely clear, the federal district court substituted the bracketed “U.S.” for the words “our own” (meaning Texans) in the original language.
214. 609 S.W.2d 534 (Tex. 1980).
permit such suits."

Finally, in Becker v. Computer Sciences Corp., a California defendant counterclaimed against a Texas plaintiff who had surreptitiously recorded telephone conversations that had taken place between California and Texas. In California, such activity triggered criminal sanctions as well as the possibility of civil liability. Texas law, however, permitted such recordings with the consent of one of the parties. The plaintiff argued that application of California law would violate Texas policy. The United States District Court for the Southern District of Texas disagreed:

The fact that the State of California has sought to protect its citizens' rights to privacy to a greater degree than the State of Texas, and apparently a number of states also recognize such rights . . . does not provide a sufficient basis to support a finding that the California statute violates "good morals, natural justice or is prejudicial to the general interests of its citizens."

The Texas cases have a number of elements in common: first, all of the cases arose in a tort context; second, each court identified the same sweeping language when describing circumstances that might trigger the invocation of forum public policy; third, each court refused to invoke public policy; finally, in deciding not to apply forum public policy, each court was conclusory in its public policy analysis. The result is that after these four decisions, parties will still find it difficult to predict with confidence when Texas courts may apply public policy — save for two useful guidelines: first, when a foreign law is merely dissimilar, Texas courts will not apply forum public policy; second, when the foreign law has achieved some general acceptance in states other than Texas, the Texas courts will be less inclined to find in it a violation of good morals or natural justice. Although the record of the Texas courts may not be profoundly successful, it does provide some cause for solace for those commentators who believe that public policy can be a coherent doctrine when it is measured against the performance of courts in other states.

215. Id. at 537.
217. Id. at 703. While rejecting public policy, the court applied Texas law anyway on the ground that Texas was the state with the most significant relationship. Id. at 706.
218. See supra note 6 and accompanying text; see also Delhomme Indus., Inc. v. Houston Beechcraft, 669 F.2d 1049 (5th Cir. 1982) (suggesting that because the Uniform Commercial Code is the law of 49 states it does not violate good morals in Louisiana).
V. Conclusion

One may draw two conclusions from this study of public policy. The first conclusion deals with how the courts may be able to transform public policy into a more rational choice of law tool. The second and probably more important conclusion concerns the shortcomings of modern choice of law approaches, and the reasonable expectations that we should have for any choice of law system.

A. Improvements in Public Policy

No matter how much uncertainty there may be in applying public policy doctrine, the experience of American courts since Loucks makes one point unmistakably clear: public policy is not likely to fade away. Both traditional and modern learning courts continue to find it a handy tool, and there is no sign that courts belonging to either choice of law school will discontinue using it. It may be, as Professor Lorenzen remarked sixty years ago, that the use of such a doctrine is cause for questioning the quality of the choice of law system which employs it. Even so, courts will continue to use it. At this stage of our experience with public policy, therefore, courts should endeavor to improve an admittedly flawed doctrine, rather than try to abolish it altogether.

Reform, as opposed to abolition, can begin with small steps. The first step is to recognize what is known, and thereby isolate what is not known. A generation ago, Professors Paulsen and Sovern informed us that courts do not employ public policy in a wholesale fashion; they only apply it when the forum has an important interest in the matter at issue. Nothing in this study has eroded the validity of this observation. Thus, if courts do not invoke public policy promiscuously, then the doctrine itself may create only small problems, notwithstanding the attention advocates of modern learning have accorded it in the course of their attacks on the traditional rules.

219. See supra note 6 and accompanying text.
220. See supra note 7.
221. In fact, one Georgia court was explicit in supporting their finding. See Terry v. Mays, 161 Ga. App. 328, 329, 291 S.E.2d 44, 45 (1982) (denying the invocation of Georgia public policy as to a contract made in South Carolina and primarily to be performed in South Carolina, because Georgia had no interest in such a contract).
222. See, e.g., supra notes 6-9 and accompanying text. Taken in conjunction with other defects of a choice of law system, of course, public policy may still contribute to a generally unsatisfactory situation. Recognition that public policy may not itself be a major obstacle to effective choice of law rules, however, suggests that efforts to improve choice of law should
If Professors Paulsen and Sovern brought good news, the bad news remains that American courts share very little other common ground with regard to public policy. In fact, the values that have triggered, 223 or not triggered, 224 the invocation of public policy remain strikingly different in different courts, and sometimes even in the same court. 225 The bad news, however, may be less consequential than it first appears.

When considering a doctrine such as public policy, one might expect this nationwide lack of uniformity in the values that trigger its invocation. Since the days of Judge Cardozo and his decision in Loucks, courts have only considered local values and not national ones. Given the heterogeneity of the country at large, it is no surprise that community values differ significantly. Such differences, however, need not be consequential for public policy, because the uniformity necessary to make the doctrine work well must occur within a state, not necessarily among the states.

Depending on the particular state that one examines, there may be cause for some optimism for a consistent and principled application of the public policy doctrine. Recently, Georgia and Texas, for example, appear to have done fairly well in developing their respective doctrines. 226 Additional experience may expose their apparent success as mere fortuity, but at least for now, those states seem to be laying a foundation for a principled and defensible employment of public policy.

In public policy, unfortunately, there seems to be at least one failure for every success. For every Georgia or Texas that makes a bit of progress, there appears to be a Michigan or California still stuck in a morass of logically inconsistent decisions. 227 Stare decisis may offer some limited hope for less successful jurisdictions. Even if one cannot logically harmonize two public policy decisions in a particular state, these decisions may still serve some utility as precedent for predicting when courts will invoke the doctrine. Predictability without reason is certainly less desirable than principled predictability; yet, it is better than no predictability at all. Perhaps for now, that is as much as we may reasonably expect in some jurisdictions.

223. See supra notes 41-51 & 119-29 and accompanying text.
224. See supra notes 52-59 & 130-39 and accompanying text.
225. See, e.g., supra notes 64-74 & 172-202 and accompanying text.
226. See supra notes 75-94 & 207-18 and accompanying text.
227. See supra notes 64-74 & 176-206 and accompanying text.
B. *Public Policy and Choice of Law*

This study has established that, irrespective of the choice of law system employed, there will be an irreducible number of cases in which courts will be inclined to employ public policy doctrine.\textsuperscript{228} Moreover, the decisions in many of these cases may not necessarily be doctrinally consistent. Instead, these decisions sometimes rest only on the judicial intuition that foreign law should simply not apply — even if the judge cannot quite articulate reasons why the forum's values reject this particular law and not others. That one can find such cases in both traditional and modern learning courts suggests that public policy as applied turns out differently from what advocates of modern learning believed. Contrary to their thesis, there is no evidence that modern choice of law approaches have imposed improved reasoning on the operation of public policy doctrine.\textsuperscript{229} An immediate reaction to that finding is the suspicion that perhaps the modern approaches actually operate no better than the traditional learning in other choice of law areas as well.

There is something more important, however, that this study may teach about expectations and results in choice of law. The modern systems developed in response to dissatisfaction with the existing traditional rules. These rules seemed to work well in the majority of cases; yet, their seeming rigidity forced judges to make a difficult choice between adhering to rules that might produce injustice in a particular case and disregarding the rule and dispensing justice at the cost of destroying consistency and predictability — the greatest strength of the traditional learning.\textsuperscript{230} It was largely for those cases, unprovided for in the traditional system, that the modern learning sought to overturn the established rules.

The experience of public policy suggests, however, that the enterprise has fallen short. Judges continue to identify cases unprovided for in the traditional system, but for which modern analysis seems to offer no superior solution. In short, for all the ferment the modern learning has produced, we seem not to be appreciably better off now than we were before modern systems carried the day. Indeed, considering the significant costs in confusion attendant

\textsuperscript{228} See \textit{supra} notes 41-63 & 109-44 and accompanying text.

\textsuperscript{229} See, \textit{e.g.}, R. Weintraub, \textit{supra} note 10; cf. P.J. Kozyris, Newsletter to Association of American Law Schools, Section on Conflict of Laws 1 (Oct. 3, 1984) ("[I]nterests [sic] analysis ... woes so many courts and commentators [as] demonstrated by the increasing challenges to its very foundations.").

\textsuperscript{230} See R. Weintraub, \textit{supra} note 9, § 6.1, at 265-67 (suggesting the traditional rule often produced either injustice or inconsistency in tort).
upon any major change in law such as choice of law, we may be somewhat worse off.

If so, the lesson is not that we should reject change that promises improvement, because we fear incurring some costs. Yet, the costs that we have experienced in moving from the traditional to the modern learning suggest that, before we reject a system that does not address all cases satisfactorily, we first should consider how significant such an inadequacy actually is. Perfection may exist somewhere on this planet, but it does not exist in choice of law.