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Comments on the Roundtable Discussion of Choice of Law

by Russell J. Weintraub

I. INTRODUCTION

I congratulate the Walter F. George School of Law for bringing together a distinguished group of conflict-of-laws scholars to discuss some of the best known cases in the field. There is no better way to honor Brainerd Currie of whom the School is justifiably proud as a former student and faculty member. Although, as Professor Currie freely acknowledged, he was not the first to argue that the territorial reach of a law should depend on the law's content and purpose, his series of carefully wrought articles endowed the concept such intellectual force that it could no longer be ignored. Within five years of the publication of the first article in the series, the New York Court of Appeals abandoned the place-of-wrong rule in torts. The court chose law by a "[c]omparison of the relative 'contacts' and 'interests'" of the two jurisdictions involved and cited Professor Currie for his "criticism of the traditional rule."

The comments of members of the Mercer Roundtable and the audience present useful insights into the choice-of-law process. My remarks focus on some of the many interesting issues raised by the participants. For convenience, this Article follows the order of the Roundtable discussion and uses as headings the same cases analyzed by the participants.

* Professor of Law and Holder of the John B. Connally Chair in Civil Jurisprudence, University of Texas School of Law. New York University (B.A., 1950); Harvard University (J.D., 1953).

3. Id. at 284.
4. Id. at 281.
II. *WALTON v. ARABIAN AMERICAN OIL CO.*

The issue on which the Roundtable discussion focused was the same issue raised by Brainerd Currie in his discussion of the case: if neither party contends that the law of the forum should be displaced with Saudi Arabian law, should the judge raise this issue on his own motion and dismiss the complaint when plaintiff does not prove the content of Saudi law? I agree with Professor Currie that a court should apply forum law unless one of the parties shows, with whatever modern procedures are available, that the law of another jurisdiction is different from that of the forum and that a proper choice-of-law analysis displaces forum law with foreign law. It is easier to justify this position when the forum's contacts with the parties and the transaction trigger the policies underlying forum law. Even in rare circumstances when the forum will not bear the long-range consequences of the choice of law, forum law should apply if no other law is shown to be different and relevant. Perhaps the best justification for this position is Chief Justice Vanderbilt's statement in *Leary v. Gledhill* that the parties "acquiesce in the application of the law of the forum."

Several of the Roundtable members disagreed with this position, at least when the defendant objects to the application of forum law and the forum has no "interest" in the application of its law. Professor David Currie agrees with the position of Larry Kramer that "it's up to the plaintiff to point to some law that gives a right to relief" and states that New York cannot give a right because New York has insufficient contacts with the parties or the transaction to trigger New York's

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5. 233 F.2d 541 (2d Cir. 1956). Plaintiff, an Arkansas citizen, was injured when the automobile he was driving collided in Saudi Arabia with a truck owned by defendant and driven by one of its employees. Plaintiff was temporarily in Saudi Arabia. Defendant, incorporated in Delaware and licensed to do business in New York, conducted most of its activities in Saudi Arabia.


7. See, e.g., UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT §§ 4.01-4.04, 13 U.L.A. 355, 394-97 (1986) (stating that a party shall give reasonable written notice of an intention to raise an issue concerning the law of another jurisdiction and permitting the court to consider any relevant material in determining the law of that jurisdiction).

8. See Currie, supra note 6, at 1027.

9. 84 A.2d 725 (N.J. 1951).

10. Id. at 729.

compensation policy. Dean Kay comments that if defendant raised the choice-of-law issue, there might be a "constitutional objection" to the application of forum law.12

*Phillips Petroleum Co. v. Shutts*13 is a good example of the waste of resources resulting from using the Constitution to block application of forum law without first requiring a party to demonstrate that the law of some other jurisdiction produces a different result. In a class action in Kansas, the Kansas courts applied Kansas law to determine the interest owed by Phillips on royalty payments that it withheld from owners of natural gas fields.14 The Supreme Court held it unconstitutional to apply Kansas law to the rights of royalty recipients in other states.15 Justice Stevens objected that there was no showing that the other states in which there were gas leases would have reached a different result, and therefore, "[t]here is simply no demonstration here that the Kansas Supreme Court's decision has impaired the legitimate interests of any other States . . . ."16 Justice Stevens was right. On remand, the Kansas courts decided that in the absence of clear precedent to the contrary in the other states, the judges there would probably be as fair and wise as the Kansas judges and require the same amount of interest on suspended royalties as ordered in the remanded case.17 This time the Supreme Court denied certiorari.18

In *Walton*, the laws of all the United States jurisdictions that had contacts with the parties were identical on the key issue of whether the Arabian American Oil Company (ARAMCO) was responsible for its employee's negligence.19 As the *Restatement (Second) of Conflict of Laws* states in one of its most sensible provisions, "[w]hen certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state."20 Under modern conflicts analysis, ARAMCO might argue that Saudi law should be applied so that ARAMCO can play on a level field with companies from outside the United States that do business in Saudi

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12. Transcript, *supra* note 6, at 646.
15. *Id.* at 823.
16. *Id.* at 836 (Stevens, J., concurring in part and dissenting in part).
18. *Id.*
Arabia. First, however, it should behoove ARAMCO to demonstrate that Saudi law would not permit recovery. ARAMCO's access to experts on Saudi law should make it easy for ARAMCO to present proof that under that law "responsibility for human action is individual and . . . there can be no vicarious liability." The mystery is why ARAMCO did not do so, relying instead on the long process that finally resulted in dismissing plaintiff's claim on the merits for his inability to prove the content of Saudi law.

It is not unfair to apply New York law if that law reaches the same result as the laws of Delaware, where the company was incorporated, and Arkansas, where plaintiff was domiciled. Reich v. Purcell was a suit by recently-arrived California residents against a long-time California resident for the wrongful death of family members in an automobile collision in Missouri. Missouri had a twenty-five thousand dollar cap on recovery, but California did not limit recovery and neither did Ohio, the former residence of plaintiffs. At the time of the collision, plaintiffs "were on their way to California, where [they] were contemplating settling." Justice Roger Traynor refused to take plaintiffs' move to California into account in his interest calculus because this might lead to "forum shopping." Perhaps "domicile shopping" might be a better term in this context. He rejected Missouri law on the ground that Missouri did not have "any substantial interest . . . in extending the benefits of its limitation of damages to travelers from states having no similar limitation." He could then have stated that further analysis was not necessary because California and Ohio law were identical, but instead he applied the law of Ohio where plaintiffs resided at the time of the collision. Was the application of Ohio law unfair to defendant, who had no contact with that state? Traynor's short and cogent answer was, "[a] defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile and plaintiffs receive no more than they would have had they been injured at home.

22. See Walton, 233 F.2d at 546.
24. Id. at 728.
25. Id. at 730.
26. Id. at 731.
27. See RESTATEMENT, supra note 20 and accompanying text.
28. See Reich, 432 P.2d at 731.
29. Id.
The worst thing a court can do is to raise the choice-of-law issue on its own motion and then decide it without adequate briefing and argument. *James v. Powell* is a good example of what to avoid. Plaintiff had recovered a libel judgment against Congressman Adam Clayton Powell. Powell and his wife owned land in Puerto Rico, which the wife transferred to relatives. Plaintiff then sued Powell and his wife for harm caused by this fraudulent conveyance and recovered compensatory and punitive damages. All parties were content to have the case decided under forum law, but the New York Court of Appeals would not allow the parties to overlook "[t]he rule . . . that the validity of a conveyance of a property interest is governed by the law of the place where the property is located." The court then speculated that Puerto Rican law might not permit attachment of the land or, if attachment were possible, that law might allow plaintiff to ignore the fraudulent conveyance and proceed against the property. So far so good. These facets of Puerto Rican law simply determine whether plaintiff has in fact been harmed, what Brainerd Currie would refer to as a "datum." It might be preferable for Puerto Rico to apply New York law to determine whether the New York debtor's real estate is exempt from execution by his New York judgment creditor, but what Puerto Rico does is controlling on this issue.

Next, however, the court's logic jumps the tracks. If plaintiff did have a right initially to proceed against the land and that right was frustrated, "her remedy, if any, must arise under the law of Puerto Rico." No, given the fact of harm, there is as much reason why New York law should determine the remedy as in *Babcock v. Jackson*, in which the court held that New York law afforded a cause of action by a guest passenger against a host driver although the law of the place of injury would not. In *James*, the court did find that "New York has the 'strongest interest' in the protection of its judgment creditors and, accordingly, New York law should govern as to whether the judgment

31.  Id. at 745.
32.  See id.
33.  See Currie, *supra* note 6, at 1020.
34.  See UNIF. EXEMPTIONS ACT § 3(a), 13 U.L.A. 218 (1986) (stating that "[n]onresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence"); cf. RESTATEMENT, *supra* note 20, § 132 (stating that forum law determines exemptions unless another state, such as the common domicile of creditor and debtor, "has the dominant interest in the question of exemption").
37.  See id. at 284.
debtor's conduct . . . warrant[ed] an award of punitive damages. The same could be said of compensatory damages. Then, having instructed the parties on choice of law, the court remanded for application of Puerto Rican law to compensatory damages. Thus, the court raised the choice-of-law issue on its own motion, proceeded to decide it, and made a hash of it.

I agree with David Currie that "in an adversary system" the court should not raise the choice-of-law issue on its own motion. A civil law jurisdiction is governed by the motto jura novit curia, the court knows the law, and the judge is expected to take an active role in shaping the presentation of the case. Although there is disagreement among scholars whether "jura" includes foreign law, a civil law judge is likely to raise the choice-of-law issue on her own motion and assist the parties in properly briefing and arguing the issue.

III. GRANT V. MCAULIFFE

Dean Kay raises the question of why, when two cars collide, as they did in Grant v. McAuliffe, the application of the place-of-injury rule denying recovery "depends so heavily on the residence of the parties." She asks whether the rule produced by interest analysis "is a common domicile rule." Professor Laycock has gone so far as to state that if residents of the same state are in the same automobile which crashes in another state, it would be permissible to apply the law of their common domicile, but if two strangers who happen to share the same domicile

38. James, 225 N.E.2d at 747. The court held that New York law did not permit punitive damages. Id.
39. See id. at 745.
40. Transcript, supra note 6, at 650.
41. See David S. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat, 61 S. Cal. L. Rev. 1795, 1815 (1988) (stating that "German judges have a duty, reinforced by the principle jura novit curia, to know and be bound by the appropriate legal rule without prompting from the parties").
42. See Detlev Vagts & Betinio Diamant, Book Review, 81 Am. J. Int'l L. 544, 545 (1987) (stating that jura novit curia does not apply to foreign law and disagreeing on this point with the author of the book reviewed).
43. 264 P.2d 944 (Cal. 1953). Two California residents collided while driving in Arizona. After the death of one of the drivers, plaintiffs sued his estate in California for compensation for injuries caused by the collision. Under Arizona law the cause of action would not survive the tortfeasor's death, but it did survive under California law. Judge Traynor applied California law on the ground that it was procedural. See id. at 946.
44. Transcript, supra note 6, at 659.
45. Id. at 660.
collide in another state, the Constitution requires application of the law of the place of injury.\textsuperscript{46}

Professor Laycock's position was certainly news to the authors of a popular casebook.\textsuperscript{47} Grant v. McAuliffe is a principal case in their book. In editions before Laycock's article was published, the editorial summary of the facts simply referred to "an Arizona automobile accident" without revealing whether one or more cars were involved.\textsuperscript{48} Following Professor Laycock's article, the authors inserted in the current edition the vital information that Pullen's death was the "result of the collision of two automobiles."\textsuperscript{49}

The reason Justice Roger Traynor reached the right result in Grant v. McAuliffe was that only California would bear the long-range consequences of holding Pullen's estate liable for the injuries he inflicted in Arizona. A common domicile rule is not desirable because such a rule masks the difference between false and true conflicts and sometimes gives us the wrong answer. This is illustrated by a sequence of three Wisconsin cases. In Haumschild v. Continental Casualty Co.,\textsuperscript{50} a Wisconsin husband was driving in California with his wife as passenger when his negligence caused an accident that injured his wife. At that time, California did not permit spouses to sue one another for negligent injury, but Wisconsin did. In a landmark opinion, the Supreme Court of Wisconsin overruled a long line of cases\textsuperscript{51} that had applied the law of the place of injury in these circumstances and the court applied Wisconsin law instead.\textsuperscript{52} The court accomplished this feat by recharacterizing the cause of action as "a matter of family law rather than tort law [that] should be governed by the law of the domicile."\textsuperscript{53}

Three years later the court revisited choice of law for marital immunity in a significantly different factual context. In Haynie v.

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\textsuperscript{46} Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 324 (1992) (stating that if "two strangers from Wisconsin collide on a Minnesota highway . . . there is no basis to apply any law but Minnesota's").

\textsuperscript{47} MAURICE ROSENBERG ET AL., CASES & MATERIALS ON CONFLICT OF LAWS, 493 (10th ed. 1996).


\textsuperscript{49} See MAURICE ROSENBERG ET AL., CASES & MATERIALS ON CONFLICT OF LAWS 493 (10th ed. 1996).

\textsuperscript{50} 95 N.W.2d 814 (Wis. 1959).

\textsuperscript{51} Id. at 818.

\textsuperscript{52} See id.

\textsuperscript{53} Id. at 817.
Hanson, an Illinois wife was injured when her husband collided in Wisconsin with a Wisconsin driver. The wife sued the Wisconsin driver, and he impleaded the husband's liability insurer for contribution. Illinois, but not Wisconsin, had a rule of marital immunity for tort. The court stuck to its domicile guns and affirmed dismissal of the Wisconsin defendant's cross-complaint.

The problem with this result is that this time the policies of the place of injury, not as place of injury but as defendant's domicile, are relevant. Wisconsin had an interest in permitting its resident to obtain what it regarded as equitable contribution, thus lessening his liability and, not incidentally, reducing the loss history of a car principally garaged in Wisconsin and, consequently, reducing Wisconsin liability insurance rates. The interests of the husband's residence, Illinois, in marital immunity were, if not eliminated, at least greatly attenuated. The two reasons that Illinois might impose marital immunity for tort were to prevent collusive recoveries against a spouse's liability insurer, thus reducing liability insurance rates, and to prevent domestic discord. Collusion and domestic strife were less likely in Haynie than if the wife had sued her husband. It was the Wisconsin driver who dragged the husband's liability insurer into court for contribution. If there were any suspicion that this was a Machiavellian conspiracy to get at the husband's liability insurance because the Wisconsin driver is underinsured, the scheme can be frustrated by permitting the Wisconsin driver to receive contribution only after he has paid more than his proper share of the judgment.

Another six years passed before the Wisconsin court recognized that the rigid domicile rule was capable of doing mischief just as the rigid place-of-wrong rule had. The court in Zelinger v. State Sand & Gravel Co. applied "interest analysis" and permitted the Wisconsin defendant

54. 114 N.W.2d 443 (Wis. 1962).
55. See id. at 444.
56. See Zelinger v. State Sand & Gravel Co., 156 N.W.2d 466, 472 (Wis. 1968) (stating that the Wisconsin rule of contribution is designed “to promote the spreading of the risk and fasten liability in torts on a moral basis of fault”).
57. See id. (stating the policy of interspousal immunity “rest[s] on the proposition that family peace is promoted thereby and perhaps as a by-product collusive suits are held to a minimum”). These policies are speculative. In actual litigation, whether one or both of these policies underlay the Illinois rule would be determined by careful study of the legislative history of any statutes involved and of any Illinois cases discussing the reasons for marital immunity. See Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171, 178 (stating that we should determine a statute's territorial reach by the same process used to determine “how a statute applies in time, and how it applies to marginal domestic situations”).
58. 156 N.W.2d 466 (Wis. 1968).
to obtain contribution in circumstances similar to Haynie.\(^{59}\) The court repented that in Haumschild\(^{60}\) it had substituted for the place-of-wrong rule "another universal mechanical rule . . . which required the application of the law of the domicile."\(^{61}\) All this did not prevent the New York Court of Appeals, four years after Zelinger, from adopting a common-domicile rule for guest-statute cases.\(^{62}\) Oh well, you can't expect New York judges to read cases from a hick state like Wisconsin.

IV. BABCOCK V. JACKSON\(^{63}\)

I do not agree with Dean Kay "that Georgia is better off not to have [legislative history] because the Georgia judges, then, won't be as distracted maybe as some of the other judges will be" in attempting to find the purpose of a statute as part of interest analysis for choice of law.\(^{64}\) Dean Kay refers to Professor Brilmayer's contention that interest analysts are not really concerned with legislative intention because they would not follow a specific legislative direction concerning the geographical reach of legislation if the statute required application of the law of a state that had no "interest" in the resolution of the controversy.\(^{65}\)

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59. Id. at 470. This analysis was through a Leflar lens. The court adopted as "guidelines . . . A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; D. Advancement of the forum's governmental interests; E. Application of the better rule of law." Id. at 469 (citing Robert Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267, 282 (1966)). The court applied Wisconsin law as "the better law." Id. at 473.

60. 95 N.W.2d 814 (Wis. 1959), discussed supra text accompanying notes 50-53.

61. Zelinger, 156 N.W.2d at 468.

62. See Neumeier v. Kushner, 286 N.E.2d 454, 457 (N.Y. 1972) (stating that "[w]hen the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest").

63. 191 N.E.2d 279 (N.Y. 1963). A New Yorker was driving his automobile in Ontario when he lost control and struck a stone wall. His passenger, also a New Yorker, was injured. The passenger sued the driver to recover for her injuries. Ontario law did not permit a guest passenger to sue her host driver, but there was liability under New York law. The court applied New York law stating that "[c]omparison of the relative 'contacts' and 'interests' of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal." Id. at 284.

64. Transcript, supra note 6, at 671.

65. See Lea Brilmayer, Methods and Objectives in the Conflict of Laws: A Challenge, 35 MERCER L. REV. 555, 558 (1984) (stating that if a state statute has a choice-of-law provision requiring the application of that statute in certain circumstances "[s]urely 'statutory construction' [in which interest analysts purport to engage] compels the finding of an interest [of that state in applying its statute]"); Id. at 560 (stating that no "mainstream interest analyst would say that [the state] can be shown to have an 'interest"
Legislative history can be useful in determining the policies that a statute has implemented. These policies determine whether a state is "interested" in having its law applied; otherwise one of those policies will be subverted. A choice-of-law clause requiring application of the statute when no purpose underlying the statute will be served is not an expression of a state "interest" in the sense relevant to functional conflicts analysis.

Legislative history is not equal in quality. A section-by-section analysis intended to facilitate legislators' understanding of the enactment and drafted by the committee that voted out the statute is likely to be reliable. A question from the floor during debate asking how the statute would apply in a specific circumstance and answered by one of the bill's sponsors may be another matter entirely, particularly if inquiry reveals that the questioner had the interests of a client in mind when asking the question and that the answer had been prearranged to obtain the support of the questioner. Of course that never happens, does it?

Moreover, just because legislative history states that a statute is designed to serve a certain purpose, it does not mean that courts in other states must find the purpose credible or yield their interests to that of the enacting state. Suppose, for example, Alabama added a provision to its guest statute\(^66\) stating that it applied whenever the injury occurred in Alabama because the purpose of the statute was to protect owners and drivers from ungrateful guests, and that this protection was extended not only to Alabama residents but also to all who visit Alabama. That would bind Alabama courts, but courts of other states should feel free to permit recoveries in cases like Babcock v. Jackson.\(^67\) The interest that Alabama asserts pales in comparison to the interest of the domicile of host and guest in assuring adequate compensation to its injured residents or their surviving dependents. If we could trust the United States Supreme Court to micromanage choice

\(^{66}\) ALA. CODE § 32-1-2 (1975) (requiring "willful or wanton misconduct" before an owner or operator of a motor vehicle is liable for injury or death of a guest passenger).

\(^{67}\) 191 N.E.2d 279 (N.Y. 1963). For a statement of the case, see supra note 63.
of law, which we cannot, Alabama would be told to desist from such an officious assertion of an interest.

V. SCHULTZ v. BOY SCOUTS OF AMERICA, INC. \(^{69}\)

Dean Kay states that interest analysis is vulnerable to forum shopping.\(^{70}\) Any method of choice of law, unless uniformly applied by all possible forums, will lead to forum shopping if plaintiff attorneys are doing their jobs. Basic litigation tactics require the attorney to determine all jurisdictions in which the plaintiff can sue the defendant, the laws of these jurisdictions, and whether each jurisdiction will apply its own law or the law of some other place. A perfectly good case can be kicked down the sewer by suing in the wrong forum.

In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973,\(^{71}\) is a good example. New Hampshire residents who had purchased

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68. We do not want the same folks who have made a mess of personal jurisdiction to do the same with choice of law. For a jurisdictional masterpiece, see, for example, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417-18 (1984) (denying jurisdiction over a Colombian helicopter company that killed United States workers in Peru and that had extensive business contacts with the forum, relying on Rosenberg Bros. v. Curtis Brown Co., 260 U.S. 516 (1923), which was decided 22 years before International Shoe Co. v. Washington, 326 U.S. 310 (1945), ushered in a new jurisdictional regime). It is just as well that the Court allows states to do pretty much what they will with choice of law. See Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (permitting Minnesota to apply its law to construction of an insurance policy issued in Wisconsin to a Wisconsin resident and thus increase compensation for death caused in Wisconsin). In the past 50 years, only one full opinion by the Court held unconstitutional a state's application of its own law, and in that case it did not make any difference what law applied. See Phillips Petroleum v. Shutts, 472 U.S. 797 (1985), discussed supra text accompanying notes 13-18. The last opinion before Phillips Petroleum to declare choice of law unconstitutional was Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947). In 1981, the Court affirmed without opinion an Eighth Circuit decision holding application of Missouri law unconstitutional. McCluney v. Joseph Schlitz Brewing Co., 649 F.2d 578 (8th Cir.), aff'd mem., 454 U.S. 1071 (1981).

69. 480 N.E.2d 679 (N.Y. 1985). Two New Jersey brothers were members of a Boy Scout troop. The scoutmaster was a Catholic priest who also was a teacher at a parochial school attended by the brothers. The scoutmaster took the brothers to a camp in New York where he sexually abused them. Both boys suffered emotionally and one committed suicide. The boys' parents sued the Boy Scouts and the Brothers of the Poor of St. Francis, an Ohio corporation, that supplied teachers for the New Jersey school attended by the boys. The Boy Scouts were headquartered in New Jersey when the abuse in New York occurred, but then moved to Texas. Under New Jersey law, the Brothers of the Poor and the Boy Scouts were entitled to charitable immunity for the harm caused by the priest, but they had no immunity under New York law. The court applied New Jersey law and affirmed summary judgment for defendants. See id. at 681.

70. Transcript, supra note 6, at 676.

airplane tickets in New Hampshire and boarded the craft there were killed when the airplane crashed in Massachusetts. Some of the wrongful death suits were filed in federal district court in New Hampshire and some in federal district court in Massachusetts. All actions were consolidated in federal district court in Massachusetts for coordinated pretrial proceedings. At that time, Massachusetts had a $200,000 statutory limit on wrongful death recovery and a Massachusetts court would apply Massachusetts law as that of the place of injury. New Hampshire had no statutory limit on recovery and a New Hampshire court would apply the law of that state based on five factors, including "advancement of the forum-state's governmental interests" and "the sounder rule of law." The Court in Van Dusen v. Barrack had held that when a case is transferred from one federal district court to another in a different state, the transferee court applies the conflicts rules of the transferor state. The Massachusetts federal district court therefore ruled that New Hampshire law applied to those claimants whose actions were first filed in New Hampshire, but Massachusetts law, including its cap on damages, applied to those actions filed there.

Professor David Currie states that if a court using interest analysis decided that its law does not apply to a multistate occurrence, "there's an argument" that courts in other states should follow this definitive ruling on the sister state's interest and not apply the law of that state to similar fact situations. The decision of a court applying interest analysis that its law does not apply is an expression of that state's "interest in a given matter, and of the intensity of that interest." Again, other courts are free to decide that the reasoning of the judges in their sister state is insufficiently cogent and come to a different conclusion.

An example is provided by cases dealing with New York's statute of frauds for agreements to assist a client in locating companies with whom the client can engage in mergers and acquisitions. New York courts

73. Air Crash at Boston, 399 F. Supp. at 1108.
74. Id. at 1113. This five-factor analysis used by the New Hampshire courts was proposed by Professor Leflar. See Leflar, supra note 59, at 282.
75. 376 U.S. 612 (1964).
76. See id. at 639.
77. See Air Crash at Boston, 399 F. Supp. at 1115.
78. See id. at 1116.
79. Transcript, supra note 6, at 681-84.
80. RESTATEMENT, supra note 20, § 8 cmt. k.
81. See supra text accompanying notes 66-68.
have applied this statute of frauds to prevent New York brokers from recovering on oral contracts with clients from other states. Moreover, New York courts have done so even though the clients' states would enforce these unwritten agreements. The reason that the New York Court of Appeals gave for applying the New York statute to prevent recovery by New York brokers was that "New York is a national and international center for the purchase and sale of businesses," and invalidating oral brokerage contracts "encourages the use of New York brokers and finders by foreign principals." This puffing made the Massachusetts Supreme Judicial Court gag; thus, unlike the New York Court of Appeals, it permitted a New York broker to recover on an oral contract with a Massachusetts client.

David Currie states that he does not think that "the better law approach has any applicability to the conflict of laws." He believes that if a court disfavors its own state's statute, the court violates the "separation of powers" between the court and the legislature. If the disfavored local rule is judge-made, the court should simply overrule it for all cases, domestic as well as interstate.

Sometimes, when there is a true conflict of state interests, the law of one of the states is, when compared with the law of other states, anachronistic or aberrational. States might well adopt, as a "just" method of resolving disputes, a rule that clashes of state policy should be resolved by rejecting the law that is objectively anachronistic. Many distinguished conflicts scholars have advocated a 'better-law approach to resolving conflict problems.

Moreover, outside of the tort area there is wide acceptance of the proposition that a court should reject forum statutory law when that law

83. Id. at 582.
84. Id. at 583.
86. Transcript, supra note 6, at 683-84.
87. Id. at 682.
88. Id. at 682-83.
89. See JOHN RAWLS, A THEORY OF JUSTICE 251-57 (1971) (discussing the concept of the "original position" under which a person selects principles of justice without knowing how the principles will affect the selector).
90. See, e.g., FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 195 (1993) (advocating choice of the law that best reflects modern trends and doctrine); Elliott Cheatham & Willis L.M. Reese, Choice of the Applicable Law, 52 COLUM. L. REV. 959, 980 (1952) (referring to "a situation in which one of the possibly applicable laws is in tune with the times and the other is thought to drag on the coat tails of civilization"); Leflar, supra note 59, at 282 (referring to "[a]pplication of the better rule of law").
would discourage interstate and international commercial transactions.
The Restatement (Second) of Conflicts reflects long-established case
law\textsuperscript{91} when it validates a contract "against the charge of usury if it
provides for a rate of interest that is permissible in a state to which the
contract has a substantial relationship."\textsuperscript{92} Even on the sensitive
subject of small loans made for personal purposes, the Uniform Small
Loan Law\textsuperscript{93} enforces loans lawfully made in another state under a
small loan law "similar in principle" to the forum's act.\textsuperscript{94}

VI. \textit{Lilienthal v. Kaufman}\textsuperscript{95}

Dean Kay states that Professor Baxter proposed his "comparative
impairment" method of resolving true conflicts only for an impartial
"federal court."\textsuperscript{96} Professor Baxter contended that federal constitutional
law, as interpreted and applied by federal courts, should control choice
of law by rejecting the law of the state "whose internal objective will be
least impaired in general scope and impact by subordination in cases
like the one at hand."\textsuperscript{97} He did recommend that "every state . . . as a
matter of state law, adopt the comparative impairment principle," but
did not think that this was constitutionally mandated.\textsuperscript{98}

I believe that the comparative impairment method is of very limited
use in resolving true conflicts. In only rare true conflict cases will an
objective observer conclude that the policies of one state will clearly be
less impaired than those of another. The most likely situation in which
comparative impairment is a useful method of resolving conflicts is that
in which the law of one state protects the policy underlying the law of
the other, but the law of the second state would completely frustrate the

\textsuperscript{91} See Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 407-08 (1927) (approving
a rule that refers either to the law of the place of contracting or the law of the place
of performance to validate a loan agreement against a charge of usury).

\textsuperscript{92} Restatement, supra note 20, § 203.

\textsuperscript{93} For the history of this law, see Frank Brookes Hubachek, Annotations on
Small Loan Laws 192-93 (1938).

\textsuperscript{94} Unif. Small Loan Law § 18 (6th draft 1935), reprinted in Hubachek, supra note
93, at 111.

\textsuperscript{95} 395 P.2d 543 (Or, 1964). A California creditor made a business loan in California
to a resident of Oregon. The borrower promised to repay the loan in California. When the
borrower defaulted, the creditor sued him in Oregon. The court applied Oregon law under
which a guardian for the "spendthrift" borrower had declared the obligation void. See id.
at 543-44.

\textsuperscript{96} Transcript, supra note 6, at 695.

\textsuperscript{97} William F. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 18
(1963).

\textsuperscript{98} Id. at 42.
purposes of the first state's law. *Intercontinental Hotels Corp. v. Golden*\(^9\) affords an example. A New Yorker incurred a gambling debt at a casino in Puerto Rico. Puerto Rican law permitted the casino to recover the debt in court, but New York law invalidated the obligation. The court enforced the debt, noting that New York law was designed to protect "the family man of meager resources from his own imprudence at the gaming tables."\(^\text{100}\) The court noted that "Puerto Rico has made provision for this kind of imprudence by allowing the court to reduce gambling obligations or even decline to enforce them altogether, if the court in its discretion finds that the losses" threaten the welfare of the gambler's family.\(^\text{101}\) The court, thus, felt free to follow its "consistent practice of enforcing rights validly created by the laws of a sister State which do not tend to disturb our local laws or corrupt the public."\(^\text{102}\)

In most cases, which state's policies will be "more impaired" if not applied will be in the eye of the beholder. An opinion by a court in one state preferring its own law under this method can be rewritten to reach the opposite result by simply switching the names of the two states and making a few other minor changes. *Bernhard v. Harrah's Club*\(^\text{103}\) is a good example. The court held a Nevada casino civilly liable under California law for getting a Californian drunk and thus contributing to his maiming a California motorcyclist on a California highway.\(^\text{104}\) Nevada law did not impose civil liability on the liquor seller. The court used the "comparative impairment" method to choose California law.\(^\text{105}\) The opinion stated that "California's interest would be very significantly impaired if its policy were not applied to defendant,"\(^\text{106}\) but that "Nevada's interest in protecting its tavern keepers from civil liability ... will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business."\(^\text{107}\) A Nevada court applying the identical method might reach the opposite result by concluding that California's compensation policy "will not be significantly impaired when as in the instant case liability is [denied] only [for] those tavern keepers who [serve liquor to drunks who manage to reach California before injuring someone]."\(^\text{108}\)

\(^\text{100}\) Id. at 213.
\(^\text{101}\) Id.
\(^\text{102}\) Id. at 214.
\(^\text{103}\) 546 P.2d 719 (Cal. 1976).
\(^\text{104}\) See id. at 725.
\(^\text{105}\) See id. at 723-25.
\(^\text{106}\) Id. at 725.
\(^\text{107}\) Id.
\(^\text{108}\) Id.
VII. Rosenthal v. Warren

The panelists raised the issue of whether New York had sufficient contacts with defendants and their course of conduct to make it fair to impose New York law on them. Unfairness in choice of law ranges over a spectrum. At one end of the spectrum, application of forum law is so outrageous that it would violate due process. At the other extreme, it is patently fair to apply forum law. The Second Circuit opinion in Rosenthal states several circumstances in which New York law might be applied to wrongful death elsewhere, but apparently does not realize that the examples fall at different points on this fairness spectrum:

One might well inquire whether it would be anomalous to permit Dr. Rosenthal's heirs to recover without damage limitation if he died in a plane crash en route to Boston's Logan International Airport (Kilberg v. Northeast Airlines, 172 N.E.2d 526 (N.Y. 1961)) or in a taxi cab from Logan to New England Baptist (Miller v. Miller, 237 N.E.2d 877 (N.Y. 1968)) but not once he stepped into the hospital itself.

It is fair to apply New York law to the airline. The New York decedent purchased his ticket in New York and boarded the airplane there for a round trip that was to end back in New York. The taxicab example is the one that poses the most unfairness because, except for knowing that his fares are likely to be residents of other states, the driver has no reason to foresee that his conduct will cause effects in New York. Even if he could foresee New York effects, I suspect that most persons who have not had their minds clouded by a legal education would find it outrageous

109. 475 F.2d 438 (2d Cir. 1973). A New Yorker was operated on in a Massachusetts hospital and died there. The decedents' executrix sued the doctor who performed the operation and the hospital in federal district court in New York. Plaintiff obtained jurisdiction over the doctor by attaching his malpractice insurance. See id. at 439-40. The United States Supreme Court subsequently held this method of obtaining jurisdiction a violation of due process. See Rush v. Savchuk, 444 U.S. 320 (1980). Plaintiff obtained jurisdiction over the hospital by serving a hospital officer while he was soliciting funds in New York. See 475 F.2d 439-40. Service on an officer of a company while in the forum is not a basis for jurisdiction over the company. See International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (stating that "it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there"); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 329 (2d ed. 1992) (stating that "mere presence within the state of an agent of the corporation, or even a principal officer, is insignificant as a basis for jurisdiction"). Massachusetts law limited wrongful death recovery to $50,000, but New York had no limit. The court applied New York law. See 475 F.2d at 439.

110. Transcript, supra note 6, at 702-04.

111. Rosenthal, 475 F.2d at 443-44.
to apply New York law to the cabby. It is fairer to apply New York law to the hospital and doctor because they treat persons from all over the world and know that Rosenthal hales from New York and has dependents there who will not receive adequate compensation if a court applies the Massachusetts limit on wrongful death recovery. Nevertheless, reasonable persons might disagree as to whether it was fair to apply New York law in Rosenthal. A court has not done its job if it applies the law of a state on the ground that this application will effect that state's policies, but has failed to note that the state has no contact with the defendant or the defendant's course of conduct that would make it reasonable to impose its law on the defendant.

David Currie states that we should use the same choice-of-law analysis for international as for interstate cases and gives as an example determining the extraterritorial application of United States antitrust law. This is consistent with his view that courts should take a unilateral approach to choice of law and apply forum law whenever forum policies are affected. I prefer forum-neutral solutions to the true conflict and would not use antitrust law as an example when comparing techniques in interstate and international cases. For most civil litigation between private parties involving the ordinary substantive law of subjects such as torts and contracts, I agree that the same techniques used in interstate cases should be applied to resolve both true and false conflicts in international transactions. The reason that I would not use antitrust law as an example is that public law is involved. There is far more justification for a United States court taking a unilateral approach to the application of United States public law than to the application of private law. Public law triggers strong national policies, and differences in the public law of countries are not likely to be resolved by neutral criteria such as "better law." I favor a presumption that United States antitrust law applies to conduct abroad whenever that conduct foreseeably causes consequences here that our law is designed to prevent. There is, nevertheless, a spectrum of

112. See Willis L.M. Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587, 1605 (1978) (stating that Rosenthal was wrongly decided and may violate due process).
113. Transcript, supra note 6, at 709-10.
114. Id. at 683.
115. See supra text accompanying notes 86-94.
suggested approaches to the extraterritorial application of public law, ranging from purely unilateral\textsuperscript{117} to refusal to apply our law to events abroad unless application is expressly mandated by the relevant legislation.\textsuperscript{118}

VIII. Erwin \textit{v. Thomas}\textsuperscript{119} and Hurtado \textit{v. Superior Court of Sacramento County}\textsuperscript{120}

I put these two opinions together because they both present the so-called "no interest" case of plaintiff's law favorable to defendant and defendant's law favorable to plaintiff. In my view, they pose identical problems because I do not find it relevant that in \textit{Hurtado} the injury occurred in defendant's state, whereas in \textit{Erwin} it occurred in plaintiff's state. The difference would be material only if civil liability were likely to deter negligent driving. If you think that drivers say to themselves, "Gee, I'd better slow down, this state doesn't have any limits on wrongful death recovery," so be it. I prefer a more cogent basis for applying the law favorable to plaintiff and would find it in both cases. The driver's state has an interest in assuring that, through the device of liability insurance, its citizens are responsible loss distributors. It should not be


\textsuperscript{118} See \textit{Hartford Fire Ins. Co. v. California}, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (stating that "if the question were not governed by precedent, it would be worth considering whether that presumption [against extraterritorial application] controls the outcome here").

\textsuperscript{119} 506 P.2d 494 (Or. 1973). An Oregon resident, while driving in Washington in the course of his employment, injured a Washington resident. The victim's wife sued for loss of consortium, a remedy permitted under Oregon law, but not under Washington law. \textit{Id.} at 494-95. Concluding that "neither state has a vital interest in the outcome of this litigation," the court applied Oregon law on the ground that this was the natural result in an Oregon court and would not offend any Washington policy. \textit{Id.} at 496-97.

\textsuperscript{120} 522 P.2d 666 (Cal. 1974). A Mexican citizen was killed in a traffic accident in California. The court applied California law to permit much greater recovery than would be possible under the law of the Mexican state where the decedent had been domiciled. \textit{See id.} at 668. The court found that California had an interest in deterring negligent conduct on its highways but that Mexico had no interest in limiting the recovery of its citizens against California defendants. \textit{See id.} at 670.
so callous as to limit this interest to injuries to its own citizens or within its own state.\textsuperscript{121}

I take a different view of enterprise liability. When manufacturer’s law is favorable to plaintiff and plaintiff’s law is favorable to manufacturer, a court should apply the law of plaintiff’s residence if liability is asserted on the basis of strict liability or negligence. Otherwise, manufacturers in a state with law favorable to recovery will be put at a competitive disadvantage when compared with manufacturers from other jurisdictions that do business in plaintiff’s state.\textsuperscript{122} On the other hand, if the manufacturer’s conduct is sufficiently outrageous that its home state might wish to punish and deter such activity, then the law of that state should be applied to favor recovery by a nonresident injured elsewhere. In such circumstances, it should make no difference whether the law favorable to the nonresident is compensatory or punitive. Higher recovery in either category will punish and deter outrageous conduct.

\section*{IX. Conclusion}

It is refreshing to read the transcript of the Roundtable discussion and realize anew that modern conflicts theory is characterized by straight talk and useful insights into the purposes of choosing law. The similarities in the approaches taken by the great majority of current commentators are far more important than the differences. All agree that law should be chosen with an eye on the consequences in an attempt to work a maximum accommodation of the polices of the states that have contacts with the parties and the transaction.

No matter what modern approach is taken, there is no need for ad hoc analysis of each case anew. In time, and that time has probably already come, enough sound, functional results are available to permit a statement of rules. These rules, unlike the rules that have been displaced by the conflicts revolution of the past thirty-five years, do not stick pins in maps without regard to the content or purposes of the law thus chosen. New rules should summarize the results of functional

\textsuperscript{121} Cf. Labree v. Major, 306 A.2d 808, 818 (R.I. 1973) (stating that “where a driver is from a state which allows a passenger to recover for ordinary negligence, the plaintiff should recover, no matter what the law of his residence or the place of the accident”).

\textsuperscript{122} See Deemer v. Silk City Textile Mach. Co., 475 A.2d 648, 652 (N.J. Super. 1984) (stating that applying New Jersey law to favor recovery by a North Carolina worker injured by a machine manufactured in New Jersey “would have the undesirable consequence of deterring the conduct of manufacturing operations in this state and would likely result in an unreasonable increase in litigation and thereby unduly burden our courts”).
There is nothing wrong with rules, just with mindless rules, such as those in *Neumeier v. Kuehner*, 123 that do not reflect the lessons taught by wise adjudications.

123. 286 N.E.2d 454 (N.Y. 1972). For discussion of one of the Neumeier rules, see supra note 62 and accompanying text.