

Facing Real Conflicts

“If we were such that we could in a crisis dissociate ourselves from one commitment because it clashed with another, we would be less good. Goodness, itself, then, insists that there should be no further or more revisionary solving.”¹

Martha Nussbaum

Introduction

Modern choice-of-law analysis is heavily indebted to Brainerd Currie’s interest analysis. Currie argued that conflicts cases should be resolved by first determining whether more than one state has a real interest in applying its law to adjudicate the dispute. If the case poses a “false conflict,” the result is easy—apply the law of the only interested state. If the case poses a “true conflict,” then, somewhat regretfully in Currie’s view, the proper thing to do is to apply forum law.²

The majority of courts appear to accept the first part of Currie’s analysis. Most courts that use modern conflicts analysis are receptive to the idea that it is useful to start by asking whether the case poses a false conflict. However, courts uniformly appear to reject the second part of Currie’s analysis—at least if we focus on the rhetoric of the judges who decide conflicts cases.

I want to argue that this arrangement is exactly backwards. Contrary to the prevailing view of most interest analysts, I believe that the search for false conflicts is fundamentally misguided. On the other hand, recognition of a rebuttable presumption that forum law applies would be descriptively accurate, normatively desirable, and of practical utility. There are, however, important exceptions to this principle; the presumption can and should be overcome in identifiable cases. Moreover, other formulations of conflicts law might achieve the same goals by means other than a rebuttable forum law presumption.

* Professor of Law, Boston University. Thanks and affection go to Martha Minow, Larry Kramer, and Lea Brilmayer. © 1991, Joseph William Singer.

1. MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS* 50 (1986).

2. See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

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This article explains (1) what is useful about a rebuttable presumption that forum law applies; and (2) what is wrong with false conflicts analysis. In explaining what is wrong with false conflicts analysis, particular attention is paid to the ways in which interest analysis is misused by the courts and to why those misuses are predictable consequences of false conflicts analysis. The article concludes by briefly exploring a typical conflicts case with a form of policy analysis that does not rely on the search for false conflicts.

Courts need to face the real conflicts embodied in choice-of-law cases. These are hard cases which implicate multiple and conflicting principles.³ As Martha Nussbaum argues, "An honest effort to do justice to all aspects of a hard case, seeing and feeling it in all its conflicting many-sidedness, could enrich future deliberative efforts."⁴ Better decisions will result if courts see conflicts cases as the conflicts they really are.

I. Why a Rebuttable Forum Law Presumption Is Useful

A presumption that forum law applies is desirable for a variety of reasons. First, a rebuttable forum law presumption accords with the actual practice of courts in deciding choice-of-law cases. Second, it properly helps focus initial attention on the substantive policies underlying the rules or areas of law in question. Third, a rebuttable forum law presumption is compatible with the multistate goal of promoting comity or toleration and respect for diversity among separate normative and political communities if, as I advocate, the presumption is combined with criteria for overcoming the presumption and identification of paradigmatic circumstances under which it may be appropriate to defer to foreign law.

Two preliminary points are important to mention. First, this article will discuss cases that raise what I call "real conflicts" and which have traditionally been called "true conflicts."⁵ I do not advocate applying forum law to a case that has no significant contacts with the forum. Rather, I address cases in which contacts with the forum are such that it is plausible to argue that the forum has a real interest in applying its law to adjudicate the legal relationship between the parties.

Second, I do not advocate that conflicts cases presenting real conflicts be resolved automatically by application of forum law. Nor do I

3. See generally STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE (1990); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); JAMES WALLACE, MORAL RELEVANCE AND MORAL CONFLICT (1988).

4. M. NUSSBAUM, *supra* note 1, at 45.

5. The term "real conflict" is used because relatively few of the cases traditionally designated "false conflicts" by courts and scholars are such. I see true conflicts in many cases where others see false conflicts. I therefore use the term real conflict to remind the reader that I have in mind a more expansive definition of state interests than most interest analysts and consider that most contested conflicts cases raising interesting choice-of-law issues cannot reasonably be characterized as false conflicts.

argue that courts always apply forum law to resolve real conflicts. Rather, I emphasize that, more often than not, contested conflicts cases in the real world are resolved by application of forum law. At the same time, many cases presenting real conflicts are not resolved by application of forum law, and it may be both possible and desirable to construct choice-of-law principles that promote uniform and predictable results for this subset of conflicts cases.

A. A Rebuttable Forum Presumption Accords with Judicial Practice

As Louise Weinberg,⁶ Robert Sedler,⁷ Herma Hill Kay,⁸ and Michael Solimine⁹ have long reminded us, although judges may not admit it in their opinions,¹⁰ a preference for forum law—which ordinarily benefits the plaintiff—describes the results actually reached by most courts in a system without federal choice-of-law rules.¹¹ The majority of cases presenting real conflicts are resolved by application of forum law. This does not mean that courts always apply forum law; there are identifiable situations in which the courts tend to apply foreign law.

The fact that judges apply forum law in many conflicts cases is not, by itself, a sufficient reason to adopt forum law as the presumptively applicable law. However, the courts' partial preference for forum law is not the result of parochial blindness to the values of federalism. On the contrary, there are good reasons why courts ordinarily apply forum law when they can in multistate cases. At the same time, identifiable reasons exist that legitimately prompt courts to depart from using forum law in particular classes of cases. All other things being equal, a choice-of-law approach that courts are more likely to adopt is preferable to one likely to be systematically subverted through the manipulation of ambiguous concepts or the creation of escape devices. An honest recognition of the inclination to resolve real conflicts by applying forum law therefore has the merit of articulating the values underlying the "law in action." By honestly describing the actual legal practice in the courts, the forum presumption may increase predictability for citizens trying to determine

6. Louise Weinberg, *On Departing from Forum Law*, 35 *MERCER L. REV.* 595 (1984).

7. Robert Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the New Critics*, 34 *MERCER L. REV.* 593 (1983).

8. Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, extracted from 215 *ACADEMIE DE DROIT INTERNATIONAL: RECUEIL DES COURS [ACADEMY OF INT'L LAW: COLLECTED SOURCES]* (1989-III).

9. Michael Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 *GA. L. REV.* 49 (1989).

10. Judges may fail to acknowledge the forum law presumption because they unfortunately have been convinced by those legal scholars who view such a presumption as parochial and discriminatory.

11. Whether federal choice-of-law rules are preferable to state choice-of-law rules is a complicated question. Compare Daniel Meltzer, *Legislative Courts, Legislative Power & the Constitution*, 65 *IND. L.J.* 291 (1990) (arguing for federal choice-of-law rules) with Robert Sedler & Aaron Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 *MARQ. L. REV.* 76 (1989) (arguing against federal choice-of-law rules).

what their legal rights are. It may also encourage clear thinking in choice-of-law analysis by better articulating the values underlying the intuitions of the judges charged with deciding these difficult cases. Such a procedure can better explain situations in which courts are and are not willing to defer to foreign law.

It is important to recognize that the courts appear to have uniformly rejected explicitly adopting the principle of applying forum law to adjudicate what they see as real conflicts.¹² Moreover, courts that have adopted modern conflicts analysis do not always resolve real conflicts by applying forum law.¹³ Several conclusions may be drawn from this state of affairs. A rigid rule mandating application of forum law whenever the forum has a real interest in applying its law, as advocated by Robert Sedler,¹⁴ is unlikely to be adopted by the courts. This reluctance to adopt a rigid forum law preference coexists, as Sedler has shown, with an *actual* preference for forum law in the majority of cases presenting contested choice-of-law issues.¹⁵ This suggests that courts are concerned not only about the *results* they reach, but also the *reasoning* process by which those results are reached. Additionally, courts are uncomfortable with a reasoning process that fails to include consideration of the relative interests of the parties and the states involved.

One way to respond to this situation is to attempt to identify choice-of-law principles that accurately describe the situations in which courts are willing to defer to the law of another state.¹⁶ However, it is not likely that we will be able in the near future to construct principles that will govern all kinds of cases. For this reason, it is crucial to have a fallback position when no principle applies to govern the case. Some scholars have suggested that we adopt territorial rules, such as the place of the injury, as the fallback position.¹⁷ Such a response is fundamen-

12. Kentucky and Michigan have adopted approaches to answering choice-of-law questions which choose forum law if the case has any significant contacts with the forum. *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Olmstead v. Anderson*, 400 N.W.2d 292 (Mich. 1987). This test eschews interest analysis entirely, with one important exception—the choice must comply with constitutional constraints under the full faith and credit clause and the due process clause. The Constitution requires that a state “have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

13. *See, e.g., Eger v. E.I. Du Pont De Nemours Co.*, 110 N.J. 133, 539 A.2d 1213 (1988); *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 490 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

14. Robert Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 131, 227 (1977).

15. Sedler, *supra* note 7, at 604-05, 611; Solimine, *supra* note 9, at 81-92.

16. *See, e.g.,* DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); RUSSELL WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (3d ed. 1986).

17. John Hart Ely, *Choice of Law and the States Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

tally misguided because it institutionalizes arbitrariness.¹⁸ Rather, the fallback position for real conflicts should be forum law. The forum should apply its own law when it has a real interest in doing so unless (1) application of forum law unfairly surprises one of the parties or otherwise violates their rights to the advantage of another state's law, or (2) application of forum law would illegitimately interfere with the ability of another political community to govern relationships centered there.¹⁹

Another way to conceptualize this proposal is to suggest adopting a rebuttable presumption that forum law applies. This formulation similarly requires identifying both criteria for determining when it is appropriate for the presumption to be overcome and paradigmatic circumstances in which it may be appropriate to defer to foreign law. Because a rebuttable forum law presumption is compatible with judges' intuitions of their proper role in conflicts cases, it is more likely to be adopted. The greater likelihood of adoption means that it better articulates the actual values underlying choice-of-law decisions.

B. A Forum Law Presumption Properly Focuses Attention on Substantive Policies

A forum law presumption, or fallback position, would not only better cohere with the current practice of courts than retreating to arbitrary territorial rules, but would be normatively desirable as well. A rebuttable forum law presumption correctly forces judges to confront the real conflicts underlying substantive and multistate policy in each case. Territorial rules are arbitrary because they do not require analysis of such policies. Similarly, a forum law presumption is appropriate only if the courts supplement it with consideration of such policies. The analysis must include consideration of the interests of the losing party and the ability of the state whose law is not applied to govern relationships centered there. The combination of choice-of-law principles with a principle of applying forum law when no such principles apply will constitute a workable system for modern interest analysis by the courts.

A forum law presumption properly focuses the courts' initial attention on the substantive policies and goals underlying the legal rules in question. Forum law is preferred, after all, because the forum state is likely to view it as the best way to resolve the dispute, either because the law is viewed as fair or because it promotes the general welfare. For this reason, courts should begin their analysis of choice-of-law cases in the same way they analyze purely domestic cases—by determining which legal principle and result best accord with both justice and wise social policy.²⁰

Conflicts cases provide an unusually powerful impetus for the forum court to reexamine the wisdom and justice of the policies under-

18. Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U.L. REV. 731 (1990); Joseph William Singer, *Real Conflicts*, 69 B.U.L. REV. 1 (1989).

19. Singer, *Real Conflicts*, *supra* note 18, at 90-92.

20. *Id.* at 79-83.

lying forum law. A conflicts case involving harm caused by a dangerous product, for example, involves two states' conflicting policies about how to handle products liability cases. The conflict arises because of the different tort policies, and because the parties or the events have sufficient contacts with each state to raise legitimate expectations in each state of either a right to protection or legitimate regulatory interests. A rebuttable forum law presumption—while requiring the forum to articulate the policies underlying forum law—encourages the forum to articulate why forum policy is better than the policy of the competing jurisdiction. In so doing, the forum court will better understand what it would be giving up if it defers to the law of the other state. At the same time, precisely because it is a conflicts case, the court has a duty to face, and to try to understand, why the other jurisdiction disagrees with the forum as to the better tort policy.

As Professor Weinberg has argued, this process of comparing the substantive policies of the affected states may lead the forum court to revise its conception of which legal rule better accords with the forum's notions of justice and utility.²¹ If the forum court determines that the foreign law is better than its own law, then the forum should change its law if it can. If courts follow this approach, conflicts cases could serve as a major impetus for reexamination and modernization of the law. By examining the reasons why other states have chosen different policies and by comparing those reasons to the arguments underlying forum law, the forum will develop a more sophisticated understanding of those areas of law that are in flux or about which there is substantial disagreement among the states and perhaps even the populace generally.

If the forum court cannot change what it perceives as the "worse" forum law—either because it is embodied in a statute or a recent higher court opinion—then the initial focus on substantive policy will have the benefit of focusing the court's attention on the real conflicts posed in multistate cases. The court will have to wrestle with whether it is appropriate to confine its own "worse" forum law to purely domestic cases—thereby limiting the externalities of unjust or unwise social policies on other jurisdictions²²—or whether failing to apply forum law would unjustly discriminate against either party by denying them the protection of forum law under circumstances that cannot reasonably be distinguished from cases in which forum law would be applied.²³

On the other hand, if the forum court concludes that forum law is better than the foreign law, the court still has an obligation to address multistate policy. The question here is whether the forum court should

21. Weinberg, *supra* note 6, at 597.

22. *See, e.g.*, *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 583 P.2d 72, 148 Cal. Rptr. 867 (1978) (failing to apply California law partly on the grounds that it was archaic).

23. *See* *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964) (O'Connell, J., specially concurring) (arguing that it would be discriminatory to protect families whose members wasted money inside Oregon but not families whose members wasted money outside Oregon).

forego what it views as the better law and enforce a result it believes is either unjust or promotes socially destructive behavior. It might do so for two reasons. First, it might defer to the right of one of the parties to claim the protection of another state's law. Second, it might defer to another state's ability to constitute itself as a normative and political community by applying state policies to relationships centered there.²⁴

By starting with a presumption that forum law applies, attention is focused on the right issues, namely (1) the best tort or contract policy as a matter of substantive law, and (2) how to resolve conflicts between substantive justice as the forum sees it (i.e., applying the better forum law) and tolerance (i.e., deference to the law of another political and normative community that is vitally interested in governing the relationship between the parties and the conduct at issue).

C. A Rebuttable Forum Law Presumption Accords with Multistate Policy

A rebuttable forum law presumption can be expressed in two different ways. On one hand, it consists of a combination of choice-of-law principles with a fallback position of forum law applicable to cases that do not come under any of the general principles. On the other hand, it can be described as a presumption that forum law applies which can be overcome if the case falls within the special situations in which the forum should, in all justice, give up its otherwise applicable law in deference to the authority of the political community in another state. The presumption therefore represents a compromise between the extremes of always applying forum law to adjudicate real conflicts and never resorting to forum law as a deciding factor.

The presumption that forum law applies rests on the assumption that the forum court should ordinarily resolve disputes so as to further the forum's conception of justice and wise social policy. The forum court should, however, defer to foreign law when doing so would protect the justified expectations of persons who reasonably relied on the law of another state, who would be unfairly surprised by application of forum law, or who would otherwise have a right to claim protection of the law of the other state. The forum court should also defer to foreign law when application of forum law would unduly interfere with the ability of another state to constitute itself as a normative and political community by preventing it from regulating relationships centered there. I believe that these exceptions apply in a relatively narrow range of cases. Nonetheless, it is crucial in each case for the forum to face any conflict that may arise between furthering its substantive policies and the multi-state policies embodied in these exceptions.

24. See *Bernkrant v. Fowler*, 55 Cal.2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (refusing to apply forum law to invalidate an oral agreement made in Nevada by a Nevada resident which was enforceable at the time made under Nevada law).

Several scholars have advocated an even stronger forum law preference than that urged here. They argue that forum law should generally be applied if the forum has a real interest in applying its law unless application of forum law would so unfairly surprise one of the parties as to constitute an unconstitutional denial of due process.²⁵ Forum law should constitute the fallback position, but even when it would not be unconstitutional to apply forum law, the forum court should, as a common law matter, wrestle with whether application of forum law wrongly violates the rights of one party or unduly interferes with the ability of another state to govern relations centered there.

For several reasons, a preference for forum law in cases that present real conflicts does not violate multistate norms of toleration or comity. First, cases involving real conflicts necessarily involve the sacrifice of one state's interests at the expense of another state's interests. Coase taught us to see all legal disputes in this light.²⁶ Application of either state's law will create externalities for the other state.

Second, as Professor Herma Hill Kay has recently argued in her Hague Lectures, the principle of toleration or respect for diversity among the laws of different states applies not only when the forum court defers to the law of another state, but when it applies forum law with confidence that an interested foreign jurisdiction would understand the reasons why the forum claims a legitimate interest in governing the rights of the parties to the suit.²⁷

Third, application of forum law is not inherently parochial or discriminatory.²⁸ In many cases, application of forum law will benefit a non-resident, as when a foreign tort or contract plaintiff sues a resident defendant and claims that the higher standard of care imposed by forum law applies to regulate the defendant's conduct there.²⁹ At the same time, the forum should address the question of whether application of forum law will wrongly discriminate against one of the parties by deny-

25. B. CURRIE, *supra* note 2, at 117-21; Kay, *supra* note 8, at 149-67; Sedler, *supra* note 7, at 593; Sedler, *supra* note 14, at 227; Weinberg, *supra* note 6, at 595. The difference may be less than it appears on the surface because these scholars use more expansive definitions of false conflicts which may lead them to defer to foreign law in appropriate circumstances by arguing that the forum has no real interest in applying its law to the case. See, e.g., Sedler, *supra* note 14, at 222-23.

26. Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

27. Kay, *supra* note 8, at 173-75.

28. I use "inherently" because a rigid forum preference might be used in a way that was illegitimately parochial or discriminatory. For this reason, I argue for a rebuttable presumption that forum law applies, rather than a rigid rule to that effect.

29. See, e.g., *Bushkin Assoc., Inc. v. Raytheon Co.*, 393 Mass. 622, 473 N.E.2d 662 (1985) (applying forum law to enforce a contractual promise made by a Massachusetts resident to a New York resident even though the obligation would not have been enforceable in a New York court because the New York plaintiff did not comply with the New York statute of frauds); *Johnson v. Spider Staging Corp.*, 87 Wash.2d 577, 555 P.2d 997 (1976) (applying forum law to impose full tort liability on a Washington defendant who had sold a product to a customer in Kansas who was injured by the product, despite the fact that Kansas limited liability for wrongful death).

ing the benefits of foreign law which would be accorded to similarly situated parties in the foreign state.

Fourth, in certain cases a rebuttable presumption that forum law applies may have the desirable effect of expanding the range of application of better law in the multistate cases to which it applies; it therefore may decrease the range of application of aberrational, unjust, or inferior state laws. Professor Weinberg has argued, for example, that application of forum law furthers generally desirable social policies of providing compensation for injured victims, deterring wrongful conduct, and protecting justified expectations based on contract. To the extent that these policies are wise and just and alternative policies represent relatively narrow exceptions to these principles, a forum law presumption may have the felicitous consequence of confining aberrational or minority policies to domestic cases within those states that choose to pursue such policies. On the other hand, rigid application of forum law may have the opposite effect of encouraging a race to the bottom among the states. It is therefore necessary to identify the circumstances in which the forum law presumption should be overcome.

D. Limits to the Forum Law Preference

A rigid, forum law preference may have significant undesirable effects. It is important to remember that a forum law preference may create a race to the courthouse by both parties. It is not at all clear that the plaintiff will be the hapless tort victim or the one whose contract has been wrongly breached. Because courts in recent years have been more likely to apply forum law in multistate cases, this has provided an impetus for potential defendants to bring declaratory judgment actions in defendant-protecting jurisdictions. A rigid forum law presumption would thus allow the more sophisticated and wealthier parties to overwhelm potential adversaries by racing to the courthouse before them. For this reason, it is important in every case to examine whether fairness or multistate policy would justify denying the plaintiff the benefits of forum law.

In some cases, a rigid forum law preference may generate a process that resembles a "race to the bottom" among the states on particular social and legal issues. Litigation involving national companies gives plaintiffs wide discretion in choosing the forum. Plaintiffs may, for example, all choose to sue in a state with tort policies relatively more favorable to plaintiffs than defendants. The practical effect may be for that one state's law to displace the law of other states in governing human activity. If that state does not suffer the majority of the harmful consequences of its own legislation, it may be able to recoup the benefits of its policies by gaining compensation for its citizens injured in the forum, while externalizing most of the costs of those policies on defendants elsewhere. The forum court may not be in an ideal position to determine the wisdom or justice of its law; it may not realize that its law represents poor social policy because it has, perhaps unconsciously, suc-

ceeded in externalizing most of the negative consequences of its policies.³⁰

Even if the race to the bottom actually turns out to be a race to the top—imagine a relatively competitive market for state law³¹—a rigid forum law preference may still result in one state running the nation on particular issues. Such a situation would be undemocratic to the extent that it allowed one state to determine the internal policies of all others. Complaints of imperial states that purport to govern activities centered elsewhere are legion in conflicts scholarship. For example, some have argued that Delaware has wrongly succeeded in setting corporate policy for the entire nation.³² Similarly, others have criticized states like Mississippi and New Hampshire for imposing their tort law on the nation by maintaining aberrational six-year statutes of limitation and procedural classifications for such statutes.³³

Making the forum law presumption rebuttable, rather than rigid, helps develop the debate about multistate policy in the appropriate direction. For example, it encourages discussion of the appropriate limits to defendant—versus plaintiff—protecting policies in torts and contracts. This represents one of the major disagreements in conflicts law and is an area in which some of the most fruitful discussion is currently taking place. A rebuttable forum law presumption also focuses attention on the substantive policies underlying the law, thereby increasing the sophistication of debate about the wisdom and justice of substantive law.

II. What Is Wrong with False Conflicts Analysis

False conflicts do exist. When two New Yorkers sign a construction contract while on vacation in Miami which is to be performed in New York and which violates no criminal or regulatory law of the state of Florida, Florida has no legitimate interest in applying its law to determine whether a valid contract was made. When a couple married in a state with interspousal immunity moves to a state without such immunity, the former state has no legitimate interest in applying its law in a lawsuit between the parties arising out of an automobile accident occurring in their new domicile, especially if insurance was purchased at the new domicile.³⁴

At the same time, many courts and scholars have misused false conflicts analysis. This misuse is not a minor or infrequent occurrence; it

30. Michael McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW* 90-101 (W. Olson ed. 1988).

31. See Frank Easterbrook & Daniel Fischel, *Corporate Control Transactions*, 91 *YALE L.J.* 698 (1982).

32. Richard Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 *CALIF. L. REV.* 29 (1987).

33. Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 *HOFSTRA L. REV.* 103 (1981).

34. Tort immunity is not legitimately conceptualized as an implied condition of the marriage arrangement.

stems from the very genesis of interest analysis, as developed by Brainerd Currie. From the beginning, false conflict analysis has exhibited several major defects. First, it encourages gross oversimplification of both the substantive policies underlying state law and the multistate policies involved in determining the appropriate geographic or territorial scope of these state policies. Second, as Professor Lea Brilmayer has argued,³⁵ it wrongly eschews consideration of individual rights, including those underlying substantive state laws and multistate policy. Third, it wrongly oversimplifies the problem of identifying the appropriate baselines in multistate analysis. Fourth, it is misused in predictable ways by the courts.

A. Oversimplification of Substantive and Multistate Policy

The methods used to create false conflicts often wrongly oversimplify either substantive or multistate policies. One method for creating a purported false conflict is to define substantive policy in an overly narrow fashion. For example, many interest analysts make a fundamental distinction between conduct-regulating and loss-allocating rules.³⁶ “Conduct-regulating” rules are intended to affect behavior. “Loss-allocating” rules are intended to place the losses occasioned by social activity on the appropriate party even if those rules will leave unaffected the intensity, frequency, or manner of the harmful activity. The distinction between conduct-regulating and loss-allocating rules allows the analyst to create false conflicts. As Professor Robert Sedler has argued,

Depending on the policy reflected by a particular rule of law, a state's interest in applying its law in order to implement the policy reflected in that law may indeed be predicated on a party's residence in that state. Tort rules imposing liability to implement compensatory policies or tort rules protecting defendants from liability, and rules reflecting people-protecting policies fall into this category [of loss-allocating policy]. A state's interest in applying laws that reflect admonitory or regulatory policies, on the other hand, is predicated on a state's connection with the conduct sought to be deterred or with the activity sought to be regulated [conduct-regulating policy], and has nothing to do with a party's connection with the state.³⁷

This distinction fails to recognize that both conduct-regulating and loss-allocating goals can be attributed to most, but not all, legal rules. Moreover, scholars disagree among themselves as to whether the goals of tort and contract law, for example, should be geared to a post hoc determination of who should fairly bear the loss or an ex ante determination of which rule creates the appropriate level of deterrence. Some law and economics scholars argue, for example, that the only legitimate goal of tort law is deterrence or setting appropriate incentives for efficient con-

35. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *YALE L.J.* 1277 (1989).

36. See, e.g., Robert Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 *U.C. DAVIS L. REV.* 865, 884 (1990).

37. *Id.*

duct. Other scholars argue, equally vehemently, that the primary goal of tort law is to require the defendant to compensate the plaintiff—either because the defendant acted wrongfully or because of the moral principle that those who profit from an activity should bear its costs.

The difficulty of distinguishing between conduct-regulating and loss-allocating rules can be seen in a case discussed by Professor Robert Sedler. Fifty members of a Colorado club board a bus in Colorado owned by a company that does most of its business in Colorado. They travel to Arizona where the bus is involved in an accident. Colorado, but not Arizona, limits recovery for noneconomic loss for ordinary negligence to \$250,000 for each plaintiff. Sedler argues that the case by the Colorado plaintiffs against the Colorado bus company presents a false conflict. "Colorado has a real interest in applying its law to limit the liability of the Colorado defendant,"³⁸ he argues. "However, Arizona has no real interest in applying its law to allow recovery to the Colorado plaintiffs, since the consequences of the accident and of allowing or denying recovery will be felt by the plaintiffs in Colorado."³⁹

This argument depends on the assumption that the Arizona policy of full compensation is a loss-allocating policy rather than a conduct-regulating policy. If this assumption is correct, it may be plausible to argue that the effects of compensating or not compensating the plaintiffs will be felt entirely in Colorado.⁴⁰ However, there is no reason to believe that the Arizona policy is not intended to affect behavior that has foreseeable consequences in Arizona. It is often argued that tort liability does not affect behavior in driving vehicles because fear of personal injury provides all the deterrence that is needed. However, even if this assertion is true, it does not follow that the Arizona statute has no effect on behavior in this case. For example, it is entirely possible that the bus company in Colorado would increase its investment in safety—either by being more careful in hiring drivers or giving them more training or supervision—if its expected liability were higher than the limits allowed by the Colorado statute. Indeed, the Arizona statute providing for full damages may be intended to achieve just this result. Arizona may be interested in inducing nonresident companies to act more carefully before they send buses into the state in order to protect the safety of all citizens driving on Arizona roads.

A second method of creating false conflicts is to oversimplify the legitimate geographic scope of state policy. In Sedler's bus example, Arizona may be thought to be a disinterested state, not because its policy is loss-allocating, but because it is unlikely that its law will affect the behavior of the defendant in Colorado. In that case, the deterrent pol-

38. *Id.* at 900.

39. *Id.*

40. At the same time, there may be effects inside Arizona of limiting liability, for example, limiting the funds available to medical services and other creditors, and wrongfully denying the nonresident plaintiffs the benefits of Arizona law which are extended to other persons in the state.

icy is directed only to Arizona bus companies, meaning those whose principal place of business is in Arizona. As another example, in *Schultz v. Boy Scouts of America*,⁴¹ the New York Court of Appeals reasoned that New York tort law was unlikely to affect the behavior of the defendant Boy Scouts of America because it was located in New Jersey. Yet New York law may very well have been intended to give the nonresident defendant an incentive to operate more carefully inside New York. Moreover, such a policy might have a real effect in inducing the defendant either to not send its troops into New York or to take greater care in the selection or supervision of Scoutmasters. Similarly, the Arizona law in Professor Sedler's example may be intended to induce nonresident bus companies to take adequate care before sending untrained or careless drivers into Arizona, thereby endangering residents and nonresidents on Arizona roads.

A third method of creating false conflicts is to define the potential consequences of state law in an overly narrow fashion. In the bus hypothetical, for example, Sedler argues that the "consequences of the accident and of allowing or denying recovery will be felt by the plaintiffs in Colorado."⁴² The impetus to find a false conflict leads Professor Sedler to ignore the possible financial effect in Arizona. Professor Weintraub, for example, argues that in such cases Arizona may have a potential interest in an adequate fund to compensate local medical creditors.⁴³ This interest exists even if the Arizona policy is purely loss-allocating and is not intended to have any effect on the defendant bus company's conduct in either Colorado or Arizona.

My purpose here is not to argue that only one of several possible formulations of state policy or state interest is correct and all others are incorrect. Rather, the goal is to emphasize the complexity of these determinations. This does not mean that it is impossible to make judgments about the legitimate scope and definition of state interests. Before making judgments of this sort, however, courts should generate and compare competing interpretations of the range of state interests in particular cases.

B. Inattention to Individual Rights

Another method of creating false conflicts is to oversimplify multistate policy by focusing only on consequential analysis, and wrongfully ignoring rights analysis. Sedler, like most interest analysts, focuses on the places where the effects of compensating or not compensating will be felt. In the bus example, he argues that if we assume Arizona policy is not conduct-regulating, then all the consequences of compensating or not compensating the parties will be felt in the place of their common

41. 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

42. Sedler, *supra* note 36, at 900.

43. R.WEINTRAUB, *supra* note 16, § 6.10, at 301-02.

domicile.⁴⁴ Professor Brilmayer has correctly argued that this form of analysis wrongly eschews consideration of individual rights.⁴⁵ Rights arguments are indeed relevant, not only to determination of the justice or fairness of the underlying substantive tort law, but of the fairness of the rules which implement multistate policy as well.

In the bus hypothetical, Sedler assumes that Arizona has no legitimate interest in applying its tort law to adjudicate the allocation of loss between nonresident Coloradans, just because the accident occurred inside Arizona. This assumption oversimplifies the problem of determining whether it is fair to deny the plaintiffs the benefits of Arizona law or, on the contrary, whether it would be unfair to deny the defendant the protection of Colorado law.

On one hand, the defendant can argue that the problem of loss allocation is one that implicates the relationship between the parties, rather than their conduct. That relationship between the Colorado parties is centered in Colorado. Colorado, therefore, is the state with the greatest interest in determining the fair contours of the relationship between the parties. Application of Arizona law would unfairly surprise the defendant bus company, while at the same time giving the plaintiffs a windfall because they did not rely on Arizona law in deciding to go there. Arizona should refrain from applying its conception of justice as reflected in its state law because to do so would unduly interfere with the ability of the political community in Colorado to govern relationships centered there.

On the other hand, the plaintiffs can argue that nonresidents, like residents, have the right to the protection of Arizona law while in Arizona. It would be an unconstitutional denial of equal protection of the laws, as well as a denial of privileges and immunities, for Arizona police to fail to protect nonresidents who come to Arizona. Arizona's tort policy is, in effect, a backup rule that applies when its police protection has failed. There can be no unfair surprise to the defendant that its actions in Arizona are governed by Arizona law, or that its conduct in training and supervising its drivers in Colorado can be governed by Arizona law when it chooses to send its drivers to do business inside Arizona by traveling on Arizona roads and endangering Arizonan lives.

It is not immediately apparent which of these formulations is the right one. Perhaps they are both misguided. The point is that false conflict analysis wrongly blocks these arguments from even being considered.

44. Sedler, *supra* note 36, at 900 (arguing that Arizona has no real interest in applying its law to allow recovery to the Colorado plaintiffs, since the consequences of the accident and of allowing or denying recovery will be felt by the plaintiffs and the defendant in Colorado).

45. L. BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 191-230 (1991); Brilmayer, *supra* note 35, at 1277.

C. Inattention to Baseline Problems

A final method of creating false conflicts is to fail to recognize the problem of identifying the appropriate baseline for analysis. In *Grant v. McAuliffe*,⁴⁶ the court faced the question of whether a negligence claim arising out of an Arizona accident, involving parties domiciled in California, survived the death of the tortfeasor and could be assessed against the tortfeasor's estate being administered in California. California, but not Arizona, provided for the survival of tort claims.

Currie discussed a variant of this case in which the plaintiff victim was domiciled in Arizona and the defendant tortfeasor was domiciled in California. Many interest analysts see this as an unprovided-for case for the following reasons. Both the survival doctrine and negligence liability in automobile accident cases are thought to be loss-allocating regardless of their outcome. Because they have no effect on conduct, neither state is interested in applying their respective laws to affect behavior. If these rules are merely loss-allocating, then neither state is thought to be interested in applying its law. California has no interest in imposing liability because the injured victim is not a California resident and the accident did not happen in California. Moreover, California does not purport to apply California regulatory laws to conduct in Arizona that has no injurious effects inside California. Arizona has no interest in protecting the defendant from liability since the defendant is not an Arizona resident and the consequences of imposing liability will be felt solely in California.⁴⁷

Professor Kramer criticizes this analysis and presents an ingenious alternative.⁴⁸ He agrees that Arizona has no interest in applying its non-survival rule to benefit the family of a California tortfeasor. On the other hand, this does not mean that Arizona tort law is completely inapposite. The death of the tortfeasor and the lack of survival of the tort claim constitute a defense to the negligence claim which is legitimately based on Arizona law. The fact that Arizona has no interest in applying its defense to this case does not mean that it has no interest in applying its negligence law to grant the plaintiff a claim for compensation for the defendant's negligent conduct inside Arizona. This analysis uses *depe-gage* to disentangle claims and defenses; the lack of interest in extending the Arizona defense to the California defendant does not imply or entail a lack of interest in granting the plaintiff a claim. According to Kramer, Arizona is interested in applying its tort law to provide a remedy for negligence on Arizona roads, especially if the victim is an Arizona resident. In contrast, California has no right to attempt to regulate the con-

46. 41 Cal.2d 859, 264 P.2d 944 (1953).

47. Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 229 (1958), reprinted in B. CURRIE, *supra* note 2, at 152, cited in Larry Kramer, *The Myth of the Unprovided-For Case*, 75 VA. L. REV. 1045, 1050 (1989).

48. Kramer, *supra* note 47, at 1050-55.

duct of Californians on Arizona roads; California has no interest in applying its negligence law to conduct inside Arizona.

This analysis raises several interesting questions. First, Kramer redefines the state interests involved in the case and combines them with analysis of rights to the protection of specific state laws. Contrary to the prevailing formulation, Kramer argues that the case does not present an unprovided-for case with neither state interested in applying its law. Rather, it presents a false conflict because Arizona is interested and California is not. He successfully demonstrates an alternative interpretation of the nature and scope of state and individual interests involved in the case. However, his analysis falls short in too quickly answering the question of what each state's interests are. Given the conflict between his interpretation and the traditional interpretation, it seems apparent that further discussion is needed about which of the competing interpretations is best as a matter of justice and social policy.

False conflict analysis presumes that it is possible to identify limits to state and personal interests in a relatively non-controversial fashion. I am not convinced that this is possible. On the contrary, I believe that it is almost always possible to reinterpret interests so as to create a real question about the proper and just resolution of the choice-of-law decision. Unless courts consider the alternative perspectives implicated by each case, they will not reach reasonable decisions. For example, it is possible to accept the distinction Kramer makes between claims and defenses, but nonetheless interpret the case as legitimately governed by California, rather than Arizona, law. Thus, contrary to Kramer's analysis,⁴⁹ the California defendant's estate may argue that Arizona may indeed have a legitimate interest in applying its non-survival rule to protect a California family from liability for conduct of their deceased family member inside Arizona. The California estate can argue that Arizona law limits liability for negligent accidents occurring in Arizona to seizure of the tortfeasor's assets; once the tortfeasor dies, the claim lapses. Tort suits are brought against the wrongdoer alone, not against the wrongdoer's family.⁵⁰ If the tortfeasor has died, he can no longer be punished, and the sin does not descend to his relatives. There is no reason why the Arizona legislature should make an exception to this principle just because the tortfeasor is from California. The liability imposed by Arizona law simply does not extend to the deceased tortfeasor's family. Such an interpretation of Arizona's substantive and multistate policy may have the benefit of extending to nonresident families the same protection extended to the families of resident tortfeasors. It interprets Arizona law as simply not creating a claim upon which relief can be granted.

49. *Id.* at 1053.

50. It is true that a successful claim against the tortfeasor, resulting in a judgment, will affect the financial interests of the tortfeasor's family who relies on him. Nonetheless, the lawmakers in Arizona may believe that it is immoral to impose this cost directly on the family when the wrongdoer is no longer around to suffer from the consequences of his actions.

On the other hand, the Arizona plaintiff may argue that the California forum may have a legitimate interest in applying its tort law to an accident between a California resident and an Arizona resident in Arizona. Although the California legislature would not ordinarily attempt to regulate the conduct of its residents anywhere in the world, it may be interested in imposing its norms of justice if they will not offend the policy of any other state and if this result will not unfairly surprise a California resident who reasonably relied on the law of another state in fashioning his conduct. If one goal of California tort law is to determine, as a matter of justice and fairness, which party should bear the loss in an automobile accident, then the central issue is the just contours of the relationship between the parties. This is especially true if tort law in automobile crash cases is thought to be loss-allocating rather than conduct-regulating. The relationship between the plaintiff and defendant is not fixed for all time at the moment of the crash. Rather, the failure of the tortfeasor to compensate the plaintiff is a continuing failure. If that failure to compensate is unjust, then it is a continuing injustice *inside California*. If California law sanctions this result, it is allowing a California defendant to get away with murder (so to speak).⁵¹ When doing so furthers no real interest of Arizona, it is unclear why California should immunize its resident defendant and leave the plaintiff without a remedy.⁵² In this case, application of California law will not interfere with any legitimate interests of Arizona. Arizona law is meant to protect the property of innocent family members of deceased tortfeasors; however, the tortfeasor's family is not an Arizona family. Moreover, California law embraces the principle that as between the innocent family members of the tortfeasor who had vague hopes of inheritance and the wronged victim, the victim should prevail. Nor will this result cause any unfair surprise to the deceased tortfeasor and his family; he did not rely on the Arizona survival statute in deciding how to act inside Arizona.

These varying interpretations of state substantive and multistate policy present different pictures of the relations among the parties and the states connected with the case. We cannot intelligently choose a particular construction of state and party interests without considering this range of interpretations.

A second interesting implication of Kramer's analysis is that he illustrates the importance of identifying appropriate baselines for analysis in conflicts cases. Kramer suggests that California has no legitimate interest in regulating the conduct of Californian drivers on Arizona roads. This principle has the foreseeable result of denying the plaintiff a remedy unless the plaintiff can show a right to recover under the law of the place of the injury. By withholding from the victim the protection of plaintiff-protecting forum law, Kramer's baseline protects the defendant from liability. On the other hand, Kramer identifies an applicable plain-

51. Weinberg, *Conflicts Law and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023 (1982).

52. B. CURRIE, *supra* note 2, at 153-54.

tiff-protecting policy of the place of the accident in his *Grant v. McAuliffe* variation. But in the absence of such a policy, under his analysis, the plaintiff would lose.

*Erwin v. Thomas*⁵³ involved an accident in Washington between a driver from Washington State and a defendant from Oregon. The victim's wife sued the defendant in Oregon for loss of consortium. Oregon, but not Washington, allowed recovery for loss of consortium. Kramer argues that the plaintiff has no right to recover for loss of consortium because no state gives her a cause of action.⁵⁴ Her home state of Washington gives her no right to recover for loss of consortium; it does not recognize this as a legally protected interest for which compensation can be given. Oregon recognizes the legally protected interest, but it can reasonably extend that interest only to Oregon domiciliaries, or perhaps to nonresidents injured inside Oregon. Thus no state grants her a cause of action. Case dismissed.

This is an interesting and creative approach to unprovided-for cases, but the issue is not so simple. Kramer's definition of state interests adopts an implicit defendant-protecting baseline; the plaintiff loses if she cannot identify some law that affirmatively grants her relief. Although I agree with this general statement of the legal principle, I believe that it is a conceptual trick to maintain that no state's law grants the plaintiff in *Erwin v. Thomas* a cause of action. It is possible to construct an alternative interpretation of the principle that the plaintiff must point to some law granting her relief that is relatively more plaintiff-protecting than Kramer's interpretation. Courts must face the choice between these alternative baselines, as well as any other baselines that may be proposed.

Washington, the place of the injury, like the forum in Oregon, requires the negligent defendant to compensate those proximately injured by his conduct. It is true that Washington does not recognize the injury to the plaintiff. What would have happened if the plaintiff had brought the case in a Washington court? On the one hand, the forum might simply have applied forum law, denying plaintiff a remedy based on the law of the forum, which was also the place of the accident. On the other hand, it might have reexamined forum law, which was embodied in a prior court decision and not based on a statute,⁵⁵ and considered the wisdom of denying a remedy for loss of consortium. After all, the common law originally provided a remedy for loss of consortium for men, but not for women,⁵⁶ and the 1953 Washington Supreme Court opinion cited by the *Erwin* court in 1973 uncritically adopted the common law policy. A Washington court might instead have reconsidered

53. 264 Or. 454, 506 P.2d 494 (1973).

54. Kramer, *supra* note 47, at 1060-63.

55. *Erwin*, 264 Or. at 455, 506 P.2d at 495; see *Ash v. S.S. Mullen, Inc.*, 43 Wash.2d 345, 261 P.2d 118 (Wash. 1953).

56. W. PAGE KEETON, DAN DOBBS, ROBERT KEETON & DAVID OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 125, at 931 (1984).

the policy basis for denying a remedy to the wife. It might have concluded, as the majority of states today hold,⁵⁷ that the harm to the relationship between the victim and his wife—depriving her of some of the benefits of his companionship—constituted a real injury. In other words, the Washington court might have modernized its law, thereby granting the plaintiff a remedy and removing the conflict of laws. In fact, the Washington common law rule, allowing a remedy for loss of consortium for husbands but not for wives, was overruled seven years after *Erwin* in an opinion in which the court noted that “[t]he common-law distinction between husband and wife in regard to consortium is . . . based upon an unreasonable, discredited concept of the subservience of the wife to her husband” and would violate the equal protection clause.⁵⁸

If, however, forum law had been embodied in a clear (and constitutional) statute, or the Washington court was not ready to change forum law, the court would probably have applied forum law on the grounds that the Oregon defendant did not carry the disabilities and obligations of Oregon law with him when he traveled to Washington and had the same right to immunity from suit for this type of claim as any Washington resident driving in Washington.⁵⁹ The policy of multistate justice, or nondiscrimination against a nonresident defendant in Washington, might support extending the protection of forum law to the defendant. The Washington court might therefore have seen the case as involving the right of the defendant to the same protections accorded by Washington law as are given to other defendants who negligently cause injury inside Washington. Although aberrational, it may be appropriate for the Washington court to apply its old-fashioned law to benefit a nonresident when the only person harmed by such a result is a Washington resident who is not entitled to relief under the law of her domicile. The argument for Washington law is fairly strong.

At the same time, it is possible to imagine an argument that application of Oregon law would not be unfair to the defendant. After all, he did not plan his activities in Washington based on the limits on liability there; indeed, he understood that his negligent conduct in Washington could subject him to heavy damages. To impose Oregon law on him would differentiate him from Washington residents who injure others inside Washington, yet the different treatment may be justified in the sense that the legislature in his home state would consider this result fair. While one does not ordinarily imagine Oregon attempting to regulate an Oregon resident’s conduct inside Washington, that may be the wrong way to explain what is going on. Rather, one might note that

57. *Id.* at 932.

58. *Lundgren v. Whitneys, Inc.*, 94 Wash. 2d 91, 614 P.2d 1272, 1275 (1980) (quoting *Leffler v. Wiley*, 15 Ohio App. 2d 67, 69, 239 N.E. 235, 236 (1968)).

59. *But see Weinberg*, *supra* note 6, at 595 (arguing that the higher liability standard of a plaintiff’s home state law might apply to govern the behavior of a defendant acting at home.)

both Oregon and Washington provide heavy legal sanctions for negligent operation of an automobile. The failure of the Oregon resident to compensate the Washington wife is a continuing failure. The defendant will consume resources inside the state of Oregon which might otherwise have gone to compensate the injured Washington wife. Is the state of Oregon interested in protecting its resident's assets from the just claims of a victim whose injuries are recognized under the law of Oregon, and of the majority of states? Perhaps not.

But suppose that the Washington court would still apply Washington law and deny the remedy. Must an Oregon court do the same thing? It is not at all clear that it should. Consider the case as viewed by an Oregon court. Application of Oregon law would not unfairly surprise the defendant, who did not rely on the lack of a claim for loss of consortium for women in deciding to drive to Washington. He may claim a right to the protections of Washington law while he is there, and he may claim that it would be discriminatory to deny him this protection. On the other hand, the plaintiff also can make some rights arguments. She was wronged by the defendant; the law of the forum—which is the defendant's residence—recognizes this fact, although her own domicile might not. The forum in Oregon might consider the fact that, if the case were heard in Washington, the Washington court might very well take that opportunity to jettison its aberrational rule, modernize its law, and grant the wife a claim. Why should the Oregon court deny a remedy which is sanctioned under forum law if Washington would provide a remedy?

Even if the Oregon court believed that the Washington court would keep its old rule and apply it to deny the wife a remedy, this does not mean that the Oregon court must follow suit. From the standpoint of the Oregon court, the case involves a resident defendant who negligently injured a nonresident plaintiff in her home state. Although the plaintiff's domicile does not recognize her injury, the forum in Oregon does. To allow her to go uncompensated is to perpetuate an injustice; it is to allow the defendant, a resident of the forum, to continue living in Oregon without having compensated the victim of his wrongful conduct. If the plaintiff had been an Oregon resident injured in Washington by the Oregon defendant, the plaintiff would have prevailed in the Oregon lawsuit; that would be a common domicile case. Since the case concerns a loss-allocating rule, the law of the common domicile would almost certainly control. Moreover, if the plaintiff had been a man instead of a woman, she would have prevailed under either Washington or Oregon law. Why should the Oregon court deny a remedy to the Washington plaintiff merely because she is a nonresident and a woman? This result would countenance a continuing injustice against the plaintiff, as well as arguably discriminatory treatment. Although the defendant claims a right to be treated like a Washington defendant who injured someone on the roads in Washington, the plaintiff claims a right to the same compensation that would be granted to an Oregon plaintiff, or to a male

Washington plaintiff for an accident with an Oregon defendant in the State of Washington. As between the injured Washington wife and the negligent defendant, whose rights should prevail?

This version of the multistate policies turns Kramer's analysis on its head. He asks whether any state gives the plaintiff a cause of action. My proposed analysis recognizes that each state requires the defendant to compensate those proximately injured by the defendant's conduct and then asks whether either state grants the defendant a defense to this *prima facie* claim. The answer to this question may well be "no." Oregon is not interested in protecting its own domiciliary from what Oregon sees as the natural consequences of his negligent conduct; that would be to countenance a continuing injustice inside Oregon. Oregon also is interested in avoiding sex discrimination; it may be unwilling to apply Washington law that denies plaintiff a remedy solely on the basis of her sex. Washington may be interested in granting the defendant the same immunity from liability to a Washington victim that would be extended to a Washington defendant. On the other hand, the Oregon defendant in an Oregon court is differently situated than an Oregon defendant in a Washington court. The nonresident woman has the right to be treated equally by the forum, even though her own courts would deny her equality. The Washington policy discriminates on the basis of sex and arguably violates the fundamental public policy of the forum. Nor did it have long to last—seven years later, Washington changed its law. The nonresident plaintiff may also claim the same rights as an Oregon plaintiff injured by an Oregon defendant in Washington. It may therefore be just for forum law to determine the existence of a legal claim since the forum is interested in altruistically extending its law to protect the interests of a nonresident—granting the nonresident the same rights that would be conferred upon an Oregon resident injured by the defendant in Washington—rather than dismissing the lawsuit on the grounds that the plaintiff is not a resident of the forum. This argument is a strong one if Washington has no affirmative interest in denying her a remedy, as long as the defendant is a nonresident.

My point is not to prove that this analysis is the only one possible or right way to resolve the dispute—quite the contrary. It is useful to recognize competing interpretations in analyzing conflicts cases. These multiple versions of state and individual interests, individual rights to protection of state law, and rights to nondiscrimination in multistate cases demonstrate that, in adjudicating choice-of-law cases, the courts could adopt relatively more plaintiff-protecting multistate policies or defendant-protecting multistate policies. Courts will make better decisions if they recognize these competing interpretations and then present reasons for adopting one baseline over the other.

D. How Interest Analysis Is Misused by Courts

1. *The Case of the Missing Airline*

A final problem with false conflicts analysis is that it is often misused by the courts. The impetus to resolve cases by finding false conflicts encourages courts to engage in one-sided analysis of choice-of-law cases. In the well-known 1985 case of *Bryant v. Silverman*,⁶⁰ the Arizona Supreme Court applied the Second Restatement of Conflict of Laws to determine the law applicable to an airplane crash in Colorado. The reasoning in the opinion contains some common—and disastrous—mistakes. Moreover, the mistakes are not random. Rather, many are the predictable consequence of a form of interest analysis that rests on the search for false conflicts.⁶¹ The case involved a wrongful death claim against an airline company, Sun West Airlines, arising out of an airplane trip that departed from New Mexico and crashed in Colorado, the destination state, killing several passengers. Sun West, the defendant airline, had its principal place of business in Arizona, but serviced cities in New Mexico and Colorado as well. The plaintiff, Barbara Bryant, was the beneficiary of her husband, Paul Bryant, one of the passengers killed in the crash. The Bryants were both domiciled in Arizona at the time of the crash, as was Barbara Bryant at the time of trial.⁶² The victim, Paul Bryant, had purchased his ticket in Colorado, the place of the crash. The plaintiff alleged that the crash was caused both by the pilot's negligent operation of the plane in Colorado, where it crashed, and by the defendant airline's negligent failure to provide adequate training to the pilots at its principal place of business in Arizona.

The choice-of-law issue concerned the measurement of damages. Arizona, the forum and the place of what the court characterized as the parties' common domicile, allowed compensatory damages for non-pecuniary losses (such as loss of consortium or pain and suffering) and also allowed punitive damages. Colorado, the place where the crash occurred and the ticket was purchased, limited damages to pecuniary losses and did not allow punitive damages.

60. 146 Ariz. 41, 703 P.2d 1190 (1985).

61. The Arizona Supreme Court actually applied the most significant relationship test of the Second Restatement, rather than interest analysis. However, it interpreted the Second Restatement in a way that effectively incorporated interest analysis through Section 6, which requires courts to determine the policies underlying the substantive laws at issue and to judge their relative significance in the case. Other states that have adopted the Second Restatement adopt other approaches—some focus on the presumptive rules, others adopt a center of gravity principle, and still others adopt a kind of better law approach. As Larry Kramer notes, the Second Restatement is all things to all courts. (Correspondence, November, 1990).

62. There were two other wrongful death claims in the case filed on behalf of two other victims. At the time of the crash, Mary Peters was domiciled in New Mexico and Joyce Branham was domiciled in Texas. Since all plaintiffs asked the court to apply Arizona law and the defendant asked the court to apply Colorado law, the court refused to consider the interests of New Mexico or Texas. *Bryant*, 146 Ariz. at 42, 703 P.2d at 1191.

The Second Restatement requires the court to consider the significance of various contacts based on the policy considerations underlying conflicts law. Section 6 of the Restatement lists the factors to be considered in choosing the applicable law, including the policies underlying the laws of the two states, the justified expectations of the parties, and comity concerns about the appropriate relations between overlapping political communities. Section 145 lists the contacts generally thought to be relevant to torts cases, including the domicile of the parties (including a company's principal place of business), the place of the tortious conduct, the place of the injury, and the place where the relationship, if any, between the parties, is centered.⁶³

The court made several serious errors in applying this modern policy-oriented analysis. These errors include (1) analyzing contacts before analyzing the substantive policies underlying the laws of the two states; (2) engaging in one-sided analysis by failing to recognize the legitimate policy concerns of Colorado and the justified expectations of the defendant airline; (3) confusing arguments about state interests with arguments about justified expectations and comity concerns; and (4) formalistic characterization of the issue as involving the law of torts, ignoring the relevant contractual policies clearly present in the case.

The overall effect of these mistakes was to present an inaccurate picture of both state interests and the justified expectations of the parties. The court egregiously misrepresented the legitimate policy concerns of the state whose law favored the defendant. The case presented a real conflict, but the court's analysis made it appear as if both states' interests would be furthered by application of Arizona's plaintiff-favoring law. The court also failed to note the reasons why the defendant might legitimately claim protection under the law of the defendant-protecting state of Colorado. The court's methodology thus had a significant consequence: the concerns and legitimate claims of the airline were effectively rendered invisible. It may be the case that the interests of the plaintiff and the regulatory concerns of the place of the parties' common domicile should prevail over the interests of the defendant and the regulatory concerns of the place of the crash, but the court will never get to make this determination if it willfully blinds itself to the interests on one side of the dispute.

Moreover, it seems the court's failure to analyze adequately the state and individual interests is related to false conflict analysis. False conflict analysis gives the courts an impetus to resolve the case by find-

63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971). The court also noted the presumption in Section 175 that the place of the injury in wrongful death cases has the most significant relationship with the case unless some other state can be shown to have a more significant relationship. Like many courts applying the Second Restatement, the court gave this presumption little weight because the presumption itself notes that it can be overcome if some other state has the most significant relationship to the case. The court therefore has no choice but to apply the most significant relationship test directly to choose the applicable law. What is more puzzling is that the court gave so little attention to the contractual aspects of the case.

ing a false conflict if they can; otherwise, the court will appear to be trampling on the interests of one state or another. Since the court is likely to choose forum law to resolve what it sees as a real conflict, it is not only going to appear to be trampling on the interests of the foreign jurisdiction, but may look both parochial (intolerant of the law of other states) and imperial (wrongly attempting to regulate events centered elsewhere). False conflict analysis, on the other hand, makes the problem appear to go away, thereby avoiding the problems just noted. This set of incentives to search for false conflicts causes the courts both to oversimplify the interests at stake in choice-of-law cases and to overlook obvious interests which do exist.

2. *How False Conflict Analysis Misled the Court*

The first mistake made by the court was to address the relevant choice-of-law factors in the wrong order. It wrongly analyzed the contacts in the case before addressing the policies underlying the laws of the two states.⁶⁴ This procedure is confused because we cannot judge the significance of a particular contact unless we know the policies the state is seeking to achieve. The significance of different contacts in particular cases will differ depending on whether the place of the contact has a plaintiff-protecting policy or a defendant-protecting policy. It is therefore critical to identify the policies underlying the laws of the two states before considering the significance of specific contacts. Otherwise, the court may wrongly attribute a plaintiff-favoring policy to the place of the injury when, in fact, it has—relative to other interested states—a defendant-protecting policy.⁶⁵

This mistake cannot be attributed to interest analysis generally, or false conflict analysis in particular. All interest analysts insist on analysis of the policies underlying state laws to determine whether the states are interested in applying their law to the contacts in the case. If anything, this mistake can be attributed to a misuse of the Second Restatement. Some courts may misread Section 145 and analyze the contacts listed in that section independently of the policies underlying the potentially applicable state laws.

The court's second mistake was that its review of the substantive policies underlying the conflicting laws was woefully one-sided. This mistake can be attributed to false conflicts analysis. In addressing the interests of the place of the injury, the only policy mentioned by the court was the interest in compensation.⁶⁶ Since the plaintiff was not domiciled in Colorado and there were no unpaid medical creditors

64. See 146 Ariz. at 44, 703 P.2d at 1193 ("Our analysis starts with the four contacts specified in § 145(2) . . ."); *id.* at 47, 703 P.2d at 1196 (later considering the policies underlying Arizona and Colorado damages law).

65. That is precisely what happened in this case. In considering the interests of the state where the injury occurred, the court discussed only the plaintiff-favoring policy of compensation, when that state had a defendant-protecting policy.

66. 146 Ariz. at 43, 703 P.2d at 1194 ("Although Colorado is the state of injury, the state where the injury occurs does not have a strong interest in compensation if

there, the court concluded that the place of the injury had little interest in applying its law of damages to the case.⁶⁷ This argument assumes that the only policies underlying tort law are plaintiff-favoring. But the conflict in this case arose because the place of the injury had a defendant-protecting policy, the purpose of which was to limit the liability of companies doing business there. The court's description of the significance of the place of the injury is therefore not only biased toward the interests of plaintiffs, but also is an inaccurate description of the regulatory policies at stake in the case before it.

Although the court later acknowledged Colorado's interest in protecting defendants from ruinous liability,⁶⁸ it asserted that this policy applied only to Colorado corporations. Since the defendant had neither incorporated nor placed its principal place of business in Colorado, the Colorado protective policy did not apply. This is a flawed application of interest analysis and leads to a false conflict.⁶⁹ It is true that Currie and his followers tend to argue that state policies are intended to benefit residents.⁷⁰ For instance, in the case of injured victims, Currie believes the consequences of not providing compensation will be felt almost entirely in the place of their domicile—injured plaintiffs who do not recover may go on welfare at the taxpayer's expense. The domicile state will therefore either be interested in compensation to avert this expense, or will be willing to live with undercompensated plaintiffs as a way to achieve other social goals such as promoting industry. On the other hand, interest analysts like Weintraub argue that the place of the injury has interests in compensating nonresidents to provide a fund from which to compensate local medical creditors.⁷¹

In the case of corporate defendants, it is unclear why a defendant-protecting policy should apply only to businesses "domiciled" in Colorado (either incorporated there or having their principal place of business there). Contrary to the assertions of the court,⁷² the injury in this case was not completely fortuitous—it is true that no one planned to crash in Colorado, but it is also true that the injury arose out of the defendant's business operations in Colorado. When an injury occurs in a state with which the defendant has substantial business contacts, and

the injured plaintiff is a non-resident Compensation of an injured plaintiff is primarily a concern of the state in which plaintiff is domiciled.”).

67. *Id.* at 45 n.4, 703 P.2d at 1194 n.4.

68. *Id.* at 47, 703 P.2d at 1196.

69. See Jack Goldsmith, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 *YALE L.J.* 597 (1989) (arguing that traditional ways of interpreting state interests fail to recognize legitimate state interests in regulating or benefiting corporations who do business in a state, but are not incorporated nor have their principal place of business there).

70. See Currie, *supra* note 2, at 85 (arguing that Massachusetts legislates for “Massachusetts women”).

71. R. WEINTRAUB, *supra* note 16, § 6.10, at 301.

72. *Bryant*, 146 *Ariz.* at 46, 703 P.2d at 1195 (The court stated that since airplane accidents are not planned, arguments about predictability and justified expectations are weak).

the injury arises out of those contacts, there is every reason to believe that the place of the injury may be interested in applying its defendant-protecting policy to benefit the defendant.

It may be the case that the plaintiff-protecting policy of the place of the parties' common domicile, Arizona, should prevail over the policy of the place of the injury. But the court never got to make this determination. It failed to do so, first, because it initially attributed only plaintiff-protecting policies to the place of the injury, and second, because when it did examine the defendant-protecting policies of the place of the injury, it failed to recognize the applicability of the Colorado policy to an injury arising out of the defendant's substantial business contacts with Colorado.

The court's eagerness to find Colorado to be a disinterested state caused it to overlook entirely the place of defendant's conduct. It did so, presumably, because the defendant had acted, and was alleged to have acted, in both Arizona and Colorado, and there was no way to determine which place was more significant.⁷³ But the fact that the defendant acted in both states surely does not mean that the place of the conduct has no significance—companies may expect their business activities in Colorado affecting Colorado to be governed by Colorado law, whether or not they are also doing business in Arizona. Companies that do business in many states do not thereby announce their willingness to act everywhere under the standards of the most plaintiff-protecting state with which they have contacts. It may be reasonable to charge them with the plaintiff-protecting policy when they have acted in a plaintiff-protecting state in a way connected with the case, but this does not mean that their conduct in defendant-protecting states has no significance.⁷⁴

The court's third mistake was to confuse the analysis of state interests with analysis of the justified expectations of the parties and comity concerns. The appropriate way to proceed is to identify the regulatory and moral policies of the two affected states, and then to ask whether those could appropriately apply to the case. After doing this—and only afterwards—one can ask whether one of the states should engage in restrained interpretation of its policy because the issue is legitimately governed by the political community in the other state. Initially, the court should be generous in describing the scope of state policies. In this case, for example, the court should have concluded that Colorado very well might be interested in applying its defendant-protecting policy

73. *Id.* at 44-45, 703 P.2d at 1193-94.

74. Moreover, in addressing the interests of the place of the injury, the court noted that the place of the injury has less ability to control behavior by deterrence or punishment than the state where the defendant airline is domiciled or the state where the misconduct occurred. 146 Ariz. at 45, 703 P.2d at 1194. The court fails to acknowledge that the misconduct was alleged to have occurred in both Arizona and Colorado. When misconduct occurs in the place of the injury, the place of the injury is less fortuitous than when the injury occurs in a state unconnected with the defendant's conduct. See D. CAVERS, *supra* note 16, at 146 (arguing for application of the defendant-protecting law of the place where both the conduct and injury occurred).

to save a corporation doing substantial business in Colorado from ruinous liability for an accident arising out of its operations in the state. Imposition of liability may push the airline into bankruptcy or cause it to cut back services, and this would affect both employment and the economy generally inside Colorado. The idea that Colorado is only interested in protecting businesses that have their principal place of business in Colorado is fanciful; in this day and age when many corporations do business in many states, there will often be more than one state interested in regulating their activity. Only after identifying this interest should the court ask whether, in the context of this multistate case, Colorado would or should engage in restrained interpretation of its law in deference to Arizona's plaintiff-protecting policies. Colorado might do so either to protect the justified expectations of the plaintiff who relied on the law of her domicile or because application of Colorado law would substantially interfere in the ability of the political community in Arizona to govern legal relations among its domiciliaries, and Arizona's interests in the case therefore outweighed Colorado's interests.

The Arizona court's eagerness to find a false conflict induced it to overlook the possible regulatory and moral interests of both the defendant and the state where the injury occurred. In contrast, an analysis that encouraged recognition of the competing interests of both the parties and the affected states would avoid this mistake without preventing the forum from applying forum law if it were appropriate to do so.

Finally, the court erred by formalistically characterizing the case as a torts case, ignoring the potential contractual policies implicated in the dispute. It asserted that the case involved liability for tortious conduct arising out of the contractual relationship, rather than "the terms of the contract."⁷⁵ This assumes that contract law involves ascertaining the will of the parties and tort law involves coercive state regulation of private conduct for social ends. Yet it would be perfectly appropriate to view the wrongful death statute as an implied term in the contract made when the ticket was purchased in Colorado. Contracts do not only implement the will of the parties, but are heavily regulated; those regulations effectively become part of the relationship established by the parties. It may be that Arizona should refuse to defer to the law of the place where the contract was made, either because it was an adhesion contract, or because the terms were fundamentally unfair or because its own interests in regulating the relationship between the parties take precedence. Nonetheless, it is implausible to claim that the place where the parties enter a contractual relationship and where performance is due has no interest in regulating their relationship.⁷⁶ The court's eagerness to find

75. *Bryant*, 146 Ariz. at 46, 703 P.2d at 1195.

76. Currie argued that the place where the contract was made was arbitrary because contract law was meant to protect the parties. Thus, a Massachusetts woman should not be able to contract with a Massachusetts company in Maine and thereby avoid the Massachusetts protective contract-regulating policy. However, this does not mean that the place of the contract was completely irrelevant. Currie later

a false conflict was a contributing factor in inducing the court to overlook the legitimate interests of Colorado in regulating the contractual relationship initially established there. Real conflicts analysis would allow recognition of these potential interests, while allowing the forum to explain why it may have been appropriate for Colorado to defer to Arizona law.

3. *How False Conflict Analysis Is Misused in Contracts Cases*

False conflicts analysis is sometimes misused by the courts in contracts cases, as well as torts cases. For example, in *Intercontinental Planning, Ltd. v. Daystrom, Inc.*,⁷⁷ the plaintiff, a New York corporation, alleged that the defendant, a New Jersey corporation, had made a written promise in New York to pay the plaintiff a finder's fee if it merged with a company identified by the plaintiff. When the first deal did not work out, plaintiff found a second company for the defendant, which orally promised to modify the written contract to include the second company. The defendant's oral promise was made at a meeting at the defendant's offices in New Jersey. The plaintiff's business was centered in New York and suit was brought there. The contract was enforceable under New Jersey law, but not under New York's statute of frauds.

The New York Court of Appeals held that the case presented a false conflict.⁷⁸ According to the court, New York was interested in applying its statute of frauds to a transaction between a New York finder and a New Jersey promisor. New York law was intended to protect defendants from fraudulent claims for commissions on services rendered by brokers in the sale of businesses. "This policy would include foreign principals who utilize New York brokers or finders because . . . New York is a national and international center for the purchase and sale of businesses and interests therein."⁷⁹ The court went on to note that New York law is "intended to protect not only its own residents, but also those who come into New York and take advantage of our position as an international clearing house and market place."⁸⁰ New Jersey, on the other hand, had "no interest in having its lack of protection for its residents used to establish their liability in a suit brought by residents of other jurisdictions when the laws of the forum State offer a complete defense to the action."⁸¹ In other words, according to the New York court, New Jersey would not intend to impose a \$2,781,848 judgment against a New Jersey company to benefit a New York resident when the New York resi-

argued that the forum should engage in restrained interpretation of forum law if the contract is made in another jurisdiction and it would unfairly surprise one of the parties to apply the law of the forum. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

77. 24 N.Y.2d 372, 248 N.E.2d 576 (1969).

78. *Id.* at 385, 248 N.E. 2d at 584.

79. *Id.* at 383, 248 N.E.2d at 582.

80. *Id.* at 383-84, 248 N.E.2d at 583.

81. *Id.* at 385, 248 N.E.2d at 584.

dent violated New York law in a way that would deny him a remedy under the law of his home state.

The case is not so easy. In *Bushkin Associates, Inc. v. Raytheon*,⁸² a Massachusetts company made an oral promise by telephone to a New York broker. Just as in *Daystrom*, the New York statute of frauds denied the broker a claim while Massachusetts law would enforce the promise. The Massachusetts court rejected the idea that Massachusetts was uninterested in imposing a monetary obligation on a resident for the benefit of a New Yorker who had failed to comply with the regulatory requirements of the law of his domicile. Rather, the Massachusetts Supreme Judicial Court applied Massachusetts law to enforce the promise.

Although the Massachusetts court did not find the case to present a false conflict, it used arguments reminiscent of false conflicts to make the difference between the two laws seem less significant. For example, it argued that both states shared interests in "enforcement of contracts."⁸³ The states merely differed on the best way to protect this shared interest. Further, the court noted that consideration of "the justified expectations of the parties . . . militates for Massachusetts law."⁸⁴ These characterizations of Massachusetts and New York policy misstate the case; they fail to appreciate the real conflict between the policies of the two states. To say that both states enforce contracts suggests that the difference is merely one of detail, rather than basic principle. However, in almost any conflicts case, we can point to shared policies, such as imposing liability for wrongful conduct and promoting a market system. If we state policies at a sufficiently high level of generality, we can always make it appear as if the states really agree on fundamentals.

However, it is extremely misleading to suggest that there is no real conflict between the policies underlying the laws of the two states. New York requires a writing to protect customers from fraudulent claims by brokers. Massachusetts, on the other hand, is more worried about fraudulent or quasi-fraudulent promises made by customers to brokers. Allowing the Massachusetts company to take advantage of the New York broker by obtaining information from him in reliance on its promise to pay a large commission, and then reneging on the promise, would be to countenance a fraud by the Massachusetts company on the New York broker. Although both states are interested in preventing fraud, they have quite different views about what kinds of actions are most likely to raise dangers of this kind. Similarly, it is misleading to argue that enforcing contracts obviously promotes justified expectations. It is true that people ordinarily expect their promises to be enforced. Under New York law, however, those expectations are not justified unless they are in writing.

82. 393 Mass. 622, 473 N.E.2d 662 (1985).

83. *Id.* at 634, 473 N.E.2d at 670.

84. *Id.* at 635, 473 N.E.2d at 670-71.

In contrast to the suggestions by both the Massachusetts and New York courts, cases of this kind present real conflicts. New York is interested in promoting New York as a center of international commerce by regulating New York brokers so as to protect customers from fraudulent claims by those brokers. Massachusetts, on the other hand, is interested in promoting business contacts between nonresidents and Massachusetts residents by giving nonresidents the same protections afforded to residents when they contract with Massachusetts companies. Thus, Massachusetts is interested in imposing a monetary judgment on its resident defendant who orally promised inside Massachusetts to pay a commission to a nonresident. The nonresident who deals with a Massachusetts resident in Massachusetts is entitled to the same protections as would be afforded others contracting there.

The search for false conflicts led both the New York court and the Massachusetts court down the wrong path. They each failed to appreciate the strength of the individual interests on the other side of the case. They also failed to appreciate sufficiently the legitimate regulatory interests of the state whose law was not applied. Courts will not be able to promote justice between citizens of different states if they blind themselves to the real conflicts presented by these intractable cases.

III. Real Conflicts Analysis

The following table illustrates some competing arguments for the plaintiff and defendant in *Bryant v. Silverman* as to whether the plaintiffs have the right to damages for pain and suffering. The table begins by listing the relevant contacts and the possible policies underlying the conflicting laws of the two states. There may, of course, be additional policies relevant to the analysis. It is then followed by arguments about the justified expectations of the parties and the relative interests of the two states. The arguments listed under the Arizona column are examples of those that could be expected to be offered by the plaintiffs, and those under the Colorado column are those that could be expected from the defendant. An adequate analysis of the case requires a full development of these competing perspectives.

Deciding the case requires exploration of whether it is possible to generate a choice-of-law principle that would be acceptable to the courts in both states and which would properly (1) balance the competing interests of the plaintiff and defendant in relying on or claiming the protection of the laws of the different states; (2) determine whether the relationship between the parties was centered in one state and whether the political community where the relationship is centered has a legitimate claim to govern it without interference by other states; and (3) determine whether one of the laws is sufficiently archaic, isolated, unjust, or unwise to be confined to domestic cases in the state that follows it. If none of these criteria generate a choice-of-law rule, the case should be resolved by application of forum law on the grounds that there is no

reason for the forum to give up what it sees as the better law in deference to the just expectations of the defendant or in deference to the norms of another political community. This result does encourage forum shopping in those cases where choice-of-law principles do not apply. However, forum shopping is less of an evil than the arbitrariness or dishonesty that accompany rigid territorial rules combined with the escape devices they inevitably generate. Nor do jurisdiction-selecting territorial rules generate uniformity of results in conflicts cases; characterization questions and escape devices effectively vitiate any possibility that non-policy-oriented rules will be applied in a manner that creates uniform results regardless of where the case is heard.⁸⁵

Moreover, we have reached this point because we have been unable to generate a choice-of-law principle that would be acceptable to both of the states. The problem of forum shopping arises not because of parochial prejudice, but because we have a real conflict between the policies of interested states. The existence of the real conflict means that it may not always be possible to develop a choice-of-law principle that will be convincing to the state whose law is not applied. After all, in the absence of a conclusion that particular types of conduct or particular relationships should be governed by the state's law with which they bear a particular connection, choice-of-law principles necessarily privilege certain substantive policies over others, either by calling those policies "basic," by characterizing them as constituting the better law, or by giving one of the parties the option of choosing the law of one of the states. But there is a real conflict precisely because the states disagree about how to answer these questions. It is imperative that courts and commentators face this truth, rather than attempt to suppress it.

85. Singer, *Real Conflicts*, *supra* note 18, at 6-33.

Bryant v. Silverman

	<i>Arizona</i>	<i>Colorado</i>
Contacts	<ul style="list-style-type: none"> • π's domicile • Δ's principal place of business • possible site of Δ's negligent conduct (mis-training pilot) • forum 	<ul style="list-style-type: none"> • destination • place of injury/crash • possible site of Δ's negligent conduct (in operating the plane) • ticket purchased
Laws	<ul style="list-style-type: none"> • π has the right to recover for nonpecuniary losses, including pain and suffering 	<ul style="list-style-type: none"> • Δ is immune from claims for nonpecuniary damages, including pain and suffering
Policies	<ul style="list-style-type: none"> • full compensation for all injuries • failure to compensate for pain and suffering will unjustly relieve the Δ of the actual consequences of Δ's wrongful conduct • full compensation is necessary to internalize the external effects of Δ's wrongful conduct, thereby giving Δ proper incentives to engage in the efficient level of investment in safety 	<ul style="list-style-type: none"> • protect Δ from ruinous liability • encourage business to operate in Colorado by limiting liability for activities there, thereby creating jobs and helping the local economy • prevent the jury from engaging in unfettered redistribution from Δs or insurance companies to sympathetic πs • refrain from overdeterrence and wasteful investment in safety
Justified expectations	<ul style="list-style-type: none"> • Δ did not plan for the accident to happen in Colorado; since it could have happened in either state, Δ cannot be unfairly surprised by application of Arizona law • π has a right to the protection of the law of her domicile, and would be surprised to learn that her rights against another domiciliary turn on the fortuity of where the accident occurred 	<ul style="list-style-type: none"> • π voluntarily went to Colorado and accepts the vulnerabilities, as well as the benefits, of Colorado law • by going to Colorado, π cannot be unfairly surprised that Colorado law applies to an accident in Colorado • Δ justifiably expected Colorado law to apply to its business activities in Colorado, and would be unfairly surprised to learn that its activities there were governed by Arizona law

<p>Interest analysis</p>	<p><i>Arizona has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • The consequences of undercompensating the π will be felt in Arizona at the π's domicile • Arizona is interested in full compensation to provide sufficient incentives to induce its resident Δ to invest in safety • The relationship between the parties is centered in Arizona since it is their common domicile; the forum is vitally interested in the continuing injustice between the parties <p><i>Colorado has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Colorado is not the Δ's principal place of business; since Δ's conduct is centered in Arizona, Colorado should engage in restrained interpretation of its policy and allow the state of the common domicile and Δ's principal place of business to determine both the proper level of investment in safety and the just amount of compensation • Application of Colorado law will interfere too much in the ability of Arizona to regulate the conduct of its resident business • Colorado has no right to externalize the effects of its business protection policies to Arizona, where an undercompensated π may need public assistance 	<p><i>Colorado has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Colorado is interested in protecting from ruinous liability all companies who do substantial business in Colorado; this policy applies here because Δ does substantial business in Colorado and because the accident arises out of its business contacts there • Colorado is interested in regulating the contract entered into in Colorado when π's husband purchased the ticket <p><i>Arizona has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Application of Colorado law will provide sufficient incentives to invest in safety since the Δ will not be able to plan to have accidents happen just in Colorado; thus it faces the possibility of full liability under Arizona law if the accident occurs there • Arizona has no right to externalize the effects of its compensatory policy to interfere in Colorado's ability to regulate its own economy • Since application of Arizona law would unjustly violate Δ's justified expectation that its conduct in Colorado would be governed by Colorado law, the Arizona court should engage in restrained interpretation of Arizona law
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IV. Real Conflicts and the Problem of Power

Interest analysis is subject to criticism for urging courts to look for false conflicts. Even if the results reached by interest analysts are often correct, it is wrong to reach those results by the fiction that many cases present false conflicts. Rather, I suggest we must face the real conflicts underlying contested choice-of-law cases and then justify the results we reach with these real conflicts in mind. Thus, I see myself as a sympathetic critic of interest analysis.

To resolve conflicts cases, I suggest attempting to generate choice-of-law principles of the kind suggested by Larry Kramer, David Cavers, and Russell Weintraub, and to resort to forum law where such principles do not apply, as suggested by Louise Weinberg, Herma Hill Kay, and Robert Sedler. Real conflicts analysis can help generate these principles by clarifying the value choices implicated in adjudicating these cases. Those value choices include (1) identifying which policies are sufficiently archaic or unjust that they should be confined to purely domestic cases; (2) identifying when actors have a right to rely on the law of particular jurisdictions in planning their conduct; and (3) determining which kinds of issues are so central to the norms of particular political communities that those communities should have the right to determine the contours of relationships centered there.

Real conflicts analysis may change the results reached in multistate cases. Giving up the urge to find false conflicts wherever possible means we may recognize state and individual interests that we had previously ignored. Recognition of these interests may change how we evaluate both the costs and benefits and the justice or injustice of applying the conflicting laws.

Even if recognition of real conflicts does not change the result, it helps to enable decisionmakers to confront the effects of their power. It is wrong to make power too easy to exercise. I fear that false conflicts analysis does just that—it relieves the decisionmaker of the need to confront the interests of the losing party. For this reason, I believe that recognition of real conflicts is a prerequisite to the legitimate exercise of power by courts.

As Martha Nussbaum has explained, many “‘solutions’ [to practical conflicts] do not really solve the problem. They simply underdescribe or misdescribe it. They fail to observe things that are here to be seen: the force of the losing claim, the demand of good character for remorse and acknowledgement.”⁸⁶ She concludes that “the only thing remotely like a solution here is, in fact, to describe and see the conflict clearly and to acknowledge that there is no way out”⁸⁷ Recognizing that there is “no way out” does not mean that we throw up our hands. It means decisionmakers must recognize real conflicts and make considered judgments about them, generalizing and developing choice-of-law principles

86. M. NUSSBAUM, *supra* note 1, at 49.

87. *Id.* at 40-50.

where possible. False conflicts analysis does not help us do this. It just gets in the way.⁸⁸

88. For further development of the conflicts analysis presented in this article, see Singer, *A Pragmatic Guide to Conflicts*, *supra* note 18.

