# REAL CONFLICTS

JOSEPH WILLIAM SINGER

I. INTRODUCTION ..... 3
II. TWO FALSE CONFLICTS ..... 6
A. *Rules versus Standards* ..... 7
1. Rule Systems Require Standards ..... 8
2. Standards Generate Rules ..... 19
3. The Form of Conflicts Doctrine ..... 22
B. *Policy Approaches versus Territorial Rules* ..... 23
1. Jurisdiction-Selecting Rules ..... 23
2. The Relation between the Rules/Standards Debate and the Policy/Territory Debate ..... 25
3. Territorial Approaches Require Policy Analysis ..... 26
4. Policy Analysis Includes Territorial Contacts ..... 31
C. *Resolving the Rules/Standards and Policy/Territory Debates* ..... 32
III. REAL CONFLICTS IN CONFLICTS THEORY ..... 33
A. *Substantive State Policies* ..... 35
1. Utilitarian and Moral Policies ..... 35
2. Liberty and Security Interests ..... 39
(a) *Liberty and Security Interests in Tort Law* ..... 39
(b) *Liberty and Security Interests in Contract Law* ..... 42
3. The Fallacy of Appealing to Basic or Shared Policies ..... 45
B. *Multistate Policies* ..... 47
1. The Contradictory Meanings of Multistate Policy ..... 47
2. Substantive Justice versus Tolerance ..... 49
(a) *Tolerance, Comity, and Diversity* ..... 49
(b) *Substantive Justice, Better Law, and Uniformity* ..... 53
(c) *The Comedy of Territoriality: Comity, Better Law and the Pathological Race to the Bottom* ..... 59
3. Discrimination in Choice of Law ..... 64
IV. UNDERSTANDING CONFLICTS CASES AS THE CONFLICTS THEY REALLY ARE ..... 74
A. *False Answers to Real Conflicts* ..... 75
B. *Social Justice in a World of Overlapping Normative Communities* ..... 79
1. Substantive Justice and Social Policy ..... 81
2. Multistate Policy ..... 83
(a) *Elaboration of Substantive and Multistate Policy* ..... 83
(b) *Consideration of the Relations among Overlapping Normative Communities* ..... 85
(c) *Preference for Forum Law* ..... 90
C. *Freedom and Immunity versus Protection from Harmful Conduct* ..... 92
1. The General Structure of Torts Arguments ..... 92
2. Reliance on the Law of the Place Where the Relationship is Centered versus Claims to Protection Based on the Law of the Place of the Conduct or Injury ..... 94
3. Reliance on the Immunizing Law of the Place Where One Acts versus Claims to Protection Based on the Law of the Place Where One is Injured or Lives ..... 101

D. *Freedom of Contract versus Justice in Relationships* ..... 110
1. The General Structure of Contracts Arguments ..... 110
2. Intent to Be Bound: Formality versus Informality ..... 111
3. Reliance on the Validating Law of the Place Where the Contract is "Made" versus Protection from Coerced or Unfair Obligations . 119
V. FACING REAL CONFLICTS ..... 127

# REAL CONFLICTS

JOSEPH WILLIAM SINGER*

[W]e have first raised a dust, and then complain, we cannot see.[1]
George Berkeley

Consistency in conflict is bought at the price of self-deception.[2]
Martha Nussbaum

## I. INTRODUCTION

In *The Left Hand of Darkness*, Ursula Le Guin describes a cult of priests on a far off planet who have perfected the art of foretelling the future. They make their living answering questions about what the future will bring. Yet they seem reluctant to exercise their skill. When a visitor asks them why this is so, he learns that they developed the art of predicting the future "[t]o exhibit the perfect uselessness of knowing the answer to the wrong question."[3]

Conflicts scholars have known for some time now that the hard part of their inquiry is figuring out what really matters. Answers are a dime a dozen; it is questions that are precious. Choice-of-law theory focuses on choosing the right question, or, as we say, distinguishing real problems from false ones.[4] Thus, we are concerned with state and individual interests, not just contacts; policies, not magical vesting moments; justified expectations, not mechanical jurisprudence; true conflicts, not false conflicts.

We hope to resolve conflicts cases in a way that furthers social justice. To do this, we must identify the issues that most concern us, and then develop an approach to evaluating the relative significance of competing principles and policies. Yet there appears to be no agreement about how to do this,

---



* Associate Professor, Boston University School of Law. Thanks and affection go to Martha Minow, Jack Beermann, Bob Bone, Joe Brodley, Joel Freedman, Andrew Melnick, Nell Minow, Newton Minow, Josefina Rotman, Larry Sager, Ed Tumavicus, and Louise Weinberg. I presented an earlier draft of this Article at the Faculty Workshop Series at the Boston University School of Law in the fall of 1988 and I thank my colleagues for their helpful comments.

[1] GEORGE BERKELEY, A TREATISE CONCERNING THE PRINCIPLES OF HUMAN KNOWLEDGE 8 (K. Winkler ed. 1982) (Dublin 1710).

[2] MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS 242 (1986).

[3] URSULA LE GUIN, THE LEFT HAND OF DARKNESS 70 (1969).

[4] Professor David Cavers writes:

> A change in methodology invites a re-inspection of the problem to be attacked, for the formulation of a problem is likely to be as much the product of an approach as the approach is the product of the problem. A positive methodology

either among courts or law professors. In 1933, Professor Cavers wrote of conflicts law in the courts that "[l]ines of decision have hardened here and there, but the article on a conflict-of-laws topic which does not deplore a current 'confusion of authority' is still a rarity."[5] More than fifty years later, little has changed. The law professors are even more divided than the courts. We are even confused about whether we should be confused. Many scholars view the mass of conflicting precedents and theoretical approaches as—in Prosser's famous phrase—a "dismal swamp."[6] Yet, others see conflicts law as converging on a single, sensible approach—not a "dismal swamp," but a "well-watered plateau."[7]

One way to approach this bewildering subject is to apply the false conflict idea to the theoretical disputes among conflicts scholars. What do we really disagree about? Are these disagreements fruitful? In other words, are they real conflicts? When we ask these pragmatic questions, we discover that some of the debates in which conflicts scholars engage are useful, and some are not. I argue, in Part II, that several traditional debates about conflicts theory that have long occupied our attention have outlived their usefulness. These debates include: (1) whether conflicts law should take the form of rigid rules or flexible standards; and (2) whether conflicts rules should appeal directly to the policies underlying competing substantive laws or instead

---

applied to a problem which for it, at least, is false will not yield a fair return; and the situation disclosed by the state of authority in cases involving a choice of laws is symptomatic of a false problem.

David Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 176-77 (1933).

[5] *Id.* at 177; *see also* Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation"*, 18 OKLA. L. REV. 243, 244 (1965) (stating: "[c]onsistently with my usual experience in research in choice-of-law matters, I find the cases rather in a mess, and in no mood to have order imposed upon them"). For comprehensive studies of choice of law in the courts in recent years, see Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) and Gregory Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987).

[6] William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) (discussing the application of conflict of laws theory to tort liability for interstate publication). The full quote is:

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.

[7] Robert Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (Spring 1977). Professor Leflar noted:

Most of the current cases follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law.

*Id.*; *see also* Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984) (explaining that courts historically decide conflicts cases by furthering multistate policies) [hereinafter *Forum Law*].

should focus on choosing the political community that has the most significant territorial contacts with the parties and the dispute. These debates have framed a substantial amount of conflicts theorizing since the advent of modern choice-of-law approaches. With the recent revival of interest in territorial approaches to choice-of-law issues,[8] they have assumed new significance. I argue that no one seriously advocates either a system of rules or a system of standards; in fact, whether we start with rules or standards, any conflicts system will necessarily develop both forms of legal doctrine. I further argue that evaluation of substantive policies is a necessary component of any choice-of-law theory, including one that focuses on territorial contacts. Moreover, all the modern policy approaches to conflicts depend on analysis of the significance of territorial contacts. The real disagreements are about the level of specificity at which we consider relevant policies and the ways in which we should analyze the legitimate territorial scope of substantive state policies. We need to move beyond these sterile conflicts so that we can address the underlying issues that really matter.

In Part III, I identify what I see as the real issues in conflicts law. I begin by identifying the factors that form the starting place of modern choice-of-law analysis. My list is reminiscent of Leflar's five choice-influencing considerations,[9] although it is structured differently, distinguishing between substantive state policies and multistate policies. This particular construction of choice-of-law factors has a political purpose: I intend it to highlight the internal contradiction within conflicts policies. Conflicts cases confront us with competing values and policies. Real disagreements have arisen among conflicts scholars about how to identify and resolve these conflicts. These theoretical conflicts include disagreement about: (1) whether to recognize the existence of moral, as well as economic or regulatory, state policies; (2) whether to recognize the existence of state interests in protecting individual liberty, including freedom to act without fear of liability and freedom from harsh or coerced contracts; (3) whether to recognize the existence of shared or common policies in cases where substantive laws differ; (4) whether to recognize the existence of multistate policies and how to identify them; (5) how to reconcile the competing goals of uniformity and diversity in deciding multistate cases; (6) how to reconcile the competing goals of enforcing what the forum sees as the better law (expressing the moral voice of the community) and tolerance for the norms of another community where the relationships at issue are centered; (7) how to decide when a choice of law is discriminatory; and (8) how to determine when a choice of law promotes coexistence and tolerant respect for diversity among separate normative and political communities and when it significantly impairs the ability of one or more states to constitute itself as a normative community. Resolving these conflicts requires controversial judgments

---

[8] *See infra* note 38.

[9] Robert Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 S. CAL. L. REV. 1584, 1586-88 (1966).

about both the substantive and multistate policies that we want to implement in multistate cases.

In Part IV, I further argue that the most popular modern choice-of-law theories, including interest analysis, comparative impairment, the "most significant relationship" test, principles of preference, choice-influencing considerations, and party autonomy fail to confront directly the substantive value choices identified in Part III. Because they do not confront these value choices directly, modern choice-of-law analysis is indeterminate. We must address these value choices openly and honestly to figure out why we are resolving conflicts cases in the way we are.[10] More important, we need to focus on these substantive value conflicts to reach a result that both constitutes wise social policy and furthers our conception of social justice in a multistate system.

I propose not a methodology but an eclectic framework for analyzing conflicts cases. This framework asks us to generate competing versions of substantive and multistate policies in different social contexts. We can generate these disparate explanations of what is at stake in particular multistate cases by attempting to understand the dispute from the perspective of the different individuals and groups touched by these conflicts. This approach means that we will rarely resolve conflicts cases by resort to the fiction that they present false conflicts. Instead, we should understand the real conflicts underlying every conflicts case. We must see conflicts cases as the conflicts they really are.

I argue that multistate cases should ordinarily be resolved by application of what the forum considers to be the better law, which will usually be forum law. This result has the virtue of confining arguably bad laws to purely domestic cases within the states that have chosen to promulgate those laws. However, the forum should not apply what it sees as the better forum law if this will significantly interfere with the ability of another state to constitute itself as a normative and political community and the relationship between the forum and the dispute is such that the forum should defer to the internal norms of the foreign normative community. The forum must determine under what circumstances it is obligated to subordinate its own concerns to the ability of its neighbor to create and enforce a different way of life.

## II. Two False Conflicts

Choice-of-law theory in this century has focused largely on two issues. First, scholars have argued about the form that conflicts doctrine should take. On one hand are advocates of rigid rules, like those in the First Restatement.[11] Rules of this sort resolve conflicts questions in a relatively

[10] *See* Leflar, *supra* note 7, at 26 ("Every one of the new proposals calls for decisions based upon real reasons relevant to the functions of law in our society"); Willis Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 323 (1972) (arguing that the "rule-making process would be aided immeasurably if the courts were always to give their real reasons for arriving at a particular result").

[11] RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

mechanical fashion by identifying particular territorial contacts as determining factors in choosing the applicable law. On the other hand are advocates of flexible standards, like the Second Restatement test which resolves conflicts questions by applying the law of the state with the most significant relationship to the parties and the transaction or occurrence.[12] While tests of this sort identify relevant factors to consider in choosing the applicable law, they fail to identify particular territorial contacts as determinative. Rather, they ask us to consider various contacts and to judge their relative significance in particular cases.

Second, conflicts scholars have debated whether choice-of-law determinations should hinge on the particular substantive policies underlying the laws of the affected states. Some scholars argue that the significance of a territorial contact does not depend on whether the state allows or prohibits an activity, or whether it provides a remedy for a particular harm.[13] Others argue that the central question is whether the state's policy goals will be furthered by applying its law to the case at hand, and that the answer to this question may well depend on what the state's policy is.[14]

Both of these debates have outlived their usefulness. Each side oversimpliflies what is involved in choosing a legitimate conflicts system. Moreover, the debates distract our attention from more fundamental issues. By focusing exclusively on the form of conflicts doctrine, these debates have failed to clarify underlying substantive value choices. These value choices require us to make judgments about justice in social relationships, the utility of competing market arrangements, and the proper relations among overlapping normative communities.

### A. *Rules versus Standards*

Since the advent of modern choice-of-law analysis, it has been commonplace to argue that a basic question in conflicts law is choosing between what Willis Reese called "rules" or an "approach."[15] I agree that the difference

[12] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (1971).

[13] *See infra* text accompanying notes 82-84.

[14] *See infra* text accompanying notes 76, 85.

[15] Reese, *supra* note 10; *see also* Clifford Allo, *Methods and Objectives in the Conflict of Laws: A Response*, 35 MERCER L. REV. 565, 565 (1984) ("Those of us concerned with choice of law are in two camps: the advocates of analysis and the advocates of rules."). Conflicts scholars adopt many different attitudes toward rules and standards. *See, e.g.*, Moffatt Hancock, *Some Choice-of-Law Problems Posed by Antiguest Statutes: Realism in Wisconsin and Rule-Fetishism in New York*, 27 STAN. L. REV. 775, 778-89 (1975) (criticizing the rigid rules adopted by Chief Judge Fuld in Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), as leading to unacceptable results in a variety of cases and suggesting that it may not be possible to invent satisfactory choice of law rules that are superior to case-by-case interest analysis); Peter Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1667-70 (1981) (advocating that conflicts cases generally be resolved by "concrete rules," but that these rules be "subject to gap-filling or displacement by a more general test"); Alfred Hill, *The Judicial Function in Choice*

between rigid rules and flexible standards[16] is significant; rules are more likely to be applied in a relatively mechanical fashion, without adequate consideration of underlying policies.[17] The difference, however, is much less than is commonly supposed; whatever method we adopt in real world disputes will necessarily combine rules and standards.[18]

1. Rule Systems Require Standards

Every rule system that has ever been proposed or used as a basis for choice-of-law decisions requires the addition of standards to make the rule system determinate in a nonarbitrary way.[19] Rule systems require standards for several reasons.

---

*of Law*, 85 COLUM. L. REV. 1585, 1588-89, 1597, 1600 (1985) (arguing that conflicts rules should advance governmental interests, but that the jurisdiction-selecting rules of the First Restatement do in fact advance those interests in many cases and that scholars should assume that the traditional rules do in fact implement governmental interests); Maurice Rosenberg, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 641, 644 (1968) (maintaining that choice of law rules are preferable to a no-rule approach because "[t]he idea that judges can . . . do hand-tailored justice, case by case, free from the constraints or guidelines of rules, is a vain and dangerous illusion"); Maurice Rosenberg, *Two Views on* Kell v. Henderson: *An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967) (advocating choice of law rules like David Cavers' principles of preference).

[16] The most commonly accepted current terminology distinguishes between "rules" and "standards." *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (analyzing competing forms of legal solutions to substantive problems in terms of "clearly defined, highly administrable, general rules" and "equitable standards producing ad hoc decisions with relatively little precedential value"). Pierre Schlag explains the difference between rules and standards as follows:

> The paradigm example of a rule has a hard empirical trigger and a hard determinate response. For instance, the directive that "sounds above 70 decibels shall be punished by a ten dollar fine," is an example of a rule. A standard, by contrast, has a soft evaluative trigger and a soft modulated response. The directive that "excessive loudness shall be enjoinable upon a showing of irreparable harm," is an example of a standard.

Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382-83 (1985).

[17] This is not necessarily the case, however. It is certainly possible to justify a rule choice by sophisticated policy analysis. At the same time, standards, because of their convenient vagueness, may effectively mask underlying policy choices that implicate competing values.

[18] This insight is explored in Schlag, *supra* note 16, at 383 (arguing that the rules versus standards debate is an irreducible "arrested dialectic").

[19] This declaration also applies to the strict forum law approach adopted by Kentucky and Michigan. *See* Sexton v. Ryder Truck Rental, Inc., 413 Mich. 406, 320 N.W.2d 843, 845 (1982) (holding that forum law will prevail when two residents, or two corporations doing business in the state, or a combination thereof, are involved in an accident in a foreign state); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972) (holding that forum law will apply if the forum has any significant contact with the case); *see also* Kay, *supra* note 5, at 579-81 (1983) (reviewing development of the

First, all choice-of-law rule systems create characterization problems. Since it is impossible to develop rules that can legitimately answer all characterization questions, such questions must be answered by appealing to standards. For example, in *Alabama Great Southern R.R. Co. v. Carroll*,[20] a brake operator, an Alabama employee of an Alabama railroad, was injured on the job in an accident in Mississippi. Alabama, but not Mississippi, had an employers' liability statute.[21] Mississippi prohibited common-law tort suits against the employer for injuries caused by the negligence of a fellow employee. The Alabama statute, in contrast, abolished the fellow servant rule, thereby granting the plaintiff a remedy against the employer. Under the First Restatement, if the claim were characterized as a tort issue, the law of the place of the wrong would apply; Mississippi, as the place of the injury, would immunize the defendant employer from liability.[22] If the claim were characterized as a contracts issue, Alabama law would apply as the place where the employment contract was made, and the plaintiff would

---

Michigan and Kentucky approaches). This is because forum law can only be applied if the constitutional threshold has been satisfied, and that threshold is defined—and I would argue *must* be defined—in terms of a standard. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (holding "that for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests such that choice of its law is neither arbitrary nor fundamentally unfair"); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985) (relying on the *Allstate* standard to find that Kansas did not have sufficient contacts to constitutionally apply its own law).

[20] 97 Ala. 126, 11 So. 803 (1892).

[21] *Id.* at 131, 11 So. at 805. Workers' compensation statutes require the employer to pay the employee a statutorily stated amount for injuries incurred on the job. An employers' liability act, in contrast, requires such a payment only upon a showing of fault by the employer, and, in some cases, vicarious liability for negligence by another employee. 81 AM. JUR. 2D *Workmen's Compensation* § 5 (1976). Many states have replaced employers' liability acts with workers' compensation statutes, which do not require a proof of the employer's fault. 53 AM. JUR. 2D *Master and Servant* § 341 (1970).

[22] Of course, the First Restatement leaves open to interpretation whether the place of the wrong is the place where the *injury* occurred or where the *conduct* occurred. The traditional definition focuses on the place of the injury, RESTATEMENT (FIRST) OF CONFLICT OF LAWS 377 (1934), because "[t]he tort is complete only when the harm takes place, for this is the last event necessary to make the actor liable for the tort." HERBERT GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS §93 (3d ed. 1949). Yet, the First Restatement notes that the issue might be influenced by the law of the "place of the actor's conduct," when the law of the place of conduct involves "the application of a standard of care." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 380(2) (1934). If a standard of care regarding the actor's conduct has been defined for particular situations by the law of the place of conduct, that definition of the standard may be applied. Moreover, a person required, forbidden, or privileged to act under the law of the "place of acting" is immune from liability for consequences suffered in another jurisdiction. *Id.* at § 382. These exceptions could easily wipe out the rule. For example, in *Carroll*, the defendant could argue that the

be able to recover from the employer. The court chose the torts characterization and denied the worker's claim.[23]

In determining that the claim was "really" a tort claim and not a contract claim, the court engaged in formalistic reasoning that is plainly unacceptable in 1989. Justice McClellan based his decision on the view that contract law protects the free will of the parties and tort law imposes the coercive will of the state on citizens to protect them from harmful conduct.[24] Contract law thus concerns rules about the contracting process, a process whose goal is identifying and then enforcing the will of the parties. Rules stipulating substantive contract terms represent state regulation of private relations—a coercive interference with free will—and therefore belong in the torts category. This argument was so obvious to the court that it noted that any other result "would be astounding to the profession . . . ."[25]

Yet it would not be astounding to us. In fact, the categorization of workers' compensation claims as contractual issues was so obvious to the Supreme Court forty years later that it held the torts characterization to be unconstitutional.[26] In *Bradford Electric Light Co. v. Clapper*,[27] a Vermont worker was killed in New Hampshire while working for his Vermont employer. The substantive laws were the opposite of those in the *Carroll* case; here the place of injury allowed full recovery by the employee under its employers' liability statute, while the place where the employment contract was made limited the remedy to compensation under its workers' compensation act. The lower federal court applied the law of the place of the injury, as *Carroll* had done, but here granting the worker a tort claim against the

---

Mississippi law gives it the privilege to operate the railroad in Mississippi without liability for injury to its employees that does not result from its own negligence.

[23] *Carroll*, 97 Ala. at 138-39, 11 So. at 808-09.

[24] [T]he duties and liablities [sic] incident to the relation between the plaintiff and the defendant, which are involved in this case, are not imposed by, and do not rest in or spring from, the contract between the parties. The only office of the contract . . . is the establishment of a relation between them,—that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation, the statute imposes certain duties and liabilities on the parties to it, wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations.

*Id.* at 137-38, 11 So. at 808.

[25] *Id.* at 136, 11 So. at 807.

[26] Admittedly, the law regarding workers' compensation and employers' liability acts had evolved in the forty-year period following *Carroll*, as such statutes became more common. As Justice Brandeis stated in Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 157-58 (1932), "Workmen's compensation acts are [now] treated, almost universally, as creating a statutory relation between the parties—not, like employers' liability acts, as substituting a statutory tort for a common law tort."

[27] Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).

employer. The Supreme Court reversed. Arguing in a manner that was just as formalistic as the reasoning in *Carroll*, Justice Brandeis held that the case concerned the rights and duties accompanying the contractual relation between the parties, that "[t]he relation . . . was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there."[28]

We now understand that neither characterization is obvious—each case is easily described as either a torts case or a contracts case. How then would a reasonable court, today, attempting conscientiously to apply the First Restatement, answer the question of how to characterize such a claim? A modern court would avoid formalistic definitions of torts and contracts; it would further avoid the mechanical application of precedent characterizing the issue for a different purpose.[29] It would ask why the case should be treated one way or the other. And the answer to this question will, of necessity, address policy questions that cannot be reduced to rigid rules.

A competent brief for the defendant in *Carroll* would argue, for example, that the defendant railroad reasonably relied on the law of Mississippi to immunize it from liability for injuries to its employees arising out of its business activities there when those injuries were caused by the negligence of fellow employees. An employer has a right to rely on the law of the place where it is acting, especially when that law serves to encourage business activity by limiting its liability for the harmful consequences of its activities there. While it is true that the accident could have happened in Alabama, the railroad must have taken into account, in planning its business and in purchasing insurance, that some accidents would occur in the defendant-protecting state of Mississippi, and the railroad thus had the right to immunity for injuries resulting from its operations there. The railroad would further argue that the employee, by entering the state of Mississippi, assumed not only the benefits but the legal vulnerabilities of all employees working there and thus could not claim that he was unfairly surprised by his inability to recover under the employers' liability statute of his home state. Moreover, the state of Mississippi has legitimate state interests in applying its defendant-protecting law to promote its public policy of protecting em-

[28] *Id.* at 158.

[29] For examples of mechanistic applications of precedent, see Levy v. Steiger, 233 Mass. 600, 601, 124 N.E. 477 (1919) (holding that burden of proof was a procedural issue for choice of law purposes on the grounds that a prior precedent had held it procedural, even though the prior case had held the issue procedural, not for choice of law purposes, but for the purpose of determining whether a legislative change in burden of proof violated substantive due process) and Grant v. McAuliffe, 41 Cal. 2d 859, 867-69, 264 P.2d 944, 949-50 (1953) (Schauer, J., dissenting) (arguing that survival of tort claims was a substantive issue for choice of law purposes on the grounds that it had been earlier held to be substantive for the purpose of determining whether a change in the law would be applied retroactively); *see also* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 158 (1942) (criticizing "the tacit assumption that the precise point at which the line between [substance and procedure] is to be drawn is the same for all purposes").

ployers operating in its borders from ruinous liability. Such a policy promotes business and economic development in the state of Mississippi. Applying Alabama's law to business activities in Mississippi would represent illegitimate extraterritorial regulation and would interfere illegitimately with Mississippi's sovereign power over its own economy. Alabama may choose to impose liabilities that would stifle economic and job development in its own state but has no right to externalize the costs of its workers' compensation program onto the state of Mississippi. Application of Alabama law here would impose economic costs on Mississippi citizens for the sole purpose of protecting Alabama taxpayers from having to take care of a disabled Alabama worker.

Conversely, the plaintiff-employee would emphasize his justified expectation that he was entitled to compensation for injury resulting from his employment. He reasonably believed that the employment relation centered in Alabama entitled him to compensation for injuries that occurred on the job—no matter where those injuries occurred. He would further argue that the company could not have relied on the law of Mississippi to limit its liability since the accident in this case could just as easily have happened in Alabama; the negligent conduct—the failure to inspect the train and thus to discover the defective link between the trains—had occurred in Alabama as well as Mississippi. Thus the railroad could not be unfairly surprised by being held to the terms of the Alabama compensatory policy. The brake operator would further appeal to the interests of the state of Alabama in regulating the employment relationship entered into and centered in Alabama. Most, but not all, of the consequences of not compensating the employee would be felt in the state of Alabama; that state would have to maintain the worker with public assistance if he were disabled and unable to work. His injury, whether temporary or permanent, would also limit the pool of labor available in the state and possibly raise the costs for Alabama employers competing for workers.

Moreover, Alabama has various policies governing the appropriate terms of employment relations centered there. It has a moral policy regulating the unequal power exerted by employers over workers in the marketplace. Through the democratic process, the polity in Alabama has determined that the appropriate contours of the employment relationship require the more powerful partner to take care of the disabled worker injured by the negligence of a fellow employee. Further, Alabama may have an economic policy that requires the company to internalize the costs of its operations by taking into account the injuries its activities will cause its employees; such a policy may increase efficiency by encouraging desirable investment in safety. Cost internalization may even result in the desirable closing of businesses whose activities are overly dangerous, causing more social harm than social benefit. Application of Mississippi's defendant-protecting policy represents an illegitimate extraterritorial application of Mississippi's economic development policy to employment relations centered in Alabama. Mississippi may seek to encourage economic development in Mississippi by sacrificing its

workers and treating them poorly; but it has no right to benefit its economy by imposing external costs on Alabama, which, after all, is the state that will bear the burden of caring for the uncompensated disabled worker.[30]

A modern brief that failed to discuss these policy questions would be incompetent. And a judge who decided the case without addressing these considerations would not be doing her job. Formalistic classification of the issue as one of "tort" or "contract" would simply not suffice.

The second reason why rules generate standards is that rule systems simply cannot be comprehensive. They inevitably contain significant gaps and ambiguities. In fact, we want them to contain space for discretion. David Cavers explained that this was particularly true in conflicts cases because, "where . . . the problem is essentially complex, the rules developed must contain variables to permit some degree of accommodation to those complexities whose precise nature cannot be anticipated."[31] Karl Llewellyn and Felix Cohen taught us long ago that the question of whether a new case is governed by an existing rule cannot itself be answered by applying a rule.[32]

---

[30] The arguments in *Clapper* would be similar to these arguments, but would simply point in the opposite direction. The defendant would argue, for example, that it had a right to rely on the law of the place where it created the employment relation to limit the scope of its liability, and that the place of employment has interests in regulating the employment relation to determine the appropriate obligations of employers toward employees. Moreover, the employee cannot claim unfair surprise that the law of his home state, which he had some power over (having elected the legislature), would place on him the obligation of buying disability insurance. The plaintiff, on the other hand, would argue that the place of the injury has interests in protecting all workers who are employed and working within its borders. To not allow this worker to be compensated for injuries suffered on the job in New Hampshire would discriminate against him, treating him differently from all other workers in New Hampshire, solely because he comes from out of state. Further, Vermont has no right to extend its policy to govern business activities that occur in New Hampshire.

[31] Cavers, *supra* note 4, at 195.

[32] KARL LLEWELLYN, THE BRAMBLE BUSH 69 (Oceana ed. 1960) ("You have now the tools for arguing from that case as counsel on *either* side of a new case." (emphasis in original)). Felix Cohen argues:

> To the cold eyes of logic the difference between the names of parties in the two decisions bulks as large as the difference between care and negligence. The question before the judge is, "Granted that there are differences between the cited precedent and the cases at bar, and assuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?" Obviously this is an ethical question. Should a rich woman accused of larceny receive the same treatment as a poor woman? Should a rich man who has accidentally injured another come under the same obligations as a poor man? Should a group of persons, e.g., an unincorporated labor union, be privileged to make all statements that an individual may lawfully make? Neither the ringing hexameters of *Barbara Celarent* nor the logic machine of Jevons nor the true-false patterns of Wittgenstein will produce answers to these questions.

Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 217 (1931); *see*

It is true, however, that once a workers' compensation case is classified as a tort claim for choice-of-law purposes, this rule could be applied in a determinate fashion to future cases.[33] This possibility leads advocates of rules to assume that eventually most important claims will be clearly characterized. We would then have a relatively comprehensive system—an idealized version of the First Restatement—that would enable us to make choice-of-law decisions without appealing to standards. Such a system would not only have rules about which law to apply to different categories of cases but also rules about how to characterize each type of claim.

The history of the First Restatement teaches us that we have no reason to be optimistic about rule systems working this way. While the theory is lovely, the overwhelming evidence indicates that rule systems do not function this way in practice. Part of the reason for this is that new cases arise constantly. Consider *Levy v. Daniels' U-Drive Auto Renting Co.*[34] A rental car, leased in Connecticut, was involved in an accident in Massachusetts. A Connecticut statute makes rental companies strictly liable to anyone injured by operation of their rented cars; Massachusetts requires an injured party to prove negligence in order to recover against the rental company. Is a claim by a passenger in the rental car against the lessor a tort claim based on liability for the injury in Massachusetts, or is it a contracts claim based on the contractual relationship whose terms are regulated in Connecticut? Or consider *Schultz v. Boy Scouts of America, Inc.*,[35] in which a New Jersey Boy Scout committed suicide after being sexually abused by his scoutmaster on a camping trip in New York. New Jersey, but not New York, immunizes charities from tort liability to their beneficiaries. Is this a tort claim based on the injury inflicted in New York? Is it an implied contract claim based on the relationship entered into in New Jersey between the Boy Scouts and the boy's parents who agreed to let him belong to the organization and go on the camping trip? Or is it an issue of status based on the responsibilities and immunities of a charitable organization towards its "beneficiaries" in New Jersey? Further, consider *Wood Brothers Homes, Inc. v. Walker Adjustment Bureau*.[36] An owner of a New Mexico apartment building entered an agreement in Colorado with a contractor, whose principal place of business is in Colorado, to repair the New Mexico building, even though the owner was aware that the contractor lacks a New Mexico builder's license. When the New Mexico authorities prohibit the illegal construction project and the contractor sues the owner for payment for services rendered, is the contrac-

---

*also* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 211 (1986) (noting that "the realists insist that the legal system contains competing rules which will be available for a judge to choose in almost any litigated case").

[33] Although even then the question would arise whether to distinguish different *kinds* of workers' compensation cases.

[34] 108 Conn. 333, 143 A. 163 (1928).

[35] 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

[36] 198 Colo. 444, 601 P.2d 1369 (1979).

tor's claim based on the Colorado contract? Is the issue one concerning building regulation—a real property issue governed by the law of the situs in New Mexico? Or is it an issue of contract performance governed by the law of the place where the work is to be done—New Mexico—rather than an issue concerning the validity of the original agreement, governed by the law of the place where the contract was made—Colorado?

The variety and complexity of these cases makes it difficult to see how one could invent characterization rules that are not only sufficiently comprehensive and determinate to decide these cases, but also would be acceptable from the standpoint of social justice and therefore likely to be applied in a regular manner. The evidence indicates that no advocate of choice-of-law rules, from Joseph Beale to David Cavers, has ever been able to identify rigid rules for deciding characterization questions that can provide what Llewellyn called a "satisfying working result"[37] in all or even most cases.

The third reason that rule systems inevitably incorporate standards is that rules work only as long as they accord with contemporary notions of social justice. As social values change, courts increasingly resort to escape devices to break out of the rigid straitjacket of the rules system. Eventually, new rules replace the old ones. The process of formulating and changing rules requires active judicial consideration of the contemporary standards of justice and utility those rules are designed to achieve. For this reason, the current nostalgia for territorial rules[38] is hard to understand. These rules

[37] KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960).

[38] *See, e.g.*, Neumeier v. Kuehner, 31 N.Y.2d 121, 129, 286 N.E.2d 454, 458, 335 N.Y.S.2d 64, 70 (1972) (holding that "[t]he law to be applied is that of the jurisdiction where the accident happened unless it appears that displacing [the] normally applicable rule will advance the relevant substantive law purposes of the jurisdictions involved"); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Arnold Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

Professor Korn argues in favor of the First Restatement *lex loci delicti* rule for tort cases "in which the [personal] injury resulted from a single encounter between strangers domiciled in different states with conflicting laws, each favoring the local party . . . ." Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 801 (1983). Korn does not focus on the problem of what to do when the conduct and injury are in separate states. In this kind of case, the formula of the "place of the wrong" is ambiguous, *see supra* note 22, and thus could apply either to the place of the conduct or the place of injury, although traditionally, this formula was interpreted to apply to the place of the injury. Korn fails to address this question because he assumes that "tort cases typically center about a single event whose locus clearly identifies the most appropriate source of at least all laws addressed to the potentially injurious primary conduct." *Id.* at 962. He therefore fails to focus both on characterization questions and the problem of the conduct/injury choice. Given Korn's concern that a party be free from "amenability to the adverse laws of a state with which he has in no way voluntarily associated himself," *id.* at 966, one would expect him to favor the law of the place of the conduct, rather than the place of the

were abandoned because they often dictated results that were unconscionable under developing notions of justice and because they often defeated both important state policies and justified expectations.[39] At the same time, however, it may very well be true that what was wrong with the First Restatement rules was not that they were rigid rules but that they were the wrong rules. It might be the case that different rules, such as Cavers' principles of preference, would better serve us today. Nonetheless, the question of whether rules accord with contemporary standards of justice and fairness is not one that can be answered merely by appealing to the rules themselves; it can be answered only by reference to the standards that will govern the fit between rules and current social values.

The fourth reason that rule systems ordinarily include standards is that standards act as exceptions or as supplements to the basic rule structure; without these exceptions, rule systems are overly mechanical, defeating both important state interests and justified expectations. For example, the First Restatement required courts to use *renvoi* in cases involving ownership of real property.[40] This exception to Professor Beale's general antipathy to *renvoi* was based on his conclusion that the goal of uniformity of result was more important in these cases than in others.[41] Yet the very existence of this exception, and the reasoning behind it, makes the justification for the exception available as an argument in other cases where uniformity is thought to be equally important. In other words, the idea that it is legitimate to create exceptions to the basic rules means that judges may be asked to create new exceptions on the basis of analogy to the old ones. Rules cannot, and should not, stop this process. General appeals to the need for determinate rule systems should not stop the growth of new exceptions or distinctions when application of the old rules would create substantial injustice.[42]

The public policy exception is another example of standards as exceptions or supplements to rule systems. The First Restatement rules always allowed

---

injury. But maybe causing harm in another state constitutes "voluntary association." Korn's failure to deal with these issues fuels his nostalgic revival of the First Restatement rule; he can advocate it because he has passed over its ambiguities.

[39] Russell Weintraub, *The Future of Choice of Law for Torts*, 41 LAW & CONTEMP. PROBS. 146, 147 (Spring 1977) (stating that courts have moved away from territorial rules because when "only one state is likely to have to live with the long-range social consequences of applying one competing rule rather than another, it is that state's rule that should be applied").

[40] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 8 (1934).

[41] 1 JOSEPH BEALE, CONFLICT OF LAWS 57 (1935).

[42] For example, see Peters v. Peters, 63 Haw. 653, 664, 634 P.2d 586, 593 (1981), in which the court refused to apply the general principle of applying the law of the domicile to govern questions of interspousal immunity when the car was rented rather than owned by the couple. As the court held, "[there is] no basis for the acceptance of *lex loci delicti* as a controlling rule . . . . The preferred analysis . . . would be an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation." *Id.*, 634 P.2d at 593. As Frederick Schauer explains:

the forum to refuse to apply foreign law that violated a strong forum public policy.[43] This exception has been interpreted narrowly by requiring foreign law to "shock the conscience" before the exception can be applied.[44] Nonetheless, the very existence of the defense means that it will be used sometime,[45] even though it is difficult to imagine how the law of one state could be so far out of whack with existing standards of justice in the forum that it could be called "uncivilized" or "shocking."

The necessity for standards to supplement rule systems is even clearer in Cavers' principles of preference.[46] Professor Cavers proposed a series of rules to govern various choice-of-law disputes. He was able to identify a number of rules that he believed both described accurately the current practice of courts and were justifiable "not only as a desirable accommodation of the conflicting laws of the states involved but also as fair to the parties affected by the choice."[47] But he acknowledged that the principles, although stated in relatively formalistic terms, contained "terms that are obviously in need of a gloss"[48] and thus were intended "only as guides for decision, leaving ample room for independent judgment to any courts that resorted to them."[49] In developing law under Cavers' principles, courts would almost certainly be forced to draw narrower rules over time by making relevant distinctions among classes of cases. Moreover, Cavers recognized that rules will only work if they are related to contemporary standards of justice and utility, and thus cannot be applied mechanically. As Cavers explained: "Certainly, in the field of choice of law, such principles, if rigidly conceived and applied, would not survive."[50] Further, Cavers acknowledged that his system was not comprehensive; it was not possible to identify a set of principles that would solve all choice-of-law cases.[51]

---

> Legal systems must provide some escape route from the occasional absurdity generated by literal application because applying the literal meaning of a rule can at times produce a result which is plainly silly, clearly at odds with the purpose behind the regulation, or clearly inconsistent with any conception of wise policy. Insofar as a legal system offers its decisionmakers no legitimate escape from unreasonable consequences literally indicated by the system's norms, the system is much less a legal system, or is at least not a legal system worthy of that name.

Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 525 (1988).

[43] *See, e.g.*, RESTATEMENT (FIRST) OF CONÆICT OF LAWS § 612 (1984).

[44] *See* Loucks v. Standard Oil Co., 224 N.Y. 99, 112, 120 N.E. 198, 202 (1918) (Cardozo, J.) (refusing to apply the public policy exception on the grounds that the foreign law did not "shock our sense of justice").

[45] *See* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (applying the public policy exception to refuse to apply the law of the place of the injury which limited the amount of damages in a wrongful death suit).

[46] *See* DAVID CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

[47] *Id.* at 122.

[48] *Id.* at 136.

[49] *Id.*

[50] *Id.* at 132.

[51] *Id.* at 138 (noting that his discussion of his principles also comments on "the

For example, in *World-Wide Volkswagen Corp. v. Woodson*,[52] the defendant car dealer sold an allegedly defective car in New York that caused injury in Oklahoma. The Supreme Court intimated that, although the case could not be heard in Oklahoma, it might be constitutional for a New York court to apply Oklahoma law.[53] Cavers' applicable principles state that when the conduct and injury are in two different states, the court should choose whichever law favors the plaintiff.[54] However, an exception to this rule applies the law of the place of the conduct if the "physical or legal consequences of [the defendant's] action were not foreseeable."[55] It is even arguable that under *Allstate Insurance Co. v. Hague*,[56] application of Oklahoma law may have been arbitrary or fundamentally unfair.[57] The question of what the dealer foresaw cannot be answered mechanically. The dealer obviously was aware that the car might travel to Oklahoma, but it had no specific knowledge that it would. Moreover, the question is not just what the dealer's subjective expectations were; the constitutional question is what, in justice, the dealer should have foreseen. This example shows that it may not be possible to invent rigid rules that can be mechanically applied. They must be supplemented by judgments about when their application is fundamen-

---

disposition of cases that do not fall within a principle"). Cavers expounds:

> The seven [principles] I have provided are illustrative; they do not form a system. The fact that a situation falls short of conditions specified in a given principle does not mean that a contrary choice of law must be made; the question is left open for decision on a narrower base. Its solution could lead to the formulation of another principle, but the court might prefer to leave the problem to *ad hoc* determination until a trend in the relevant case law could be ascertained. Another possibility, indeed, a probability, is that, in the course of decision, the principles which I have stated in very broad terms—again, more for purposes of exposition than from conviction—would be subjected to fission as distinctions were drawn on grounds that I have not attempted to identify and consider. This process of fission could continue for some time before what had begun as a principle would be converted into a set of specific rules . . . .

*Id.* at 136-37.

[52] 444 U.S. 286 (1980).

[53] *Id.* at 296-97 n.11 (noting that although the foreseeability of the automobile's ability to cause injury in Oklahoma would not support personal jurisdiction, it might bear "on the possible desirability of imposing substantive principles of tort law"); *see* Hay, *supra* note 15, at 1652 (arguing that Oklahoma substantive law could have been applied in *World-Wide Volkswagen* even though the defendant local dealer could not be sued in Oklahoma since the defendant could foresee that the product it sold could cause injury in Oklahoma).

[54] D. CAVERS, *supra* note 46, at 139-45, 159-66.

[55] *Id.* at 141. Louise Weinberg has similarly argued that in cases where the place of the injury does not have a legitimate interest in applying its law, it should be unconstitutional to apply the rigid First Restatement rule of the place of the injury. Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 70-80 (1988).

[56] 449 U.S. 302 (1981).

[57] *See id.* at 308.

tally unfair not only to answer constitutional concerns but to operate in a manner that is tolerable to judges.

Advocates of choice-of-law rules bemoan the unpredictability and complexity of policy-oriented approaches.[58] Yet we have no reason to believe that rule systems, in practice, are any simpler than approaches based on standards. All rule systems require judges to appeal to standards in order to: (1) choose how to characterize the case; (2) determine whether the case is distinguishable from the cases clearly covered by the applicable rules; (3) determine whether to create a new exception or to modernize the law in order to comply with contemporary notions of social justice; and (4) determine whether rigid application of the rule in the specific circumstances of the case violates constitutional standards that prohibit fundamental unfairness in choice-of-law determinations. Professor Cavers was right to challenge the basic assumption that rigid choice-of-law rules produce more certainty and predictability than policy-oriented approaches: "We have neither certainty nor uniformity despite the formulation of rules and principles of the conflict of laws without regard for the substance of the law whose application they dictate."[59] Choice-of-law rule systems must be supplemented by standards. The historical evidence for this proposition is overwhelming.

2. Standards Generate Rules

Advocates of choice-of-law rules believe that conflicts principles based entirely on standards are inevitably both more complicated and less predictable than rules.[60] I have argued that the historical evidence demonstrates that choice-of-law systems based on rules involve substantial complexity. This complexity has the potential to destroy the supposed predictability of rule systems. Further, choice-of-law systems based on standards do not necessarily fail to give sufficient notice of which law will be chosen to govern private conduct or to adjudicate disputes; nor do standards necessarily leave trial judges without a basis for deciding conflicts cases that come before them. Often, one can predict how courts will decide choice-of-law issues in jurisdictions that have adopted the modern, standard-oriented approach. Cavers was correct in arguing that jurisdictions utilizing one of the modern

[58] *See,* Reese, *supra* note 10, at 316 (arguing that rules are more predictable than standards); *id.* at 317 (maintaining that discerning state interests is often an "onerous, difficult, and frustrating" task); Rosenberg, *supra* note 15 at 644 (noting that modern approaches require judges to engage in "three dimensional chess games"); Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 959 (1981) (arguing for the necessity of rules); Aaron Twerski, Neumeier v. Kuehner: *Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 121-22 (1973) (asserting that modern approaches are all too predictable, generating results that favor plaintiffs through application of the forum's plaintiff-protecting law in ways that defeat defendant's reasonable expectations and arguing for a rule-based territorial approach designed to protect party expectations).

[59] Cavers, *supra* note 4, at 198.

[60] *See supra* note 58 and accompanying text.

approaches to conflicts often develop predictable patterns of adjudication—patterns that can in fact be reduced to something akin to rules.[61] It is true that the Court of Appeals of New York has changed its approach to choice-of-law issues wildly since it adopted interest analysis, in that the approach in *Neumeier v. Kuehner*[62] is significantly different from that in *Babcock v. Jackson*.[63] Nonetheless, when one compares this confused record to the record of escape devices used in states following the First Restatement, one begins to wonder whose law is really more unpredictable.[64]

Developing generalizations about legal practice from vague standards is a large part of what lawyers do. If lawyers did not have to counsel clients on the basis of ambiguous or conflicting principles, we would have little need for lawyers or law schools—all we would need would be trained clerks able to look up the answer in the library. In fact, much of the practice of law consists of predicting what courts will do on the basis of incomplete information when no precedent on point is available in the jurisdiction. Lawyers also must make predictions based on flexible standards like "negligence," "undue influence," and "touch and concern the land," or on the basis of conflicting doctrines, such as the First Restatement's appeal to both the place where a contract is made and the place where it is performed to decide contract claims with no clear guidance about when each applies.

We can often predict what the courts will do even when the law is ambiguous because it is sometimes possible to describe in fairly specific terms the practice of courts under a regime of standards.[65] Even Professors Sedler and Weintraub, the most vigorous modern proponents of interest analysis, have argued that, in the course of using this policy-oriented approach, courts may over time be able to develop rules for certain conflicts cases.[66] For example, although Beale classified family immunities as a tort

---

[61] *See* D. CAVERS, *supra* note 46, at 14.

[62] 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

[63] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[64] *See* W. COOK, *supra* note 29, at 42-46, 311-46 (criticizing the First Restatement rule-oriented approach with its escape devices for being unpredictable since it did not address the real considerations underlying choice of law decisions); Leflar, *supra* note 9, at 1585 ("[C]ourts can replace with statements of real reasons the mechanical rules and circuitously devised approaches which have appeared in the language of conflicts opinions, too often as cover-ups for the real reasons that underlay the decisions.").

[65] Duncan Kennedy explains:

> [T]he application of a standard to a particular fact situation will often generate a particular rule much narrower in scope than that standard. One characteristic mode of ordering a subject matter area including a vast number of possible situations is through the combination of a standard with an ever increasing group of particular rules of this kind.

Kennedy, *supra* note 16, at 1690.

[66] *See* RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.32 (3d ed. 1986); Robert Sedler, *Rules of Choice of Law versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 978 (1977).

issue, governed by the place of the wrong, the modern solution—discerning the place of the most significant relationship with the parties and the occurrence regarding this issue—is much more likely to apply the law of the family's domicile.[67] Similarly, in airplane crash cases, plaintiffs ordinarily get the advantage of plaintiff-protecting tort policies adopted by either the place of departure or the destination.[68] If the plane departs from a plaintiff-protecting state, for example, a court in that state is likely to apply its law no matter where the crash occurs and no matter where the passengers are domiciled.[69] We also can say with some certainty that courts are now likely to enforce choice-of-law clauses in contracts when the parties are sophisticated commercial entities who bargained over the clause but are much less likely to do so when one of the parties is a consumer or the contract is one of adhesion.[70]

The existence of these regularities means that a jurisdiction that has adopted a modern approach, such as the "most significant relationship" test or interest analysis, will not necessarily appeal directly to the general standard in all cases. Specific rules of the type advocated by Professors Cavers,[71] Reese,[72] and Weintraub[73] will develop naturally, if not explicitly in judicial opinions, then in the law offices where lawyers give advice to clients. The

---

[67] 2 J. BEALE, *supra* note 41, at § 389.1. *Compare* Buckeye v. Buckeye, 203 Wis. 248, 252, 234 N.W. 342, 343-44 (1931), Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966), and Gray v. Gray, 87 N.H. 82, 83, 174 A. 508 (1934) (all applying the law of the place of the wrong) *with* Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 138, 95 N.W.2d 814, 818 (1959) and Thompson v. Thompson, 105 N.H. 86, 89, 193 A.2d 439, 441 (1963) (both applying the law of the marital domicile). *See also* Peters v. Peters, 63 Haw. 653, 664, 634 P.2d 586, 593 (1986) (acknowledging that the common domicile would ordinarily determine the existence of interspousal immunity but applying the law of the place of the wrong or the place of the contract to injuries arising out of use of a rental car for reasons of public policy).

[68] Willis Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303, 1305, 1310-18 (1982) (arguing that plaintiffs should be able to take advantage of these policies premised on the ideal of providing compensation to injured plaintiffs).

[69] *See, e.g., In re* Air Crash Disaster at Washington, D.C. on January 13, 1982, 559 F. Supp. 333, 344 (D.D.C. 1983) (applying plaintiff-protecting law of the forum to plaintiffs injured in a crash on take-off within forum); Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 43, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 138 (1961) (applying forum's plaintiff-protecting law when forum is the place of departure and the crash occurs in the destination state, which has a defendant-protecting law).

[70] *See* R. WEINTRAUB, *supra* note 66, § 7.3(C) (explaining that the comments to the Second Restatement note one factor to consider in deciding whether to enforce a choice-of-law clause is the existence of unequal bargaining power).

[71] *See* D. CAVERS, *supra* note 46, at 139-203.

[72] *See* Reese, *supra* note 68, at 1310-18.

[73] *See* R. WEINTRAUB, *supra* note 66, at § 6.2, § 6.32.

development of precedent will effectively introduce rules into the system.[74] Lawyers and judges will generate rules by making analogies to decided cases. The test may require judges to determine the significance of territorial contacts, but, in implementing this standard, they will generate more specific rules. For example, courts may develop a rule that in determining whether a defendant can raise the defense of interspousal immunity the court should apply the law of the domicile of the parties because it has the most significant relationship with the parties and with that legal issue. Thus, a regime of standards is not necessarily less predictable than a regime of rules. How predictable a particular regime is depends on how it is used.

Some scholars have criticized the modern approach not for being unpredictable but for being all too predictable in that it ordinarily results in plaintiff-favoring forum law. They argue that a regime of standards is bad not because it is mushy or requires judges to weigh competing policies and interests but because it reaches consistently bad results. What is bad about the modern approach, according to these critics, is that it leads to implicit rules of practice and that these implicit rules are bad ones for they often illegitimately trample on the defendant's justified expectations.[75] They are not bad because they require weighing policies; they are bad because they weigh policies incorrectly or otherwise achieve unjust results.

This criticism is based partly on the claim that standards give decision-makers too much discretion. But, it is more fundamentally a claim that they are using their discretion badly by making incorrect normative judgments; they are failing to protect adequately the interests of defendants. If this is the real criticism, it is not a critique of the form of the doctrine, but its substance. In that case, the criticism should be made more directly that the line between plaintiffs' and defendants' interests is being drawn at the wrong place.

3. The Form of Conflicts Doctrine

For several reasons, it is not possible to give a definitive answer to the question of whether conflicts doctrine should take the form of rules or standards. First, actual implementation of conflicts doctrine generates a professional practice that ordinarily involves both rules and standards. Rule systems must be supplemented by standards to determine the scope of application of existing rules, to adjudicate conflicts between them, to fill in gaps, and to implement constitutional limits on the mechanical application of

---

[74] *See generally* Earl Maltz, *The Concept of Precedent in Choice of Law Theory*, 51 MO. L. REV. 191 (1986) (explaining the role of precedent in conflicts law).

[75] *See* 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, 112 (1981); Twerski, *supra* note 38, at 382.

rules. Moreover, regimes based on standards generate rules when lower court judges seek to apply precedents established by higher courts and when attorneys advise clients on their legal rights.

Second, the choice between rules and standards can only be made sensibly in the context of particular social conflicts and particular legal questions. We cannot tell, in the abstract, which form of doctrine will work best. Therefore, choice of the best form for conflicts doctrine is inseparable from other choices about the appropriate substantive outcomes of conflicts cases. I do not mean that conflicts issues are meaningless and that all conflicts issues reduce to questions of which substantive law is better. I mean that the real question is how to balance substantively the competing interests of the parties when their dispute emerges out of a social context that includes contacts with several states with different policies. The answer to this question will turn partly on determining which law is better, but it will also turn on the question of how overlapping normative communities should relate to one another. This second question is substantive in that it requires us to determine which policies are entitled to deference as expressions of the internal norms of a neighboring polity. It is also substantive in that it requires us to determine both which relationships among separate normative communities work well in a federal system and what constitutes justice in those relationships. As Cavers once wrote: "[C]onsiderations of justice and social expediency should be . . . the dominant determinants of problems in this field."[76] This is the real debate.

### B. *Policy Approaches versus Territorial Rules*

#### 1. Jurisdiction-Selecting Rules

The legal realists, starting with Walter Wheeler Cook and Hessel Yntema, made two major criticisms of the First Restatement. First, they argued that it led courts to reason in a way that obscured the real concerns underlying conflicts law, namely the policies that conflicts law is meant to further.[77] The

---

[76] Cavers, *supra* note 4, at 178.

[77] *See, e.g.*, W. COOK, *supra* note 29, at 35 ("The decision thus appears not as an inevitable outcome from fixed premises . . . , but for what it is, and for what Mr. Justice Holmes perhaps knew it was—a practical result based upon reasons of policy established in prior cases."); Hessel Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 482-83 (1928) ("The vice of the vested rights theory is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved and so it must perforce obscure the issue.").

Professor Leflar has long argued that judicial opinions should set forth the real reasons for the decision. This means that choice-of-law approaches should reflect the substantive values that motivate decisions in conflicts cases. Leflar explains:

The real reasons, if they are present, are moral, social, or economic, i.e.,

result of their critique is the standard list of factors in section 6 of the Second Restatement[78] and Leflar's five choice-influencing considerations.[79] Next, the realists argued that Joseph Beale wrongly assumed that it was possible to deduce from the concept of sovereignty or legal rights the single physical contact that determined which state had legitimate power to apply its substantive law to a dispute.[80] Beale's approach is called a "jurisdiction-selecting approach," or a territorial approach, because the conflicts issue is decided by asking where—in which territory—the crucial event occurred or the set of contacts is located, regardless of the substantive policies of the affected states or the actual expectations of the parties.[81]

Territorial approaches vary in their complexity and neutrality. One approach identifies the place in which the single crucial event occurred and applies that state's law no matter what result that law mandates. The First Restatement exemplifies this approach; the place of the injury decides tort issues. Linda Silberman similarly adopts this approach when she suggests that the place of the conduct should always control the liability or immunity of a defendant when the conduct and injury occur in different states.[82] A second territorial approach would look at several contacts to determine which law to apply. For example, Cavers argued that a paternalistic contract policy should be applied to protect the purported beneficiary from contract liability only when the contract is made in that person's home state.[83] A third approach, favored by Professor Twerski, would locate the center of gravity of all the relevant contacts.[84] A fourth approach would combine contacts with substantive policies, and require that, given a certain set of contacts

---

political reasons. If those reasons are present, they deserve clear enunciation, not only in counsels' arguments and at the conference table, but also in the opinions that set forth judge-made law and prescribe that law's meaning and scope.

Robert Leflar, *Honest Judicial Opinions*, 74 NW. U.L. REV. 721, 741 (1979).

[78] These factors include: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[79] Leflar's list includes: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. Leflar, *supra* note 9, at 1586-88.

[80] W. COOK, *supra* note 29, at 3-47.

[81] *See* Cavers, *supra* note 4, at 178; Korn, *supra* note 39, at 778.

[82] *See* Silberman, *supra* note 75, at 121.

[83] D. CAVERS, *supra* note 46, at 181-94.

[84] *See* Twerski, *supra* note 58, at 119-20; Twerski, *supra* note 38.

and a particular substantive difference between potentially applicable laws, the courts should favor a specific substantive policy. For example, Cavers and Reese both argue that, at least in certain kinds of cases, when the conduct and injury are in different states, the courts should apply whichever law is more favorable to the plaintiff.[85]

For a long time after Brainerd Currie introduced us to the idea of interest analysis, policy-oriented approaches were on the rise and territorial approaches were in disrepute. Recently, however, advocates of territorial approaches have reemerged. As with the rules/standards debates, the policy/territory debate oversimplifies conflicts theory by supposing that the choice between policy and territorial approaches can be answered in a global and acontextual manner. The debate also fails to address the substantive questions involved in determining the significance of territorial contacts.

### 2. The Relation between the Rules/Standards Debate and the Policy/Territorial Debate

The debate about rules versus standards is related to the debate about policy-oriented approaches versus territorial approaches. Indeed, the same underlying concerns prompt the proponents of rules and territorial approaches to combat the modern policy-oriented, standard-based approach. Those who favor choice-of-law rules and territorial approaches appear to have two major and somewhat contradictory concerns. First, they often argue that policy-oriented approaches are so confusing and open-ended that they make it impossible for citizens to predict what law the courts will apply to their conduct. This uncertainty thereby makes it impossible for people to plan their actions and frustrates justified expectations when they do make plans based on the law of some state.[86] Second, proponents of rules or territorial approaches argue that modern approaches to conflicts either allow or encourage courts to apply plaintiff-favoring forum law too often and in inappropriate ways. They hope to limit the tendency of courts to favor plaintiffs and redress what they see as the current imbalance in conflicts law by generating rules that will give greater weight both to defendants' interests and the policy goals of defendant-protecting states.[87] These arguments are

---

[85] D. CAVERS, *supra* note 46, at 139-45, 159-66; Reese, *supra* note 68, at 1310-18; *see also* W. COOK, *supra* note 29, at 345 (indicating that when the conduct and injury are in different states, "it would be sensible to adopt whichever of the two (or more) domestic rules is most favorable to the plaintiff").

[86] Reese, *supra* note 10, at 316.

[87] John Corr & Ira Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 442 (1988) (noting that modern choice-of-law approaches incorporate a forum bias that constitutes "an effective tool for disadvantaging defendants"); Twerski, *supra* note 58, at 121 (maintaining that interest analysis results in the relatively mechanical application of forum law).

contradictory because the first argument depends on a claim that the law is uncertain, while the second argument asserts that the law is certain but unfair.

One might expect that a proponent of rules would be attracted to territorial approaches, since territorial solutions based on the location of crucial events or contacts seem to be easy to state in the form of rules. Conversely, a proponent of policy analysis might favor a conflicts system based on standards in order to engage in nuanced, case-by-case consideration of all relevant interests and policies.

Nonetheless, there is no intrinsic relationship between rules and territorial approaches and between standards and policy analysis. A proponent of standards could adopt either a policy approach or a territorial approach. For example, the most prominent modern policy approaches are stated in terms of standards, including interest analysis, the "most significant relationship" test, comparative impairment analysis,[88] and choice-influencing considerations or the better law approach.[89] Yet, the center of gravity approach advocated by Professor Twerski is a territorial theory couched in terms of a standard.[90]

Similarly, a proponent of choice-of-law rules might develop rules that turn on substance or territoriality or a mixture of these. The First Restatement is based on rules that point to the territorial location of crucial events, such as the place of the injury or the place where a contract is made, regardless of the substantive law of that place. On the other hand, Cavers and Reese have proposed choice-of-law rules that turn on the substantive law of the affected jurisdictions. They both argue that, given a particular set of contacts, the court should choose the law that favors the plaintiff.[91] These approaches are policy-oriented rules; they choose, in a relatively rigid manner, a particular substantive result to govern certain classes of cases.

### 3. Territorial Approaches Require Policy Analysis

The supposed manipulability, complexity, and unpredictability of policy analysis has led a significant number of conflicts scholars to wax nostalgic

---

[88] *See* William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 14-15 (1963) (espousing the "comparative impairment" theory, under which a court focuses on an examination of which state's interest and policy would be least impaired if its policy were subordinated to the law of the other state).

[89] *See* EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS § 2.11 (1982) (explaining and criticizing the "better-law" approach to resolving conflicts of law).

[90] *See* Twerski, *supra* note 58, at 120; Twerski, *supra* note 38.

[91] *See* D. CAVERS, *supra* note 46, at 139-45, 159-66 (arguing that when the conduct and injury are in different states, the court should apply the law that favors the plaintiff); Reese, *supra* note 68, at 1310-18 (arguing that the plaintiff may get the benefit of a plaintiff-favoring law of the place of departure or destination).

about jurisdiction-selecting rules.[92] They do so because they believe that jurisdiction-selecting rules avoid discriminating against the citizens of foreign states,[93] simplify the judicial task,[94] or bring back certainty and predictability into the law by controlling judicial discretion.[95] Whatever their reasons, these scholars seemingly assume that it is both possible and desirable to construct a system of jurisdiction-selecting rules that does not require judges to confront substantive policy questions directly in deciding conflicts cases.

It is theoretically possible to construct territorial choice-of-law rules that allow courts to adjudicate conflicts cases in a relatively mechanical fashion, without appealing either to the policies underlying conflicts law or those underlying the conflicting substantive laws of the affected states.[96] I contend, however, that it is not possible to choose *which* territorial rules to adopt without directly addressing these policy considerations. On one level, this assertion may appear trivial; in this post-legal realist age, we obviously agree that rules are designed to achieve certain purposes and to further underlying principles and policies and that they should be fashioned with these ends in mind. Yet, I believe the assertion is not trivial for the following reason. Most of those who advocate a return to territorial rules—and their numbers appear to be increasing—do not sufficiently appreciate the difficulty in choosing among competing possible territorial rules. If they did, they would see that devising a legitimate and acceptable territorial conflicts system requires policy analysis at a very high level—analysis that is ordinarily missing in their calls for a return to territoriality.

---

[92] *See* Ely, *supra* note 38, at 177, 214-17; Korn, *supra* note 39, at 801 (both arguing for territorial rules). Professor Brilmayer criticizes interest analysis and voices an inclination towards territorial approaches on the grounds that, when legislatures do address conflicts questions in statutes, they usually adopt territorial approaches that identify crucial contacts regardless of the substantive law of the affected jurisdictions. *See* Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 467 (1985) [hereinafter *Governmental Interest Analysis*]; Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 424-29 (1980) [hereinafter *Myth of Legislative Intent*]. *But see* U.C.C. § 1-105 (applying a standard to resolve choice of law questions, i.e., requiring the forum to apply forum law, in the absence of an agreement to the contrary, when the transaction "bear[s] an appropriate relation to [the forum]").

[93] *See* Ely, *supra* note 38, at 180-99.

[94] Reese, *supra* note 10, at 317 (arguing that standards are difficult for judges to administer).

[95] *Id.* at 316; Maurice Rosenberg, *Two Views on* Kell v. Henderson, 67 COLUM. L. REV. 459, 464 (1967); Rosenberg, *The Comeback of Choice-of-Law Rules*, *supra* note 58, at 959; Rosenberg, *Comments on* Reich v. Purcell, *supra* note 15, at 644.

[96] Adjudication would be only *relatively* mechanical because of the necessity of supplementing rules systems with standards to answer characterization questions and the like. *See supra* text accompanying footnotes 19-59.

Thus, even if it is desirable to return to territorial rules to achieve neutrality and predictability, it is not at all clear which rules are the right rules. For example, Judge Fuld adopted the place of the injury rule for large classes of tort cases in his list of choice-of-law rules.[97] Yet Professors Silberman and Korn have intimated that the most important contact is not the place of the injury but the place of the defendant's conduct.[98] We need to know how to choose which territorial rule to adopt.

Similarly, Professor Twerski has argued vigorously for a return to a territorial approach based on locating what we used to call the center of gravity.[99] His goal is to decide conflicts questions by applying the law of the jurisdiction in which the legally significant events that "dominate the case" are centered[100] or the law of the "seat of the relationship"[101] between the parties, or the law of the location of the "vortex of [the] event."[102] In deciding where the center of gravity is located, Twerski relies heavily on his intuitions, which he hopes will be widely shared. "By and large juridical events tend to be rather heavily centered in one jurisdiction or another. This is true in the vast majority of conflicts cases. The reason for this phenomenon is that people tend to orient their lives towards central focal points."[103]

Professor Twerski is fairly confident that he can identify the location of the center of gravity of the facts of the case. Yet, his own intuitions appear to conflict—or at least to be complicated. In the famous guest-host case of *Cipolla v. Shaposka*,[104] a Pennsylvania plaintiff passenger was injured in a car accident in Delaware in a car driven by a Delaware host on the way to a Pennsylvania destination. In 1971, Twerski argued that a "Delaware driver, on a trip in Delaware expects Delaware law to apply. He may be driving a Pennsylvania guest to his home in Pennsylvania but his expectation prior and subsequent to any accident is that whatever the Delaware law may be it

---

[97] Neumeier v. Kuehner, 31 N.Y.2d 121, 129-30, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972).

[98] Silberman, *supra* note 75, at 112 (arguing that defendants should not be held liable under "a legal standard without any purposeful involvement on their part with the regime of law that imposes the standard"); Korn, *supra* note 38, at 805 (arguing that choice-of-law rules should depend in part, on defendants' expectations in framing their primary conduct).

[99] ROGER CRAMTON, DAVID CURRIE, & HERMA HILL KAY, CONFLICT OF LAWS 183-88 (4th ed. 1987); Twerski, *supra* note 58; Twerski, *supra* note 38.

[100] Twerski, *supra* note 58, at 120.

[101] Twerski, *supra* note 38, at 388.

[102] Twerski, *supra* note 58, at 123; *see also* James Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 195, 227 (1976) (arguing for territoriality as the basic norm underlying conflicts law, focusing on whether "critical events happened within the state").

[103] Twerski, *supra* note 58, at 120.

[104] 439 Pa. 563, 267 A.2d 854 (1970).

will apply to him."[105] In fact, a Delaware defendant in this situation "would be surprised even shocked to find that while driving in Delaware he is subject to Pennsylvania law."[106] "Delaware drivers driving in Delaware deserve Delaware law—for better or for worse. When the bizarre becomes the norm—we destroy the norm."[107]

Yet two years later, when discussing *Foster v. Leggett*,[108] Twerski reached the opposite conclusion. In that case, an Ohio driver picked up his guest at her Kentucky home for a trip to Ohio that was to end by returning to her Kentucky home that evening. They got into an accident in Ohio. Thus we have an Ohio driver driving on Ohio roads. Given Twerski's earlier argument about *Cipolla*, one might think this was an easy case; the Ohio driver would be shocked to discover that, while driving in Ohio, he was governed by the law of Kentucky. Yet Twerski reached the opposite conclusion. He appealed to the driver's substantial contacts with Kentucky, noting that the driver often stayed in a rented room in Kentucky and used to be married to and lived with his Kentucky guest in Kentucky. Because the driver's contacts with Kentucky were so substantial, and because the trip began and was to end in Kentucky, Twerski concluded that the "Kentucky facts dominate the case."[109]

This apparent contradiction is not necessarily an argument against territorial approaches based on the center of gravity. But it does mean that deciding which contact, or set of contacts, is most important cannot be done simply by appealing to our intuitions about the crucial event or the center of gravity. Our intuitions may be contradictory. Some people may focus on the place of the injury, others on the place of the conduct. Some may focus on the fact that an Ohio driver is driving on Ohio roads; others may focus on the fact that the relationship between the parties is centered in Kentucky, that the trip began and was to end there, and that the driver spent a lot of time there.

The question then becomes how to choose which contact or set of contacts should control the choice of the applicable law. In other words, if we accept the idea that territorial rules are better than a policy-oriented ap-

---

[105] Twerski, *supra* note 38, at 382.

[106] *Id.* at 378.

[107] *Id.* at 382.

[108] 484 S.W.2d 827 (Ky. 1972).

[109] Twerski, *supra* note 38, at 120. In another example, Twerski explained:

> I can envisage a case where a Delaware citizen drives into Pennsylvania and requests a Pennsylvania doctor to come to his home for an emergency house call. The Delawarean drives the doctor to his home and on the way back before crossing the Delaware line is involved in an accident in which the doctor is injured. To argue for the application of Pennsylvania law in this instance does not upset me since the case in [sic] essentially a "Pennsylvania case."

Twerski, *supra* note 38, at 390.

proach, how should a reasonable judge decide whether to adopt the law of the place of the injury or the law of the place of the conduct in cases like *Carroll* and *Clapper*? If we hope to construct territorial rules of the fourth kind—those that apply the law of the place of a particular territorial contact only if the law in that state favors a particular party—we must confront directly the substantive policies of the affected states. If our goal, however, is to avoid case-by-case consideration of the substantive policies of the respective states, then we want to pick a contact that will determine the state whose law is to apply, whatever that law is. How should courts make this determination? Formalistic analysis of where rights vested,[110] or whether the case is one of contract or tort, is clearly unacceptable.

The only answer is that we will have to engage in policy analysis. In choosing between a place of the injury rule and a place of the conduct rule, we will try to select a territorial rule that could govern both *Carroll*—where the state of employment required the employer to compensate the worker for his injuries and the state of the injury did not—and *Clapper*—where the state of employment immunized the employer from liability and the state of the injury required compensation. We will do so by examining the same factors we examined earlier, primarily the justified expectations of the parties and the general regulatory interests of the two states. The only difference is that we will address these issues generally rather than specifically.

For example, we will notice that the place of employment relationship is interested in determining the contours of that relationship, for both moral and economic or policy reasons. It may have a moral interest in requiring the employer to take care of the worker with whom it has established a continuing relationship, or it may have a moral interest in protecting the employer from liability, thereby promoting self-reliance on the part of workers. It may have an economic interest in requiring the company to internalize the social costs of its activity for reasons of efficiency or to protect the public fisc. Or it may have an economic interest in promoting business by limiting liability on employers for non-negligent, i.e., reasonable, activities in the market.

On the other hand, the place of the injury has interests in determining whether businesses have a right to operate in that territory without liability for non-negligent harm to their employees or whether workers in that territory have the right to be compensated when they are injured on the job. It

---

[110] The vested rights approach depends on the assumption that the crucial event was the last event necessary to create a cause of action—injury in the case of a tort, acceptance in the case of a contract. Walter Wheeler Cook submitted this theory to a scorching critique, arguing that the last event was no more significant than the first in creating the cause of action, and that it was odd that the last event could create legal rights even though the first event occurred in a state that would not attach legal significance to it. Why should injury in a plaintiff-protecting state change conduct in a defendant-protecting state from lawful to unlawful? Why should acceptance in a contract-validating state turn an invalid offer—invalid under the law of the place it was made—into a valid offer? *See* W. COOK, *supra* note 29, at 361-72.

will also have interests in determining the appropriate level of incentives for investment in safety for conduct that affects persons injured within its borders.

To choose between the place of the injury and the place of the conduct, we would have to consider the policies and interests relating to the different contacts that each state seeks to further. We would also consider which contacts will ordinarily best accord with the expectations of the parties. Similarly, in *Foster v. Leggett*, where the choice was between the place of the accident and the place where the relationship between the parties was centered, we would have to consider the general expectations of the parties and the regulatory interests and policies that might be furthered by the two states. To make those choices, we must answer such questions as whether it is more important to regulate conduct or relationships, and whether the moral and economic policies of the place of conduct should prevail over those of the place where the injurious consequences of that conduct are felt.

These choices pose further questions about justice and the general welfare. Should corporations, for example, be free to determine where they will incorporate—thus creating a desirable competition among states for corporate allegiance—or is it illegitimate for Delaware to be able to impose its conception of corporate structure on the entire nation?[111] We cannot answer this question simply by appealing to the place of incorporation or the company's principal place of business or the place where shareholders are domiciled as the most crucial contact. There is no way to avoid the conclusion that territorial approaches require painstaking analysis of social policy.

4. Policy Analysis Includes Territorial Contacts

Just as territorial approaches require policy analysis, all policy approaches to conflicts necessarily include territorial contacts as crucial determinants of the outcome. Interest analysis requires that courts identify the relevant contacts with each state, define the policies behind each state's law, and then determine whether the policies would be furthered by applying them to the contacts in that state. In *Carroll*, for example, we must ask whether the Alabama policy of compensating workers injured on the job applies to an employment relation centered in Alabama when the injury takes place in Mississippi. We may conclude that the forum policy can reasonably be applied only to employees who are injured on the job while they are working inside the state. If that is the case, and if Mississippi has an interest in applying its defendant-protecting policy to immunize the employer from liability for its activities in Mississippi, we have identified a false conflict. Limiting the scope of state policies on the basis of territorial factors is what allows us to define a conflicts case as a false conflict.

Territorial considerations are also part of determining whether the forum

---

[111] *See* Davis, *Delaware Inc.*, N.Y. Times, June 5, 1988, § 6 (Magazine), at 28.

should engage in restrained interpretation of forum law. If the court interprets the Alabama compensatory policy to apply to accidents that take place in Mississippi, it must then ask whether it is willing to defer to Mississippi law in this situation. It may do so for two reasons. First, it may want to protect the justified expectations of the employer who relied on Mississippi's protective policy in planning its business activities there. Second, it may seek to protect the forum's multistate interest in deferring to Mississippi's interest in determining the legal rules governing economic activity taking place within Mississippi's borders. Both of these possible reasons for restrained interpretation—protecting the defendant's justified expectation and accommodating a neighboring state's ability to further its public policies within its borders—hinge on placing geographic bounds on the policy of each state.

In a similar manner, the "most significant relationship" test requires us to analyze territorial contacts. It asks us to consider all relevant geographic contacts with each state and then to judge the significance of those contacts by reference to various policies. We then must assess the relative strength of those policies in the given case, basing our decision in part on where the crucial events occurred or what other contacts exist. The policy of protecting justified expectations also asks us to consider whether one or both of the parties reasonably expected that their actions would be governed by the law of a particular state, and whether they planned their conduct accordingly. In the absence of reliance on a specific law, we should also consider whether the parties would justifiably expect to be protected by the law of one of the states. Just as territorial approaches to choice-of-law issues require evaluations of state policy interests, policy-oriented approaches require evaluation of the significance of territorial contacts. Any general attempt to divorce policy analysis from territorial considerations proves unrealistic.

### C. *Resolving the Rules/Standards and Policy/Territory Debates*

I have argued that neither the debate about rules versus standards nor the debate about policy analysis versus territorial approaches is useful in its current form. Any approach to resolving choice-of-law questions must combine all of these elements in one way or another. All approaches to resolving conflicts questions require policy analysis to determine the relative significance of different territorial contacts. Similarly, all approaches based on rules will require standards to determine which rules to adopt, to answer characterization questions, and to determine when to distinguish prior cases and create exceptions to basic rules. All approaches based on standards will generate standardized practices that can be reduced to the form of tentative rules of law.

How then should we treat these issues? We should look at what lies behind the rules/standards and policy/territorial debates. These disputes involve disagreement about the underlying goals of conflicts law and the

values that should inform it. Conflicts scholars disagree both about whose expectations matter and about what expectations are justified. They disagree about how to determine the relative geographic scope of plaintiff- and defendant-protecting policies. They disagree about whether a preference for forum law is illegitimately parochial and partisan or whether it furthers policies that are shared—or should be shared—by all states. My claim is that it is best to deal with these issues head on, rather than through the guise of the rules/standards dispute or the territorial/policy dispute.

We should further recognize that these debates are unresolvable at the high level of generality at which the discussion occurs. There is simply no way to state a priori and acontextually which form of conflicts law will best achieve the goals of accommodating the policies of different states and protecting the justified expectations of the parties. A better way to deal with these questions is through contextual analysis of particular situations that raise characteristic conflicts questions.[112] This analysis must include: (1) an inquiry into the actual or potential substantive policies of the affected states and the ways in which they conflict with each other; (2) an assessment of the legitimate geographical range of those substantive policies when they conflict with each other and with multistate policies favoring a particular mixture of diversity and uniformity in a multistate system; and (3) an evaluation of how the choice of different laws will affect the justified expectations of the parties.

## III. REAL CONFLICTS IN CONFLICTS THEORY

There appears to be a general consensus about the factors that enter into choice-of-law determinations.[113] In my view, the most important factors include: (1) furthering the substantive policies underlying state laws, including (a) their moral policies regarding individual rights, and (b) their social welfare policies or regulatory goals; and (2) furthering multistate policies,[114] such as (a) protecting the justified expectations of the parties who may plan their conduct in reliance on a particular law or claim a right to its protection, (b) determining the correct balance in multistate cases between the goal of diversity (comity) and the goal of uniformity, and (c) determining the correct

---

[112] Recent proposals for choice-of-law rules by Professor Reese to govern airplane crashes and by Professor Weintraub to govern products liability cases follow this method. *See* Reese, *supra* note 68, at 1310-22; R. WEINTRAUB, *supra* note 66, at § 6.29.

[113] Scholars have compiled different lists of these factors. Compare the seven factors in the Second Restatement, *see supra* note 78, with Leflar's five factors, *see supra* note 79. *See also* Baxter, *supra* note 88, at 7 (distinguishing between internal substantive policies and external conflicts policies).

[114] *See* Weinberg, *supra* note 7, at 595.

balance between the goal of promoting the forum's view of substantive justice by applying what it sees as the better law and the goal of tolerance of the norms of another political community where the relationship between the parties is centered or which otherwise has a greater claim to settle the matter.

Conflicts scholars disagree about what these factors mean and how they fit together. I understand these factors as describing a network of conflicting policies and principles. Moreover, none of the modern approaches to resolving choice-of-law issues requires courts to face these conflicts directly. In this section, I elaborate the most important issues in contemporary conflicts theory. Some of them are well-recognized; others are neglected by conflicts scholars. Our understanding of conflicts law will only progress if we address these fundamental questions: (1) whether to recognize the existence of moral, as well as economic or regulatory, state policies; (2) whether to recognize the existence of state interests in protecting individual liberty; (3) how to reconcile the competing goals of uniformity and diversity in deciding multistate cases; (4) how to reconcile the competing goals of promoting substantive justice (applying what the forum sees as the better law) and tolerance (comity to the norms of other self-governing communities); (5) how to determine whose expectations matter and when those expectations are justified; (6) how to decide when a choice of law is discriminatory; and (7) how to determine the correct balance between plaintiffs' and defendants' interests in conflicts cases. Answering these questions requires controversial judgments about both the substantive and multistate policies that we want to implement in multistate cases. These competing policies must be reconciled by some normative framework external to the factors themselves.

The failure to focus on these issues has important consequences. Conflicts analysis that ignores these issues oversimplifies the problems of multistate systems by encouraging judges to appeal to the various factors in a piecemeal, rather than a systematic, fashion. This procedure generates one-sided pictures of conflicts cases. Focusing on the contradictions in conflicts policy, in contrast, generates a more realistic understanding of the competing interests at stake in these cases.

The failure to focus on the tensions in conflicts law has a second consequence. To a large extent, it is what makes false conflict analysis plausible. To characterize a case as a false conflict, one must present a one-sided picture of the competing interests of the parties and the policy goals of the affected states. Recognizing the competing values underlying conflicts law, on the other hand, means that it will rarely be possible to resolve a conflicts case by resorting to the fiction that it presents a false conflict. If this conclusion is correct, we will need some other way to resolve these cases.

We can identify a relatively simple method for clarifying the value choices and competing policies underlying conflicts law. This method emerges from what is best in the adversary system through which common law develops.

In analyzing a conflicts case, we should view the case from the perspective of each of the litigants. Essentially, we should write a good brief for each side. This process requires us to imagine various ways each side would characterize both state policies and individual interests and allow us to generate the strongest set of arguments on each side. This process will clarify alternative interpretations of state interests and individual expectations. It will generate a rich field of normative conflict, allowing us to face clearly and realistically the political and moral meaning of our multistate system. Unfortunately, resolving the value choices in conflicts law is not as easy as identifying those choices. We leave that question for section IV.

### A. *Substantive State Policies*

#### 1. Utilitarian and Moral Policies

There are two kinds of substantive policies: utilitarian or regulatory policies designed to maximize the general welfare, and rights-based or moral principles designed to promote social justice. The first are well known by conflicts scholars; the second are often neglected.[115] The regulatory policies that are most widely accepted as legitimate by both courts and commentators are the tort policies of deterring socially harmful conduct and compensating victims of that conduct and the contract policy of protecting reliance on agreements.[116] Such regulatory policies are consequentialist or utilitarian in nature; they point to the effects that laws are designed to achieve. They promote socially desirable conduct, such as investment in safety, the purchase of insurance, compensation of victims of harmful conduct, or the development of real estate. These consequences are justified because they achieve the social goals of maximizing social utility, promoting the general welfare, or furthering economic efficiency. In contrast, rights-based policies are not justified because of their consequences for society as a whole but because they embody the community's sense of justice by defining moral obligations within social relationships.[117]

---

[115] Exceptions are Professors Twerski and Martin. Both have argued for the existence of state interests in moral claims. *See* James Martin, *An Approach to the Choice of Law Problem*, 35 MERCER L. REV. 583, 590-91 (1984). As Twerski explains: "When a state makes an 'anti-tort' policy determination it is making a policy judgment of the highest order. Whether its judgment is that the family order will be disturbed or that parties will collude against insurance companies—its judgment is a moral one." Twerski, *supra* note 38, at 384-85. Similarly, Professor Leflar's view that courts consider the better law explicitly requires courts to consider their interests as justice-administering states. ROBERT LEFLAR, LUTHER MCDOUGAL, III, ROBERT FELIX, AMERICAN CONFLICTS LAW § 107 (4th ed. 1986).

[116] *See* Weinberg, *supra* note 7, at 599.

[117] For discussions of the difference between arguments based on maximizing social utility and arguments based on rights, see RONALD DWORKIN, TAKING RIGHTS

The difference between policies based on social utility and policies based on rights can be illustrated through the concept of cost internalization. Scholars and judges often argue that an economic activity should account for the harm it does to others; it should "internalize its external costs." This argument can be phrased either in terms of social utility or rights.

The utilitarian argument is that cost internalization promotes the general welfare by giving producers incentives to make appropriate economic decisions. If a factory, for example, does not have to account for the cost that its smoke imposes on the neighborhood, it may underinvest in pollution control. From the standpoint of society as a whole, the cost the factory imposes on society may be greater than the benefits of operation of the factory. If the factory does not have to take social costs of its operations into account in its private profit calculations, it may cause more harm than good. Forcing the factory to internalize its external costs will cause it to make economically appropriate decisions that will maximize the general welfare.[118]

The rights argument appeals not to the consequences for society as a whole but to the justice of social relationships. The rights version of the cost-internalization argument espouses the ideal that "those who profit from an activity should bear its costs" or "as between two innocents, those who caused the damage should pay." The point is that, regardless of the general social consequences of one's actions, it is immoral for an actor to engage in this kind of activity for personal gain in a way that causes harm to others without compensating them for the wrong done to them.[119] It appeals to the

---

SERIOUSLY 82-83 (1977) and Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 358-60 (1979).

[118] This argument has been subjected to scathing criticism. The main problem with it is that it fails to recognize conflicting economic activities as posing reciprocal costs on each other. The cost cannot be mechanically attributed to one of the two activities; it results from the fact that they conflict with each other and are therefore joint costs. If each activity interferes with the other, and if the costs are thus the result of both activities, it is unclear which activity should internalize the cost. *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 393-98 (1981).

[119] Justice William Brennan, while he was on the New Jersey Supreme Court, wrote an opinion using the cost internalization argument in both its economic and moral sense:

> [S]ociety has a great interest that land shall be developed for the greater good. It is therefore properly a consideration in these cases whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters . . . . But while today's mass home building projects . . . are assuredly in the social good, no reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas of our State into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit.

Armstrong v. Francis Corp., 20 N.J. 310, 330, 120 A.2d 4, 10 (1956).

inherent justice or morality that should be a part of the relationship between parties.

The distinction between utilitarian and rights arguments is important for conflicts law. When most scholars and judges analyze conflicts policies, they almost always appeal to utilitarian rather than rights arguments. One reason for this is that the early critics of the traditional approach, Walter Wheeler Cook and Hessel Yntema, used the legal realist approach of focusing on the consequences of legal rules as a way to determine whether they were justified.[120] The decision to ignore moral policies is crucial to modern conflicts theories; to a large extent, it is what makes false conflict analysis plausible.

For example, consider a hypothetical variation on *In re Air Crash Disaster at Washington, D.C. on January 13, 1982*,[121] in which a plane departing from Washington, D.C. crashed in the Potomac River. The passengers sued the manufacturer of the plane, claiming that their injuries were caused by a design defect. The manufacturer, Boeing, had its principal place of business in Washington State, where the plane was designed, manufactured, and sold. Suppose that some of the passengers were domiciled in Washington State and were on their way home. Suppose further that Washington State has abolished damages for pain and suffering, while the District of Columbia allows them.[122] Does the District of Columbia have a legitimate government interest in extending its compensatory policy to the Washington plaintiffs?

Under one interpretation, the District of Columbia has no interest in compensating out-of-state plaintiffs, making the case a false conflict.[123] Washington State is clearly interested in limiting Boeing's liability, perhaps as a way of promoting economic development and job creation in Washington State. It is also willing to live with undercompensated victims, who have no right to complain that a law they adopted—or could repeal through their votes—is applied to them in a case like this. The District of Columbia, on the other hand, arguably is not interested in applying its compensatory policy to Washington State plaintiffs. It clearly wants to compensate its own domiciliaries. But why? The traditional interest analysis argument is that the

---

[120] *See* W. COOK, *supra* note 29, at 170-77; Yntema, *supra* note 77, at 482-83.

[121] 559 F. Supp. 333 (D.D.C. 1983).

[122] In the actual case, Washington State required a showing of negligence to prevail on a design defect products liability claim, while the District of Columbia allowed recovery on the basis of strict liability. *In re* Air Crash Disaster, 559 F. Supp. at 345-46.

[123] Brainerd Currie argued:

> New York has no interest in applying its [plaintiff-protecting] law and policy merely because the ticket was purchased there, or because the flight originated there. New York's policy is not for the protection of all who buy tickets in New York or board planes there. It is for the protection of New York people.

Brainerd Currie, *Conflict, Crisis, and Confusion in New York*, 1963 DUKE L.J. 1, 16.

consequences of not compensating its domiciliaries will be felt almost entirely in the District of Columbia. If they are not compensated, they may need public welfare, paid for by the taxpayers of the District.[124] However, the consequences of not compensating the Washington State plaintiffs will be felt entirely in the state of Washington, which is willing to live with undercompensated plaintiffs. Let us also assume that the decision whether to grant pain and suffering damages to the Washington State plaintiffs is unlikely to have any significant deterrent effects on Boeing or to promote safety inside the District of Columbia because the airplane manufacturer has sufficient other incentives to invest in safety, such as the threat of pecuniary damages and its own desire not to build planes that crash.[125] If this is indeed the case, the District of Columbia has no legitimate governmental interest in applying its policy of full compensation to the Washington State plaintiffs.

Why then might the District of Columbia be interested in compensating plaintiffs from Washington State? The traditional way of creating a state interest in this case, in the absence of any deterrent interest, is to argue that there may be uncompensated medical creditors at the place of the injury who would benefit by imposition of liability. This argument is clearly a "make-weight." It is based on the notion that the only interests that count are economic interests. A more direct and sensible way to understand the forum's interest in compensating outsiders is that it has a moral policy of requiring loss-spreading to compensate unfortunate victims who come to harm within the forum's borders. The fact that there is no chance the forum government will have to maintain outsiders on public assistance is irrelevant; outsiders, like residents, are entitled to be protected by the laws of the District of Columbia when they are there. It is important to recognize that the place of the injury may have a legitimate moral policy of protecting all persons within its borders, including non-residents, and thereby may refuse to discriminate against accident victims by denying them the benefits of the law of the District of Columbia simply because they are non-residents.

The court in this hypothetical case should recognize the conflict between the forum state's substantive policy of compensation and the immunizing policy of the defendant's state. Of course, identifying a moral interest in compensating outsiders does not necessarily decide the case. The forum

---

[124] *See* Robert Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593, 621 (1983) (arguing that "the plaintiff's home state has a real interest in applying its law that allows the plaintiff to recover since the social and economic consequences of the accident will be felt by the plaintiff in that state"); Allo, *supra* note 15, at 570 (contending that a major purpose of tort compensation policy is to keep victims off welfare).

[125] Conflicts cases concerning family immunities and guest statutes often argue that these issues concern loss-distribution rather than deterrence. *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 481-83, 191 N.E.2d 279, 283-85, 240 N.Y.S.2d 743, 749-51 (1963).

might nevertheless engage in restrained interpretation of its policy or use comparative impairment analysis to decide that the District of Columbia law should give way to the Washington State policy in this particular case. It might do so because, alongside its substantive policy of compensating victims, it has a multistate policy of protecting the justified expectations of persons who legitimately rely on the law of another state or protecting the ability of the other state to implement its public policies for its own people. The one thing the forum should not do is ignore the forum's legitimate moral policy of protecting outsiders within its borders. Ignoring this policy makes the case too simple. It fails to address the real conflict between the substantive policies of Washington State and the District of Columbia and the real conflict between the District's substantive policy of compensation and its multistate policy of deferring to Washington policy to govern legal relationships centered there. We should recognize the conflicts among these policies and judge their relative importance.

Recognizing the forum's moral interest means that the case cannot be resolved as a false conflict. The forum must make difficult judgments about the extent to which it wishes to adhere to its substantive compensatory policy as compared to its multistate interest in respecting the ability of Washington State to formulate public policy protecting its manufacturers from ruinous liability. If I am right about this, relatively few cases can be resolved by resort to the notion that they are false conflicts. We must address directly both the conflicting substantive policies of the two states and the conflict between the forum's substantive policy and its multistate policy.

2. Liberty and Security Interests

Conflicts scholars often interpret the policies underlying contract and tort law in ways that are misleadingly one-sided. In torts cases, scholars often emphasize security interests—interests in compensating victims and deterring of wrongdoing by tortfeasors. In so doing, they minimize liberty interests in freedom of action. Less often, scholars make the opposite mistake in torts cases—emphasizing liberty interests in freedom of action and ignoring legitimate interests in protecting victims from harm. In contracts cases, scholars usually emphasize security interests in freedom of contract—interests in protecting the expectations of parties based on agreements. In so doing, they minimize governmental interests in liberty—regulations that protect vulnerable persons by granting them freedom from oppressive or coerced contractual obligations. Making one-sided assumptions about the goals of tort and contract law allows scholars and judges to engage in false conflict analysis in ways that illegitimately hide from their view the underlying value choices they are making.

(a) *Liberty and Security Interests in Tort Law.* False conflicts are created in torts cases not only by ignoring the forum's moral policies but also by ignoring policies that have the effect of immunizing defendants from liability

for harmful conduct. I call these policies "liberty interests" because they grant people freedom to act without regard to the consequences to others. Although these interests are pervasive in our legal system,[126] they are often ignored in interest analysis, in deference to policies that foster security interests by requiring compensation for harmful conduct.

For example, in *Carroll*, we can agree that Alabama has a governmental interest in requiring an Alabama employer to compensate an Alabama employee injured in Mississippi, both to protect the worker and his family and to keep them off public assistance. Indeed, it is sometimes argued that the place of the accident has no interest in denying compensation to an injured plaintiff when both parties come from a state that favors compensation.[127] But this argument fails to consider that the place of the accident may have a policy of freeing people within its borders—both residents and visitors alike—from fears of unwarranted liability for their conduct. Moreover, this policy may further the economic goal of promoting business and creating jobs in the state by protecting companies that operate there from ruinous liability. Whether or not the Alabama compensatory policy should be subor-

---

[126] *See* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980-85.

[127] *See* Babcock v. Jackson, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963) ("Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law."). This is an odd use of the word "tortious." It is true that the driver's conduct may be negligent—meaning unreasonable. But the law in Ontario attaches no legal consequences to this conduct; it gives rise to no legal rights in the passenger. Thus, the conduct is *not* tortious if we are concerned, as the legal realists were, with the actual reality of what the law means. If the principle underlying the Ontario law is to allow drivers on Ontario roads to drive without the fear of liability to their passengers, then it is the driver, not the passenger, that has a legal right. To call the conduct "tortious" misrepresents Ontario law; Ontario has not sought to encourage or authorize drivers to drive negligently or to recklessly harm others. It *has* granted drivers the freedom to drive without accounting to their passengers for harm. There is no reason to believe that Ontario has any interest in withholding that right from visitors driving on Ontario roads.

Clifford Allo similarly argues that New York has no interest in applying its defendant-protecting law—a guest statute—to immunize a Connecticut defendant from liability to a Connecticut guest for injuries incurred in an accident in New York on the grounds that the New York guest statute was intended only to protect New York hosts or New York insurance companies. Allo, *supra* note 15, at 569-70. Professor Allo ignores the possibility that New York might seek to extend its defendant-favoring policy to protect anyone, including a nonresident, who drives on New York roads. It may seek to do so either to free drivers from liability to guests or because it is loath to discriminate against nonresidents by denying them the benefits of New York law while they are there.

dinated to Mississippi's interest in limiting the railroad's liability for its conduct in Mississippi is another question. But we will never get to this question if we do not recognize the legitimate interest Mississippi might have in this case.

Analyzing conflicts cases requires us to recognize the regulatory goals and moral principles each state might seek to further through its substantive laws and policies. When we do this, we discover that limiting liability for harmful conduct is just as important and widely-accepted a tort policy as imposing liability to achieve deterrence and compensation. Indeed, the spate of tort reform acts passed in recent years is testament to this fact.[128] Moreover, most business activities that harm individuals do not result in lawsuits and damage judgments. Consider the example of a business that closes a plant, putting thousands of persons out of work and wrecking the economy of a region; no state makes the company liable for the harm it has caused.[129] Or consider the business that successfully competes and thereby puts a competitor out of business; it has no liability for the resulting harm.

In some conflicts cases involving torts, scholars and jurists make the opposite mistake—they privilege the liberty interests of defendants over the security interests of victims. Some courts have found that the only state with a legitimate interest in imposing punitive damages is the state where the conduct occurred.[130] Other courts have argued that, while both the place of the conduct and the place of the injury have an interest in imposing punitive damages, the plaintiff's domicile has no legitimate interest in imposing punitive damages.[131] Yet, it is clear that a company, like an airplane manufacturer, that operates nationally and knows that its products will be used in every state in the nation, might in fact be deterred by a punitive damages policy of the home state of a single airline passenger. The risks of a huge punitive damage award in the wake of a plane crash, even if only one state in the nation permits punitive damages, might cause a manufacturer to take

---

[128] *See, e.g.*, ALASKA STAT. § 9.17.010 (1987); COLO. REV. STAT. § 13-21-102.5 (1986); HAW. REV. STAT. § 663-87 (1987); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (1987); MICH. COMP. LAWS ANN. § 600-1483 (West 1987); MINN. STAT. ANN. § 604.7 (West 1987); MO. ANN. STAT. § 538-210 (Vernon 1986); NEB. REV. STAT. § 44-2825 (1984); N.H. REV. STAT. ANN. § 508:4-d (1987); N.M. STAT. ANN. § 41-5-6 (1986); WASH. REV. CODE ANN. § 4.56.250 (1987).

[129] *See* Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

[130] *See In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 690, 705-06 (E.D.N.Y. 1984) (arguing that only states where the defendant acted have sufficient interests in determining whether or not punitive damages may be imposed).

[131] *See In re* Air Crash Disaster, 559 F. Supp. 333, 356-59 (D.D.C. 1983) (applying the law of the place of the airplane crash to impose punitive damages on the airplane manufacturer).

more care. If this is true, then under traditional interest analysis that state would clearly have an interest in applying its deterrent policy to this defendant. It is a separate question whether it would be fair—or even constitutional—to impose the punitive damages remedy in this case, or whether the domicile state should engage in a restrained interpretation of its policy of providing security to its people in deference to the defendant's justified expectations of freedom of action. These questions should be addressed only after we have identified the legitimate interest of the domicile state in deterring conduct that has harmful consequences for its people and its economy.

(b) *Liberty and Security Interests in Contract Law.* Courts and scholars often create false conflicts in contract law by focusing on the policy of protecting freedom of contract. In so doing, they ignore competing policies that cause states to regulate contractual relations. These policies include promoting individual autonomy, establishing justice and fairness in social relations, and furthering the general welfare. In sanctifying the principle of freedom of contract, courts and scholars oversimplify the norms of contract law.

One method of oversimplifying contract law is to presume that the parties intended to be bound and then simply choose the validating law. In the famous case of *Pritchard v. Norton*,[132] for example, the issue was whether a promise to indemnify another for a pre-existing obligation was enforceable. The original obligation had been incurred in Louisiana, which would accept the pre-existing obligation as consideration; however, the promise to indemnify was made in New York, which would not recognize the past consideration and would therefore not enforce the New Yorker's promise. As one justification for its decision to enforce the promise, the Supreme Court indicated that the parties presumably intended their agreement to be enforceable, and that they "cannot be presumed to have contemplated a law which would defeat their engagements."[133] Thus, in deference to the parties' supposed intent, the Court chose the law that validated the contract.

By presuming that the contract was valid, the Court failed to recognize the competing policy sought to be implemented by the state that would hold the promise unenforceable. One reason for New York's rule might have been to require a formality before a promise would be held binding. Traditionally, the purpose of formalities is to guarantee sufficient evidence that the parties intended to be bound or to warn the parties that they are about to undertake a serious obligation. This cautionary or paternalistic policy helps to make sure that the promisor really wants to undertake the obligation by requiring him to stop and think before entering the agreement. Thus, the purpose of the New York law was to make sure that the promisor intended to undertake

---

[132] 106 U.S. 124 (1882).

[133] *Pritchard*, 106 U.S. at 137 (quoting 4 R. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW § 654 (2d ed. 1874)).

a binding legal obligation. The Court's presumption that he did so intend completely overrides the New York policy.

Presuming that the contract is valid in this case also presents a circular argument. Under the Court's analysis, the question is whether or not the parties intended to be bound. But Louisiana and New York answer this question differently: Louisiana says yes; New York says there is not sufficient evidence that the promisor intended to be legally bound. The presumption that such promises are enforceable takes Louisiana's definition of intent and privileges it over New York's without any justification. New York would refuse to enforce the promise precisely because it is not convinced the promisor intended his promise to be binding. Even if New York is convinced that the parties intended the promise to be binding, it seeks to protect its citizens from contractual obligations that are not undertaken with requisite formalities that give further evidence of the promisor's understanding of the consequences of the promise. Either way, New York law serves to ensure that the obligation is truly voluntary. Presuming the agreement was intended to be enforceable overlooks the difference between Louisiana and New York policy regarding how to determine when an agreement is voluntary and when it is not.

A second oversimplification of contract law results when the courts claim to facilitate the will of the parties by enforcing contracts but ignore the problem of unequal bargaining power and adhesion contracts. For example, in *Siegelman v. Cunard White Star Ltd.*,[134] Judge Harlan (later Justice Harlan) enforced a clause on a steamship ticket that required any injured passenger to sue within one year of the injury. Plaintiff was injured on a steamship but neglected to sue within the stated limitation period because he relied upon an oral waiver of the provision by the company's representative. The ticket further contained a choice-of-law provision in favor of English law, under which the one-year limitation was enforceable despite an oral waiver by a company representative; under New York law, the limitation would not be enforceable, precisely because of the plaintiff's reliance upon the company representative's oral waiver. Judge Harlan reasoned that both parties intended English law to govern and that they should be free to choose English law as long as New York's regulatory policies were not strong.[135] Judge Jerome Frank, in dissent, argued that it was unrealistic to assume that small print on a ticket that is presented to a passenger who purchases it constitutes a bargained-for term that represents the voluntary agreement of the parties. In contracts of adhesion, the parties may have unequal bargaining power; a powerful and sophisticated commercial party may present the terms of the contract to a vulnerable and uninformed party like a consumer and coerce acceptance.[136] In such situations, the courts

---

[134] 221 F.2d 189 (2d Cir. 1955).

[135] *Id.* at 193-96.

[136] *Id.* at 206 (Frank, J., dissenting).

cannot reasonably conclude that the parties agreed either to the choice-of-law provision or contract term creating a one-year limitations period. Moreover, New York and England have made different judgments about whether the terms in the contract are the result of a voluntary agreement between the parties or are instead an imposition of unfair and oppressive requirements on a vulnerable person.[137]

By presupposing that the contract terms are valid and enforceable, the court fails to recognize that the two states have made conflicting judgments about whether the contract is sufficiently voluntary to justify enforcing the contract. It also presumes that intent to be bound overrides all other policy considerations that New York may have, such as preventing the steamship from fraudulently inducing the plaintiff to miss the limitations period by promising to waive the requirement. The case presents a direct conflict between the validating English policy and the protective New York policy, which is intended to take a realistic look both at the voluntariness of the contract terms and at their substantive fairness. Presuming that the validating law applies overlooks the real conflict between the contract policies of New York and England.

A third simplification of contract law identifies its basic policy as giving people the freedom to make whatever market arrangements they want without interference from the government and promoting reliance on those agreements by enforcing them. This claim fails to consider the fact that much of modern contract law consists of regulation of the substantive terms of contracts to promote social goals. In *Seeman v. Philadelphia Warehouse Co.*,[138] for example, the Supreme Court upheld a loan contract between a New York borrower and a Philadelphia lender that was usurious under New York law. Justice Stone reasoned that the parties had agreed that the loan was to be repaid in Philadelphia and that, as Pennsylvania was the place of performance, they must have intended to chose Pennsylvania's validating law. But the purpose of New York law was to *limit* freedom of contract—to protect borrowers from getting in over their heads when they are in financial need. Allowing the New York borrower to evade New York's protective policy by agreeing in New York to pay a rate that was usurious under New

---

[137] *See* Albert Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953). In this famous article, Professor Ehrenzweig argued that "economic pressure precludes a meeting of minds." *Id.* at 1078. He further explains:

> Whatever the status of the principle of party autonomy in the conflict of laws of contracts in general, this principle has no place in the conflicts law of adhesion contracts. Once we have thus consciously and expressly rejected reliance on a spurious "freedom to adhere" we shall have restored to the common law one of its provident achievements—freedom of contract.

*Id.* at 1090.

[138] 274 U.S. 403 (1927).

York law completely overrides the New York policy of protecting New York borrowers from decisions they may later regret.

Regulation of contracts is geared to such social and political goals as preventing racial and sexual discrimination, promoting the alienability of property and competition in business, preventing dishonesty in the sale of securities, and protecting consumers and the beneficiaries of insurance policies.[139] It is hard to think of a contract of significance in our economy whose terms are not regulated in some way. Protecting people from harsh terms in adhesion contracts or from terms that have negative social consequences is as central a goal of contract law as is holding people to their agreements. Thus, competing interests in providing liberty for individuals burdened by those agreements may significantly limit the security interest in enforcing agreements.

Regulation of contracts may be interpreted as the protection of liberty interests because contracts are enforced only when they are the result of the voluntary agreement of the parties. They are not enforced when they are the result of coercion or fraud by one of the parties. Thus, we require sellers of securities to disclose information about the company issuing the security to make sure that buyers are able to make informed decisions. This policy provides some assurance that the agreement is mutually beneficial and thus what both parties want. We also refuse to enforce contracts containing onerous terms when the parties have grossly unequal bargaining power. We do so partly because of the negative social consequences of enforcing unfair and oppressive agreements and partly because we are convinced that the persons burdened by those agreements entered into them not as an expression of individual autonomy but because they were compelled to agree by their limited range of alternatives.

Contract law, like tort law, is based on a series of compromises among competing contract policies. On one hand, we sometimes protect liberty interests in allowing people to agree freely on whatever terms they want and then giving them the security of being able to rely on the terms of those agreements. On the other hand, we sometimes further security interests by protecting individuals and society as a whole from market arrangements that have negative social consequences. Additionally, we promote liberty interests in making sure that contracts are the result of free and voluntary agreement, rather than oppressive impositions of power by one party over the other.

### 3. The Fallacy of Appealing to Basic or Shared Policies

Theorists who appeal to the Second Restatement concept of the "basic policies underlying the particular field of law" or to the concept of "policies

---

[139] *See* Jack Beermann, *Contract Law as a System of Values*, (Book Review) 67 B.U.L. REV. 553, 574-79 (1987).

all states share" are misguided.[140] These concepts lead analysts and judges alike to claim, for example, that the basic goals of tort law are compensation and deterrence,[141] when the truth is that the law of torts represents a compromise between the policy of requiring people to compensate others when they harm them and the policy allowing people to act freely without regard to the interests of others. Likewise, the basic goal of contract law is not enforcing agreements. It is a compromise between the policy of enforcing agreements in accordance with their terms and the policy of regulating agreements as a way to promote social goals, protecting the actual—rather than the formally expressed—expectations of the parties or limiting the ability of powerful persons to coerce vulnerable persons to enter onerous arrangements.

I feel foolish saying this, but the reason we have a conflicts case is because the laws of the two states conflict. They do not have a shared policy, and it is misleading to pretend that they do. Nor do we advance the analysis by formalistically defining one of the policies as the rule—a "common policy"—and the other policy as an "aberrational"[142] exception to the basic rule. The state that passes a tort reform act limiting tort liability will be surprised to learn that its law will not be applied in a case involving out-of-state contacts because its policy is not somehow "basic." Granted, in some cases, it might be a good idea to confine a disfavored law to domestic cases, either because the disfavored law is archaic or unusual or because it would frustrate justified expectations. But, I am arguing that we cannot get around having to make judgments of this sort by defining large areas of law, like torts and contracts, to have "basic policies" or by appealing to a non-existent national consensus. There is simply no basic policy of tort or contract law—these areas of law involve accommodations between conflicting interests in freedom and security. In my view, this means that relatively

---

[140] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1971); *see, e.g.*, Reese, *supra* note 68, at 1305 (arguing that compensation of victims is the "basic policy underlying the law in the field of personal injuries and, indeed, in most areas of torts"); Robert Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 235 (1977) (arguing to resolve unprovided-for cases by looking to the "common policy of the involved states").

In contrast, Professor Brilmayer argues—in my mind correctly—that "[t]here is no complete agreement on when to limit imposition of liability . . . ." *Governmental Interest Analysis*, *supra* note 92, at 471. She further argues:

> There is no common policy of loss spreading in all circumstances. Indeed, not a single state has a policy to this effect. No state in the country has a tort law that guarantees every injured person a defendant to pay the bills. Every state's tort law asks whether, how much, and from whom.

*Id.*

[141] *See* Reese, *supra* note 68, at 1305.

[142] *See* Weinberg, *supra* note 7, at 603.

few cases can be disposed of by reference to the idea that they are false conflicts.[143]

The proper way to analyze the policies underlying the conflicting substantive laws in a conflicts case is to be generous and honest in recognizing the conflicting state and individual interests. We should recognize that one state's compensation and deterrence policy conflicts with the other state's policy of freeing actors from the threat of ruinous liability. One state's policy of enforcing agreements conflicts with the other state's policy of regulating its market arrangements to prevent undue coercion or to promote various social goals. We should recognize these conflicting interests first. Once we have done this, we can ask which policy should prevail in these kinds of cases, and why.

### B. *Multistate Policies*

Some conflicts scholars argue that a major goal of conflicts law should be to further multistate policies. Others recognize multistate policies but argue that they should almost always be subordinated to furthering the substantive policies of the forum. Even among those scholars who favor the idea of multistate policies, there is significant disagreement regarding what those policies are; in fact, they may mean completely opposite things by this term. I contend that we should care about multistate policies. Yet, at the same time, we should recognize that these policies require us to confront difficult questions about the goals of conflicts law: (1) Should conflicts law further uniformity or diversity?; (2) Should conflicts law promote substantive justice or tolerance?

#### 1. The Contradictory Meanings of Multistate Policy

Ever since Brainerd Currie suggested resolving true conflicts by applying forum law,[144] conflicts scholars have waged a fierce battle about the legitimacy of a preference for forum law. On one side are those, like Perry Dane[145] and Linda Silberman,[146] who argue for choice-of-law approaches that are facially neutral as between the laws of the affected states.[147] On the

---

[143] *See* Ely, *supra* note 38, at 202-03 (criticizing the idea that two states with conflicting laws share a "common policy").

[144] Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 119 (1963) (originally published in 25 U. CHI. L. REV. 227 (1958)).

[145] Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

[146] Silberman, *supra* note 75.

[147] *See also* Corr & Robbins, *supra* note 87, at 434-43 (arguing against a forum bias).

other side are those, like Louise Weinberg[148] and Robert Sedler,[149] who argue that courts should apply forum law in the absence of any good reason to do otherwise and who assume that the appearance of neutrality in multistate cases does not constitute such a reason.[150]

As with the rules/standards and policy/territoriality debates, this debate is unresolvable in its current form. The advocates of the different positions have been talking past each other. The participants in this debate all appeal to "multistate policies," but they have not sufficiently noted that they are using the term in contradictory ways. The general formulation is that conflicts cases should be decided in ways that further "interstate harmony and commerce."[151] But, interstate harmony sometimes means that courts should reflect the diversity of state laws in a federal system, expressing comity to the law of other jurisdictions, and sometimes means that courts should further underlying shared policies so as to produce uniformity in multistate cases by implementing the better law.[152]

Scholars who refer to "multistate policies" often have in mind the idea of furthering diversity. For example, Professor McDougal cites the Second Restatement's explanation of the "needs of the interstate and international systems"[153] to explain why courts should sometimes refuse to further their own domestic policies in deference to the policy of another state. There are two major reasons for such deference. First, they should defer when application of forum law would interfere significantly in the political process of another state, preventing it from implementing its policy goals within its own community. Deferring to foreign law in this situation furthers the "harmonious relations between states."[154] Second, the forum should defer to foreign

---

[148] Weinberg, *supra* note 7.

[149] Sedler, *supra* note 140, at 227; Sedler, *supra* note 124, at 604-05.

[150] The issue of whether the forum may prefer forum law is often confused with the issue of whether it can legitimately favor domiciliaries. *See* Ely, *supra* note 38, at 209-10. It is true that plaintiffs ordinarily choose the forum, and usually choose a forum with plaintiff-favoring law, if they can. Nonetheless, application of forum law does not necessarily favor domiciliaries. For example, a consumer injured by a defective product may sue in the state of the manufacturer if that state has a relatively more favorable policy than the law of the place where the accident occurred. In that case, application of forum law would serve to regulate the in-state activities of the domiciliary for the benefit of an outsider.

[151] Luther McDougal, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 MERCER L. REV. 483, 499 (1984) (suggesting that courts should apply the "best" law to resolve choice of law cases, rather than merely the better of the applicable and available state rules).

[152] On the conflict between unity and diversity in a world of multiple normative communities, see Robert Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 13-19 (1983).

[153] McDougal, *supra* note 151, at 490.

[154] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment d (1971).

law when application of forum law would interfere with the legitimate expectations of a party who relied on the law of the other state or is otherwise connected with it.[155] Deferring to foreign law is thought to facilitate commercial intercourse among citizens of different states by eschewing unfair surprise.

At the same time, other scholars identify uniformity, not diversity, as the underlying justification for multistate policy. They mean that conflicts cases should generally be decided in ways that further certain fundamental shared policies—what we can call the better law.[156] For example, Professors Weinberg and McDougal both argue that all states share an interest in compensating victims of wrongful conduct and protecting reliance on agreements.[157] Weinberg justifies a preference for forum law on the grounds that the plaintiff chooses the forum and that plaintiff-favoring law furthers shared interests in compensating victims, deterring wrongful conduct, and enforcing contracts.[158]

We can move forward if we recast the debate about forum preference versus forum neutrality. A better way to address this issue is to determine the appropriate accommodation between the conflicting goals of uniformity and diversity and between substantive justice—application of what the forum sees as the better law—and tolerance—comity to the norms of other self-governing communities. This reformulation will not answer the question of how to decide the forum preference issue, but it will clarify the conflicting policies implicated in this choice.

2. Substantive Justice versus Tolerance

(a) *Tolerance, Comity, and Diversity*. The first meaning of multistate policy holds that, at times, the forum may wish to further its legitimate interests in limiting the applicability of its substantive policies in multistate cases by engaging in restrained interpretation of forum law. It may have such interests for two reasons. One reason would be to protect the justified expectations of the party who relied on the law of the other jurisdiction in planning her conduct or who, because of her contacts with the other state, has a right to be protected by its law. If that party has significant contacts with the other state—especially if she reasonably relied on its law—the forum may view her interests as stronger and worthier of that state's protection than if her conduct took place wholly within the forum. Because the

---

[155] *Id.*

[156] *See* Weinberg, *supra* note 7, at 600-01.

[157] McDougal, *supra* note 151, at 497; Weinberg, *supra* note 7, at 599-600; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1971) (appealing to the "basic policies underlying the particular field of law").

[158] Weinberg, *supra* note 7, at 599.

interests of the parties are different in multistate cases than in domestic cases, the forum, in weighing their interests, may conclude that fairness requires a different result than in a purely domestic case.[159]

The second reason why the forum may defer to foreign law is that the forum may have an interest in accommodating the norms of a neighboring polity. It may have an interest in doing this, not for the selfish reason that it hopes the other state will respect its substantive policies in like occasions, but because it is affirmatively interested in tolerance or respect for the autonomy and self-government of a neighboring political community.[160] Applying forum policy in a multistate case has a cost that it does not have in domestic cases: it interferes with the ability of a neighboring state to constitute itself as a normative community by making and implementing its public policy in cases that affect its people.[161] The forum may reach a different judgment if it takes this additional cost into account in determining the just result.

Both of these reasons for restrained interpretation of forum law recognize that the forum itself has competing policies. The forum wants, first, to further its substantive policies to achieve social justice. At the same time, however, the forum may have multistate policies that cause it to assess the value and justice of its substantive policy differently in a case that involves contacts with another state.[162] By limiting application of its substantive

---

[159] "[I]t is classic conflicts reasoning that forum law should not be construed so as to surprise the nonresident without ample notice of it." Weinberg, *supra* note 7, at 596-97. Weinberg further explains:

> There is one widely shared policy concern . . . which territorialists are persuaded makes the residual territorial choice far superior to the residual choice of forum law: fairness. Even the interest analysts would agree that there is some wisdom in the territorial choice for cases in which the reasonable expectations of the regulated party would be dispositive. An interest analyst would deal with such cases by determining whether forum law reasonably could have been intended to govern the extraterritorial transaction, given the inability of the affected party to foresee the laws at the unknown future forum. The affected party will be able to foresee forum law only to the extent that the forum bears some other, known, relation to the case. Forum law is thought to be foreseeable if the forum was the place of the transaction or occurrence, or is the home state of the party to be disadvantaged by it.

*Id.* at 622.

[160] Lawrence George, *Asking the Right Questions*, 15 FLA. ST. U.L. REV. 449, 468 (1987) (recognizing that conflicts cases bear a distinct resemblance to "arguments about a sort of 'religious' tolerance, given the universality of the effects and pretensions of localized political processes"); *see also* Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U.L. REV. 389 (1987) (arguing that lawmakers should concern themselves not only with the effects of their legislation on their own constituents but on outsiders as well).

[161] *See* Cover, *supra* note 152, at 26-33.

[162] Professor Martin explains:

> [F]or conflicts of laws concerned chiefly with moral judgments and not with the

policy in certain cases involving justified expectations or multistate contacts, the forum may help maintain the co-existence of separate, self-governing political and normative communities. Displaying comity or deference to the law of other states in cases with multistate contacts may have the added effect of promoting diversity in a federal system by allowing separate states to develop diverse socio-economic systems. In contrast, relentless application of forum law may decrease diversity by allowing the forum to override the internal policies of other states.[163]

There has been some confusion recently about whether multistate policies promoting comity and diversity should always matter in conflicts cases. Professor Sedler, one of the most enthusiastic current advocates of interest analysis, argues that courts generally do apply forum law to resolve any case involving a true conflict, and should continue to do so. He maintains that there is no good reason to displace forum substantive policy in a multistate case, as long as application of forum law furthers a "real interest" of the forum and is not fundamentally unfair to the other party.[164] Sedler does not deny that "multistate interests" may exist; deference to the interests of the other state or the justified expectations of a party may cause a court to engage in a restrained interpretation of forum law.[165] However, he does contend that it is difficult to see why a state should engage in restrained interpretation when the forum has decided that forum policy would be "significantly advanced" by applying its law, and such an application would not be fundamentally unfair to the other party.[166] When the forum has a real interest in applying its law, it should do so, regardless of multistate policies.

Thus, Professor Sedler's position is that forum substantive policy will ordinarily outweigh any interests the forum might have in respecting the political process and communal norms of another state as long as the forum really cares about applying its law to the case at hand.[167] His critics, like

---

deterrence of wrongful conduct or the planning of consensual transactions, the forum always has a moral judgment available for application. Whether or not it chooses to implement that judgment or to defer to the judgment of another state depends on the degree of connection between the forum and the facts of the case, the strength of the forum's judgment, and the forum's willingness to defer to other states having stronger connections with the case.

Martin, *supra* note 115, at 590.

[163] *See* Brilmayer, *supra* note 160, at 400 (maintaining that "dividing the world into smaller units often protects diversity").

[164] Sedler, *supra* note 140, at 227; Sedler, *supra* note 124, at 604-05, 611.

[165] Sedler, *supra* note 140, at 192-94 (explaining Currie's principle of restrained interpretation).

[166] *Id.* at 222-23.

[167] There is no reason to assume, as Professor Sedler seems to, that the forum does not care about the additional cost of interfering with the multi-state system, *see* Cover, *supra* note 152, at 26-33, whenever application of forum law would further a real interest of the forum. Indeed, Sedler's formulation is circular. He posits that the

Professor McDougal, argue that Sedler's approach does not go far enough in recognizing multistate concerns that the forum itself might have.[168] Perry Dane has gone so far as to argue that the failure to give due deference to multistate policies in a federal system is incompatible with the rule of law.[169]

The real question here is how to value the norms of respecting the expectations of persons who rely on the law of states with which they are connected and respecting the integrity of competing political and moral communities. Professor Sedler argues that interests in protecting the defendant's expectations should be limited to preventing fundamental unfairness. The opposite position is that the goal of conflicts law should not be just to avoid great unfairness but affirmatively to achieve fairness. Adopting this position would mean that reliance on the law of another state or a claim to protection under it is not simply a minimum threshold to overcome but is an independent interest to take into account in determining how to evaluate the relative interests of the plaintiff and the defendant. If the defendant's interests are stronger in a multistate case than in a domestic case, the forum may reach a different judgment about who should win. Taking such foreign contacts into account may therefore lead the forum to engage in restrained interpretation or otherwise defer to the policy of the foreign state. On the other hand, the forum may still conclude that the defendant's harmful conduct unfairly surprised the plaintiff, and that the plaintiff's interests in being protected by forum law outweigh any unfair surprise to the defendant.[170]

Even if we could agree that the norm of promoting diversity is entitled to greater weight than Professor Sedler is willing to give it, we would still have the problem of figuring out which of the competing laws to apply. The application of the law of either state may impose costs on the other state or otherwise interfere with its ability to promote its goals and sense of justice.

---

forum should apply its substantive law if it has a real interest in doing so. But, since one interest of the forum is taking account of the fact that application of its law will have the cost of interfering with a neighboring state's policy goals, it is not clear whether the forum should want to further its policy in this case. In other words, determining whether or not the forum has a real interest in applying its substantive policy depends upon a decision about the *value* the forum should place on the fact that application of forum law has a cost that is not present in domestic cases. This decision, in effect, hinges on a cost-benefit analysis; the state must evaluate whether it is willing to further its substantive policy by applying forum law despite the added burdens of this cost.

[168] *See* McDougal, *supra* note 151, at 489-99; Luther McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 UCLA L. REV. 439, 451 (1979).

[169] *See* Dane, *supra* note 145, at 1244-45.

[170] *See* Weinberg, *supra* note 7, at 623-26.

Conflicts scholars often criticize a preference for forum law as overly parochial and indifferent to the concerns of diverse states in a federal system. Such arguments implicitly claim that application of foreign law would have the effect of promoting diversity among separate political communities. Yet this does not explain why application of foreign law to trump forum law is preferable to application of forum law in a way that trumps foreign law. For example, in *Carroll*, application of forum law will further the policy of regulating the employment relationship centered in Alabama but will interfere with the ability of Mississippi to govern economic activity occurring within its borders. Moreover, application of forum law will interfere with the right of the railroad to claim protection under the law of a place where it is doing business and where the injury occurred. Application of Mississippi law will promote an opposing set of evils: it will enforce the Mississippi policy at the expense of Alabama's ability to protect its own workers from unfair working conditions imposed by its own employers. Either way, one state is furthering its policy at the expense of the other. The real question is choosing the right accommodation between the substantive policies of the two states and the interests of the railroad employer and the injured worker. Abstract principles like "comity," "neutrality," and "real interest" contribute little to answering these questions; to think that they can is to engage in conceptualism. We can only address these questions adequately in the context of specific cases or social problems that generate multistate contacts and conflicts issues.[171]

(b) *Substantive Justice, Better Law, and Uniformity*. I have argued that diversity is a legitimate goal of conflicts law. Thus, a forum state may have legitimate interests in sometimes refusing to decide cases in a way that furthers its conception of justice and good social policy—what it considers to be the better law. The forum may do so in order to defer to the policies of other states, to allow them to implement their public policies within their communities, to constitute themselves as normative communities, or to protect the rights of a party who is entitled to protection under that state's law. In recognizing these interests, the forum modifies its notion of social justice to accommodate the internal norms of a separate political community. Of course, merely identifying these multistate interests in diversity does not tell us when the forum should act in such an altruistic fashion. In each case, the forum must weigh these interests in diversity against the forum's substantive interests in promoting its conception of substantive justice between the parties.

In a pathbreaking article, Louise Weinberg has argued for a version of multistate policy that focuses not on diversity or comity but on uniformity.[172] This uniformity might be achieved in the following manner. Conflicts schol-

---

[171] *Cf.* K. LLEWELLYN, *supra* note 37, at 121-57.

[172] *See* Weinberg, *supra* note 7, at 595-98.

ars have long noted a trend toward application of forum law in multistate cases, thus creating the opportunity for plaintiffs to shop for a plaintiff-favoring forum. Since plaintiffs have significant freedom to choose where their case will be heard, multistate litigation may come to be dominated by plaintiff-favoring law. If this happens, the multistate litigation system may have the intended or unintended effect of promoting uniformity in the disposition of multistate cases—the bulk of these cases will be decided in favor of plaintiffs. The greater the extent of this uniformity, the more the multistate system hampers the ability of different states to establish a variety of socio-economic systems; the fifty laboratories will be reduced to one laboratory. Weinberg applauds this result, despite the fact that it may place significant limits on the ability of defendant-protecting states to further their policies. The promotion of uniformity in multistate cases by recommending application of plaintiff-favoring forum law may therefore conflict with the goal of promoting diversity.[173]

Professor Weinberg is correct in arguing that the promotion of uniformity is a legitimate way to resolve conflicts cases in a multistate system. If plaintiff-favoring law is better than defendant-protecting law, application of forum law will resolve multistate cases in a way that promotes better social policies while effectively confining the pernicious consequences of unjust laws to purely domestic cases with no out-of-state contacts. Once the case touches another state with significant interests in promoting its better, plaintiff-favoring policies, the case comes within the legitimate purview of the multistate system. A defendant who is unwilling or unable to confine its conduct to a defendant-protecting state is legitimately subject to regulation by the state which promotes better law. In effect, the promotion of uniformity would limit the harmful effects of bad laws while allowing a desirable amount of diversity in the multistate system.

Weinberg argues for the adoption of uniformity, through application of better law, as the goal of multistate policy in two ways. She argues, first, that all states share certain basic policies, like compensating tort victims, deterring wrongful conduct, and enforcing agreements; therefore, there is a general consensus about what law is better. Second, she argues that all existing approaches to resolving choice-of-law issues explicitly or implicitly already require consideration of the better law.[174] I will address these arguments in turn.

---

[173] At the same time, forum-shopping by plaintiffs may inhibit, rather than promote, uniformity in conflicts cases. This may happen, for example, if one state has an eccentric view, and few plaintiffs are able to obtain personal jurisdiction over defendants in that state. In that case, the plaintiff who is lucky enough to have her case heard in that state may achieve a result that varies from the ordinary result in such cases heard in other states.

[174] *Id.* at 599-601.

First, Weinberg suggests that there is a relatively clear answer to the question of which law is better. Plaintiff-favoring laws are generally better in both torts and contracts cases because they advance justice by compensating victims and deterring further harmful conduct. Only in peripheral cases do courts depart from or modify these basic policies. If plaintiff-favoring laws are indeed better than defendant-favoring laws, application of forum law in multistate cases will effectively promote *both* better law and uniformity in multistate cases.

Weinberg further argues that whenever the forum is tempted to defer to nonforum law, it is ordinarily making a judgment that nonforum law is better than forum law. If this is so, she contends the better result is for the forum to change forum law in order to make it compatible with the better nonforum law. If this can be done, the forum can promote both comity and forum substantive policy at the same time by adopting the foreign law as its own. The end result again is to promote both better law and uniformity in conflicts cases.

I have argued, in contrast, that it is misleading to pretend that states have shared underlying policies when their substantive laws conflict.[175] Appealing to shared policies obscures the real conflict between the policies of plaintiff-protecting and defendant-protecting states. Conflicts cases arise precisely because plaintiff- and defendant-protecting states disagree about which law is better. Weinberg correctly argues that a forum that becomes convinced that foreign law is better should change forum law if it has the power to do so. But if the forum believes that forum law is better than foreign law, or if the forum has no power to change forum law embodied in a statute, there exists no general consensus about the justice or wisdom of the competing policies. If there is no agreement about which law is better—contrary to Weinberg's assumption—we may face a conflict between enforcement of the better law and the achievement of uniformity in multistate cases.

This conflict between better law and uniformity might arise in several instances. For example, it might arise when the forum policy is a minority one. If the vast majority of states allow manufacturers to assert a state of the art defense to limit their tort liability for dangerous products, the forum's refusal to allow a defendant to assert the defense may interfere in the goal of promoting uniformity in interstate commerce. The forum's divergent view of what constitutes the better law or its inability to change its plaintiff-protecting law may hamper, rather than further, the goal of uniformity in this kind of case.[176]

---

[175] *See supra* text accompanying notes 140-43.

[176] This conflict can only be avoided by maintaining that the question of which law is better can, and must, be answered by assuming that a rational consensus exists about which law is better. If we assume that better rules will inevitably come to the

Application of better law may also conflict with the goal of uniformity if plaintiff-protecting policies are not better than defendant-protecting policies. If the definition of which law is better depends on a perspective, then, from the perspective of defendant-protecting states, the promotion of uniform plaintiff-protecting policies in conflicts cases achieves uniformity at the expense of justice. For example, if the better law regulates contracts of adhesion as a means of avoiding enforcement of harsh terms, plaintiffs may shop for minority jurisdictions that enforce contracts under all circumstances. To the extent defendants are subject to suit in more than one state, such a result would further uniformity by promoting security of transactions in multistate cases; yet, this uniformity is one of injustice rather than justice, at least according to the standards of the defendant-protecting states. Similarly, libel plaintiffs may choose the jurisdiction with the longest statute of limitations even though their claims are barred everywhere else. Application of forum law here may promote uniform, pro-plaintiff results in multistate libel cases. Yet, if the better law is to promote free speech through limited enforcement of libel claims, application of forum law promotes uniform application of worse, not better, policies.[177]

If we presume, as I do, that it is misleading to appeal to shared policies to resolve conflicts cases, the question of which law is better becomes problematic. The answer to the question depends on a choice of perspective. By whose lights is the law better? This dilemma means that promotion of better law and uniformity are separate, and possibly conflicting goals. It also means that we need to justify application of what the forum sees as the better law on grounds other than promoting uniformity in multistate litigation.

Weinberg answers this criticism by arguing that all modern choice-of-law theories implicitly require the forum to determine its own view of what policy constitutes the better law. If she is right about this, then choice-of-law theory presents us with competing principles. Sometimes it asks us to promote a multistate policy of diversity, sacrificing the forum sense of

---

fore in the marketplace of ideas, then we can further assume that the majority rule is the better law. In that case, application of the worse forum law sacrifices both uniformity and the better law. Application of the better law would entail changing forum law; in that case, application of the better forum law would promote uniformity, just as Weinberg claims it would. In contrast, if we presume conflict rather than consensus about which law is better, then we must ask, from whose perspective is the law better? If the forum prefers forum law, then it must choose between promoting its view of the better law and uniformity in multistate cases.

[177] *See* James Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 429 (1985) (arguing that courts should refrain from applying plaintiff-favoring forum law in defamation cases where such application will interfere significantly with the ability of other states to promote free speech by adopting relatively speech-enhancing, defendant-protecting rules).

substantive justice to the ability of another state to constitute itself as a normative community; at other times, it asks us to promote the better law. If, as I have argued, identification of the better law requires a perspective, we must recognize that this criterion requires the forum to consider its own sense of substantive justice in determining how to resolve the choice-of-law issue. From the forum's perspective, promotion of the better law promotes uniformity in multistate cases by confining worse laws to purely domestic cases in the states that choose to promulgate them. In this view, the forum must choose between the goal of diversity and the goal of promoting the better law.

The argument for applying the better law is highly controversial. Most conflicts scholars and courts reject the explicit consideration of which of the conflicting laws is most just or wise. Application of the better law is thought to be parochial and self-serving.[178] To paraphrase Professor Silberman, it allows one state to rule the nation.[179] Yet other scholars, including Robert Leflar,[180] Louise Weinberg,[181] and Paul Freund[182] have argued in favor of explicit consideration of better law. Moreover, Weinberg explains that all modern approaches to resolving choice-of-law issues implicitly refer to the notion of applying the better law. This insight helps explain some otherwise puzzling aspects of modern choice-of-law theory.

The Second Restatement, for example, points to the "basic policies underlying the particular field of law." Although this norm obscures the real conflict between the policies of the affected states, it does mean something. It can only be understood as an appeal to treat one state's law as the norm and the other as the exception. Determining whether the basic norm in tort

---

[178] *See* Korn, *supra* note 38, at 958.

[179] Silberman, *supra* note 75.

[180] *See, e.g.*, Leflar, *supra* note 7, at 24; Leflar, *supra* note 9, at 1587.

[181] *See* Weinberg, *supra* note 7, at 600; *see also supra* text accompanying notes 172-77.

[182] *See* Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1215-16 (1946) (approving of the consideration of the better law, at least to the extent of giving less weight to laws that are "archaic and isolated"). Professor Freund explains that consideration of the better law is especially legitimate in situations where contacts with several states are evenly distributed or of equal significance. In those cases, he asserts that

> the choice [of the more favorable or better law] does not differ radically from the problem of judicial decision in many purely internal controversies; judges must choose starting points for legal reasoning, must consider when to construe statutes narrowly and when broadly, must weigh the interest in security of transactions against the interest in protection of a group subject to duress, must, in short, own, and preferably own up to, a philosophic content in their decisions. There is no reason why the judicial process should become measurably simpler when a controversy touches and concerns more states than one.

*Id.* at 1215-16.

law is requiring "cost internalization" or whether it is "letting the loss lie where it falls" requires the analyst to determine what the presumption should be. This determination, in turn, requires a judgment about the fairness and wisdom of competing legal rules. The Second Restatement requires this factor to be balanced against the interest in diversity—called "the needs of the interstate . . . system[ ]." It is therefore standard conflicts reasoning that the goal of uniformity—applying better or "basic" policies—must be balanced against the goal of diversity—preserving distinct normative and political communities in the separate states.

The comparative impairment test similarly refers to the notion of applying the better law by requiring the analyst to determine whether a policy is "archaic and isolated" or "prevalent and progressive."[183] Professors Cavers, Weintraub, and Reese also have devised choice-of-law rules that explicitly require or allow application of arguably better plaintiff-favoring law. Interest analysts like Professor Sedler ask courts to determine whether the forum has a real interest in applying its law. Engaging in restrained interpretation means that the forum has decided that the interests of the defendant in relying on nonforum law outweigh the interests of the plaintiff in claiming protection under forum law. The forum ordinarily will be unwilling to do this unless its own policy is outdated; if its policy is still vital, it will tend to prefer the interests of the party protected by its law. After all, forum law implies a judgment about which interests most deserve to be legally protected. And, as Weinberg argues, if forum policy is not the better law, then the forum should change forum law—if it can—to comport with the better nonforum policy. If the forum law is still vital, Sedler advises courts to resolve cases in which the forum has a real interest by application of forum law—presumably because forum law furthers the forum's sense of good social policy.[184]

---

[183] Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 165, 168, 583 P.2d 721, 726, 728, 148 Cal. Rptr. 867, 872, 874 (1978); *see also* ARTHUR VON MEHREN & DONALD TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 377 (1965) (arguing for application of the law that is "emerging" rather than the law that is "regressing"); R. WEINTRAUB, *supra* note 66, § 6.25 (arguing that law that is "aberrational" or "anachronistic" should be disregarded).

[184] Even territorial approaches, like Twerski's "center of gravity" approach, require the analyst to make substantive judgments about the relative importance of the possible policies of the place of conduct versus the place of the injury. Thus, in choosing which territorial contact to privilege, we must consider whether protecting injured victims (the law of the place of the injury) is more or less important than protecting the right of a defendant to rely on the immunizing law of the place where the defendant acted. The relative strength and importance of these respective contacts will turn, in part, on substantive judgments about which interests are more worthy of protection or more in need of regulation.

In practice, it is quite clear that what courts ordinarily do in conflicts cases is to apply forum law. Whatever the scholars say about it, the judges seem to understand that the point of law is to do justice, and, to the extent they view themselves as the moral voice of their community, they are likely to understand forum interests as outweighing nonforum interests. None of the modern approaches make better law the only issue in deciding conflicts cases. They all allow for protection of the justified expectations of a person who relied on the law of a place where she acted, and who could not, in all fairness, be held to the standards of another state. They all allow application of the better law to be overcome by other factors—including interests in diversity. Nevertheless, they all require consideration of which social policy should be favored in multistate cases; they ask us to create presumptions about which policies should prevail. These presumptions, by necessity, refer to the better law.

(c) *The Commedy of Territoriality: Comity, Better Law, and the Pathological Race to the Bottom.* I have argued that conflicts scholars who advise courts to apply the better law or the underlying common policy of different states have oversimplified the question of which law is better. They either fail to confront the actual conflicts between the policies of different states, or, when they do recognize those conflicts, they fail to give an adequate defense of the law they have identified as better. Conflicts scholars, as well as courts deciding conflicts cases, tend to identify the basic policies of different areas of law in a relatively mechanical and simplistic fashion. Perhaps because modern conflicts analysis itself is so complex, scholars tend to avoid the complexities that underlie the substantive field at issue. Seeking some sense of stability, they choose to simplify the policies underlying substantive law while they confront the difficult questions of multistate policy. Thus, their discussions of substantive policy underlying conflicting state laws are devoid of the sophistication that characterizes analyses of domestic cases involving conflicts about the substantive law of torts, contracts, and property.

Yet, the advocates of the multistate interests in uniformity and the better law are not the only ones who have oversimplified multistate policy. The advocates of comity have similarly oversimplified what is involved in defining the appropriate bounds of overlapping state powers in a federal system. Application of forum law promotes the policy of a separate state and therefore could further multistate interests in comity just as easily as application of the law of some other state. If the application of forum law substantially frustrates the ability of another state to further its local policies, we should worry about how conflicts cases of this kind will affect the ability of separate states to pursue separate policies for their own communities. But, if application of either state's law will advance one state's interests while interfering with the norms of the other state, the goal of promoting diversity will not tell us which way to go. Abstract references to the norms of comity

or the "needs of the interstate system" are not sufficiently determinate to guide us in choosing which state's law to apply. Moreover, Professor Weinberg notes that comity cannot require each state to defer to the law of the other.[185]

The advocates of comity have not given sufficient thought to the kind of self-governing polities or separate normative communities they are interested in protecting. We are dealing with situations in which application of either state's law will interfere with the other state's norms in a way that should legitimately concern it. In these kinds of cases, the issue that should seize our attention is the relations among overlapping normative communities. When and for what reasons should we protect the right of someone to rely on the law of the place where she acts to limit her liability or to enforce an arguably unconscionable contract? When is a community entitled to govern itself even though its policies affect outsiders adversely? What kinds of foreign social relationships should the forum reinforce or accept, even though the forum would judge them to be unjust or oppressive?

Consider *Western Airlines v. Sobieski*.[186] Western Airlines, like many corporations, incorporated in Delaware.[187] Yet, it did a substantial amount of business in California: more than thirty percent of its stock was owned by California residents; more than sixty percent of its wages and salaries were paid to employees in California; the majority of its passengers traveled between points in California; and its executive and operations offices were located in California.[188] In contrast, it did no business in Delaware. A group of minority shareholders succeeded in electing two directors by voting their shares cumulatively. The corporation responded by amending its certificate of incorporation to eliminate cumulative voting; the amendment was adopted by a shareholder vote of about 450,000 to 200,000. Delaware, the state of incorporation, permitted Western Airlines to so amend its governing charter; California, the principal place of business, required corporations to provide for cumulative voting and thus prohibited such a maneuver. The Commissioner of Corporations of California exercised his statutory authority to disapprove the decision to eliminate cumulative voting. The trial court overruled the Commissioner, applying the traditional rule that relations among shareholders are governed by the law of the place of incorporation. The District Court of Appeals reversed, holding that the forum had significant interests in applying its law to protect resident minority shareholders and to regulate the governance of a corporation whose business activities

---

[185] Weinberg, *supra* note 7, at 618.

[186] 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).

[187] *See* Davis, *supra* note 111, at 32-34.

[188] Western Airlines, Inc. v. Sobieski, 191 Cal. App. 2d at 402, 12 Cal. Rptr. at 721; R. CRAMTON, D. CURRIE & H. KAY, *supra* note 99, at 240.

were centered in the forum.[189] This result is highly unusual[190] and disapproved by many conflicts and corporations scholars.[191]

---

[189] *Western Airlines*, 191 Cal. App. 2d at 411-14, 12 Cal. Rptr. at 727-29; *see also* Wilson v. Louisiana-Pacific Resources, Inc., 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982) (applying the California statute requiring cumulative voting for directors to a Utah corporation despite a contrary Utah law permitting, but not requiring, cumulative voting); State *ex rel.* Weede v. Iowa S. Utils. Co., 231 Iowa 784, 2 N.W.2d 372 (1942), *modified* 4 N.W.2d 869 (1942) (applying Iowa law prohibiting stock from being issued without monetary compensation to a Delaware corporation operating a public utility in Iowa).

[190] *See* John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 17-18 (explaining that over the last twenty-five years, "in all but a handful of [potential conflicts cases involving corporations] the law of the state of incorporation was applied"); Deborah DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 163 (1985) (asserting that "[m]ost states follow the traditional internal affairs doctrine, either through case law or statutory provisions").

[191] Kozyris writes:

> [I]nternal corporate rules establish an entire system of private governance on a continuing basis involving persons—directors, officers, shareholders of various classes—performing different tasks and having potentially antagonistic interests. It would be intolerable to allow its component parts to be regulated under differing principles for different persons at different times. Rather, such a regime must be uniform and stable to promote efficient and equitable operation. The corporate participants need to know the rules of the game in advance and must be able to plan their transactions under fixed standards and procedures that determine their rights and liabilities.

Kozyris, *supra* note 190, at 49. Similarly, Donald Regan argues against the practice of states attempting to regulate the "internal affairs of the corporation" when the corporation is incorporated in another state. Donald Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987). There is even an argument that application of the law of the state of incorporation is constitutionally required. In McDermott, Inc. v. Lewis, 531 A.2d 206, 217 (Del. 1987), the Delaware Supreme Court held that the internal affairs doctrine was constitutionally required under the due process, full faith and credit, and commerce clauses in all but rare cases. *But cf. In re* Orfa Securities Litigation, 654 F. Supp. 1449 (D.N.J. 1987) (applying the law of the principal place of business of a corporation and the place where the illegal acts occurred, rather than the law of the place of incorporation, to govern the fiduciary obligations of corporate officers that traded the stock of a Utah corporation). The result in *McDermott* has been criticized, and legal scholars continue to posit various scenarios in which a state other than the state of incorporation would be constitutionally free to regulate the so-called "internal affairs" of a corporation. For example, Kozyris argues that after Edgar v. MITE Corp., 457 U.S. 624 (1982), the result in *Western Airlines v. Sobieski* may be unconstitutional under the commerce clause unless all the regulated corporation's contacts (other than the place of incorporation) are in the regulating state. Kozyris, *supra* note 190, at 34, 55; *see also* Richard Booth, *The Promise of State Takeover Statutes*, 86 MICH. L. REV. 1635

Clearly, the forum viewed its own policy as better. The case thus presented a real conflict between California's and Delaware's conceptions of the better law. It also presented a real conflict between the multistate policy of enforcing the better, just law to vindicate the forum's interest in regulating business affairs centered in the forum and the multistate policy of promoting diversity by granting comity to the policies of the state where the corporation chose to incorporate. But, the case also highlights a real conflict about the meaning of comity. Does application of forum law illegitimately interfere with the ability of Delaware to govern relations among shareholders who establish corporations under its incorporation law? Does it illegitimately constrict the freedom of shareholders to decide where they will incorporate? Or, conversely, does application of Delaware law illegitimately interfere with the ability of California to regulate business affairs that have a substantial effect on the California economy? Does application of the law of the place of incorporation effectively delegate to Delaware the power to rule the nation?

These ambiguities in the notion of comity remind us that application of either state's law will interfere with the policies of the other. They also remind us that invocation of "critical territorial contacts" cannot decide this case for us; the territorialists must explain to us whether the critical contacts are with the principal place of business or with the place where incorporation papers are filed. To answer this question, they need to explain whether or not a business can evade the regulatory requirements of the place where it does business simply by announcing that it resides in another state. Should shareholders be free to determine which state's law will govern their relations among themselves, thereby obliterating entirely the power of the place where they do business to regulate their governance structure?

Initially, application of Delaware law would appear to further interests in comity. The California forum could engage in restrained interpretation of its regulatory policy by altruistically deferring to Delaware's policy of granting a liberty interest in freedom of contract to shareholders to freely determine their governance structure. Deference to foreign law in this situation by the California court would show an admirable willingness to live in a multistate system by enforcing legal relationships centered in other states that the forum views as oppressive or socially harmful.

But, this initial appearance of comity is deceiving. Fortunately—or unfortunately—deference to the law of the place of incorporation will

---

(1988); Mark Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735 (1988); Kozyris, *supra* note 190, at 55-76 (explaining circumstances in which it may be legitimate for a state other than the state of incorporation to regulate internal corporate affairs); Arthur Pinto, *The Constitution and the Market for Corporate Control: State Takeover Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699, 766-67 (1988) (criticizing aspects of the *McDermott* case).

change the behavior of corporations nationwide. Boards of directors that want to minimize the power of minority shareholders will attempt to change the state of their incorporation to the free haven of Delaware; given management's influence over most directors and stockholders, they may succeed quite often. Delaware seeks to have as many corporations incorporate (and operate) in Delaware as possible, as the fees and taxes generated by incorporation add significant revenues to the state budget.[192] To this end, Delaware lowers or abolishes many forms of regulation that hamper management or interfere with its ability to protect itself from being dislodged.[193] The likely result is that hundreds of corporations will change their state of incorporation to Delaware. Other states, surveying the positive economic effects of Delaware policy and recognizing their own desire for corporate fealty, subsequently lower their standards to rival Delaware's. The competition among states thus starts a pathological race to the bottom.[194] Delaware, with its rock bottom standards, effectively rules the nation. The result, far from an advancement of interests in diversity, is one of national uniformity.[195] And it may be uniformity of an unattractive kind—not uniformity of the better law, but of the worst law.[196] Thus, we must ask the question: When

---

[192] *See* Davis, *supra* note 111, at 32 (explaining that "[b]y 1929, corporate fees and taxes provided 42.5 percent of state income").

[193] *See, e.g.*, DEL. CODE ANN. tit. 8, § 203(a) (Supp. 1988) (regulating takeovers of corporations incorporated in Delaware by requiring approval by the board of directors for stock purchases resulting in 15% of a target's voting stock unless the acquiror purchases 85% of the target's stock). *See generally* Pinto, *supra* note 191.

[194] I get this phrase from Nell Minow. There is a heated debate about whether a free market in state incorporation statutes works to benefit shareholders or to harm them. For arguments that this arrangement creates a race to the bottom, see William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). For arguments that the system maximizes shareholder interests, see Frank Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540 (1984), Daniel Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47, 68; Daniel Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913 (1982); Ralph Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). Whether protection of shareholders' interests similarly protects the interests of workers, or maximizes the general welfare, is another question.

[195] *See* Richard Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987) (arguing that to interpret CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987), as requiring application of the law of the state of incorporation, would, as a matter of constitutional law, wrongfully result in the "Delawarization" of state corporate law).

[196] Of course, scholars disagree vehemently about whether competition among states for corporate allegiance through amendment of incorporation laws helps or hurts shareholders and the economy at large.

does deference of the law of another state actually further interests in preserving separate political communities or social laboratories and when does it promote uniform bad law?

On the other hand, application of the supposedly better forum law does not solve the comity problem either. For example, if a few states adopt plaintiff-compensating policies because their legislatures are controlled by their state trial lawyers' associations, their courts may become havens of multistate products liability lawsuits. As the flurry of tort reform legislation of recent years shows us, many people believe that the sentimental policies of a few judges who cannot see around hapless victims are ruining the economy of the nation. Whether they are right or wrong, we should worry about whether the tort victims' ability to choose to sue in plaintiff-favoring states allows these states to rule the nation under the guise of promoting justice, and results in a different—but no less perverse—race to the bottom.

What kind of political community is it in Delaware to which California should defer? If most of the shareholders and business activities of companies incorporated in Delaware are located in other states, what social relationships *in Delaware* does Delaware law protect? Is it the community of pieces of paper in the offices of the Delaware Secretary of State? Does the Delaware law represent an effort of the people of Delaware to constitute themselves as a normative community? Or does the community of Delaware taxpayers merely want to decrease its taxes? Is this enough to justify California's acquiescence in what it views as inefficient and unjust relationships among the resident owners of businesses whose real activities are centered in California? Should shareholders scattered around the country have the right to declare allegiance to Delaware and thus obtain the benefits of Delaware law at the expense of those who claim the protection of the law of their home state?

Identifying what we mean by comity requires us to consider what kinds of issues relate to the idea of a political or normative community. We must identify the kinds of social relationships that the notion of comity should protect. What kinds of policies must we tolerate in the interest of promoting diverse polities? When does a state constitute a normative community? If real conflicts arise between the abilities of different states to further their conceptions of justice, what forms of accommodation should we seek? These questions raise complexities about the meaning of self-government, democracy, tolerance, and political pluralism. They cannot be answered by appealing to the abstract notions of the "most significant relationship" or "comparative impairment" or "real interests." They require us to define, not abstractly, but in context, what we mean by social justice and freedom in the relations among overlapping normative communities.

### 3. Discrimination in Choice of Law

In my discussion so far, I have often referred to the argument that it is wrong for a state to discriminate against a party simply because she is a

nonresident. Discrimination issues raise real conflicts in multistate cases. Yet, the argument that someone is being treated differently "simply" because she is a nonresident begs the question. Everyone agrees that residency is often a legitimate reason for distinguishing among legal claims. Nonresidents are never treated differently from residents in conflicts cases "simply" because of their residency; they are treated differently because the scope of state policy in conflicts cases may legitimately turn on domicile. The forum may sometimes legitimately apply its policies to benefit residents only, as in the right to vote, receive welfare, or attend the state university at a subsidized cost. In these cases, the forum legitimately applies the claimant's home state's policy to adjudicate her rights.

In a widely-noted article, Professor Ely argues against interest analysis on the grounds that it promotes discrimination based on residency, specifically discrimination against nonresidents.[197] He rejects the notions that "a state's interest in protecting people extends *only* to protecting its own [residents]" or that "a state has a greater interest in protecting its own citizens or residents than it has in protecting others."[198] He contends that the primary goal of interest analysis is to identify false conflicts and that the primary method of identifying false conflicts is to limit the forum's plaintiff-protecting policies to residents. Without this limitation of the forum's interest in protecting its own residents, almost every case would present a true conflict.[199] He then concludes that the only alternative to finding a false

---

[197] Ely, *supra* note 38. Ely argues that discrimination against nonresidents through conflicts law should, in certain cases, be held to violate the privileges and immunities clause. *Id.* at 181-83, 186-87. Although the Supreme Court is highly unlikely to invalidate a choice of law on the grounds that it violates this clause of the Constitution, conflicts scholars like Ely nonetheless continue to argue that nondiscrimination policies should be applied, not as a matter of constitutional law, but as a matter of state common law of conflicts. *See also* Brilmayer, *supra* note 160, at 409 (asserting that the sharing of benefits and burdens of state law constitutes the basis for the state's coercive power towards nonresidents); Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Insider-Outsider"*, 134 U. PA. L. REV. 1291, 1302 (1986) (arguing that it is discriminatory to presume without adequate justification that forum law was intended to benefit only forum residents). *See generally* Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U.L. REV. 431 (1987); Gerald Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 314-28 (1987) (both discussing discrimination issues in choice-of-law cases).

[198] Ely, *supra* note 38, at 173 (emphasis in original).

[199] Ely argues:

> If, however, the state with the plaintiff-protecting rule is taken to have an interest in protecting the plaintiff irrespective of where he is from, and the state with the defendant-protecting rule is taken to be interested in protecting the defendant irrespective of where he is from, both states will necessarily be interested and the conflict will thus necessarily be true.

conflict is to resolve the true conflict by resort to a territorial rule like the place of the injury or the place of the conduct or, in some common domicile cases, the place where the relationship is centered—the common domicile.[200] Thus, the only alternative to a domiciliary preference, in Ely's view, is to return to some version of the traditional territorial rules which would define interests "entirely in terms of the geographical locale of one or another critical event."[201]

In our earlier hypothetical involving a plane crash in Washington, D.C., we assumed a products liability suit against the manufacturer of the plane, located in Washington State. The defendant claimed immunity from damages for pain and suffering based on its reliance on the law of the place where the plane was manufactured. This case presents two possible forms of discrimination against nonresidents: (1) discriminating against nonresident plaintiffs by denying them the benefits of forum law; and (2) discriminating against nonresident defendants by giving resident plaintiffs, but not nonresident defendants, the right to claim protection under the law of their home state.[202] Ely focuses his concern on the first form of discrimination and fails to address the second.

---

*Id.* at 176 (emphasis omitted); *cf.* Mark Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 896 (1988) (stating that "[i]f the forum has an unusually protective law, a citizen is at an advantage in dealing with out-of-staters, because in suits in the forum, that law only protects the citizen").

[200] Ely, *supra* note 38, at 177-78, 187, 208-10.

[201] *Id.* at 177. Ely fails to see that the forum could resolve the true conflict by resort to substantive rules promoting the better law. Even the recent choice-of-law rules proposed by Sedler, Reese, Cavers, and Weintraub all promote the application of plaintiff-favoring law in narrowly defined circumstances. Perhaps Ely ignores this possibility. He assumes two things: (1) that plaintiff-protecting policies will ordinarily encourage the forum to apply its own law; and (2) that the plaintiff will ordinarily be domiciled in the forum. Thus, he might have concluded that resorting to substantive rules promoting the better law will ordinarily result in an illegitimate preference for the interests of the local domiciliary. Of course, Dean Ely fails to recognize that the plaintiff may not be a local domiciliary at all. For example, in our air crash hypothetical, a domiciliary of New Jersey would rather sue in the District of Columbia than in Washington State and claim that the forum had an interest in compensating anyone harmed in the District, rather than just an interest in compensating residents. *See supra* note 150 and accompanying text.

[202] The first discriminates against nonresident plaintiffs by denying them the benefits of forum law, and the second discriminates against nonresident defendants by giving resident plaintiffs, but not nonresident defendants, the right to claim protection under the law of their home state. *See* Brilmayer, *supra* note 160, at 394-95; *see also* Marc Klein, *A Critical Analysis of New Jersey's Domicile-Driven Choice of Law Methodology*, 17 SETON HALL L. REV. 204, 208 (1987) (arguing that preference for the interests of a resident plaintiff over the interests of a nonresident defendant effectively discriminates against the foreign defendant by allowing the plaintiff, but not the defendant, to rely on the law of her home state).

The first form of discrimination would occur if the forum grants pain and suffering damages to plaintiffs domiciled in the District of Columbia but withholds such damages from plaintiffs domiciled in Washington State. It might do so, under widely-shared views of how to define state interests, because the forum is interested in compensating its residents in order to keep them off the welfare rolls; however, since the Washington State plaintiffs live in a state that is willing to tolerate undercompensated resident victims as a means of protecting its resident manufacturers from disastrous liability, the forum might defer to the interests of the state of the common domicile. Ely is concerned that this decision to discriminate against the Washington plaintiffs based on their residence might be illegitimate. It is illegitimate, he contends, for the District of Columbia to adopt a policy of full compensation for people injured by defective products brought into the District and then to limit this protective policy to domiciliaries.[203] Under interest analysis, the Washington plaintiffs lose the benefits of the forum's plaintiff-favoring law because the forum defines its own protective policy as extending only to residents; it has no interest in protecting nonresidents. He argues, moreover, that the only way interest analysis generates false conflicts, and therefore determines the results in cases, is by promoting such discriminatory policies. Without distinctions based on domicile, every case will present a true conflict.[204] Thus, the forum should be interested in compensating all persons injured in its borders, residents and nonresidents alike. In that case, we have created a true conflict between the forum's interest in protecting anyone harmed in the forum and the foreign interest in protecting its manufacturer from ruinous liability. And the only way to resolve this true conflict is by resort to territorial rules that the interest analysts had hoped to discard.[205]

---

[203] *See* Brilmayer, *supra* note 160, at 402, 409-13 (arguing that nonresidents have a right to share in the benefits of forum law if they have significant contacts with the forum); *Myth of Legislative Intent*, *supra* note 92, at 410 (criticizing the "blatant parochialism" of failing to extend the benefits of forum law to nonresidents).

[204] *See* Ely, *supra* note 38, at 176-77. While I agree with Ely that almost every case presents what we should understand as a true conflict, I do not agree that this conclusion means that we must retreat from interest analysis back to territorial rules. The "place of the injury" rule was abandoned because it arbitrarily frustrated both the justified expectations of the involved parties and important state policies. The need to choose between competing policies means that we should discuss the competing policies directly rather than reject policy analysis entirely. Ely seems not to recognize that recent trends are not to pick the law of the territory where crucial events happened, but instead to choose the better law, usually plaintiff-protecting law, in narrowly defined circumstances. *See supra* note 201. This result is relatively mechanical, but it turns both on an underlying policy analysis of which rule is better and a substantive choice of when this policy should prevail at the expense of diversity.

[205] Ely, *supra* note 38, at 176-78.

The second form of discrimination against the nonresident defendant occurs when the forum automatically applies its law to resolve what it sees as a true conflict.[206] If we correct the illegitimate discrimination against nonresident plaintiffs and hold that forum plaintiff-protecting law applies to all persons injured in the District of Columbia, then the case presents a true conflict between the interest of the forum in compensating the injured plaintiffs and the interest of Washington State in granting the Washington manufacturer immunity from liability. Ely argues that this kind of case, which he calls the " 'head-on' configuration," is "the classic embarrassment for interest analysis," presumably because the case cannot be resolved by identifying a false conflict.[207] The forum will ordinarily resolve such a "head-on" true conflict by applying forum law, thus creating a form of discrimination that Ely neglected to analyze—the automatic preferrence of the interests of its residents over the interests of nonresidents.[208]

---

[206] Ely does not address this form of discrimination because he thinks that true conflicts were unresolvable under interest analysis except through thoroughly arbitrary rules, by which he meant applying forum law. "All head-ons and most crisscrosses . . . are deadlocked *however* you define interest: as limited to helping the state's own, as extending to everyone, or as I have suggested. The interest analysts' 'ways out' of these two sorts of deadlock either are *admittedly arbitrary knotcutters, or they are delusions*." *Id.* at 212 (latter emphasis added). This is quite an odd position for Ely to take. His own answer to true conflicts is to return to some form of territorial rule, like the place of the conduct or the place of the injury rules. Yet, it is hard to see why this solution is any less "arbitrary" than the law of the forum. It is certainly a "knotcutter," but, if anything, it is far more arbitrary than forum law; after all, the forum is adjudicating the dispute, and forum law, at the very least, has the advantage of furthering the forum's sense of justice and good social policy.

[207] *Id.* at 200.

[208] It is important to note that application of forum law will not necessarily benefit residents; it may also regulate or impose liabilities on residents. Ely assumes that, under interest analysis, the forum will refuse to impose liabilities on a resident defendant when the plaintiffs come from defendant-protecting states. He argues that this creates another kind of discrimination against nonresidents: the failure of the forum to apply its regulatory laws to impose liability on a resident defendant when the plaintiff resides in a defendant-protecting state that, hypothetically, grants its resident no right to compensation. Thus, if the defendant had manufactured the plane in the District of Columbia, a defendant-regulating or plaintiff-protecting jurisdiction, and all the plaintiffs were domiciled in Washington State, a defendant-protecting state, Ely argues that interest analysts would fail to extend forum plaintiff-protecting policy to these plaintiffs. *Id.* at 196-97.

However, this is plainly wrong. If the defendant's local activity causes a local risk of harm—after all, the plane crashed in the forum—a forum using interest analysis would almost certainly find a deterrent interest in forum law and apply the plaintiff-compensating rule for deterrent purposes. If the forum determined that the law in question was compensatory only, and not deterrent—as it might with damages for pain and suffering—then it is an open question how this situation would be treated

We should note that, from Ely's perspective, these two problems of discrimination create an insoluble dilemma for interest analysis. If the forum solves the first problem—discrimination against nonresident plaintiffs—by extending its protective policy to include all persons injured in the forum, it creates a true conflict between the plaintiff-protecting forum law and the defendant-protecting law of the place of manufacture. This true conflict cannot be resolved without either retreating to territorial rules—and thus abandoning interest analysis entirely—or by engaging in further discrimination against the nonresident defendant. The forum appears to have no choice but to discriminate either against the nonresident plaintiffs or against the nonresident defendant. Thus, from Ely's perspective, the only alternative to illegitimate discrimination is to return to territorial rules.[209]

Discrimination claims always require a comparison between two classes of claimants with similar characteristics who are treated differently. This different treatment for like classes is viewed as illegitimate. Traditionally, one of the classes is assumed to be the norm and the other is viewed as being subjected to less favorable, and therefore discriminatory, treatment.[210]

There are at least three different ways to respond to a discrimination

---

under interest analysis. The court could proceed as Ely suggests and claim no forum interest in full compensation for plaintiffs domiciled in a state willing to live with undercompensated plaintiffs.

The court is more likely to interpret the case as either a false conflict or an unprovided-for case, and wind up applying forum law to benefit the out-of-state plaintiffs and assess damages to the local defendant. It would do so by claiming that the defendant-protecting policy of the plaintiff's domicile applies only to protect local defendants from ruinous liability. Because no local manufacturer is present, the plaintiff's state has no interest in applying its defendant-protecting policy. Moreover, it has no interest in denying compensation to its own resident plaintiffs if such compensation has no harmful effects on a local defendant. The forum will then either interpret forum law as intended to regulate the conduct of a local defendant to protect all persons who come into the forum or will extend its compensatory policy to the nonresident plaintiffs. If the forum claims no interest in compensating the foreign plaintiffs, the case can be considered as unprovided-for—plaintiffs lose because no state is interested in compensating them. But, the forum is almost certain to resolve such a case by application of plaintiff-favoring forum law. It will apply local law because it is better law from the forum's point of view, and, as Ely noted, discriminating against nonresident plaintiffs in such cases would probably be seen as unfair and parochial.

[209] Ely notes that the rules we adopt should be narrower than the broad rules of the First Restatement. Those broad rules were too clumsy and mechanical and generated results that judges could not live with; thus, these rules were doomed to fail. Ely thus supports other scholars' calls for a return to rules, albeit more narrowly defined rules. *Id.* at 212-17.

[210] *See* Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 38-39 (1987).

charge. The first is to admit that the two classes of claimants are entitled to the same treatment. The second explains that the two classes of claimants should be treated differently because they are not similarly situated. The third answer shifts the frame of reference to reconceptualize who is being discriminated against. This last argumentative technique ordinarily introduces other classes of claimants into the analysis and maintains that to remedy one kind of discrimination may involve us in perpetrating another, arguably worse, form of discrimination. Employing each of these techniques, Professor Weinberg answers Ely's charges of discrimination in modern conflicts analysis.

Ely complains that it is wrong for the forum to limit its protective policies to residents. Weinberg responds by using the first two techniques. She first explains that Ely misunderstands the position of most modern conflicts scholars; instead of limiting forum policy to protecting residents, they "are virtually unanimous in recommending that the interested forum extend the benefit of its laws to a nonresident . . . ."[211] At least where the forum has a deterrent interest inherent in its plaintiff-protecting (or defendant-regulating) policy, this protection should be extended to grant damage remedies to nonresidents as well as residents. Thus, she rebuts the charge of discrimination by claiming that, at least in the case of a behavior-regulating policy, modern conflicts analysis would treat residents and nonresidents the same.[212] Thus, in our airplane crash case, both forum residents and nonresidents would be given the advantage of forum damage remedies intended to induce the out-of-state defendant to produce safe airplanes.

Weinberg then explains that if the rule is compensatory, rather than regulatory, the forum is justified in treating residents and nonresidents differently because they are not similarly situated. This represents the second kind of answer to a discrimination charge. The nonresident in this situation, she argues, is rationally distinguishable from the resident as being beyond the scope of the forum's legislation.[213] Thus, if the forum interprets pain and suffering damages as merely compensatory, rather than conduct-regulating, the forum is justified in denying compensation to nonresidents living in a state whose policy would protect the nonresident defendant. The forum is justified in insisting on full compensation for its residents under its own substantive tort policy. It would ordinarily have no reason not to extend this protection to nonresidents injured in the forum. But, in this case, the nonresident plaintiffs are denied compensation in deference to their home state's interest in protecting the local defendant. They have some control

---

[211] Weinberg, *supra* note 7, at 597 n.6.

[212] *Id.*

[213] *Id.* at 596 n.4, 597 n.6; *see also* Sedler, *supra* note 124, at 626-27 (arguing that it is not unfair to treat people differently if there is a reasonable basis for the different treatment).

over their own state's law, and, if the accident had occurred on arrival at their home state, they would have had no cause to complain if their home state's law were applied to limit the local defendant's liability. Moreover, to remedy the supposed discrimination against these nonresident plaintiffs would entail discriminating against the nonresident defendant, a manufacturer operating in their home state. The forum refuses to extend the forum compensatory policy to them not because they are nonresidents but in deference to both the multistate interest in comity and their home state's substantive interest in limiting the defendant's liability.

As to the second form of discrimination, Weinberg would argue that applying the plaintiff-favoring law of the forum treats the nonresident defendant the same as a resident defendant would be treated who engaged in the same behavior.[214] Moreover, any other result would irrationally distinguish between resident plaintiffs harmed by resident manufacturers and resident plaintiffs harmed by nonresident manufacturers.[215] This answer to the discrimination charge employs the third technique, shifting the frame of reference by making new comparisons between the litigants and third parties. Weinberg concludes that the only way to avoid illegitimate discrimination is to solve the bulk of conflicts cases by applying the better (forum) law. This result will reduce arbitrary discrimination among different classes of plaintiffs in the forum and will treat defendants fairly by imposing obligations that further policies supposedly shared by all states.

This debate between Weinberg and Ely cannot be resolved in the terms in which they have argued it. They have both taught us the useful lesson that modern conflicts law raises important questions about discrimination based on domicile. But their different interpretations demonstrate that it is simply not a question of who is being discriminated against in a conflicts case and whether the discrimination is justified. To answer discrimination questions, we need to address substantive arguments about which claimants are similarly situated, when differently situated claimants are entitled to different treatment, and from whose point of view we will answer these questions.[216]

Both Weinberg and Ely make the same mistakes in addressing discrimination questions: (1) they assume a particular person as the norm to whom others will be compared—without explaining why that person is taken as the

---

[214] Weinberg, *supra* note 7, at 616-17.

[215] Weinberg uses the case of Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964), to illustrate this distinction. She explains that for an Oregon court to apply California law to validate a contract between an Oregon spendthrift and a California creditor would lead to an irrational distinction between two classes of its citizens. Such an application of foreign law would cause Oregon to protect the assets of Oregon families with spendthrifts who contract in Oregon, but not the assets of Oregon families whose spendthrifts contract out-of-state. *Id.* at 605.

[216] *See* Minow, *supra* note 210, at 38.

norm—instead of understanding difference as a question of relationships among different classes of persons; and (2) they assume an objective answer to the question of which differences from the norm justify differential treatment instead of justifying their description of different classes of persons as similarly or differently situated.[217]

On the question of discrimination between resident and nonresident plaintiffs, for example, Ely assumes that resident plaintiffs constitute the norm and that the nonresident plaintiffs are the class being compared to the norm. He then argues that the nonresident plaintiffs should be treated like resident plaintiffs on the assumption that residence cannot constitute a legitimate reason for differential treatment. In contrast, Weinberg assumes that, at least for loss-allocating rules, residence does constitute a legitimate reason for different treatment between resident and nonresident plaintiffs. Thus, she could argue either that residents and nonresidents are differently situated and thus are not entitled to the same treatment, or that residents and nonresidents are actually receiving the same treatment because their rights are determined by the laws of their respective home states.

On the question of discrimination against the nonresident defendant, Ely would be concerned that application of forum law to resolve a true conflict illegitimately gives resident plaintiffs the right to protection under the law of their domicile while denying the nonresident defendant the similar right to protection under the law of its home state. Thus, in this scenario, the norm is defined by reference to the plaintiffs. Ely contends that it is discriminatory to allow the plaintiffs, but not the defendant, to rely on the law of the place where they reside. The only nondiscriminatory result, according to Ely, is to adopt rules that refer to territorial contacts other than domicile. In contrast, Weinberg argues that the relevant comparison is not between resident plaintiffs and nonresident defendants but between resident defendants—the norm—and nonresident defendants—the class being compared to the norm. She argues that nonresident defendants should be treated like resident

---

[217] *See id.* at 34-54. Professor Brilmayer asks us to address the question: "Under what circumstances may nonresidents be treated differently from residents?" Brilmayer, *supra* note 160, at 393. This way of stating the question fails to emphasize that what it means to treat nonresidents differently is itself problematic. Denying nonresidents the benefit of forum law could be seen as treating them differently from residents—because residents, but not nonresidents, are protected by forum law—or the same as residents—because nonresidents, like residents, are relegated to the law of their home state. Brilmayer recognizes that

> [d]ifferential treatment [of nonresidents] is not necessarily objectionable because at times differential treatment actually amounts to deference to the visitor's home state law. As noted earlier, in the interstate context protection of outsiders sometimes requires treating them differently from insiders rather than treating them the same.

Brilmayer, *supra* note 197, at 1322.

defendants; they both should be subject to liability for harming resident plaintiffs.

Weinberg's and Ely's solutions to discrimination problems are just as problematic as their analyses of those questions. Their solutions beg crucial questions. Ely retreats to territorial rules on the ground that they appear more neutral and evenhanded than interest analysis; yet, he fails to confront the difficult question of which territorial contacts to privilege and why. If he had addressed these questions, he would have understood that no choice of law approach can escape from the need to make substantive choices about who is similarly situated and which differences deserve different treatment.

Weinberg's answer is much closer to the mark. She asks us to treat multistate cases the way we treat domestic cases. In domestic cases, we ordinarily engage in substantive debate about the relative interests of the parties and the competing principles and policies we want the law to promote.[218] Multistate cases differ from domestic cases only because multistate contacts introduce new individual interests and special multistate policies. Yet, by identifying multistate policy almost entirely with the norm of applying the better law, Weinberg oversimplifies these new interests and policies. She fails to recognize sufficiently both the competing multistate norm of comity and the fact that we have conflicts cases precisely because two states differ on what is the better law.[219]

Any result we choose in our airplane crash case will arguably be "discriminatory" in some sense. If we apply forum law to benefit plaintiffs who were injured or domiciled in the forum, we discriminate against the nonresident defendant by denying it the right to rely on the protective law of the place where it does business. Yet, if we apply the nonforum law to benefit the nonresident defendant, we grant a higher level of protection to plaintiffs injured in the forum by resident defendants than to plaintiffs injured by

---

[218] Weinberg, *supra* note 7, at 600.

[219] Weinberg does recognize that "it is classic conflicts reasoning that forum law should not be construed so as to surprise the nonresident without ample notice of it." *Id.* at 596-97. However, Weinberg gives little weight to the interest in preventing unfair surprise; she believes it is almost always outweighed by the better policy of requiring defendants to compensate victims when they engage in wrongful conduct. Being held to account for such conduct, she argues, should not surprise them: "The expectations of tort defendants are that, unless there is some defense unanticipated by them, they or their insurer will have to pay for the consequences of their tort; that is why they tend to insure." *Id.* at 622. Although I tend to agree with this substantive value choice, I see the conflict between the better law and comity as more troublesome than Weinberg does. And, at any rate, justifying the subordination of comity concerns to better law requires a more adequate defense than Weinberg has given. As I have argued, reference to shared policies is an insufficient normative argument to identify which of the competing state substantive policies is better. *See supra* Part III(A)(3).

nonresident defendants. Similarly, if we allow the nonresident defendant to rely on the law of the place where it acted by denying a remedy to nonresident plaintiffs, we discriminate against nonresident plaintiffs by failing to grant them the protection of forum law that we extend to resident plaintiffs. Yet, if we treat nonresident plaintiffs the same as resident plaintiffs, we discriminate against the nonresident defendant by denying it the protection of the law of the place where it resides.

These issues cannot be resolved by hypostatizing "crucial territorial contacts." Any contacts we choose will arbitrarily exclude alternative contacts that have equally valid claims as the most crucial. Nor can these issues be resolved by resort to the fiction that all states share basic policies. States have conflicting laws precisely because they do not agree on which policy is better. Multistate cases require us to focus on the conflicting interests of the parties in relying on the law of the place where they live, acted, were injured, or established a relationship. They also require us to address competing multistate interests in comity and promoting the better law, as well as competing notions of which is the better law. This means that the question of when a choice of law is discriminatory effectively restates the conflict between multistate interests in uniformity and diversity. To answer discrimination questions, we must face directly both the conflicting interests of the parties in relying on the protective law of their separate states and the conflicting strands of multistate policy.

## IV. UNDERSTANDING CONFLICTS CASES AS THE CONFLICTS THEY REALLY ARE

> Each group must accommodate in its own normative world the objective reality of the other.[220]
>
> Robert Cover

> Eteocles, like Agamemnon, faces a situation in which he has, it appears, no innocent alternative. . . . [W]hat we, with the women of the Chorus, feel most clearly is . . . the perversity of the king's imaginative and emotional responses to this serious practical dilemma. He appears to feel no opposing claim, no pull, no reluctance. He goes ahead with eagerness, even passion. It is around these deficiencies of vision and response that the blame of the Chorus centers . . . . Whether or not they would have him choose differently, they are clear that he has made things too simple. He has failed to see and respond to his conflict as the conflict it is . . . .[221]
>
> Martha Nussbaum

---

[220] Cover, *supra* note 152, at 28-29.

[221] M. NUSSBAUM, *supra* note 2, at 39.

A. *False Answers to Real Conflicts*

Conflicts cases raise fundamental questions about the substantive norms governing social relationships and the relations among neighboring political communities. Both courts and scholars are aware of the complexities these cases raise. As a result, most modern conflicts scholars emphasize a subtle, multi-layered policy analysis of conflicts cases.

But an awareness of these complexities is also the reason why many conflicts scholars seek to escape from these complexities by retreating to a form of analysis that effectively denies them. Some do so by rejecting analysis of substantive policies altogether, nostalgically reviving simplistic and unworkable answers based on privileging certain territorial contacts. Yet they fail to explain adequately why we should privilege certain territorial contacts over others, or why the contacts they pick are the most significant. Moreover, these scholars often presume a consensus about which contact is most significant when that consensus no longer exists. In the absence of such a consensus, we have no choice but to engage in discussion of the policy goals of conflicts law. Those who want to revive territorial approaches are so overwhelmed with the complexity of policy choices that they seek to return, at all costs, to a world where we simply ignore them. Yet the world they envision is already gone; Pandora's box can no longer be closed.

Those conflicts scholars who reject territorial analysis do so on the grounds that it formalistically defines some contact or aggregation of contacts as critical without justifying this choice by evaluating underlying policy concerns. But these same scholars have likewise formalized the policy analysis. They argue that compensatory policies in both contract and tort law favor widely shared goals of compensating plaintiffs, deterring wrongful conduct, and promoting reliance on agreements. But how do they know this? They have engaged in formalism by identifying these policies as "shared" or "basic" or "emerging" or "prevalent" or "better," without confronting the conflicting values and policy arguments that are faced by those who debate the substantive content of the law. They have formalized state interests by often ignoring moral interests and interests in liberty. To figure out which law is better or which policies should prevail, we would need to engage in the kind of moral, political, and economic analysis in which torts and contracts scholars engage. These scholars recognize that the law poses choices between alternative legal rules and that each area of the law represents a patchwork of compromises between competing interests and principles. Conflicts scholars should follow their lead. Sloganeering about interests in compensation, deterrence, and party autonomy, and proclaiming these goals to be the "basic policies" of tort and contract law are inadequate and formalistic approaches to resolving conflicts problems.

From reading conflicts scholarship, one would have no idea that there are fierce battles among torts scholars on the choice between strict liability and

negligence,[222] on the efficient level of damages,[223] and on the justice of loss-spreading. Nor would one have any idea that Grant Gilmore wrote a book entitled *The Death of Contract*,[224] or that the goal of contract law in the twentieth century has moved steadily away from freedom of contract to the regulation of contract terms as a means of protecting the weaker party against unequal bargaining power and promoting social justice.[225] There are no universally accepted "basic" policies underlying substantive law that can determine the outcome of every conflicts case. Conflicts scholars—if anyone—should recognize that law is an arena of conflict, of competing principles and policies, contradictory moral impulses, and wrenching dilemmas. In order to determine the "relative strength" of competing tort and contract policies and to determine which policies are better, and therefore basic, conflicts scholars need to address more fully the underlying substantive concerns of the conflicting laws at issue. After all, the fact that there is a conflict between the two laws gives us substantial evidence that the question of which law is better or more basic is not simple. It means that there is a real conflict in American society about which social relationships promote justice and the general welfare.

We should also recognize the conflict among conflicts scholars about how to determine the appropriate balance between multistate policies favoring diversity and tolerance and those favoring uniformity and substantive justice. We cannot resolve these conflicts by reference to a shared sense of what constitutes justified expectations or of what constitutes an illegitimate imposition of power by one state over another. We need to face the question of what kind of diversity is right for our multistate system. We also need to face our competing impulses to marginalize bad laws and to give them effect despite their extraterritorial implications.

None of the prevailing approaches to conflicts law requires us to confront these questions directly.[226] For example, the "most significant relationship"

---

[222] *See, e.g.*, Davis, *Strict Liability or Liability Based on Fault? Another Look*, 70 U. DAYTON L. REV. 5 (1984); Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

[223] *See, e.g.*, Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL ADVOC. 319 (1986); Note, *Medical Malpractice Damage Caps: Navigating the Safe Harbors*, 65 WASH. U.L.Q. (1987).

[224] GRANT GILMORE, THE DEATH OF CONTRACT (1974) (arguing that classical contract theory is being subsumed by the general principles of tort law imposing unbargained-for obligations).

[225] *See* Beermann, *supra* note 139, at 553 (stating that the "false conflict in the cases and literature between facilitation of market transactions and regulation to achieve social aims has been transcended, largely due to the realization that social aims are behind all of contract law").

[226] Several commentators have hinted at such an approach. *See Brilmayer, Myth of Legislative Intent, supra* note 92, at 431 (suggesting that interest analysts clarify

test fails to clarify the value choices involved in evaluating the significance of different contacts. When a defendant-corporation relies on the immunizing law of the place where it acts, its relationship to the law of that place is significant. When an injured victim claims to fall under the protective umbrella of the place where she is injured or where she lives, her relationship to the law of that place is also significant. To determine which relationship is more significant, we must make hard choices between both the substantive norms of freedom of action and security and between the competing political processes and norms of separate states. We must face the conflicts among the factors we are asked to consider. How do we resolve the conflict between the policy of pursuing the (arguably) better law—what the Second Restatement calls "the basic policies underlying the particular field of law"—and the policy of promoting comity or diverse political communities—what the Second Restatement calls "the needs of the interstate system?" The Second Restatement's silence regarding the priority of these policies mystifies rather than clarifies these choices.

Recently, scholars have come much closer to confronting value choices in conflicts law by proposing choice-of-law rules that promote specific substantive policies. Scholars have explicitly stated that conflicts law should further certain values in various social contexts. Weintraub proposes choice-of-law rules to govern products liability cases that, in certain classes of cases, favor loss-spreading.[227] Reese proposes a similar rule for airplane crash cases.[228] Other scholars advise enforcing choice-of-law provisions in commercial contracts to promote the ideal of freedom of contract.[229] These developments go in the right direction. Yet, these scholars fail to give adequate justification for the value choices they make. The mere fact that these results accurately describe the choices courts make is not a sufficient reason to approve of what they are doing. Moreover, these scholars do not address the conflict between the multistate policy of applying the better law and the multistate policy of fostering diversity.

Modern policy-oriented approaches to conflicts questions, like interest or false conflict analysis, the "most significant relationship" test, comparative impairment analysis, Cavers' principles of preference, or Leflar's choice-influencing considerations, take a form characteristic of legal process approaches to legal reasoning.[230] In other words, they attempt to define the

---

the normative bases on which their analysis rests); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 563 (1984) (contending that "[n]mormative premises are unavoidable in legal reasoning"); *see also* George, *supra* note 160, at 472 (advocating a "shift from process rhetoric to outright debate over competing substantive values").

[227] R. WEINTRAUB, *supra* note 66, at § 6.29.

[228] Reese, *supra* note 68, at 1323.

[229] *See* W. COOK, *supra* note 29, at 389-432.

[230] *See* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 505-08, 518-19 (1988).

spheres of power of different government actors without directly addressing the wisdom or justice of the rules in force. Some of these approaches do this by asking us to consider the relative strength of competing substantive policies of the affected states, rather than their wisdom. For example, the comparative impairment test asks us to determine which state's policy would be most impaired if its law were not applied in the case at hand. This test assumes that the question of the extent of impairment is a question that can be answered without evaluating the content of each state's policy or determining which substantive policy should generally be preferred in a multistate system. Other approaches, like the "most significant relationship" test and Leflar's choice-influencing considerations, simply list factors to be weighed, rather than confronting the fact that these factors identify contradictory principles, and therefore may pull us in opposite directions. Such approaches ask us to trust judges to identify an immanent social or professional consensus on these questions. Still other approaches, like Cavers' principles of preference, appeal primarily to existing practice in the courts to formulate choice-of-law rules. These approaches presume that reasoned elaboration of existing practice will reveal emerging patterns of rational consensus.

All of these approaches fail to confront directly the actual value and policy choices described in Part III above. In so doing, they fail to clarify real issues implicated in conflicts cases. Why then do these approaches persist? Why do we continue to discuss approaches to choice-of-law questions without facing these real conflicts? We do so because these approaches have the appearance of neutrality.[231] Rather than acknowledging conflict, they appeal to shared values. Rather than addressing substance, they appeal to process norms or to implicit norms of professional craft. Even invocation of the better law eschews substance by simplistically identifying some policy as better without addressing the real value and policy conflicts that pervade discussions of substantive law. We can no longer pretend that those choices do not exist or substitute platitudes for normative argument. These are false answers to real conflicts.

---

[231] *See* Baxter, *supra* note 88, at 5. Baxter, the inventor of the comparative impairment approach, argued that judges should not make "super-value judgments" about which of two competing laws is more just. He explained that consideration of the better law would require judges to engage in political decisions, a task incompatible with the judicial role.

> The drawbacks of [the better law] approach . . . are easily identified. The judge is required to formulate law in a much more frank and open manner than is generally thought compatible with his nonpolitical status. It lacks the protective apparent neutrality of traditional choice rules . . . .

*Id.* at 5.

B. *Social Justice in a World of Overlapping Normative Communities*

I propose an eclectic framework for analyzing conflicts cases. This framework has several important features. First, it requires us to look at particular conflicts problems from several angles.[232] We can learn more about a conflicts problem by approaching it from many different perspectives than by utilizing only one perspective. Since we describe our moral intuitions with generalities that are often too simplistic to capture the complexities of our values, this multiplication of descriptions may help to clarify the real value choices implicated in multistate disputes.[233] Most choice-of-law theories fail to incorporate the notion of conflict into the reasoning process itself. Conflicts reasoning, both in judicial opinions and scholarly articles, often appears one-sided. The decisionmaker or scholar often acknowledges the expectations of one of the parties and ignores the expectations of the other. Or she presents a weak version of the interests and policies of the state and the party who loses. We will make better decisions—fairer and wiser decisions—if we avoid the temptation to belittle the claims of the losing party. We will make better decisions—more knowledgeable decisions—if we recognize what we lose, as well as what we gain, by any choice of law. We will make better decisions if we recognize fully the competing forms of social justice constructed by overlapping normative communities. Finally, we will make better decisions—truer to our deep moral convictions—if we face the conflicting possible constructions of multistate policy implicated in conflicts cases.

The second important feature of this framework is that it requires the decisionmaker to focus initially on the basic considerations of substantive justice and social policy that underlie the area of law at issue, as understood by the forum. Conflicts cases present ordinary issues of tort, contract, property, family, and corporate law. Thus, the initial focus should be on the substantive goals and norms underlying the law being applied. Conflicts cases really differ from domestic disputes in only two important respects: (1) they implicate the interests of a party who may have relied on, or who claims protection under, the conflicting norms of another state; and (2) they further implicate the ability of the members of that other state to govern themselves and constitute themselves as a normative community by determining the fair contours of relationships centered there. It is my view that these unique features of conflicts cases should be folded into the initial

---

[232] This feature of my approach appears to closely resemble the approach currently taken by many courts. "[A]ll the modern theories are being bundled together by the courts to make up 'the new law' of choice of law." R. LEFLAR, L. MCDOUGAL, R. FELIX, *supra* note 115, at § 99.

[233] As Martha Nussbaum states, "most people, when asked to generalize, make claims that are false to the complexity and the content of their actual beliefs. They need to learn what they really think." M. NUSSBAUM, *supra* note 2, at 10.

substantive analysis of the case by asking whether these special considerations give the forum adequate reason to restrain itself from applying what it sees as the better, substantively just, forum law, in deference to the interests of those connected to the other state in governing themselves and constituting themselves as a political and normative community.

The third feature of this framework is that it identifies a paradigm for analyzing choice-of-law issues. It does not, by itself, give determinate answers to the question of how particular conflicts cases should be decided or what choice-of-law principles should be adopted. It is possible for individuals with widely differing views to sue this framework to advance their proposals for adjudicating conflicts cases. For example, my framework is perfectly compatible with the possibility of rigid choice-of-law rules; and analyst could use my framework as a way to explain why certain kinds of cases are best decided by applying the law of the place where a relationship is centered, where an airline ticket was bought, or where a plane departed or arrived. An analyst could justify such rules by explaining that the place where these events are centered has the greatest interest in determining their legal consequences because those consequences are intimately connected to that community's form of social life or its ability to govern its affairs. It is also compatible with an approach that rejects choice-of-law rules entirely and relies on case-by-case adjudication. Further, different scholars and decisionmakers applying this framework may nonetheless come to radically different judgments about the circumstances under which it is appropriate for the forum to defer to the law of another state.

In the discussion that follows, I will first present my framework. I will then analyze four conflicts cases through the lens of that framework. I intend this discussion to illustrate the issues that I consider most important in adjudicating conflicts cases. I will also recommend solutions to the cases I discuss. In general, I conclude that the circumstances in which the forum is obligated to defer to foreign law are relatively narrow. I will explain why this is so and identify the special circumstances in which I see application of foreign law as appropriate. Some of my views are firm; others are quite tentative. Other scholars may disagree with my resolution of these cases, particularly the line I draw between the forum's interest in applying what it sees as the better law and the multistate interest in tolerance of the internal norms of the other state. I believe discussion about such disagreements would be fruitful, because it would serve to help clarify competing visions of the proper relations among overlapping normative communities.

Here is my proposal. The decisionmaker in a conflicts case should engage in a two-step analysis. First, the decisionmaker should determine which substantive law is best as a matter of social policy and substantive justice. Ordinarily, the forum will look to forum law to answer this question. In other words, at the initial stage of the analysis, there is no reason to treat a conflicts case differently from a domestic case. The goal in both types of cases is the same: fostering substantive justice and the general welfare.

Second, the decisionmaker should further the substantive analysis by addressing the unique facts and policies presented by multistate cases. The goal of this analysis is to determine whether the forum should deviate from what it sees as the substantively correct result in deference to the ability of the members of a neighboring state to constitute themselves as a normative and political community. To answer this question, the decisionmaker should generate multiple versions of the substantive and multistate policies implicated in the case by looking at the case from the perspective of each of the parties and from the perspective of both political systems implicated in the case. I will explain each of these steps in the analysis in turn.

1. Substantive Justice and Social Policy

The first step in my analysis requires the forum to determine which substantive law is best as a matter of social policy and justice. This determination should be made on the same basis as determinations of domestic substantive law, relying on the same moral, economic, and social policy considerations applicable in domestic cases. I assume that this process leads the court to consider competing arguments and counterarguments, principles and counterprinciples, which, in turn, requires the court to understand the case from various perspectives. The court should refrain from mechanically identifying one of the competing policies as "the basic policy" of tort or contract law. Torts and contracts represent fields of conflict between competing policies: between compensation and immunity, between freedom of contract and market regulation.

If forum law is embodied in a statute, then ordinarily the forum should identify the forum statute as the best law. In purely domestic cases, courts in the forum apply forum statutes unless they are unconstitutional. Conflicts cases should be treated no differently. If the political process works well, statutes in the forum represent the moral voice of the community. Judges, as appliers of forum law, must express that voice. Thus, if forum law is embodied in a statute, the forum should ordinarily conclude that forum law constitutes the substantively correct outcome for the forum.[234] Nonetheless,

---

[234] At the same time, it is important to acknowledge that the trial judge in the forum may disagree with the value choices made by the legislature. The judge may, therefore, be tempted in a conflicts case to apply what the judge sees as the better foreign law, if she can justify this result by choice of law theory. Similarly, if forum law is embodied in a recent, or firmly held, precedent of the forum state's high court, the trial judge may emphasize multistate policies like comity and diversity in applying foreign law to arrive at the result the judge believes is most fair. Indeed, Leflar has long maintained that we should be candid about the fact that the judge's view of the better law has an enormous impact in the resolution of conflicts cases. How then should a trial judge handle a conflicts case when she disagrees with her own legislature or the higher courts in her jurisdiction about the better law? For a detailed discussion of this issue, see *infra* Part IV(B)(2)(b).

judges should be free to revise or reinterpret forum statutory law in a multistate case under the same circumstances in which they would revise or reinterpret a forum statute in a domestic case. Statutes that have become obsolete or which are the result of a defective political process are often ignored or narrowed in scope of application in domestic cases.[235]

When forum law is embodied in the common law, rather than in a statute, a conflicts case may give the forum a special impetus to reexamine forum law in light of the contrary foreign law. If the forum determines that foreign law is better, the forum should, if possible, change forum law to accord with the better rule of law.[236] The conflicts problem will then vanish. If, on the other hand, the forum determines that forum law is better than nonforum law, or if the forum cannot change forum law,[237] the court faces at least two real conflicts. The first real conflict is between the competing policies and norms of the affected states and the competing interests and expectations of the parties who claim protection under the laws of the different states. The second conflict is between the goal of promoting substantive justice through application of the better law and the multistate goal of respecting the ability of neighboring polities to constitute themselves as normative communities.

If both states have significant contacts with a case and significant interests in applying their law to further their social policies or their notions of social justice, then application of either state's law will promote that state's interests while harming the interests of the other state. In these cases, the norm of promoting diversity or comity cannot tell us what to do. Application of either law creates externalities for the other state.[238] Resolving these cases

---

[235] Consider judicial exceptions to the statute of frauds, the statutes of limitation, state recording acts, and the federal Civil Rights Act, 42 U.S.C. § 1983. In all these cases, courts have created exceptions to clear statutory rules—exceptions that have been effectively accepted by legislatures. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982) (arguing for judicial reconsideration of archaic statutes).

[236] This is Professor Weinberg's insightful principle. *See* Weinberg, *supra* note 7, at 597.

[237] The forum court would not be able to change forum law if it were embodied in a statute. It would only be able to narrow the scope of its application or create exceptions.

[238] *See* Brilmayer, *supra* note 160, at 404. James Pielemeier further explains:

> Pluralism, or community self-determination, simply cannot be effectuated fully in the choice of law process. The subordination of one state's desires to another's is the process' inevitable result. The very nature of the problem is that no state can claim exclusive control over all consequences of its citizens' actions or all events within the state; when the litigation-creating activity is interstate in nature and the laws of the state are in conflict, one community's preferred resolution simply must give way if the matter is to be resolved.

James Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S.C.L. REV. 1299, 1336 (1987).

by applying the forum's notion of substantive justice and wise social policy at least has the virtue of enforcing the moral voice of the community for which the judges speak. As Herma Hill Kay explains:

> It is precisely because Currie saw the forum's courts as the judicial arm of state government, empowered to effectuate in private litigation the community values and state policies set out in earlier cases or established by the executive or legislator, that he directed those courts in conflicts cases to advance their own state policies and interests when their achievement was threatened by the asserted conflicting claims of another state.[239]

For this reason, I believe multistate cases should ordinarily be resolved by application of what the forum considers to be the substantively best policy, which will usually be forum law.[240] This is in fact what most courts do when resolving conflicts problems.[241] Application of what the forum sees as the better law has the further salutary effect of confining arguably worse laws to purely domestic cases within the states that have chosen to promulgate those laws. It makes sense to confine arguably bad norms to purely domestic cases that do not touch foreign states with different norms and policies. Nevertheless, this preference for forum law is only a presumption. Before applying what the forum sees as the best law, the court should consider whether multistate policies should cause it to revise its determination.

2. Multistate Policy

(a) *Elaboration of Substantive and Multistate Policies.* After addressing the substantive tort or contract considerations implicated in the case, the decisionmaker should ask whether the fact that this is a conflicts case should cause the forum to deviate from what it sees as the substantively correct result in deference to the ability of the members of a neighboring state to

---

[239] Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 612-13 (1980).

[240] *See* Kay, *supra* note 5, at 586-90 (arguing that courts should apply forum law unless there is good reason not to do so). *But see* Martin, *supra* note 115, at 587 (calling the "forum's interest in achieving a just result" a "suspect interest"). Again, special problems arise if the judge deciding the choice-of-law question differs with her legislature or her high court on the better law. I address these issues *infra*, Part IV(B)(2)(b).

[241] *See* Gregory Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U.L. REV. 602, 636 (1975) ("Unless there is frequent contact between the respective communities, legal systems will tend to prefer their own familiar values."); Courtland Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 39 (1988) (noting that "state courts now apply forum substantive law in a high and perhaps still increasing percentage of conflicts cases").

constitute themselves as a normative and political community. The forum may choose to defer to the substantive law of another state to further one or more multistate policies. These multistate policies include: (1) protecting the justified expectations of the party that claims protection under the law of the other state; (2) preventing illegitimate discrimination against various classes of residents or nonresidents; (3) promoting diversity in multistate cases of this kind; and (4) displaying tolerance of the internal norms of another normative and political community.

The decisionmaker should begin her consideration of multistate policy by generating multiple versions of the substantive and multistate policies implicated in the case. Interest analysis provides a useful framework for considering both state policy and individual interests and expectations. Thus, the decisionmaker should: (1) identify all relevant territorial contacts; (2) state the applicable substantive laws that conflict; (3) identify the important policies and values that may underlie each law and the interests those laws seek to protect; and (4) consider the various possible answers to the question of the geographic scope of each law.

Most of this analysis is implicit in traditional interest analysis, as supplemented by Currie's notion of restrained interpretation and Baxter's principle of comparative impairment. My procedure, however, differs from these approaches in two respects. First, I believe we should not be parsimonious in identifying state policies and individual interests furthered by the applicable substantive laws. This means that we should hesitate to conclude that a state has no interest in applying its law to the case. As I argued in Part III, it is as reasonable for a community to pursue a policy of freeing an actor from fear of liability for conduct that takes place within a state as it is for a community to promote a policy of compensation for victims and deterrence of harmful conduct. It is also as reasonable for a community to pursue a policy of limiting freedom of contract by regulating market relationships as it is to facilitate transactions without regard to relative bargaining power or social needs. These and other concerns mean that it will rarely be possible to identify a conflicts case as a false conflict. Although it may be reasonable for a state to be willing to *restrain* its application of its law in a case with multistate contacts, it will rarely be possible to conclude, using my analysis, that a state has *no* interest in applying its law.[242]

---

[242] For a well-reasoned contrary view, see Kay, *supra* note 239, at 606 (arguing that courts should not rush to identify true conflicts because "by hastily assuming that a true conflict exists whenever each state has a legitimate interest in applying its own law, the courts have placed an unnecessary strain on interstate harmony"). In contrast, James Martin argued:

> For Currie, forum interests either existed or did not exist, and if they did exist, the application of forum law was required. Under a restrained forum preference approach, it is conceded that the forum always has a moral judgment to make, but its desire to impose that judgment may vary from very little to very great.

The second difference with traditional forms of interest analysis is that my procedure asks the decisionmaker to analyze each case from multiple perspectives. Specifically, we should attempt to understand the dispute from the perspective of the different individuals and groups touched by the case. The easiest way to do this is to generate a brief advocating each side's position. This process will enable the decisionmaker to understand the strongest arguments on both sides of the case. She will also be able to clearly see alternative ways to characterize the policies each state seeks to further. For example, the plaintiff may characterize the policy of the defendant-protecting state in a relatively narrow manner, while the defendant may interpret it more broadly. Generating these competing stories about the applicable state policies and individual interests will help clarify what is at stake in the choice-of-law determination. It will also protect the court from wrongly passing over legitimate interests that are hidden in analysis that seeks, at all costs, to generate false conflicts.

(b) *Consideration of the Relations among Overlapping Normative Communities*. The forum should not apply what it sees as the better (forum) law if this will significantly interfere with the ability of another state to constitute itself as a normative and political community and the relationship between the forum and the dispute is such that the forum should defer to the internal norms of the foreign normative community. This principle is intended as a substitute for Baxter's comparative impairment test. The comparative impairment test addresses the relative strength of the interests of the two states by asking which state's policy would be most impaired if it were not applied in this case. In my view, this test fails to consider the relative importance of the competing laws to the two state's forms of social life. For this reason, I would focus instead on the goal of promoting coexistence and respect for diversity among separate normative and political communities.[243] The forum is not obligated automatically to give up its own ability to constitute itself as a normative community in deference to another state. It is obligated, however, at least to face the question of what circumstances should compel it to subordinate its own substantive policy concerns to its concern for a neighboring state's ability to create and enforce a different way of life.[244] The

---

> The process of deciding when to defer to the law of another state is thus not the process of deciding that the forum has no interest, but rather the process of accommodation with competing moral judgments.

Martin, *supra* note 115, at 591.

[243] *Compare* Baxter, *supra* note 88, at 17 (explaining that the comparative impairment test served to "allocate[] spheres of lawmaking control").

[244] For example, Herma Hill Kay argues that the forum should apply forum law unless there is a good reason not to do so; the main reason to depart from forum law would be to protect preexisting relationships between people living in the same state. Kay, *supra* note 5, at 589-90.

forum must consider how justice can be achieved in a world of overlapping political and normative communities.[245]

Can a defendant rely on the law of the place where she acts to immunize herself from liability or limit her legal exposure when her conduct harms someone with connections to a plaintiff-protecting state? What contacts are sufficient to permit the victim to claim protection under the law of her home state or the state where she was injured despite the defendant's reliance on another state's law? Under what circumstances and for what purposes should defendant-protecting policies outweigh plaintiff-protecting policies? Can a promisee rely on the validating law of the place of contract to enforce an agreement that is arguably unfair or oppressive, and therefore unenforceable, under the standards of the state where the promisor acts or lives? Or does the more vulnerable party have the right to claim protection under the law of the contract-regulating state? Should we presume that the national market structure rests on traditional, laissez-faire notions of freedom of contract, or should we presume that the market both works better and is fairer if market power is regulated to promote justice in social relationships? Which policies should be confined to domestic cases and which policies should presumptively govern social interactions that cross state boundaries?

To answer these questions, we must consider the relations between individuals associated with different states and the relations between self-governing polities. I have argued that the appropriate way to think about these relations is to understand individuals as belonging to or creating normative communities.[246] If we understand social relations in this way, choice of law cases become disputes that arise from relations between members of overlapping normative communities and between those communities themselves.

Normative communities are groups that share interpretive commitments about right and wrong, lawful and unlawful, valid and void.[247] These shared commitments are complicated and ever-changing. As Professor Cover explains, the unification of meaning at the center of normative worlds can "exist[ ] only for an instant, and that instant is itself imaginary. . . . The 'Torah' becomes two, three, many Toroth as surely as there are teachers to teach or students to study."[248] Yet, these communities surely exist. Moreover, they exist at many levels. Some normative communities may be local

---

[245] Professor Morrison has argued for an approach based on better law under which the forum adopts conflicts rules that further the goals underlying the forum's substantive law. *See* Mary Jane Morrison, *Death of Conflicts*, 29 VILL. L. REV. 313 (1983-84). My view differs from Morrison's in that I believe the forum should be concerned about its relations with other normative and political communities in other states, even if it ordinarily ends up applying forum law.

[246] *See* Cover, *supra* note 152, at 30.

[247] *Id.* at 4, 7.

[248] *Id.* at 15.

and be experienced partly as private or exclusive worlds—like the family. Others may be widespread and experienced as the world of public affairs—such as the state or the nation.

Describing choice-of-law cases as conflicts between overlapping normative communities presupposes that states may constitute such communities. Whether or not they can is debatable. We may adopt the position that states are simply too public, too far-flung, too large and diverse to ever constitute communities with shared norms. Such communities, if they exist, must be smaller communities whose members experience personal contact with each other. Or we could say that normative communities must be large communities of a certain kind—those whose members exhibit strong bonds of history or commitment to each other, like religious groups. Indeed, law arises from the political process in the forum, which may itself represent a compromise among contending normative communities in the forum. We may posit, therefore, that the lawmaking process is something quite different from the process by which individuals and groups create moral worlds. Thus, if these views are correct, states can never constitute normative communities—at least not normative communities of a strong kind. If states do not constitute normative communities, the forum does not have to worry about interfering in the internal affairs of other states—it should simply apply its view of the better law. This view has the advantage of at least allowing the forum to implement its own policies without fear that such policies will interfere with the ability of other states to constitute themselves as normative communities.

This view is fundamentally unappealing. The forum is concerned with applying its view of the better law partly because the political or legal process in the forum involves state officials in defining norms of social justice. The very process of determining what constitutes substantive justice in legal disputes requires judges and legislators to attempt to create a normative world for the state. While it is true that this normative world includes sub-groups with contending world-views and values, powerholders in a state system will, or should, see their role as one of evaluating these contending views and subsequently defining values to be implemented by state authorities. As a result of this process, some groups may find their values suppressed by the state while others will find their values implemented by the state. No one group is likely to capture the state entirely, although the power to influence state power may vary widely. Nonetheless, decisionmakers in such a system will have no choice but to participate in the creation of a normative world by the very process of making and implementing law.

We could take this second view to the extreme by claiming that all legal rules implemented by a state implicate fundamental value choices. No matter how trivial a rule seems, it constitutes a part of an overall system of values. For example, although the decision to enact a twelve-month statute of limitations seems to differ only trivially from a decision to enact a thirteen-month statute of limitations, we could argue that, when combined

with other rules, such a value choice constitutes a part of a defined normative system. Under this extreme view, if a foreign state has a legitimate interest in applying its law to adjudicate a dispute, the failure to apply its law in the case would always interfere with its ability to constitute itself as a normative community. At the same time, the ability of those individuals residing in the forum to constitute themselves as a normative community would be harmed by not applying forum law to the case. If every choice of law requires a significant harm to the normative world of one state or the other, there is little reason to rely on the idea of a normative community to answer the choice-of-law determination. Because the choice of either law will harm the other normative community, the forum might as well advance its own conception of the better law. In this way, it will at least express the moral voice of the community for whom it speaks.

Neither of these extreme views is attractive. This is partly because their all-or-nothing quality fails to capture our experience about the moral world. Most of us do experience the state as an important norm-generating community. At the same time, however, the state does not speak, and cannot speak, for everything we value; it is not the only community to which we belong. But, these views are also unattractive for the results they counsel. In opposite ways, each of these views asks us not to worry about the extent to which application of forum law will interfere with the ability of people in the other state to govern themselves and to establish a moral world. Such a prescription advises us to be intolerant. The fear of intolerance is the primary concern underlying claims that application of forum law fosters parochialism. What is parochial about prescriptions for forum law is not so much the preference for the values of the forum—all forums prefer their own way of life—but the failure to recognize one's relations with groups that do not share one's values. Implementation of one group's values may impose costs on others, and each "group must accommodate in its own normative world the objective reality of the other."[249]

Multistate policy places the problem of tolerance in stark relief.[250] The more convinced a decisionmaker is that forum law is better, the less interest she has in tolerating injustice by applying what she considers the worse, nonforum law. If the case is within the legitimate sovereign power of the forum, the forum has reason to be concerned that substantive justice be done between the parties; this is why courts tend to apply forum law in conflicts cases when they can. Nonetheless, on matters of great concern to the forum, and on which a judge's allegiance to her own law is strong, it naturally is hard to defer to a result she views as unjust, even if the multistate policies of tolerance and comity would seem to counsel such deference.

When the trial judge in the forum disagrees with forum law, the problem of

---

[249] *Id.* at 28-29.

[250] *See* Joshua Halberstam, *The Paradox of Tolerance*, 14 PHIL. F. 190 (1982-83).

intolerance becomes even more convoluted. This may occur where forum law is embodied in a statute or in a recent or firmly held precedent of an appellate court. In cases of this kind, the judge may feel inclined to achieve what she sees as the substantively just outcome by appealing to choice-of-law theory to justify application of the better foreign law. Indeed, Professor Leflar has long reminded us to be candid about the enormous impact consideration of the better law in fact has in conflicts cases. But, consideration of the better law is not just an evil temptation, a tendency to be avoided or stifled if possible. There are legitimate reasons why a judge's conception of the better law should factor into the judge's decision. We have a choice-of-law issue because the legislature has not spoken on the choice-of-law question; it may have spoken on the question of the better law, but it has not resolved the question of the geographic scope of that law. This means that the legislature has delegated to the trial court the duty to determine the appropriate circumstances for applying forum law in cases involving multistate contacts. In other words, while the legislature may have spoken authoritatively on the better law *for the forum*, it has not spoken on the extent to which that policy should be imposed in cases involving contacts with another state. For this purpose, the judge's conception of which law is best may be of substantial relevance.

When faced with a conflict between the judge's conception of substantive justice and forum law, the judge in the forum should reconsider the case in light of two multistate factors. First, the judge should consider whether application of the better foreign law would illegitimately distinguish this case from cases involving purely domestic contacts. In other words, the judge should recognize that she would be bound to apply the worse forum law in a case involving no out-of-state contacts. She should then determine whether the out-of-state contacts give sufficient reason to treat this case differently. Would it be unfair to grant a remedy to a plaintiff with out-of-state contacts when a plaintiff without such contacts could not prevail? Second, and conversely, the judge should ask whether the conflict over the better law gives her sufficient reason to conclude that there is a significant problem in applying forum law to a case with out-of-state contacts. Even if the forum legislature is convinced that its law is best for domestic cases, the court must decide whether forum policy is of the sort that legitimately can be imposed outside the state. The controversy about the better law may lead the judge to conclude that the forum policy is sufficiently controversial that it is inappropriate for it be to extended to cases involving multistate contacts. Under these circumstances, the legislature itself might hesitate to extend its controversial policy to cases with out-of-state contacts.

Conflicts cases illustrate the conflicts between different communities' definitions of justice. They also illustrate the conflict within each state about how to reconcile the interest in promoting the better, forum law and the interest in deferring to the self-governance of another normative community. We cannot face these conflicts adequately without asking whose perspective

we take to answer these questions. And, we cannot decide them legitimately without acknowledging what we are giving up. Restrained interpretation of one's own values is hardest when they are deeply held; yet, it is often just such cases when conflicting values are most deeply held by the other side as well. It is just such cases that raise most starkly the question of how different communities can coexist.

(c) *Preference for Forum Law*. I agree with Professor Weinberg that the circumstances in which the forum should deviate from forum law are relatively narrow. Because my framework for analyzing conflicts cases requires close attention to the norm of tolerance among overlapping normative and political communities, however, this preference requires explanation. The best explanation is a contextual one; my view is best understood in the context of the detailed discussions of the cases that follow. Nonetheless, some preliminary remarks might prove helpful.

Complaints about the modern preference for adjudicating conflicts cases by application of forum law ordinarily revolve around three major concerns. First, forum law generates a lack of uniformity. Since the result often depends on where the case is heard, like cases will not be treated alike. This lack of uniformity seems to violate fundamental norms behind the rule of law. Second, this lack of uniformity means that results in conflicts cases may depend on a race to the courthouse. Whoever gets to the courthouse first has an advantage because they have chosen the forum. It seems wrong for the rights of the parties to depend on such an arbitrary factor. Finally, a preference for forum law seems to exhibit an unacceptable parochialism. It allows the forum to engage in intolerance of the norms and policies of another state with arguably greater claims to govern the dispute.

These complaints are serious and deserve our attention. At the same time, they are surprisingly one-sided; they ask us to worry about certain kinds of arbitrariness, while ignoring other kinds. Those who argue in favor of forum neutrality ordinarily adopt solutions to choice-of-law questions that themselves exhibit characteristic problems of arbitrariness. Forum neutrality is problematic for several reasons. First, some critics of forum preference argue in favor of reviving territorial rules. Territorial rules appear neutral; they do not lead to outcomes that differ depending on where the case is heard. But, as I argued in Part II, territorial rules achieve this appearance of neutrality at the expense of arbitrarily overriding the government interests of the state whose contacts with the case are deemed uncontrolling.[251] For example, application of the "place of conduct" rule in a tort liability case promotes the interests of that state over the interests of the place of injury, where significant consequences of the conduct may be felt. Adopting rigid territorial rules thus seems to substitute one kind of arbitrariness for another.

Second, critics of forum preference who advocate policy analysis rather

[251] *See supra* text acompanying notes 92-111.

than territorial rules ordinarily appeal to standards that appear neutral. However, these seemingly neutral standards, such as false conflict, comparative impairment, or "most significant relationship" analysis, fail to confront the real conflicts underlying choice-of-law cases. I have argued, for example, that false conflict analysis seems impartial because the decisionmaker claims to apply the law of the only state interested in applying its law. Yet, this impartiality is only apparent. False conflict analysis rests, to a large extent, on an impoverished conception of state interests. This conception wrongly excludes policies based on such fundamental norms as morality, liberty, and nondiscrimination. It therefore achieves the appearance of neutrality only by subterfuge; it quietly privileges some state interests above others and then claims that those other state interests do not exist. The analysis entirely fails to explain why one policy or set of contacts is deemed more significant than another.

Forum-neutral approaches fail to confront directly the basic Coasian point: when each state has nontrivial contacts with the case, giving it significant interests in applying its law, application of the law of either state will interfere with the policies and interests of the other state. The critics of forum preference are correct to point out that application of forum law defies the interests and policies of the other state and those who claim protection under its law. But this criticism is woefully one-sided. The truth is that, no matter how the court decides the case, it must defer to the law of one state while defying the law of the other.

The critics of forum preference presume that we can identify a suitably neutral way to adjudicate between the competing interests of states and the parties who claim protection under their law. Yet, if the policies of those states *really conflict*, we have no choice but to identify which set of policies should be preferred in a multistate system. Forum neutrality may therefore be neutral with respect to the interests of the forum, but it cannot be neutral with respect to competing policies and interests. To determine which state has the most significant relationship, or whether a state has a "real interest" in applying its law, or which policy is more strongly held because "emerging" or "basic" or "widely shared," the decisionmaker must make value choices. *Yet, we have a conflicts case precisely because the states disagree about how to make these choices.* A preference for party autonomy in contract law may appear suitably neutral from the standpoint of the state that validates the contract, but it appears arbitrary from the standpoint of the state that regulates the contract. From the perspective of the regulatory state, this forum-neutral system discriminates against its policies. It therefore substitutes one form of arbitrariness for another.

If this analysis is correct, then any way we choose to resolve conflicts cases will be deemed right by some standards and wrong by others. There is no way to decide a real conflict without doing something wrong. The four cases that follow illustrate this fundamental dilemma. In almost every case, I conclude that either state would be justified in applying its law to the dispute.

Therefore, I see every reason why there should be a presumption in favor of the forum doing justice as it sees it by applying forum law.

At the same time, this presumption can be overcome. I have identified at least three special circumstances in which application of foreign law may be the most appropriate outcome.[252] The first special circumstance is where the parties are sophisticated commercial actors that engage in complex contractual relationships in which planning and predictability are particularly important. For these parties, choice-of-law clauses may aid significantly in planning. Nonetheless, even in this kind of case, the forum should override the agreement between the parties when the forum policy explicitly regulates contractual relationships of this kind to protect various social interests, and when the forum has significant interests in furthering its regulatory policies. The second special circumstance is where the parties have purposefully formed a relationship in a foreign state. If that relationship is undertaken with full knowledge of the parties, and if the place where the relationship is centered would hold its conception of that relationship to be important to its way of life, then the forum should defer to the law of that state. Again, even in this type of case, the forum should apply its own standards if the parties to the relationship have significant contacts with the forum, and if the standards of the place where the relationship is centered violate the forum's sense of justice. Tolerance does not mean acceptance of the unacceptable. Third, the forum should apply foreign law if it is convinced that the circumstances are such that: (1) one of the parties relied—and had a right to rely—on the law of that state or legitimately claims its protection; and (2) if the other party, by her voluntary contacts with the foreign state, placed herself within its legitimate sphere of power. This criterion should apply, for example, when application of forum law would unfairly surprise a nonresident who relied on foreign law and where application of forum law would discriminate against that person by wrongfully treating her differently from similarly situated nonresidents.

### C. *Freedom and Immunity versus Protection from Harmful Conduct*

#### 1. The General Structure of Torts Arguments

When judges or scholars argue in favor of deferring to nonforum law in torts cases, they almost always emphasize the right of the defendant to rely on the liability-limiting law of the place where she acted or established a

---

[252] Of course, the forum should not apply forum law if it has no contacts with the case giving it legitimate interests in applying its law. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). I am talking here about cases that raise real conflicts in which more than one state has legitimate reasons to consider application of its law appropriate.

relationship.[253] This argument for restrained interpretation of plaintiff-favoring forum law sometimes focuses on unfair surprise: the defendant would be unfairly surprised by finding out that although she was acting locally, she is being held to the higher standards of another state. At other times, the argument focuses, not on unfair surprise, but on the defendant's justified expectation that she would be protected by the law of the place where she was acting: she had a right to rely on the defendant-protecting policy of the place where she acted or where she established a relationship, regardless of where the consequences of her actions occurred. For example, in *Carroll*, the defendant railroad could argue that the forum should subordinate its plaintiff-protecting policy to the defendant-immunizing policy of the place of the injury because the defendant expected, and had a right to expect, that its business activities in Mississippi would be protected by Mississippi law.

However, in almost every case in which the defendant has a plausible argument that she has a right to freedom of action based on the law of the place where she acted, the plaintiff has an equally plausible counterargument: the plaintiff justifiably expected to be protected by the law of the place

---

[253] *See* Morrison, *supra* note 245, at 362. Morrison explains that "[o]ne of the pervasive concerns in choice of law has been whether applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails)." She feels, however, that this should not be a concern as long as constitutional requirements are met such that the defendant has sufficient contacts with the state whose law is being applied so that it is not fundamentally unfair to hold the defendant to that law. *Id.*

Conflicts scholars and judges often argue that justified expectations are not relevant to tort rules that are loss-allocating, as opposed to conduct-regulating, because people do not plan to have accidents. *See, e.g.*, Milkovich v. Saari, 295 Minn. 155, 161, 203 N.W.2d 408, 412 (1973) (stating that "[o]bviously, no one plans to have an accident"); Bryant v. Silberman, 146 Ariz. 41, 46, 703 P.2d 1190, 1195 (1985) (arguing in favor of a diminished role for justified expectations in conflicts cases involving airplane accidents since "it is not likely that either party acted with the consequences of his conduct in mind or the law to be applied should a dispute arise out of such negligent conduct"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment g (1971) (asserting that "the parties have no justified expectations to protect" when they "act without giving thought to the legal consequences of their conduct or to the law that may be applied").

This argument is specious. While it is true that people do not plan to have accidents, they may very well have expectations about what law will govern their liabilities if their conduct does result in injury to others. For example, airline companies may investigate the laws of different states to determine how much insurance to purchase. Moreover, there is a widely shared sense that it is problematic—if not unconstitutional—to surprise someone acting locally by holding them to the higher standards of another state.

where the relationship between the parties was centered. Thus, in *Carroll*, the plaintiff worker justifiably relied on the compensatory law of his domicile, which was also where the employment relationship between the parties was centered. Moreover, it was purely fortuitous that the accident happened in a defendant-protecting state; it could just as easily have happened in Alabama. In that case, the employer could not dispute that it would be liable to the worker for an injury incurred in his home state. The plaintiff therefore sees no reason to engage in a restrained interpretation of forum law. While deference to Mississippi law would seem to further the interests of comity and diversity, it does so at the cost of overriding forum law in a case where justified expectations exist on both sides and in which both states have a real interest in furthering their public policies. Applying foreign law would involve the court in promoting the policy of the separate political community of Mississippi, while overriding the policy of its own community of Alabama.

In cases like this, both comity and expectations arguments are internally contradictory. Each of the parties has a plausible argument that application of its favored law will promote multistate interests in diversity. For each of defendant's two major arguments—protecting its justified expectations and implementing the policy of the place of the injury—the plaintiff has counterarguments—protecting his justified expectations and implementing the policy of the place where the employment relation is centered. These cases therefore pose a conflict between two interpretations of whether comity requires the forum to defer to the law of another state.

2. Reliance on the Law of the Place Where the Relationship is Centered versus Claims to Protection Based on the Law of the Place of the Conduct or Injury

Consider the case of *Schultz v. Boy Scouts of America, Inc.*[254] In that case, the New Jersey plaintiffs sued to recover damages for injury to themselves and their two sons, ages eleven and thirteen, who were sexually abused by their scoutmaster; the incidents occurred in New Jersey—the plaintiff's and Boy Scouts' residence—and on a camping trip to New York State. After returning to New Jersey from the camping trip in New York, the older son committed suicide. While the Boy Scouts operated in every state, its national headquarters was in New Jersey. New Jersey, but not New York, held charities immune from tort liability to their beneficiaries. The plaintiffs naturally sued in New York, basing their claim on the occurrence of the tort there and the Boy Scouts' contacts with New York. The plaintiffs claimed, among other things, that the defendant's negligence in New York State caused their son's suicide in New Jersey.

---

[254] 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

(a) *Substantive Justice and Social Policy*. The case presents New York with an occasion to review the wisdom of its policy denying charities immunity from tort liability. The rights argument in favor of charitable immunity is twofold: first, that it is morally wrong for the beneficiaries of charities to bite the hand that feeds them; and second, that delegalization of the relationship between a charity and its beneficiaries creates a space within which a relationship of trust can be established. The rationale behind this argument is that encouraging lawsuits against charities poisons the relationship of caring—and even, in some cases, intimacy—that the charity may hope to establish with the people it serves. In contrast, the rights argument against charitable immunity holds that charities, like all other persons and organizations, have a duty to act with due care. The failure to act reasonably constitutes a moral failure that demands a remedy, because the charity has caused grievous harm to a victim that depended on its services. By negligently failing to choose carefully its employees and supervise their conduct, the defendant violated the trust placed in it by the victim and his parents.

The social utility argument for charitable immunity asserts that immunity encourages the provision of charitable services by limiting liability and promoting a relationship of trust between the charity and its beneficiaries. Moreover, the imposition of liability is unlikely to increase the charity's standard of care by an appreciable amount. Because negligent acts by the Boy Scouts will interfere with the organization's ability to serve its charitable mission, the Boy Scouts therefore already have sufficient incentives to act with a high level of care. The social utility argument against charitable immunity claims that liability may very well change the defendant's behavior in a way that increases its standard of care. Liability for their negligence, for example, may induce charities to select employees more carefully and to supervise them on the job. Further, to argue that lawsuits of this kind will hamper development of relationships of trust between charities and their beneficiaries makes no sense; the fact that the charity has already acted negligently in itself destroys any trust.

I am inclined to accept the modern trend of abolishing charitable immunity. I do not believe that beneficiaries of charity violate a trust when they seek damages for negligent conduct; on the contrary, the relationship of trust has broken down by the time the lawsuit occurs. Nor do I accept the argument that delegalization is helpful here in establishing a relationship of trust in the first place. Indeed, liability for negligence itself may help create relationships of trust from the beginning by conveying the message that charities, like all other actors, have a moral obligation to act reasonably toward those with whom they form relationships. Moreover, although I am not convinced that imposition of liability will have significant deterrent effects, a highly publicized case of this sort may indeed have an effect on the conduct of organizations like the Boy Scouts. My position might change if I could be convinced that immunity is necessary to bring charities into existence, or that without immunity a great many charities that provide needed social services would greatly curtail their valuable activities.

At the same time, I acknowledge that I might come to different conclusions on the question of the better law, depending on whether I was a sitting as a New York or a New Jersey judge. As a New York judge, I would almost certainly conclude that New York's law imposing liability was better. As a New Jersey judge, I would be inclined to use my power to abolish charitable immunity if it were established through the common law rather than a statute.[255] Yet, the history of the law in New Jersey, public opinion in the state (to the extent I had accurate knowledge of this), the positions of other judges in the system, and my loyalties to New Jersey as a political community would all affect my views.

Assuming that a New York judge would conclude that New York law is better, is this an appropriate case for New York to engage in restrained interpretation of its liability-imposing policy in deference to the normative community in New Jersey? This is a hard question. The fact that it is hard, and the reasons why it is hard, are why I think the legitimate adjudication of conflicts cases of this sort turns on the decisionmaker consciously facing these difficulties.

(b) *Multistate policy.* New York and New Jersey each have sufficient interests to support the position that their respective policies are essential to each state's maintenance as a normative community. The forum has interests in applying forum law both for regulatory and moral reasons.[256] New York's policy of holding charities liable for wrongful conduct may serve a deterrent function by encouraging careful selection and adequate supervision of employees in organizations that provide services to young people.[257]

---

[255] On the other hand, because New Jersey law is embodied in a statute, I would initially defer to that legislative judgment unless I was convinced either that the political process that produced the law was defective or that, because the statute was old, it no longer expressed contemporary values. At the same time, the fact that charitable immunity is now the law in very few states might lead me to conclude that New Jersey's isolated defendant-protecting law should be limited in application to cases with no significant out-of-state contacts. Nonetheless, if New Jersey's law were embodied in a recent statute, I would probably resolve the case by applying forum law on the ground that the case is appropriately governed by the law of the place where the relationship is centered, and no interests of the New York political community or the parties outweigh this determination.

[256] The New York Court of Appeals concluded, in contrast, that the forum had no real interest in applying its plaintiff-favoring compensatory law. Effectively finding a false conflict, it applied New Jersey's defendant-protecting policy. *Schultz*, 65 N.Y.2d at 200-01, 480 N.E.2d at 686-87, 491 N.Y.S.2d at 97-98.

[257] The majority opinion, unbelievably, ignores the possibility that tort liability in this instance may serve a deterrent or conduct-regulating function. It blithely assumes that such liability was intended simply as a loss-allocating device. *Id.* at 200, 480 N.E.2d at 686, 491 N.Y.S.2d at 97. The court's conclusion rests on a one-sided interpretation of charitable immunity. Obviously, New Jersey's policy of immunizing the charity is not intended to regulate *harmful* conduct; it is intended to regulate

Even in the absence of a deterrent purpose, the New York law serves a loss allocation function by promising to compensate those who are injured by wrongful conduct in New York, no matter where the injury occurs. New York's justification for this policy is not only economic—that it seeks to keep injured residents off the welfare rolls—it also has a moral commitment to compensate persons injured in the state by reprehensible conduct. This policy applies equally to nonresidents and residents; the forum has no reason to discriminate against nonresidents by treating them differently from residents injured in New York. New York has no reason to withhold the benefits of forum law here; outsiders, as well as residents, are entitled to the protection of New York law while they are there. The children and their parents have a right to expect that their children will be protected by the law of the place they are visiting. The defendant Boy Scouts should not be surprised that New York law governs its activity in New York and that it will be held to higher New York standards when it enters and acts in New York.

New Jersey, on the other hand, has an interest in regulating two relationships centered in New Jersey: (1) the relationship between the Boy Scouts and the victims' parents; and (2) the relationship between the Boy Scouts and the victims. New Jersey policy encourages the organization of charities in the state by immunizing them from liability resulting from their operations; in essence, New Jersey law creates a liberty interest in the Boy Scouts as a means of promoting its existence and activities. The relationship between the parties is entered into, and thus centered, in New Jersey. The parents, as citizens of New Jersey, theoretically have some control over New Jersey law on charitable immunity. Indeed, they—or their children—receive the benefits of the New Jersey charity partly because New Jersey has adopted a policy that effectively encourages the organization of such charities. They should not be heard to complain when that immunity is invoked. Moreover, there is no reason to distinguish this case from a wholly domestic case, for which the parents would clearly have no remedy except to change the law establishing immunity. Finally, the Boy Scouts justifiably relied on the fact that its relationship with the victims and their parents, both centered in New Jersey, would be regulated by New Jersey law.

---

general business conduct by encouraging charities to domicile in New Jersey. It does so by granting charities a liberty interest in freely providing charitable services without fear of ruinous liability. On the other hand, the New Jersey law may be based on the moral principle that beneficiaries of charities should not turn around and bite the hand that feeds them. It is true that this second rationale of New Jersey's policy is concerned with allocation of loss rather than deterrence of harmful conduct. But, New York policy *imposes* liability; certainly, it was intended as a means of encouraging charitable organizations to take care in selecting their employees and providing their services. Moreover, New York's policy represents a moral choice that, as between the "innocent" charity and the innocent victims, the charity should have to compensate for the wrong its representative did. This policy should apply equally to nonresidents visiting New York and New York residents.

(c) *Plaintiffs' argument for substantive justice*. Plaintiffs would argue that New York has sufficient interests in the case to apply its policy and thereby regulate events in New York and to achieve justice between the parties. This policy will neither unfairly surprise the parties nor interfere with New Jersey relationships.

(1) The Argument for Better Law. The plaintiff would argue not only that New York policy is strong here but also that it is better than New Jersey policy. New Jersey law is unjust and archaic and therefore should be limited to domestic cases that touch only New Jersey. New Jersey may allow charities to commit atrocities in New Jersey with impunity, but, when they enter New York, they will be held—as are all citizens—responsible for the harm they do. Moreover, New York is not less concerned about these plaintiffs because they come from another state; it has no interest in discriminating against the plaintiffs simply because they are nonresidents. It would be unconscionable for the plaintiffs' lawyer to have to tell her clients that the New York court decided that they could get substantial damages if they were New Yorkers but that the court did not consider their interests worthy of protection because they were from New Jersey.

(2) Justified Expectations. While it is true that the expectations of the parties are somewhat different than they would be if the dispute were between two New Yorkers, it is also true that the defendant should expect that New York law regulates its wrongful conduct in New York. And, to the extent that charities come to New York from out of state to engage in activities, New York wants to impose its deterrent policy to encourage safe and reasonable conduct within its borders. If wrongful conduct does occur there, New York has determined that the wrongdoer must do what can be done to remedy the damage. Nonresident defendants who come into the state are not exempt from New York's salutary regulations; nor are nonresident victims unprotected by its laws. Moreover, just as nonresidents can expect police protection while they are in New York, they have a right to expect that its protective tort policies will apply to them as well.

(d) *Defendant's Argument for Tolerance*. The defendant Boy Scouts would argue for a restrained interpretation of forum plaintiff-protecting law on the grounds that application of New York law would interfere in the charitable relationship centered in New Jersey, and that the proper level of deterrence and compensation in a relationship of this sort is best regulated by the law of the place where the relationship is centered.

(1) The Argument for Comity. This case represents a paradigm case for deference to foreign law. The issue concerns the contours of an ongoing relationship clearly centered in a particular state. The regulation of such relationships is central to a community's definition of itself and its form of social life. For New York to apply its law here would illegitimately interfere with the political decision of New Jersey to establish charitable immunity as the just relationship between the parties and thus impede the ability of the New Jersey polity to constitute itself as a normative community. Indeed, the

consequences of imposing liability will be felt most heavily in New Jersey, in all likelihood decreasing the availability of charitable services there. Moreover, withholding the New York remedy here will not affect the people with whom New York is most concerned—New York families and children. New York may determine what is just between New York charities and New Yorkers but should defer to New Jersey to govern the relations between New Jersey charities and their beneficiaries—even if New York believes that New Jersey policy is unjust. The most important issue is the obligations of the parties to the relationship—the place where the injury occurred is of minimal importance. Finally, it makes little sense to distinguish this case from a case in which the injury were inflicted in New Jersey. Applying New York law would unreasonably distinguish this case from the case of New Jersey plaintiffs injured inside New Jersey by New Jersey charities who have no legal claims against New Jersey charities.

(2) Justified Expectations. The parents did not send their children to New York in reliance on its plaintiff-protecting policy; it would simply be a windfall to them if New York law applied. The fact that some of the wrongful conduct occurred in a plaintiff-protecting state does not distinguish this case in any significant way from a similar case in which the parties had never left the state. Both parties would ordinarily expect their relationship to be governed by the law of their mutual domicile.

(e) *Deciding the Case.* We could define a spectrum of possible positions from more defendant-protecting rules to more plaintiff-protecting rules to govern cases of this type. We could hold that the establishment of the charitable relationship in New Jersey is the deciding factor. The defendant relied on the defendant-protecting law of the place of the relationship to immunize it from liability. This law encouraged formulation of the relationship in the first place. The ultimate injury—the suicide of the child and the grief of the family—took place there. The forum has no right to impose its plaintiff-protecting law after the fact. On the other hand, we could take a plaintiff-protecting position and hold that if either the wrongful conduct or injury occurs in a state that protects and compensates the victim, the victim has a right to claim protection under the law of whichever states provides it. After all, the defendant cannot be unfairly surprised that its conduct in New York is governed by New York law. Nor could it be surprised if its conduct in New Jersey had caused a suicide in New York. If someone negligently parks a car in New Jersey and it rolls down a hill into New York killing an innocent pedestrian, the tortfeasor should not be surprised that New York asserts the power to protect itself from acts in New Jersey that harm New York citizens on their home turf. Or we could take a middle position, and say that when conduct and injury are in different states, or when the conduct is in a different state from the state where the relationship between the parties is centered, we should apply the law of the place where the injury occurs, wherever that is.

Each of these possible solutions requires the New York forum to balance

multistate policies promoting diversity—deferring to the New Jersey charitable relationship—against multistate policies promoting what it considers to be the better law—confining the worse law to wholly domestic disputes in New Jersey. One solution would further the forum conception of the better law and confine New Jersey policy to wholly domestic affairs. If New York applies its policy here, it interferes in the New Jersey relationship and imposes its will on New Jersey affairs; but that may be justified because of the repugnance of the New Jersey policy and the fact that the wrongful acts occurred in New York, thus bringing the case within the legislative power of the state. If the charity is able to confine its wrongful conduct to a defendant-protecting state, that is one thing; but, once it ventures into New York, it can no longer rightfully hide behind the New Jersey protective policy. A second solution sacrifices what New York considers to be the better law in deference to the ability of the political community of New Jersey to govern itself and the relations between its charities and its citizens. It also protects the right of the charity—its justified expectation—to claim protection under the law of the place where it has entered into a relationship with the plaintiffs. We cannot decide this case reasonably without facing these real conflicts.

This is a hard case. As a New York judge, I would probably rule differently depending on the status of New Jersey law. If New Jersey law were archaic and isolated, I would apply forum law to allow the plaintiffs' claim. If New Jersey law were based on an older judicial opinion whose reasoning were inconsistent with recent trends in New Jersey law, it is possible that a New Jersey court, hearing this case, would use it as an occasion to modernize New Jersey law and abolish charitable immunity. Even if the policy were embodied in a statute, a New Jersey court might determine that its outdated law, although still valid in New Jersey, should not be applied to conduct that occurred in a liability-creating state. Under these circumstances, it would be perfectly appropriate for the New York court to apply the better forum law. There is no reason for a New York court to adhere more strongly to an archaic New Jersey policy than would a New Jersey court. An archaic New Jersey law would therefore receive expression in cases entirely centered there but would not apply to cases in which the defendant was not able to confine its conduct, or the consequences of its conduct, to the defendant-protecting state.

On the other hand, if the New Jersey policy is strongly held—embodied in a recent statute or high court opinion—I would resolve the case by applying New Jersey law, as did the New York Court of Appeals. Unlike the Court of Appeals, however, I would not apply New Jersey law on the ground that the case presented a false conflict, for I have argued that New York has significant interests in applying its law to this case. I would apply New Jersey law on the ground that this is a paradigm case for restraint in application of what the forum sees as the substantively just forum law; New York should defer to the policy of the normative and political community of New Jersey.

By applying New Jersey law, the forum defers to the law of the place where a relationship has been established and where the character of the relationship is important to the community's form of social life. Rightly or wrongly, New Jersey has concluded that charitable immunity increases the availability of charitable services in the state. Moreover, the law is intended to promote trust within relationships centered in New Jersey. The plaintiffs who would benefit by New York law certainly did not rely on its negligence law in deciding to send their kids to camp there; therefore, they have little reason to complain that their relationship with the Boy Scouts is governed by the law of their home state. By applying New Jersey law, New York would not be discriminating against these plaintiffs by failing to extend a remedy to them merely because of their domicile; it would be applying the law through which they established their relationship.

3. Reliance on the Immunizing Law of the Place Where One Acts versus Claims to Protection Based on the Law of the Place Where One Is Injured or Lives

Consider a hypothetical dram shop case (very) loosely based on *Blamey v. Brown*.[258] Williams College is located in Williamstown, Massachusetts, in the northwest corner of the state. Bennington College is located in Bennington, Vermont, about ten miles from the Massachusetts border. Assume that a group of Williams College students goes to Bennington to visit some friends. They go to a bar in Bennington, which serves them liquor after they are visibly intoxicated. The owner of the bar does not advertise in Massachusetts but does engage in unrelated business activities there, leasing real estate in North Adams. Let us assume that these contacts are sufficiently extensive to grant Massachusetts general jurisdiction over the defendant for a lawsuit in the Massachusetts courts. Assume further that Vermont, but not Massachusetts, immunizes taverns from tort liability to persons injured by their serving alcohol to customers. Massachusetts imposes tort liability when a tavern serves liquor to a visibly intoxicated patron if the plaintiff can prove, by a preponderance of the evidence, that the tavern's action contributed to the plaintiff's harm. The Williams students drive back to Massachusetts, where they are involved in an accident, killing the driver of another car; the victim is a Massachusetts resident who has never left Massachusetts. Can the Massachusetts forum apply its plaintiff-favoring law or does the defendant have the right to immunity from liablity under the law of Vermont, the only place where it acted?

(a) *Substantive Justice and Social Policy.* The argument for immunity holds that the drunken driver is the one is who morally responsible for the accident. She is the one who decided to drink and drive; thus, she, not the tavern, should be the focus of the law's deterrent effects. Selling alcoholic

---

[258] 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

beverages does not cause injury—drinking and driving cause injury. Moreover, the bartender may not be able to easily discern which of her patrons have had too much to drink and will be driving. The person best able to prevent the accident is the customer herself. Conversely, the argument for liability contends that the conduct of the bar is a substantial contributing factor in causing the accident. It is common knowledge that drunk driving is a serious social problem; thus, it is morally wrong to serve liquor to someone who is visibly intoxicated and who might attempt to drive in such a condition. The bar, like any other social actor, owes a duty of care to persons who are foreseeably harmed by its activity. Liability, in turn, will affect the conduct of taverns by inducing them to train their bartenders to recognize intoxication and to instruct them to refrain from serving alcohol in such cases, thereby preventing tragic loss of life. To the extent liability is intended to compensate the family of the victim for the loss of their loved one, this burden is justly borne by the tavern. As a business, the tavern can spread the loss by raising prices to customers. To the extent such liability makes it impossible for taverns to purchase liability insurance or puts them out of business, society will be better off—those who profit from an activity should bear its costs.

As either a Massachusetts or Vermont judge, I would conclude that Massachusetts law is better.[259] Taverns are but-for causes of accidents, and their conduct in serving liquor to visibly intoxicated patrons is morally reprehensible, causing a tragic loss of lives. Liability is likely to affect the conduct of taverns by increasing their level of care regarding whom they serve and employ. Finally, it is fair for someone in the business of serving liquor to spread the loss by passing the cost along to its customers or purchasing insurance.

(b) *Multistate Policy*. Both states have interests in applying their law. Vermont is interested in immunizing its businesses operating in Vermont from ruinous liability. Massachusetts is interested both in deterring conduct in Vermont that foreseeably harms people inside Massachusetts and in compensating Massachusetts victims injured in Massachusetts by Vermont conduct that is wrongful under Massachusetts standards.

(c) *The Plaintiff's Argument for Substantive Justice*. The plaintiff would argue that Massachusetts has a legitimate government interest in applying its

---

[259] I assume here that the issue is a common-law one. If Vermont law were embodied in a statute I would feel constrained, as a Vermont judge, to adopt the legislative judgment as the appropriate measure of the better law, at least in the first instance. Yet, I admit that my personal disagreement with such a law would make me more likely to consider restrained interpretation of forum law, especially where the plaintiff is injured in his home state. As part of the choice-of-law determination, a conclusion that forum law was substantially unjust or problematic furnishes a powerful rationale for failing to extend application of forum law to a case with significant foreign contacts.

compensatory and deterrent policy to this case. Because it is easily foreseeable to a Vermont tavern that one of its customers may travel to Massachusetts and endanger people on Massachusetts roads, application of the Massachusetts law would have a deterrent effect on Vermont bars—especially if the ruling were publicized, as it probably would be, in Vermont newspapers. Moreover, even if application of Massachusetts law would have no deterrent effect on the Vermont bar, either because the bar was too far away from Massachusetts or because the bar does not know how to find out about Massachusetts law or wouldn't expect to be governed by the law of another state, application of Massachusetts law would still further Massachusetts' interest in compensating the victim's family. This compensatory policy is intended both to keep the family off the welfare rolls and to implement a moral policy in favor of redistributing the loss between the innocent victims and the actor whose conduct contributed to the harm.

The plaintiff would further argue that it is not fundamentally unfair to apply Massachusetts law to this type of Vermont conduct. While it is true that this result would upset any expectations the tavern had that its local conduct would be protected by local law, it is also true that the plaintiff did not expect to be killed on Massachusetts roads by a driver whose faculties were impaired in Vermont by what Massachusetts considers to be blameworthy conduct. From the plaintiff's perspective, it is as if the Vermont defendant fired a gun into the air, assuming that it would cause no harm, or that if it did cause harm, that harm would occur inside Vermont. But when a Vermonter negligently fires a pistol in Vermont and kills a Massachusetts citizen at home in Massachusetts, Massachusetts should have the power to protect itself from this conduct. Likewise, when a Vermont business pollutes a river in Vermont that runs down into Massachusetts, the political community in Massachusetts has as much right to protect itself from this conduct as Vermont has to attempt to immunize the actor from liability. Vermont may be able to choose to pollute its environment to protect its businesses and promote its economy, but it has no right to externalize the costs of its policy onto the people of Massachusetts. Moreover, the regulatory policy in Massachusetts is intended to make the roads safer, and thereby enable residents there to feel safer on the roads. Some residents may even decide to drive in reliance on the fact that the roads are likely to be safe from drunk drivers.

Thus, the case is not an apt candidate for restrained interpretation of forum law. Although Vermont has the right to immunize its taverns from liability for harming Vermonters in Vermont, it has no right to externalize this cost onto Massachusetts. If the defendant is not able to confine its conduct—or what Massachusetts considers the direct consequences of its conduct—to its defendant-protecting home state, then it should pay under the standards of liability of the state where the harm occurred and the plaintiff lives. If the forum were to engage in comity to the policy of Vermont, it would do so at the cost of both surrendering its sovereign power

to protect Massachusetts residents in Massachusetts and surrendering its conception of substantive justice between the parties. However much this result violates the defendant's expectations, any contrary result would do violence to the plaintiff's expectations that he was protected by Massachusetts law while driving in his home state. The defendant simply has no right to rely on the law of the place where it is acting when those acts have out-of-state consequences in a state that attaches legal significance to those consequences. Vermont has no power to give its citizens the freedom to cause harm with impunity in other states.

(d) *The Defendant Tavern's Argument for Tolerance of Vermont Law.* In contrast, the defendant would argue that this is an appropriate case for restrained interpretation of forum law. It is true that the forum has legitimate interests in compensating its domiciliary and in keeping its roads safe. There are, however, limits to its ability to further those policies. In addition to considering its substantive policies favoring deterrence and compensation, the forum must also consider multistate policies, which, in this case, should cause it to defer to Vermont's immunizing law. The plaintiff argues that because Vermont is a small state the tavern could foresee that its customers might drive to Massachusetts and that it is therefore fair to hold the tavern liable. The defendant would counter by arguing that precisely because of Vermont's small size the application of Massachusetts law would subject all taverns in Vermont to the chance of tremendous liability; the probable consequences of this would be to cause some Vermont taverns to go out of business and to prevent others from coming into existence because of the fear of ruinous liability. Massachusetts should not be able to exercise its sovereign power to intrude on Vermont's ability to govern its own affairs. Massachusetts should not be able to externalize onto Vermont the costs of its own social welfare program.

While it is true that the plaintiff never left Massachusetts, the claim that the plaintiff relied on Massachusetts compensatory law when he decided to go out and drive on Massachusetts streets is not believable. The plaintiff's expectations are thus of little value. The tavern's expectations, in contrast, are of great significance. It would be shocking for a tavern in Vermont to find out, after the fact, that although it was immune from liability under Vermont law, it was subject to regulation by another state whose policy it was powerless to control. This situation would be akin to taxation without representation. In planning the conduct of its business in Vermont, the tavern should be able to rely on Vermont law, regardless of what Massachusetts law provides. Thus, the Massachusetts forum should weigh the defendant's interests in freedom of action more heavily than it would in a domestic case, where the victim's security interests in compensation would outweigh the defendant's interest in serving liquor without fear of liability.

(e) *Deciding the Case.* Should Massachusetts apply its plaintiff-protecting law in this case? Conflicts scholars split on this question. Linda Silberman favors the most defendant-favoring position, arguing for the application of

comity or diversity policies. She argues that if the defendant has not engaged in any purposeful activity in Massachusetts related to the claim, it cannot be fairly governed by Massachusetts standards.[260] In her view, the defendant local tavern has a right to engage in business in reliance on the immunizing law of the place where it is acting. It is wrong, Silberman contends, to hold a person to standards different from the law of the place where she acts. To do so is the moral equivalent of an ex post facto law; it punishes someone for acting in a way she could not have known to be illegal. Such a person should not be held liable because she violated no law of which she should have been aware. Although Massachusetts has an obvious interest in getting compensation for its resident, the defendant's interest in relying on the local law of the place where it acts outweighs that interest. Moreover, she would reach the same conclusion no matter where the accident happened—the relevant contact is the place of conduct. Whatever Massachusetts thinks about the justice of dram shop immunity, it should adhere to the notion of multistate justice; it has no right to regulate the local conduct of a tavern in another state.

At the other extreme, Louise Weinberg adopts the most plaintiff-favoring position. She argues that the plaintiff-compensating policy represents the better law and that Vermont law should therefore be confined to wholly domestic disputes in Vermont.[261] Vermont may fail to protect its own residents injured in Vermont, but it has no right to externalize the costs of its economic development policies onto innocent victims in Massachusetts. If the defendant is not able to confine the consequences of its injurious conduct to a defendant-protecting state, it should not be surprised that it is held to account for its wrongful conduct. Moreover, Weinberg would adopt the same position to compensate a Massachusetts victim *even if the accident had occurred in Vermont.* In line with modern analysis that downplays the significance of the place of the injury, Weinberg asserts that a case in which the accident occurs in Vermont is not reasonably distinguishable from the case in which it occurs in Massachusetts. In both instances, Massachusetts is interested in compensating its domiciliary, both as a matter of justice between the parties and as a means of keeping the victim and his family off the welfare rolls. Massachusetts' deterrent interest in keeping Massachusetts roads safe is valid even if the accident had occurred in Vermont. The fact that the accident happened in Vermont is entirely fortuitous; it could just as easily have happened in Massachusetts. In either case, the defendant's conduct creates the same risk of harm to the state of Massachusetts.

---

[260] Silberman, *supra* note 75, at 121. The purposeful activity must be related to the conduct giving rise to the injury; unrelated activity sufficient to establish general jurisdiction is not enough in her view. *Id.* at 121-22.

[261] Weinberg, *supra* note 7, at 623-25. Weinberg comments that the plaintiff-protecting law is better because it promotes the "widely-shared policies . . . [of] risk spreading, compensation and deterrence . . . ." *Id.* at 624.

Although it is true that the defendant may have relied on the law of the place where it was acting to immunize it from liability, its interests are less entitled to respect when they cause harm in another state. As Weinberg states:

> That the situs cheerfully places the risk on the injured party is all very well when the injured party is one of the situs' own residents. It seems a bit high-handed when the injured party is a nonresident, particularly when the costs of the injury will have to be borne in another state.[262]

Professor Weinberg emphasizes the injustice of leaving a Massachusetts resident vulnerable to harm in her home state. Moreover, Massachusetts disagrees with Vermont about the morality of the tavern's conduct. Although lawful in Vermont, Massachusetts considers serving alcohol to intoxicated patrons to be such reprehensible conduct as to make it a proximate cause of a tragic death. From the perspective of Massachusetts, Vermont simply lets tavern owners and employees get away with murder. Even if the tavern is innocent—at least in a legal sense—because it is entitled to rely on immunizing local law, the victim was truly innocent.

David Cavers adopts a middle position. He argues that the result should depend on the place where the accident occurs. When the conduct and injury are in different states, Cavers would apply the law of whichever state favored the plaintiff.[263] Thus, when the tavern sells liquor in a defendant-protecting state, causing injury in an accident in a plaintiff-protecting state, he would hold for the plaintiff. The place of injury has the right, he argues, to protect itself from actors in other states who send dangerous instrumentalities into the state.[264] When the conduct and injury occur in the same state, however, and the only contact with the plaintiff-protecting state is the plaintiff's domicile, Cavers would apply the law of the place of conduct and injury. He would do so on the ground that it is unreasonable for Massachusetts to attempt to regulate a wholly local event in Vermont. Such a practice would, in effect, allow Massachusetts to override the Vermont lawmakers' ability to govern affairs in Vermont. Moreover, he argues that the Massachusetts resident who enters Vermont "has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard that their law had not created."[265]

Should the Massachusetts forum restrain itself from applying better forum law in deference to the political and normative community in Vermont? I find no reason why it should. Vermont may choose to protect its businesses from liability in these situations, but it has no right to do so when the results

---

[262] *Id.* at 624.

[263] Cavers might create an exception to this rule and hold for the defendant if "the physical or legal consequences of his action were not foreseeable." D. CAVERS, *supra* note 46, at 141.

[264] *Id.* at 139-44.

[265] *Id.* at 147.

of their conduct spill over into a plaintiff-protecting state. Vermont taverns have no right to rely on the law of the place where they are acting if their conduct creates a grievous harm in a state that prohibits or otherwise regulates that conduct. This is not a case of Massachusetts illegitimately attempting to engage in extraterritorial regulation of conduct in Vermont. Rather, application of Vermont law to govern Vermont conduct will illegitimately extend Vermont's defendant-protecting policy to authorize Vermont taverns to wreak havoc in Massachusetts.

To the extent that Vermont's economic policy of protecting its taverns from ruinous liability causes harm in Massachusetts, we have a direct conflict between the norms of separate political communities. Vermont holds its taverns blameless for the harm and seeks to implement a set of social relationships that places blame and responsibility on drunk drivers. It further seeks to promote business and stimulate the local economy. Massachusetts finds such conduct shameful and seeks to regulate it to protect its citizens on its roads. It further seeks compensation and deterrence of such conduct as a way to protect the economic system in the state and the intimate relationships lost when a Massachusetts resident is killed. The forum must either extend the Massachusetts regulatory policy to Vermont conduct that causes harm in Massachusetts, thus interfering with Vermont's tavern immunizing policy, or extend the Vermont policy of freeing taverns from liability to authorize them to commit harm in Massachusetts, thus interfering with Massachusetts' protective policy.

The case starkly presents the tension between the norms of separate communities. The more strongly Massachusetts believes its own policy, the less likely it is to defer to the unjust and dangerous practices in Vermont. It has a great incentive to confine the harmful Vermont policy to accidents that do not occur in Massachusetts. If Vermont cannot confine its policy and the conduct of its citizens to its own state, it should accept the consequences that the better law of the victim's state provides.

But what if the consequence of this policy would be to put all the bars in Vermont out of business? After all, Vermont is a small state, and taverns everywhere within it run the risk of their patrons driving to Massachusetts. If application of Massachusetts law to cases like this would significantly affect taverns in Vermont, a Massachusetts judge should take note of and worry about this interference with the political process and values of a neighboring community. Although a Massachusetts judge may consider the Vermont policy unjust, she cannot consider it to be unreasonable. What right does Massachusetts have to determine the economic policy that will govern the Vermont business community? The answer is that it has as much of a right as Vermont has to govern its conduct in a way that causes harm in Massachusetts, contrary to Massachusetts policy. Vermont has no right to authorize its citizens to stand across the border from Massachusetts, violate Massachusetts law, and kill someone in Massachusetts.

Would the result differ if the accident had occurred in Vermont? This is a

much harder case. For the accident to happen in Vermont, the Massachusetts victim would have had to have voluntarily entered the state. This is an intuitively powerful consideration. Cavers argues that people who voluntarily go into another state should take the vulnerabilities imposed by the law of the state they have entered.[266] They certainly should not be surprised that their rights are governed by the law of that state. Why should the Massachusetts driver be able to carry Massachusetts law with him as he drives around Vermont? A Vermont driver would not be able to recover in like circumstances, but the Massachusetts driver—a one-person liability machine—carries his armor around with him. It seems wrong for a Vermont tavern to be subject to different obligations to people injured in Vermont depending on where they come from. Such a result may even appear to discriminate against Vermont residents, treating them worse than similarly situated nonresidents injured in the state.

Application of Massachusetts law to govern the liability of a Vermont tavern for an accident in Vermont does appear intolerant. Such a result may seem parochial and imperial, governing events wholly centered in Vermont. Vermont has the power to govern its affairs within its borders, and a Massachusetts resident entering Vermont does not merely cross a border; she enters a distinct political system and normative world. Moreover, the case is being heard in Massachusetts for reasons that seem fortuitous—unrelated business contacts giving general jurisdiction over the defendant. Given all these considerations favoring application of Vermont law, the case appears open and shut.

So why is this a hard case? Professor Weinberg argues that from the standpoint of the tavern, it is entirely fortuitous where the accident occurs. It was, after all, an accident. Weinberg would argue that the defendant's conduct causes the same risk of harm in Massachusetts no matter where the accident actually occurs; in either case, the tavern served liquor to people who could foreseeably be on their way back to Massachusetts, and in either case the accident could have happened in Massachusetts. Moreover, the actual harm is the same: the death of a Massachusetts resident. The fact that it occurs one mile over the border into Vermont seems wholly irrelevant to both the tavern's conduct or the victim's family. The creation of a risk of harm in Massachusetts and the reality of the death of a Massachusetts resident are more significant than the place of the injury. The place where the cars happen to crash seems to be a painfully arbitrary place to draw the line.

Although the Massachusetts resident who drives to Vermont may be unaware that Vermont taverns are immune from tort liability for serving liquor to drunken patrons, it is not unfair to subject the Massachusetts resident to the local policies governing commercial relationships established

---

[266] D. CAVERS, *supra* note 46, at 140; Silberman, *supra* note 75, at 121.

there. I agree with Professor Cavers that there is a serious problem in allowing the plaintiff to drag Massachusetts law into Vermont and impose liability on a Vermont resident for Vermont conduct that causes harm in Vermont. Application of Massachusetts law here does seem intolerant in a way that is objectionable; Vermont should be able to determine the legality of conduct in Vermont that has harmful consequences there. Moreover, the case is only being heard in Massachusetts because of unrelated business contacts; the fact that the case can be heard there seems an arbitrary reason to subject the defendant to regulation to which it would otherwise be immune. But I also agree with Professor Weinberg that there is a serious problem that derives from failing to apply forum law in this case: the consequences of the Vermont conduct here are not limited to Vermont. The person killed was a resident of Massachusetts, and the political community there is not interested only in protecting that person's welfare but must deal with the consequences of the individual's death. A Massachusetts victim of Vermont conduct is differently situated than a Vermont victim, and compensatory tort policies suggest that one should take the victim as we find her. A Massachusetts court would be justified, therefore, in applying Massachusetts law even when the accident happens in Vermont.

As a Massachusetts judge, I would probably, but not certainly, apply Vermont law. In a case like this, the forum should defer to the law of Vermont on the grounds that the defendant relied on—and had a right to rely on—the law of the place where it acted to immunize it from liability, and that the plaintiff voluntarily entered the defendant's state, thereby subjecting himself to the benefits and vulnerabilities of Vermont law. This is not a case in which the parties have formed a relationship centered in Massachusetts that would give the plaintiff a claim to the continuing protection of the plaintiff-favoring Massachusetts policy.

Unlike Cavers, I would reach the same result even if the injury occurred in Massachusetts. Massachusetts law should apply to victims in Massachusetts who never left their home state; but a Massachusetts resident who goes to Vermont should be bound by Vermont law no matter where she is injured. The place of the accident is an arbitrary way to draw the line. This formulation constitutes a compromise between Silberman's extreme defendant-favoring position and Weinberg's extreme plaintiff-favoring position. It differs from Cavers' middle position by distinguishing cases on the basis of whether the plaintiff entered the state where the wrongful conduct occurred, rather than on the basis of the place where the accident happened to occur.[267]

---

[267] I would probably reach a different result if the parties had a relationship centered in Massachusetts. For example, in *Carroll*, the employee voluntarily entered Mississippi, a defendant-protecting state, and was injured there. However, the parties had an employment relationship centered in Alabama, a plaintiff-protecting state. In that case, the law of the place of the relationship should control. This is

D. *Freedom of Contract versus Justice in Relationships*

1. The General Structure of Contracts Arguments

When judges or scholars talk about justified expectations in conflicts cases involving contracts, they almost always assume that this argument pushes us toward enforcing the agreement between the parties.[268] Because the plaintiff is often the party claiming enforcement of a contract, application of plaintiff-protecting forum law in contracts cases will often have the effect of creating a presumption of validity. I have argued previously that this presumption oversimplifies contract law by failing to recognize that different states may have differing judgments about what the intent of the parties—their justified expectation—actually was, or whether enforcement would contravene forum policies regulating freedom of contract. It is therefore highly problematic to claim that a forum preference ordinarily furthers the better law in contracts cases.[269] One party may claim a right to rely on the law of the state that validates and enforces the agreement, while the other party will appeal to the law of a state that would not recognize the agreement as truly embodying the voluntary expectations of the parties or which would override their agreement to prevent oppression or social harm.

Professor Weinberg has also pointed out, in a strikingly original and perceptive argument, that we no longer believe that contracting parties have an absolute right to rely on the presumably applicable law in effect at the time they contract to govern their contractual rights and duties.[270] Almost no

---

partly because of the relationship centered in Alabama and partly because the defendant engaged in purposeful activities in Alabama. Similarly, I would not hesitate to apply the plaintiff-protecting Massachusetts law if the Vermont defendant *advertised* in Massachusetts, thereby placing itself within the legitimate regulatory authority of the forum. *See* Silberman, supra note 75, at 121.

[268] *See, e.g.*, Bushkin Assocs. Co. v. Raytheon Co., 393 Mass. 622, 634-36, 473 N.E.2d 662, 670-71 (1985) (arguing that the justified expectations of the parties militate toward choosing the law that validates the agreement).

[269] Although Professor Weinberg refers to "enforcement of agreements" as a shared multistate policy, *see* Weinberg, *supra* note 7, at 599, she recognizes that some defenses to contract claims, such as unconscionability, are both widely shared and the better law. *See id.* at 608 (criticizing the result in Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955), where an American personal injury claimant was held bound by a stipulation for English law contained in unbargained-for language in small print on a passenger ticket); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 460-63 (1982) (approving a Minnesota law that refused to recognize non-stacking provisions in insurance contracts).

[270] Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1040 (1982). Weinberg argues:

> The time "relevant" to governance of an ongoing contractual relationship need not be, a priori, the time when the parties entered

one thinks that it is a violation of due process for a state to change the law in a way that retroactively regulates existing contractual relationships. When the courts created a non-disclaimable implied warranty of habitability in residential leases, they applied this new obligation to all existing leaseholds, thereby destroying the expectations of landlords who entered those contracts in reliance on prior law that imposed no such responsibilities upon them. Application of the law of another state affected by the contract is no greater an interference with contractual expectations than retroactive domestic changes in contract law. There is therefore no reason to presume that regulation of contract terms by a state with significant contacts with the parties or the transaction violates fundamental norms of fairness. These cases pose a real conflict between the rights of parties who relied on the validating provisions of the law they hoped would apply to their contract and the rights of parties who claim to be covered by the law of the place that would protect them from contract obligations that are oppressive or that pose a risk of social harm.

2. Intent to Be Bound: Formality versus Informality

Our first contracts case concerns a conflict about whether the parties sufficiently manifested a voluntary intent to be bound. In *Bushkin Associates v. Raytheon Co.*,[271] the plaintiff was a New York investment banker, specializing in mergers and acquisitions. Since 1971, he had been advising the defendant Raytheon, a company with its principal place of business in Massachusetts, about possible mergers and acquisitions. In 1974, the plaintiff discovered that Beech Aircraft Corporation might be available for acquisition. He informed the defendant that he had information about a general aviation company that was available for acquisition. In a 1975 phone conversation between plaintiff's office in New York and the defendant's office in Massachusetts, Raytheon agreed to pay the banker a fee of one percent of the total sale price if the banker's information led to Raytheon buying one of two general aviation companies, Beech or Cessna. The plaintiff informed Raytheon that Beech was possibly available for acquisition. The sale fell through, but four years later Raytheon signed a merger agreement with Beech, the company whose name it had obtained from plaintiff. The value of the transaction was $800 million. Raytheon used brokers other than plaintiffs

---

out their initial contractual obligations. The governing power of a sovereign cannot be hedged round with supposed rules of that kind. If the relation has since become illegal, for example, the state as a practical matter would have to be able to step in and modify it. That is why the contract clause of the Constitution has never been interpreted to forbid legitimate exercises of state police power affecting the obligations of contracts.

*Id.* at 1040.

[271] 393 Mass. 622, 473 N.E.2d 662 (1985).

as intermediaries in the transaction, paying them more than $1 million in fees. The investment banker sued Raytheon to recover his one percent fee, totalling $8 million, that the defendant had promised in the 1975 phone conversation. Under the law of New York, a strict statute of frauds jurisdiction, the fee agreement was not enforceable because it was not in writing. Under Massachusetts law, however, the oral agreement was enforceable in accordance with its terms; the question of the existence of an agreement was a factual question for the jury to decide. Naturally, the plaintiff sued in Massachusetts.

The Massachusetts Supreme Judicial Court[272] began its analysis by pointing to the shared policy of the two states:

> We begin by noting that the laws of both Massachusetts and New York favor the enforcement of contracts. The difference is that New York believes that the protection of defendants' rights requires that, in the circumstances of this case, there be a writing to prove the defendant's promise, while the law of Massachusetts does not . . . .[273]

It then applied forum law on the grounds that it would validate the agreement, furthering the justified expectations of both parties that "any oral agreement would be enforced."[274] Effectively, the court perceived the case as establishing a true conflict and resolved this conflict by applying what it saw as the better forum law. But, in so doing, the court downplayed the competing policies of New York to such an extent that they disappeared. The conflicts between the parties' expectations and the substantive policies of the two states were subsumed by the fiction that enforcement of the contract was not only the better result but that this result furthered both the shared policy of the two states and the shared expectations of the parties. This simplistic analysis failed to appreciate the real conflicts that this case poses both for contracts and conflicts policy.

(a) *Substantive Justice and Social Policy*. In general, I find myself unsympathetic to the statute of frauds defense. It allows people to renege on promises they made upon which they knew others would rely. It may also be a trap for those who do not have access to legal assistance to inform them that they must protect themselves by formalizing the agreement. However, it does not seem unreasonable to require a sophisticated businessperson with access to legal counsel to get an agreement in writing. Such a requirement may prevent fraudulent claims and avoid needless litigation over the terms of the agreement. Even so, it seems wrong to identify the moment of signing the contract as the moment when the parties come to legitimately rely on each other; precontractual representations often create legitimate reliance on an informal relationship that may merit legal protection. Moreover, it is

---

[272] The choice-of-law question was certified to the Massachusetts court by the First Circuit Court of Appeals. *Id.* at 623, 473 N.E.2d at 664.

[273] *Id.* at 634, 473 N.E.2d at 670.

[274] *Id.* at 635, 473 N.E.2d at 671.

not clear that reducing a contract to writing forestalls litigation. Even if the contract were in writing, the parties would surely interpret it differently; they would find something to fight about. Further, the goal of preventing fraud should recede into the background if the defendant admits that an oral promise was made. In this case, the defendant is asking to prevail not on the grounds that the plaintiff's claim is fraudulent but because the plaintiff failed to comply with a formality. In this kind of case, it seems more reasonable to identify the defendant as the one who committed a kind of fraud by wrongfully inducing the broker to reveal information with false promises to compensate him for it.

(b) *Multistate Policy*. Both states have significant interests in applying their respective laws. New York's policy of requiring contracts like this one to be put into writing has several purposes. It regulates brokers operating in New York by requiring them to put fee agreements into writing; the nonenforcement of oral agreements gives brokers a strong incentive to change the way they do business. Requiring a writing protects companies like the defendant from fraudulent claims by New York brokers. Even though the result of this law is the failure to enforce oral agreements, it furthers the norm of freedom of contract by ensuring that only defendants who actually promised to pay a fee wind up paying it. It therefore protects companies from obligations that they had not voluntarily assumed. Although New York's policy may increase the cost of contracting by requiring the formality of reducing an agreement to writing, it also lessens the amount of controversy about contract terms and keeps contract disputes out of the courts, thereby lowering administrative costs. Moreover, New York courts have held that New York is interested in applying its protective policy to aid outsiders like the defendant who contract with New York brokers.[275] In

---

[275] Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 382-84, 248 N.E.2d 576, 581-83, 300 N.Y.S.2d 817, 825-27 (1969). The use of *renvoi* is disapproved by most courts and almost all conflicts scholars. R. CRAMTON, D. CURRIE & H. KAY, *supra* note 99, at 66-68. However, some of its principles have been incorporated into interest analysis. This is done by using foreign conflicts opinions to determine the geographic scope of the foreign substantive policy; so, in this case, Massachusetts defers to New York choice-of-law decisions that hold that New York is interested in applying its protective law to nonresidents who contract with New Yorkers in New York. Conversely, if the New York conflicts opinions had applied Massachusetts law in cases like this, then Massachusetts would have an argument under interest analysis to resort to forum law. If the forum is generally interested in applying its own substantive policy because it views it as better law, it may feel more confident about overriding or de-emphasizing multistate interests in diversity or comity if it discovers that the foreign law to which the forum would consider deferring would not be applied in the courts of that state. In that case, the other state is either not interested in applying its own law, or would engage in restrained interpretation of its own law in deference to the law of Massachusetts. Thus, Massachusetts' application of forum law can further both the forum's interest in applying

addition to promoting the moral interest in not discriminating against nonresidents, New York's policy furthers the utilitarian interest in promoting New York as a center of international business. Foreign companies will be more likely to come to New York to do business, or to do business with New Yorkers, if they know that they are protected from fraudulent claims. Furthermore, it is obviously no unfair surprise to the plaintiff that his brokerage operations in New York are subject to regulation by a New York law specifically directed to persons like himself.

Massachusetts is interested in applying its law to this case for several reasons. Enforcement of oral promises made in the state will deter businesses operating in Massachusetts from misleading brokers by making oral promises that are later revoked. Massachusetts therefore has a moral interest in holding residents to their promises made in the state. There is no question that a promise made to a Massachusetts plaintiff in the state would be enforceable; under a nondiscrimination policy, Massachusetts sees no reason to discriminate against this plaintiff and deny him protection simply because he comes from New York. And, just as the New York policy is intended to promote the norms of freedom of contract and security of transactions and to foster business connections in New York, the Massachusetts policy seeks to promote freedom of contract and business contacts in Massachusetts by enforcing oral agreements. Granting nonresidents the security that promises made to them will be enforced encourages outsiders to engage in business dealings with Massachusetts residents, thereby aiding the local economy. It is not an unfair surprise to the resident corporation that its promises made in Massachusetts will be enforceable despite the absence of a writing. Finally, although the statute of frauds determines the existence of a contractual obligation, the forum views it partly as a question of procedure because it involves defining what evidence will be admitted to prove a contracts claim and because it involves a decision to allow a jury to resolve disputed questions of fact.

If the case is viewed as a true conflict, how should the case be decided? Since the forum appears to have a "real interest" in applying its law, interest analysts like Professor Sedler would most likely apply forum law.[276] Policy analysts like Professor Weinberg would advise the court to apply the better, validating law of the forum because the statute of frauds is a disfavored defense;[277] other scholars and courts would appeal to a "presumption of validity" of contracts, which is a policy equivalent of applying the better law.[278] If, for some reason, the forum determined that it was better to require

---

the better law to achieve uniformity and substantive justice *and* the multistate interest in comity.

[276] *See* Sedler, *supra* note 140, at 227; Sedler, *supra* note 124, at 604.

[277] *See* Weinberg, *supra* note 7, at 612.

[278] This is exactly what the *Bushkin* court did. *See supra* note 272-74 and accompanying text.

a writing in this kind of case, Professor Weinberg would advise the forum, if possible, to change forum law to accord with better New York law and apply the new law.[279] Territorial analysts like Professor Twerski would point the court to the place where the contract was made or to the "center of gravity" of the relationship.[280] Because each of these tests is indeterminate for choice-of-law purposes, Twerski might point us to the expectations of the parties, which is his major criterion for determining the "center of gravity" of a case.[281] This policy takes us right back to conflicting contract norms. On one hand, we could define justified expectations as a presumption that agreements will be enforceable. On the other hand, we could argue that a sophisticated contract claimant operating in New York should expect that New York requirements for a writing would apply to him; application of Massachusetts' validating law would be a big surprise and an unjustified windfall.

These approaches point us to a series of conflicting policies and norms. Does the multistate policy of protecting justified expectations mean promoting freedom of contract? If it does, does freedom of contract mean that we should ordinarily enforce all promises, written or oral? Or does it mean that we should be especially careful about protecting defendants from fraudulent claims by enforcing only agreements for which we have indisputable evidence that the defendant voluntarily agreed to be bound? If these substantive policies conflict in this case, should the forum resolve the conflict by applying what it considers to be the better, validating law of the forum to further the interest in uniform contract enforcement in multistate cases? Or should the forum defer to the New York policy of regulating the conduct of brokers in New York, both because this would conform with the broker's justified expectations and because of New York's interest in applying its policy to encourage the development of an international business center in New York?

(c) *Plaintiff's Argument for Substantive Justice: Applying the Contract-Validating Law of the Place Where the Promise Was Made.* The plaintiff would argue that there is no good reason for the forum to fail to apply the better, validating forum law in deference to New York's interests in regulating its own economy. Massachusetts' interests are strong here because, assuming the plaintiff's allegations are true, the defendant's actions are the functional equivalent of committing a fraud. By making a promise that was unenforceable under the law of the state where the plaintiff was operating, the defendant induced the plaintiff to reveal valuable information without compensation. Moreover, Massachusetts law enforces oral promises to encourage business dealings with Massachusetts companies. Allowing the defendant to hide behind the New York policy might cause nonresidents to

---

[279] *See* Weinberg, *supra* note 7, at 601.

[280] Twerski, *supra* note 58, at 123.

[281] Twerski, *supra* note 38, at 381-82.

distrust Massachusetts companies out of fear that Massachusetts companies might try to break out of their deals and take unfair advantage of nonresidents whenever possible. The choice of New York law would send a message that Massachusetts courts are inhospitable to nonresidents, who, unlike residents, would lose a claim of this sort. Thus, application of New York law not only might have deleterious effects on the Massachusetts economy but would grant a Massachusetts company the freedom to commit fraud by unjustifiably breaking oral promises—a liberty interest that would not be available to the defendant if the plaintiff were a Massachusetts resident.

In comparison, New York policy is weak in this case. New York is interested in applying its policy to protect nonresident as well as resident defendants from fraudulent contract claims; this nondiscrimination policy promotes the moral interest in treating outsiders fairly and the regulatory interest in helping the New York economy. However, the Massachusetts court might conclude that New York should be less interested in extending its policy to protect businesses operating in jurisdictions that explicitly make them liable for their oral promises made in their home states. The New York Court of Appeals explained that it would apply its policy to "those who *come into New York* and take advantage of our position as an international clearing house and market place."[282] This case is therefore distinguishable from the general situation envisioned by the New York Court of Appeals: the defendant did not "come into New York" but acted inside Massachusetts. Moreover, in this case, New York policy directly conflicts with a Massachusetts' policy that is intended not only to aid the Massachusetts economy but also to prevent Massachusetts residents from defrauding both residents and nonresidents by conduct inside Massachusetts. Massachusetts has no interest in protecting its resident corporation from liability resulting from broken promises; in fact, Massachusetts has a substantial interest in requiring it to make good on its promises as a way of regulating the corporation's conduct in Massachusetts. However, to the extent that application of New York law would interfere with the Massachusetts policy regulating Massachusetts conduct as a way to encourage dealings with Massachusetts residents, the case presents a real conflict. Application of either law harms the policy goals of the other state to some extent. Therefore, there is no reason for the forum not to apply what it sees as the better, validating law in deference to the ability of New York to determine the way in which its economic affairs are conducted.

(d) *Defendant's Argument to Apply the Regulatory Policy of the Place Where the Broker Acted.* Defendant would claim that New York's policy of requiring written agreements applies equally to companies that physically come to New York to transact business and companies that do business over the phone or by other forms of electronic communication with New York

[282] Bushkin Assocs. Co. v. Raytheon Co., 393 Mass. 622, 628, 473 N.E.2d 662, 666-67 (1985) (quoting International Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 383-84, 248 N.E.2d 576, 582-83, 300 N.Y.S.2d 817, 826-27 (1969)) (emphasis added).

actors. Allowing the New York broker to prevail here would significantly interfere with New York's ability to regulate the conduct of brokers in New York and to encourage international business dealings with New York brokers. In comparison, the Massachusetts policy is weak. Massachusetts is not interested, or at least should be less interested, in protecting a person who is not protected by the law of the place where he is acting. Massachusetts wants to apply what it considers to be the better forum law to prevent fraud by Massachusetts businesses and to encourage security in transactions with Massachusetts businesses by promoting trust in market relationships. However, along with its substantive contract/tort policy, Massachusetts has a multistate policy of deferring to the separate political community of New York to govern its own economic actors and control its commercial markets. Here, Massachusetts can further New York regulatory policy without drastically diminishing the force or effectiveness of its own policy. It is true that, from Massachusetts' standards of morality, Raytheon has gotten away with murder. But New York does not see it that way. Massachusetts can choose to apply its policy to domestic disputes with Massachusetts promisees and to nonresident plaintiffs who are unsophisticated or who come from states without strong regulatory policies requiring contracts to be in writing. But when the plaintiff is a sophisticated investment banker, operating in a state with stringent regulation of his conduct, there is no reason to impose an $8 million burden on a Massachusetts company. From the plaintiff's perspective, this reward would constitute a windfall because the plaintiff attempted to evade a regulatory policy of his home state to which he was clearly subject. The plaintiff should not be surprised that he is being held to New York standards for his conduct in New York. Massachusetts is therefore not discriminating against the plaintiff by treating him differently from a domiciliary; instead, Massachusetts is affirming the application of New York's regulatory laws to him. The case is an appropriate one for restrained interpretation of forum law in deference to the forum's multistate interest in diversity.[283]

(e) *Deciding the Case.* These conflicting interpretations raise questions about both the substantive norms of contract law and the conflicting goals of

---

[283] Another interpretation would explain *Bushkin* as an unprovided-for case. *See* Weinberg, *supra* note 7, at 612 (explaining problems associated with "no interest" or "unprovided-for" cases). This interpretation simply posits that neither state is really interested in applying its law to this case. Massachusetts does not want to extend its policy to a plaintiff whose conduct is regulated by the law of the place where he was acting; New York does not want to extend its policy to protect a defendant whose conduct is regulated by the law of the place where it was acting. The plaintiff could prevail in such a case by appealing either to application of forum law or to what he can claim is the better, validating law. The defendant would prevail by claiming that neither state is interested in vindicating a claim by the plaintiff; thus, the plaintiff has failed to identify any law that grants him a right to relief.

multistate policy. How do we determine the justified expectations of the parties when the laws of the respective domiciliary states differ on the question of whether an oral promise is enforceable? Do promisees have the right to rely on an oral promise when the place where they act requires them to get the promise in writing? Do promisors have a right to renege on an oral promise when the law of the place where the promisee acts requires a writing? Can a promisee plaintiff rely on the validating law of the place where a promise was made in order to enforce a contract that is unenforceable under the law of the state where the plaintiff himself acts?

On one hand, it seems reasonable for a Massachusetts court to require a sophisticated broker operating in New York to comply with a New York law demanding that agreements be in writing. It would constitute an almost embarrassing level of altruism for a Massachusetts court to impose an $8 million obligation on a Massachusetts company for its conduct in a transaction with a New York broker when a New York court deciding the same case would probably hold a New York broker to New York's regulatory requirements.

On the other hand, as a Massachusetts judge, I would see before me a Massachusetts company that wrongly converted the plaintiff's property—information—by making what turned out to be a false promise. Viewed in this light, New York's interest in regulating its broker pales in comparison with Massachusetts' interest in regulating the wrongful conduct of a Massachusetts company in Massachusetts. It is true, however, that Massachusetts may have less reason to extend its protective policy to a broker whose claim is based on his own failure to comply with the law of the place where he was acting—a law that he should have known might apply to him. I do not think that, as a Massachusetts judge, I would be moved by the argument that the local economy would be harmed by an $8 million obligation on a local company that is not required by the law of the place where the plaintiff operated and was presumably harmed. On the contrary, Massachusetts has an interest in requiring its local businesses to treat outsiders, like residents, fairly by enforcing promises of this sort. I would further be concerned, as a forum judge, that application of Massachusetts law would interfere with the ability of New York to establish itself as a center of international commerce by inducing outsiders to trust its brokers.

As a Massachusetts judge, I would resolve the case by applying forum law, as did the Massachusetts Supreme Judicial Court. I would not do so, however, on the grounds stated by the court—that New York and Massachusetts have shared interests in enforcing agreements. I would do so on the grounds that it was wrong for the defendant to appropriate the plaintiff's property by making a promise it would not or could not keep. This result would hold true at least where there was no factual dispute about the existence of the promise or its terms.[284] The forum policy thus represents the

[284] Of course, relying on this caveat would invite future Massachusetts defendants

better law. While application of forum law certainly hinders New York's ability to regulate the conduct of its brokers and to establish itself as an international commercial center, the opposite result—applying New York law—would allow New York's commercial policy to interfere with Massachusetts' ability to regulate the conduct of its resident corporations in their dealings with nonresidents. Therefore, I do not think this case is an apt candidate for deferring to what the forum sees as an unjust result—granting the defendant the windfall of escaping a legitimate obligation. This is not a case in which the New York plaintiff relied on New York law; indeed, the plaintiff is the party attempting to claim protection under Massachusetts law. It is also not a case in which the defendant can legitimately claim to have relied on New York law; if it did, it was committing a fraud in inducing the plaintiff to reveal the information when it never intended to pay for it. Moreover, the existence or nature of defendant's obligation is really not in dispute; the only obstacle to plaintiff's recovery is the lack of a writing. Thus, the important goal of inducing outsiders to trust brokers not to make false claims and thereby establish (continue) New York's prominent role in international commerce is quite weak here. Nonetheless, the conflict between the two sets of market rules is real: application of Massachusetts law does interfere with the New York conception of a well-functioning market. Even while it applies forum law, the Massachusetts forum should recognize this cost.

3. Reliance on the Validating Law of the Place Where the Contract is "Made" versus Protection from Coerced or Unfair Obligations

Consider the following hypothetical dispute concerning a conflict about the voluntariness of an agreement and its substantive fairness.[285] The seller of a business located in New Hampshire negotiates with a Massachusetts buyer about the possible sale of the business, which includes a New Hampshire factory. The parties negotiate in both states. In the course of the negotiations, the seller makes various representations about the condition of the building in which the factory is located and the expenses of the business. The buyer trusts that the seller is telling the truth. They sign a purchase and sale agreement in Massachusetts, with a choice-of-law provision referring to New Hampshire law. The contract contains a standard clause in which the buyer represents that it is not relying upon any statements made by the seller that are not embodied in the written contract. The closing takes place in New Hampshire a month later. After taking over the business, the buyer discovers that the seller lied about the condition of the building and the expenses connected with the business. The buyer sues the seller in Massachusetts

---

in such actions to invent factual disputes regarding the plaintiff's claims as a way to protect themselves from liability.

[285] This conflicts hypothetical is loosely based on the facts of Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959).

asking the court to rescind the agreement and order the seller to pay damages for fraud in the transaction.

Assume that under New Hampshire law, the non-representation clause is enforceable in accordance with its terms, as is the choice-of-law provision. The buyer cannot now claim that it was relying on representations made by the seller not embodied in the contract. The seller violated no terms of the contract; thus, no breach of contract occurred. Moreover, because the buyer agreed that it was not relying on the seller's representations, those representations cannot have proximately caused any harm to the buyer. The buyer's problems are the result of its own failure to investigate. Thus, the buyer is not entitled to any damages resulting from the seller's fraudulent representations.

These legal rules promote various policies relating to freedom of contract. New Hampshire grants parties the freedom to agree on whatever terms they like and will enforce their agreements in accordance with those terms. This policy advances moral interests in granting market participants the freedom to fashion their relationships as they see fit and encouraging self-reliance. It also furthers regulatory interests in promoting reliance on contracts by giving the parties what they bargained for. This policy will have the effect of promoting business dealings by clarifying for the parties the obligations they undertake; they get nothing more and nothing less than the terms of their written agreement. This rule will also prevent fraudulent claims about oral representations not included in the contract, thereby ensuring that the court is enforcing only terms that were voluntarily adopted by both parties. To the extent these policies encourage market participants to distrust each other, they will exercise more care in their transactions. The non-representation clause encourages desirable business dealings because it grants the seller security that the sale will not result in any unforeseen complaints by the buyer. It promotes the alienability of property and the free flow of resources to their most profitable and productive use, thereby furthering the general welfare.

Assume that under Massachusetts law the non-representation and choice-of-law clauses are unenforceable. Massachusetts would refuse to enforce the choice-of-law provision because it violates a strong public policy of the forum.[286] Massachusetts' grounds for not enforcing the non-represen-

---

[286] The Second Restatement provides that choice-of-law provisions are ordinarily enforceable. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). However, when the contractual term at issue is one involving public policy—rather than a mere specification of terms, like an interest rate, that raises no issue of enforceability in either state—there are three exceptions to this principle. First, the provision will be unenforceable if the parties do not choose the law of a state that bears a "substantial relationship" to the parties or the transaction, or if there is some other "reasonable basis for the parties' choice." *Id.* at § 187(2)(a). Second, the chosen law will be ignored if it "would be contrary to a fundamental policy of a state which has a

tation clause would rest in its interest in protecting freedom of contract; Massachusetts has a moral interest in only enforcing agreements that are the result of voluntary agreement. Because the seller's fraudulent representations vitiate the voluntariness of the contract,[287] the agreement can be rescinded and the plaintiff can receive damages for the harm caused by defendant's fraud. The forum will not allow the parties to contract for immunity against a charge of fraud. There is no doubt that the seller's misrepresentations led the buyer to make an agreement that infringed on the buyer's expectations; indeed, the very act of the seller making these representations led the buyer to trust in them. The subsequent non-representation clause and the choice-of-law provision did nothing to alter the buyer's expectations; no reasonable buyer would interpret those bargained-for provisions as granting the seller the right to lie. Moreover, whether or not the buyer voluntarily agreed to the non-representation clause, the court should protect the buyer from mistakenly agreeing to a term that it later regrets. Allowing the seller to contract out of liability for fraud would involve the court in sanctioning a grave injustice.

Not only would enforcement be unjust, but it would harm market transactions in general by increasing distrust in the marketplace. This distrust would cause market participants to hesitate to engage in transactions and would force them to engage in wasteful and duplicative investigation of representations. It would therefore interfere with the smooth functioning of markets and increase the cost of transacting. Fraud further creates free rider problems, which lead to the creation of externalities; although the seller in this case may benefit from the fraud, allowing the seller to get away with it will inhibit future transactions in the market or increase their cost. Making the duty not to commit fraud nondisclaimable would thus result in the enforce-

---

materially greater interest than the chosen state in the determination of the particular issue" and which bears the most significant relationship to the parties and the transaction. *Id.* at § 187(2)(b). A third exception would refuse to enforce choice-of-law provisions on ordinary contract principles that reject contract terms that are not the result of voluntary agreement. *Id.* at § 187(2)(c). This exception includes the ordinary contract defenses of fraud, misrepresentation, duress, and undue influence. It also allows courts to refuse to enforce choice-of-law provisions in adhesion contracts. *See id.* at § 187 comment b. Although the Restatement is rather conservative on this issue, there is no reason to assume that courts would or should interpret choice-of-law provisions any differently than they do other terms in a contract. Thus, if the parties have unequal bargaining power, and if the chosen term is held to be unconscionable or violates some significant policy favoring, for example, deterrence of wrongful conduct or alienability of property, courts may refuse to enforce the term, just as they would refuse to enforce such terms in contracts with purely domestic contacts. The example in the text includes such a policy—the nondisclaimable duty of good-faith performance in contracts.

[287] *See Danann Realty*, 5 N.Y.2d at 326, 157 N.E.2d at 602, 184 N.Y.S.2d at 606-07 (Fuld, J., dissenting).

ment of only mutually beneficial, and therefore, efficient contracts and would discourage socially harmful conduct.

(a) *Substantive Justice and Social Policy*. I have little sympathy for the argument that freedom of contract is such an important ideal that we should allow people to contract away their right to sue for fraud. Allowing a defendant to get away with intentional misrepresentation by enforcing a non-representation clause destroys, rather that preserves, what is best in a market system. The relatively mundane question of who has the burden of inspecting the property seems different from the question of whether the promisor can unjustly induce the promisee to agree to an expensive transaction by misleading representations. Liars abuse trust, and they do not deserve much solicitude by a court of law.

At the same time, it is important to recognize that refusal to enforce either the non-representation clause or the choice-of-law provision may render the legal effects of agreements less certain. This may happen because disappointed buyers may "misremember" oral statements made before the contract was signed or may even deliberately misrepresent them as a way to get out of deals that turn out to be disadvantageous to them. Allowing a fraud claim to grant the buyer an excuse from his contractual obligations may therefore increase the risks of commercial dealings. This increase of risk may deter some transactions or raise their cost; those who fear future claims of fraud may seek additional compensation before entering an otherwise mutually beneficial transaction.

On the other hand, enforcement of the contract also increases risks of commercial dealings by creating a legal mechanism for engaging in fraud. Enforcing the contract may therefore have exactly the effects feared from not enforcing it: deterring transactions or raising their cost. Given this uncertainty about the empirical effects of the alternative contractual regimes, I see no good reason to deviate from what I see as the fair result—allowing the plaintiff to attempt to prove that the transaction was fraudulent.

Massachusetts is interested in limiting freedom of contract by regulating the terms of contracts negotiated and entered into, in whole or in part, in the forum. Applying its regulatory law will deter fraudulent statements made in Massachusetts that harm Massachusetts businesses. The forum also seeks to compensate its domiciliary for the harm it has suffered in the forum. Finally, it is interested in regulating the conduct of market participants in Massachusetts to increase trust among them, both as a way to encourage contractual dealings and to decrease the costs of transactions. Thus, the Massachusetts law will deter socially harmful acts inside Massachusetts by businesses like the defendant's, promote trust among market participants as a way to encourage commercial interaction, and promote justice in social relationships.

At the same time, New Hampshire is interested in determining the rules that will govern the sale of New Hampshire businesses. Decreasing the regulation of contract terms by enforcing the non-representation clause and

the choice-of-law provision increases security in contract relationships both by giving the parties what they bargain for and by defining clearly their mutual rights and obligations. Enforcing contracts in accordance with their terms will therefore encourage market transactions because market participants will know that the other party will not be able to back out because of unforeseen disappointments after the transaction is completed. It will also encourage self-reliance and care in transactions. In addition, there is no injustice in giving the buyer what he bargained for. The court should not rewrite the agreement to increase the buyer's protection above what he was willing to pay for the seller's business. New Hampshire is interested in applying its law to promote the sale of New Hampshire businesses and to provide security in transactions involving assets centered in New Hampshire.

(b) *Plaintiff's Argument for Substantive Justice: Applying the Regulatory Policy of the Place that Invalidates the Contract Term.* The plaintiff would claim that it is fine for New Hampshire to countenance fraud in domestic transactions in New Hampshire, but that the unjust New Hampshire law should not extend to transactions that have substantial contacts with a state that regulates market transactions to prevent what it sees as unjust and socially harmful conduct. New Hampshire has no right to authorize fraud perpetrated inside Massachusetts on a Massachusetts company. Thus, Massachusetts should apply its better law to protect its domiciliary and to regulate market conduct that touches the forum. If the defendant is not able to confine its unjust conduct to a defendant-protecting state, it has no right to rely on the validating law of its domicile. Indeed, the defendant has a somewhat limited reliance on New Hampshire law; he should have realized that the law of the state where the contract was made may be applied in this situation. Thus, Massachusetts need not restrain its application of its better law in deference to the multistate interest in comity to the law of New Hampshire.

(c) *Defendant's Argument for Tolerance: Applying the Validating Law.* Conversely, the defendant would argue that New Hampshire law is better—because it promotes security of transactions—and thus should either be adopted by the Massachusetts as forum law or applied to adjudicate this multistate case. Even if Massachusetts believes its regulatory policy is better, it should engage in restrained interpretation of its law and defer to New Hampshire's interest in regulating the sale of a New Hampshire business. When the Massachusetts buyer ventures outside the state, it should not complain that it is subject to New Hampshire law, especially when the buyer voluntarily agrees to be bound by New Hampshire law. Massachusetts should respect its own multistate policy favoring diversity; New Hampshire, as a separate political community, should be able to determine the rules governing market transactions when those transactions involve the transfer of a New Hampshire business. By purchasing a New Hampshire business, the buyer voluntarily adopted the vulnerabilities and responsibilities imposed by New Hampshire law.

(d) *Deciding the Case*. Should the forum restrain itself from applying the better, forum law in the interests of protecting the ability of New Hampshire to govern the acquisition of a New Hampshire business, operating in New Hampshire? Like the previous three examples I have examined, I see this as a hard case. It is not like the case of a tavern operating in a way that harms an innocent driver in another state. The contract is between two relatively sophisticated business persons who have contracted to transfer ownership of a New Hampshire business and have apparently agreed to let New Hampshire law govern their transaction. The Massachusetts plaintiff has voluntarily entered the New Hampshire community by taking over business operations there. And while Massachusetts may condemn the frontier, "look out for yourself" philosophy that New Hampshire has adopted, it seems inappropriate for Massachusetts, with its protective cocoon, to follow its resident to New Hampshire. On the other hand, it is not clear why New Hampshire should be allowed to extend its policy in a way that countenances fraud on a Massachusetts resident in contract negotiations that take place inside Massachusetts. The New Hampshire free market philosophy is well and good for internal affairs but perhaps not when it spills over into a state that protects its citizens from fraudulent representations in market transactions.

Each state's law in this context bears some relation to its self-definition as a normative community. New Hampshire's policy reflects its free market ideals and its notion of self-reliance. Massachusetts' policy reflects its decision to punish those who abuse the trust placed in them by others and to reward those who legitimately claim that they entered the market in reliance on the good faith of the other participants. Massachusetts surely expects its citizens to be self-reliant, but it also recognizes that individual initiative occurs in the context of dealings with others. These collaborative ventures cannot succeed unless each side plays its part with some decency. What they entered, after all, was a market, not the war of all against all.

At the same time, although the contract negotiations and the signing of the purchase and sale agreement took place in Massachusetts, the subject matter of the transaction was the sale of a New Hampshire business. Moreover, the parties specifically contracted for New Hampshire law. While it is true that a Massachusetts court need not acquiesce in the choice of New Hampshire law if a forum regulatory policy is at stake, it is also true that the plaintiff voluntarily entered the New Hampshire business community and economy by buying the New Hampshire business. It is not unreasonable for the parties to expect that such a transaction can be legitimately governed by New Hampshire law.

As with *Schultz v. Boy Scouts of America, Inc.*, I would probably base my decision partly on the status of New Hampshire law. If the New Hampshire policy is not strongly held—if it is archaic and isolated—I would resolve this case by applying forum law. There is no reason for a Massachusetts court to be more deferential to New Hampshire policy than would a New Hampshire

court. With an older policy, there is a greater chance that New Hampshire might change its law to grant the plaintiff a remedy; or, it might engage in restrained interpretation of its defendant-protecting law. In either case, the forum interest in applying the better forum policy to protect a Massachusetts resident from fraud committed in Massachusetts should prevail.

However, if the New Hampshire policy is strongly held—embodied in a recent statute or high court ruling—I would probably resolve this case by applying New Hampshire law. I would not do so, however, on the grounds that the choice-of-law provision decides the question, or that there is a presumption of validity of contracts. Neither of these presumptions sufficiently take into account the forum's regulatory interests in overriding the contract terms. I would apply New Hampshire law on the grounds that the defendant can legitimately claim the protection of the validating New Hampshire law and that the plaintiff voluntarily placed himself in the legitimate lawmaking power of New Hampshire by entering the New Hampshire economy. The purchase of a New Hampshire business by a sophisticated buyer with access to legal counsel through a contract with a choice-of-law provision selecting New Hampshire law gives the dispute sufficient contact with the New Hampshire political and normative system as to justify restraint in application of the better forum law.[288]

What would happen if the case had been heard in New Hampshire instead of Massachusetts? Suppose the New Hampshire seller, after getting several threatening phone calls from the disappointed buyer, consults a lawyer who informs him of New Hampshire's advantageous law. To protect himself from a Massachusetts lawsuit, the seller brings an action in New Hampshire for a declaratory judgment. How should a New Hampshire court handle this case?

If the New Hampshire policy were embodied in the common law, the court should take the occasion to reexamine the New Hampshire rule. If possible, the court should change the law by adopting the better Massachusetts rule. In that case, the conflict would disappear. This result would be better than simply applying the better Massachusetts law to the conflicts case because it would establish that residents, as well as nonresidents, have the right to be protected from fraud in commercial transactions.

However, it may not be possible for the court to change New Hampshire law. This would occur if the precedent establishing the rule were recent or firmly held; in that case, the trial judge could expect a significant chance of being overruled on appeal. It would also occur if the rule were embodied in a New Hampshire statute whose terms were clear and not easily subject to a

---

[288] I would, however, apply Massachusetts law if the case involved fraud in an employment relation centered in the plaintiff-protecting state of Massachusetts. In that case, the place where the relationship is centered should refuse to defer to the defendant-protecting law of New Hampshire.

narrow interpretation. In cases like this, I have argued that it is the obligation of the trial judge to assume, in the first analysis, that the forum law represents the best social policy. The court should then consider whether application of the better forum law would violate the justified expectations of a person who legitimately relied on the law of another state, or if application of forum law would interfere in relationships legitimately governed by the place where they are centered.

The New Hampshire judge speaks for the political community in New Hampshire. That community also speaks partly through the legislature or the high court in identifying the best contract policy. Nonetheless, in a choice-of-law case, the question of the judge's role is more complicated than this. I believe it is appropriate for the judge to recognize the forum statute as the better law *for the forum*. But, in the absence of choice-of-law legislation, the legislature has delegated to the courts the power to determine the range of situations in which the forum policy will be applied in cases exhibiting multistate contacts. The legislative direction is thus far less clear than it first appears. The judge is obligated to determine the legitimate scope of application of the forum policy. In making that determination, the judge cannot exclude, even if she wants to, her views about the wisdom of the legislation itself. Indeed, she will take such views into account in making choice-of-law determinations for a very good reason: application of either law will create externalities for the other state, and, in the absence of guidance from the legislature on the legitimate geographic scope of forum policy, the courts in the forum must decide whether forum policy is of the sort that should be imposed outside the state. At the very least, we can recognize that this situation demonstrates significant disagreement about the substantively correct result. The judge disagrees with the legislature in the forum, but the legislature in the forum also disagrees with the policy of another state affected by the dispute. In this kind of situation, the judge may rightly conclude that, as a matter of choice of law, it is problematic for the forum to pursue its policy when it would interfere with another state's ability to protect its citizens.

A New Hampshire judge may therefore conclude that, even if New Hampshire has determined for itself that security of transactions is the best policy, this policy is sufficiently controversial that it is inappropriate for it to be extended to cases that involve multistate contacts. In so doing, the judge is not illegitimately defying her own legislature; by hypothesis, the legislature has not spoken on the choice-of-law question. In this situation, it is therefore appropriate for the judge to conclude that New Hampshire contract policy should control transactions wholly centered in New Hampshire but that, when a New Hampshire business ventures into Massachusetts in search of a buyer and signs a contract that is fraudulent under the law of the place where it is negotiated and signed, it is appropriate to defer to Massachusetts law.

If, on the other hand, a New Hampshire judge were to conclude that New Hampshire's policy represented the better law, or if the judge were to

conclude that New Hampshire law is firmly held and important to the forum's conception of the market, then the court would be justified in applying its validating policy on the same grounds as the Massachusetts court: the plaintiff has voluntarily entered the New Hampshire political and economic system, intending to stay and participate as a member of the New Hampshire community. The defendant has a legitimate claim to protection under forum law. While application of forum law will interfere with the Massachusetts policy, a Massachusetts court might very well apply New Hampshire law to this kind of case. Moreover, to the extent the two policies clash, the case does not present sufficient reasons to lose the advantage of what New Hampshire legislature views as the better forum law in deference to the normative community in Massachusetts. The plaintiff, for the purposes of this lawsuit, can be viewed as a new member of the community in the forum.

## V. FACING REAL CONFLICTS

Remember the story of Antigone.[289] There has been a war, each side led by one of Antigone's brothers. The brother who attacked the city has died, and Antigone hopes to bury him. Yet Creon, king of the city and uncle of Antigone's traitorous brother, refuses to allow her to grant him this honor. The conflict between them is tragic, and they are tragic figures. Each has a vision of the world that is too simple. Antigone places a simplistic conception of duty to family above all other values; Creon similarly privileges a simplistic conception of the needs of the city. Martha Nussbaum explains that they are both "one-sided, narrow, in their pictures of what matters. The concerns of each show us important values that the other has refused to take into account."[290]

Conflicts cases present us with real conflicts among competing norms and interests, and among the social visions of separate normative and political communities.[291] To decide them, we must "constantly choose among com-

---

[289] SOPHOCLES, THE THREE THEBAN PLAYS: ANTIGONE, OEDIPUS THE KING, OEDIPUS AT COLONUS (R. Fagles trans. 1987). This interpretation of Sophocles' *Antigone* comes from M. NUSSBAUM, *supra* note 2, at 51-82.

[290] M. NUSSBAUM, *supra* note 2, at 67.

[291] I have used the term "real conflicts" in several different senses: (1) to describe real theoretical conflicts among choice-of-law approaches, as distinguished from debates that have outlived their usefulness; (2) to describe real conflicts among the factors we consider in deciding conflicts cases, rather than understanding the factors as simply a variety of relevant considerations; (3) to describe real conflicts in actual cases between the competing substantive policies of different states; and (4) to express my view that relatively few cases can reasonably be decided by reference to the idea that they are false conflicts. *Cf.* R. WEINTRAUB, *supra* note 66, § 3.1, at 46 (defining a "real conflict" as a situation where two or more states have policies that would be advanced by applying their laws to the case).

peting and apparently incommensurable goods and [recognize] that circumstances may force [us] to a position in which [we] cannot help being false to something or doing some wrong."[292] We must face these choices and then "continue with a vivid imagining of both sides of the dilemma."[293]

In several instances, I have argued that the case should be resolved by applying what the forum understands as the better law. Yet I have also argued that my views on what constitutes the better law might differ depending on the perspective from which I viewed the case. It would sometimes make a difference in which court I were sitting. This difference in perspective arises from the differing institutional and communal loyalties of government actors in different governmental entities and legal systems. I have further argued that even when the forum is inclined to apply what it sees as the better, forum law, it should wrestle with the question of whether, and to what extent, application of forum law interferes with the ability of another state's residents to constitute themselves as a normative and political community. If it does, the decisionmaker must compare the interests of the two communities whose norms conflict and determine what the just relationship between the two states is in this context. Even if this exercise does not change the result—even if the forum still decides to apply forum law—it will have made a better decision by facing what is really involved in the case. It will have to recognize, as it enforces its "better" law, the injustice it is doing as it attempts to enforce justice.[294]

---

[292] M. NUSSBAUM, *supra* note 2, at 5.

[293] *Id.* at 42. Lawrence George further explains:

> As a theoretical matter, therefore, we should not expect to find a single principle, or even a set of principles, that will dictate the limits of the long-arm, nor the calculus of normative choice within a forum, when the impulses toward fusion and fugue pull the decisionmaker in opposite directions.

George, *supra* note 160, at 465. *See also* CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); JAMES WALLACE, MORAL RELEVANCE AND MORAL CONFLICT (1988) (both arguing that morality involves inevitable conflicts among moral principles that cannot be resolved by resort to a single higher-order principle).

[294] *See* ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988). In a brilliant and eloquent analysis, Professor Spelman argues that the failure to investigate the varying experiences of women from different classes, races, ethnic groups, ages, and religions leads some feminists to assume that the experience of white, middle-class, Christian women describes the experience of all women. The failure of some feminist theorists to acknowledge, listen to, and recognize the different life experiences of different groups blots from view entire worlds of people. Similarly, minimizing the interests of individuals and communities in conflicts cases by creating "false conflicts" fails to acknowledge the power being exercised by the decisionmaker in privileging one normative community over another.

Facing these real choices does not disable us from making decisions or defending them. "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."[295] We differ about which contacts are more significant and what interests are real and what polices are better because we really do disagree about which kinds of social relationships are just, which market arrangements work well, and which exercises of state power illegitimately interfere with another community's power to govern its affairs. These conflicts are not false. It is only if we do not face them that we will be false to ourselves and our ideals.

---

[295] M. NUSSBAUM, *supra* note 2, at 49-50.