

# What Now?

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Surprisingly, our panel discussion reveals that conflicts teachers can agree on some basic propositions. If their use of religious metaphors is any indication,<sup>1</sup> even interest analysts realize that their approach is a creed rather than a science. They also acknowledge that interest analysis has “warts”<sup>2</sup> and “flaws,”<sup>3</sup> and that in the conflict of laws, as elsewhere, the results produced by legal rules and approaches do matter.<sup>4</sup> Thus, there is some common ground between us. But since the role in which our chairman has cast me calls for a critique of Russ Weintraub’s paper, I shall stress the differences rather than the similarities of our points of view. Let me begin, then, with a few critical remarks about the doctrine he espouses.<sup>5</sup>

## I

With three other members of this panel, I vote against the proposed resolution which John Kozyris has drafted to guide our discourse. By now, all those who labor in the field should appreciate the poignancy of Court Peterson’s remark that “governmental-interest analysis is not a theory but a religion,”<sup>6</sup> an assessment already foreshadowed by Hans Baade’s more secular characterization of the approach’s followers as “True Believer[s].”<sup>7</sup> Like others, I feel unable to make the required leap of faith. In my opinion, metaphysics, cults and catechisms are of little help in adjudicating multistate disputes. Preoccupation with transcendental beliefs merely distracts us from the real problems posed by the ever-increasing mobility of persons, things, and transactions. Past history shows how earlier ideologies, such as the vested rights and local law doctrines, have hindered rather than promoted progress, and the confused state of current American conflicts law hardly inspires confidence in the dogmas of our days. Already, the analysts have split into numerous sub-cults; in Herma Hill Kay’s words, that corner of the conflicts swamp is dotted by “stagnant pools of doctrine, each jealously guarded by its adherents.”<sup>8</sup> The common accord

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1. See Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer’s “Foundational Attack,”* 46 *OMO ST. L.J.* 483, 484 (“Koran”), 484 (“gospel”), (1985); Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases,* 46 *OMO ST. L.J.* 493, 493 (“heresy”; “alpha and omega”) (1985).

2. Weintraub, *supra* note 1, at 493 n. 4.

3. Sedler, *supra* note 1, at 484.

4. Sedler, *supra* note 1, at 483; Weintraub, *supra* note 1, at 496–97.

5. For a more thorough discussion of that doctrine, see Juenger, *Conflict of Laws: A Critique of Interest Analysis,* 32 *AM. J. COMP. L.* 1 (1984).

6. Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom,* 9 *DUQ. L. REV.* 436, 441 n.30 (1971).

7. Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Covers,* *The Choice-of-Law Process,* 46 *TEX. L. REV.* 141, 151 (1967).

8. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience,* 68 *CALIF. L. REV.* 577, 615 (1980).

among Brainard Currie's disciples is largely acoustic, consisting of little more than an identical terminology;<sup>9</sup> the ritual incantation of the words "policies" and "interest" in fact camouflages widely divergent views.

Interest analysis has lost cohesion and coherence. No longer a single doctrine, it has become but a loose amalgamation of different approaches that furnish scant guidance to judges faced with multistate problems. What agreement still persists is largely limited to the disposition of "false conflicts," which is an elliptical way of saying that the law of the parties' common home state applies. That may well be an acceptable choice-of-law principle, but the analysts can hardly claim to have invented it.

The Italian Civil Code of 1865<sup>10</sup> established a common home state rule for contract choice of law, though in accordance with Mancini's teachings<sup>11</sup> the Italian legislature proclaimed the *lex patriae* rather than the *lex domicilii* to be the relevant personal law. Later, when the *Wehrmacht* occupied much of Europe, the Nazi government issued a decree according to which German law was to govern actions between Germans for torts committed outside of Germany.<sup>12</sup> Thus, the common home state rule is not a recent breakthrough, nor is it peculiar to interest analysis. At best, Currie deserves credit for popularizing, under the label "false conflicts," the common home state principle as part of the ostensible non-rule approach he advocated. That modest accomplishment hardly justifies the extravagant claims of a "Copernican revolution"<sup>13</sup> or a "renaissance"<sup>14</sup> of American conflicts thinking. The true test of the value of the modern doctrine is therefore its ability to cope with situations in which the ready expedient of relying on a common nexus is unavailable. But it is precisely at this point where the consensus of Currie's followers breaks down and the "proponents of a functional or interest analysis begin to shout at one another in earnest."<sup>15</sup>

Whenever the parties to a lawsuit hail from different states, Currie's conceptual framework produces "true conflicts"<sup>16</sup> and "unprovided-for cases."<sup>17</sup> Conundrums of this kind are neither novel nor peculiar to Currie's teachings.<sup>18</sup> They are merely the symptoms of a birth defect that afflicts any unilateralist approach, that is to say the attempt to resolve multistate problems by focusing on the spatial reach of substantive

9. This is not to say that terminological problems do not exist. Thus Weintraub prefers to speak of "functional" rather than "interest" analysis. Weintraub, *supra* note 1, at 495. See also *id.* at 495 ("state interests" is "probably a needlessly confusing term").

10. CODICE CIVILE, Disposizioni preliminari art. 9, para. 1 (capacity and form), para. 2 (essential validity and effects).

11. See Juenger, *A Page of History*, 35 MERCER L. REV. 419, 454-56 (1984). Whatever one might say about Mancini, he was clearly not an interest analyst.

12. Verordnung über die Rechtsanwendung by Schädigungen deutscher Staatsangehöriger ausserhalb des Reichsgebiets of December 7, 1942, 1942 REICHSGESETZBLATT, TEIL I. 706, § 1(1). See Morse, *Choice of Law in Tort: A Comparative Survey*, 32 AM. J. COMP. L. 51, 57-58 (1984). Other nations as well have adopted the common home state rule. See *id.* at 91-93; see also 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 244-46 (2d ed. 1960).

13. Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 933 (1975).

14. Von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 91 (1964).

15. R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 260 (3d ed. 1981).

16. See *id.* at 260-65.

17. See *id.* at 305-08.

18. *But cf. id.* at 303 (crediting Currie with having first identified the phenomenon of the "unprovided-for case").

rules.<sup>19</sup> Long before similar “discoveries” were made in the United States, foreign unilateralists wondered what should happen if more than one state “wishes” to control a given transaction, or if no state makes such a claim.<sup>20</sup> European authors coined the terms “*cumuls*,” to describe the overlap of multiple claims to legislative jurisdiction, and “*lacunes*,” to describe the legal gaps that result from the sublime disinterest of states in a given transaction.<sup>21</sup> To solve the true-conflicts puzzle, Antoine Pillet invented the notion of “minimum sacrifice,”<sup>22</sup> a precursor of Baxter’s “comparative-impairment” doctrine.<sup>23</sup> These and other proposals to cope with true conflicts and unprovided-for cases bring to mind Joseph Beale’s characterization of Pillet’s theory as “ingenious, interesting and specious.”<sup>24</sup>

The unilateralists’ unconvincing attempts to resolve the spurious problems of their own making highlight the shortcomings of their method. Their desperate stratagems to escape from a logical impasse inspire little confidence. The blunt forum-law preference Currie and others<sup>25</sup> have advocated is too drastic an expedient to please American judges.<sup>26</sup> On the other hand, the comparative impairment doctrine and similar efforts to multilateralize unilateralism are too fine-spun and implausible to appeal to anybody but devoutly scholastic minds.

## II

I am pleased to see that in coping with the unilateralist predicament Russ Weintraub eschews both ethnocentricity and fanciful glass-bead games. Faced with the clash of personal laws he, like other analysts, is compelled to look for a device that would break the resulting stalemates,<sup>27</sup> for at this stage speculation about the sovereign’s interests in its subjects no longer helps. The analyst must, of necessity, become eclectic, because the problem cannot be resolved within the frame of reference of the very theory that created it in the first place. The approach Weintraub recommends at this juncture is frankly antithetical to the basic tenets of interest analysis as originally conceived: he seeks to articulate forum-neutral solutions designed to effectuate transjurisdictional goals, to promote predictability and to do substantial justice.<sup>28</sup> These, of course, are objectives whose pursuit Currie had

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19. See Juenger, *supra* note 11, at 426–27.

20. See Gothot, *Le renouveau de la tendance unilatéraliste en droit international privé*, 60 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 1, 29–31 (1971) (with further references).

21. See *id.* For critical comments, see 1 H. BATIFFOL & P. LAGARDE, *DROIT INTERNATIONAL PRIVÉ* 297–98 (7th ed. 1981); P. MAYER, *DROIT INTERNATIONAL PRIVÉ* 98–99 (2d ed. 1983).

22. See Pillet, *Théorie continentale des conflits de lois*, 2 *RECUEIL DES COURS* 447, 469–70, 482 (1924–I). Pillet’s Hague lecture is a brief summary of ideas he had published in various books and periodicals. For an English translation of excerpts from earlier articles, see 3 J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 1942–48 (1935).

23. See Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1, 12–19 (1963).

24. 3 J. BEALE, *supra* note 22, at 1947.

25. Pillet conceded that his principle of minimum sacrifice could not work in all cases, and he also used the forum preference as a tiebreaker of last resort. Pillet, *supra* note 22, at 471.

26. See Kay, *Theory into Practice: Choice of Law in the Courts*, 34 *MERCER L. REV.* 521, 551, 586 (1983).

27. See Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash*, 34 *MERCER L. REV.* 645 (1983).

28. See Weintraub, *supra* note 1, at 493, 496.

roundly condemned.<sup>29</sup> I, however, find Weintraub's teleological bent most congenial, and we are in good company. David Cavers,<sup>30</sup> Paul Freund<sup>31</sup> and Robert Leflar<sup>32</sup> have recognized the need for sound decisions in multistate cases. Moreover, looking at the results, rather than the reasoning, of "revolutionary" conflicts decisions, one suspects that this consideration is also uppermost in the judicial mind.<sup>33</sup> If I am unable to accept the rules Weintraub proposes,<sup>34</sup> I nonetheless welcome his result orientation.

On the other hand, I do not share Weintraub's belief in the innate superiority of personal over territorial contacts. The personal law principle cannot be deduced from sociology or from political science, as interest analysts seem to assume. If "sovereigns" (about whom are we talking? the governor, the legislature, the courts or the people?) have any interest at all in private litigation,<sup>35</sup> one should expect them to be concerned primarily with what is going on in their territories. In fact, Weintraub acknowledges the importance of territoriality when he refers to "social consequences . . . experienced *in a state*."<sup>36</sup> But why should governments be interested merely in consequences and not in the acts that cause them? Is it not idle, in any event, to ponder the mind-set of anthropomorphized states?<sup>37</sup> Weintraub seems to recognize the weakness of the assumption that it is possible to psychoanalyze states, for he plays down the notion of sovereign concerns that permeates Currie's teachings. Instead of using the "needlessly confusing" term "state interests,"<sup>38</sup> he talks more vaguely about policies that may be advanced or frustrated, depending on where the parties live.<sup>39</sup>

But where do multinational enterprises "live"? Or gypsies? Or jet-setters? Do these groups fall outside the protection of local laws? How can one assume that legislatures legislate and courts decide for the benefit of local yokels only? Has law become a personal possession? If that be the "mainstream of legal reasoning"<sup>40</sup> of our days, I shall be content to swim elsewhere. Until someone persuades me otherwise, I am inclined to think that "every law has both a territorial and a personal application."<sup>41</sup> The United States Supreme Court seems to share that view. The plurality opinion in *Allstate Insurance Co. v. Hague*<sup>42</sup> draws no distinction between

29. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 100-01, 104-06, 119, 153-54, 158-59, 168-71, 181, 581, 617, 699-701, 708-09 (1963).

30. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 193 (1933). But see D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 75-87 (1965).

31. See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1214 (1946).

32. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 180-81 (3d ed. 1977).

33. See Juenger, *supra* note 5, at 47-48.

34. See Weintraub, *supra* note 1, at 507-08.

35. *Contra* Juenger, *supra* note 5, at 29-30 (with further references).

36. Weintraub, *supra* note 1, at 502 (emphasis added).

37. See B. CURRIE, *supra* note 29, at 89, 477, 489, 496, 592 ("selfish" and "altruistic" states). But cf. D. CAVERS, *supra* note 30, at 302 n.19.

38. Weintraub, *supra* note 1, at 495.

39. *Id.* at 495.

40. *Id.* at 493. Use of the herd instinct as a basis for legal argumentation reveals the intellectual poverty of interest analysis.

41. 3 J. BEALE, *supra* note 22, at 1929.

42. 449 U.S. 302 (1981).

personal and territorial links; any "significant contact or significant aggregation of contacts . . . with the parties and the occurrence or transaction" has apparently the same potential for "creating state interests."<sup>43</sup>

Too bad the lessons of history are rarely learned. The statisticians' vain attempts to classify laws as personal or real amply demonstrate the futility of metalegal speculations about the personal and territorial scope of legal rules.<sup>44</sup> These endeavors came to naught because neither the letter nor the spirit of legal rules tells us when they "wish" to be applied. Lest I be misunderstood,<sup>45</sup> let me emphasize that I do not favor strict constructionism. On the contrary, I believe that in applying a rule it makes sense to look at its spirit as well as its letter. But I do not believe that the personal or territorial scope of a given rule of decision is revealed by its purpose. Judicial opinions, certainly, inspire little hope in policy analysis as a means of adjudicating multistate disputes.<sup>46</sup> Those who, like Currie, maintain that choice-of-law issues can be resolved by divining the reach of legal rules through the "ordinary processes of construction and interpretation"<sup>47</sup> have yet to refute Ernst Rabel's observation that "the answer is not in them."<sup>48</sup>

In any event, even if each rule of decision came equipped with an explicit directive concerning its spatial purport, conflicts problems would persist. Since one cannot reasonably expect all states to adopt identical directives, there will always be overlaps and gaps, "true conflicts" and "unprovided-for cases." As I have noted in Part I of my remarks, unilateralism offers no solution for these conundrums; interest analysts must look outside their own system, and resort to such devices as a simple forum law preference, multilateralism, or the better-law rule to resolve the conflicts their approach creates. Forced to stray from their own methodology, they become thoroughly discomfited, and here lies the true reason for their insistence on the personal law principle: if territorial contacts were of equal weight with personal ones, all conflicts would be true<sup>49</sup> and policy analysis dispensable.

### III

But what about Bob Sedler's argument that in the "real world" interest analysis does work and generally will produce functionally sound and fair results?<sup>50</sup> That is, no doubt, correct. As Judge Evrigenis showed almost twenty years ago, American unilateralism has the quality of "antimatter."<sup>51</sup> It annihilates rules and replaces them

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43. *Id.* at 308. See also *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

44. See D. CAVERS, *supra* note 30, at 2-3; Juenger, *supra* note 11, 428-29.

45. Compare Weintraub, *supra* note 1, at 494 with Juenger, *supra* note 5, at 33-35.

46. See Juenger, *supra* note 5, at 34-35.

47. See W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 477 (8th ed. 1984).

48. I. E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 103 (2d ed. 1958).

49. See Reppy, *supra* note 27, at 647 n.12.

50. Sedler, *supra* note 1, at 483.

51. Evrigenis, Book Review, 18 *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 471, 473 (1965) (referring to Ehrenzweig). It has been pointed out that that criticism describes Currie's approach more accurately than Ehrenzweig's. E. SCOLES & P. HAY, *CONFLICT OF LAWS* 16 n.4 (1982).

with complex pretexts for applying the *lex fori*, the law that judges know best, can apply best, and can adapt to the exigencies of a particular case. Moreover, application of forum law usually guarantees fair results in tort cases, which constitute the large majority of reported conflicts decisions. The homing trend of interest analysis allows plaintiffs to shop for the most favorable law, and thereby to subvert whatever interests governments may have in such noxious enactments as guest statutes, which capriciously bar recovery, and wrongful death acts, which impose unreasonable limits on damages. It might therefore make sense to adopt the rule that forum law applies in tort cases except, perhaps, where the parties share a common domicile. Only a conflicts expert, however, can conceivably explain why judges should probe the psyche of domestic and foreign legislatures and engage in legal mathematics<sup>52</sup> instead of simply applying choice-of-law rules of that kind.

Yet, even in the real world matters are apparently not all that easy. If interest analysis works so well in practice, why should it be necessary to devote sixty-nine pages plus an appendix to a summary of American case law?<sup>53</sup> Why are judicial conflicts opinions so long and full of footnotes; why do state supreme courts vacillate, and why are bench and bar bewildered? If Currie's doctrine does indeed provide "a rational basis for making choice of law decisions,"<sup>54</sup> why do his followers disagree among each other in principle and detail? As Lea Brilmayer points out, that doctrine has come to mean all things to all people;<sup>55</sup> interest analysis is but "a term employed to describe perhaps a dozen different methods."<sup>56</sup> That is, of course, precisely why it is so difficult to attack. As was to be expected, Brilmayer's attempt to take issue with what she considers to be the foundation of that conglomeration of discordant ideas has already exposed her to the charges that she has failed to address herself to some idiosyncratic variation on Currie's theme,<sup>57</sup> that she misunderstood Currie<sup>58</sup> and that her arguments are misdirected because Currie himself did not know what he was talking about.<sup>59</sup>

Outsiders may consider the disarray of current interest analysis, which these counterattacks reveal, as a sure sign of failure. Currie's disciples, however, thrive on factionalism. What an English critic wrote about the attractions of Marxism to British intellectuals seems to fit, *mutatis mutandis*, Currie's dogma:

[Interest analysis] is a religion. Its adherents are unlikely to lose their millenarian faith because of its practical or intellectual shortcomings. Even better, it is a religion divided into sects so that these shortcomings can be blamed on other heretical groups and factions.

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52. See Evrigenis, *Tendances doctrinales actuelles en droit international privé*, 118 RECUEIL DES COURS 313, 364-65 (1966-II).

53. See Kay, *supra* note 26.

54. Sedler, *supra* note 1, at 490.

55. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, (1985).

56. Reppy, *supra* note 27, at 647.

57. See Sedler, *supra* note 1, at 484-85.

58. See *id.* at 486.

59. See *id.* at 487-88.

Is not this one attraction of [Currie's doctrine]? Not its end but its endless means. The ceaseless . . . theorizing, squabbling, struggling, denouncing and demonstrating, . . . and the proclamation, abandonment and reproclamation of seminal analyses, approaches and exegetics.

The fact that the end is unattainable is unimportant. It is the means which are attractive—revving round and round on a highly-pitched ideological Honda.<sup>60</sup>

Unfortunately, the antics of joyriding conflicts revolutionaries have done little to improve the image of our discipline. The subject has been dropped from many bar examinations, few conflicts articles are printed in the better journals, law schools have reduced the hours allocated to a course that was once considered one of the most stimulating in the entire curriculum and enrollment is dropping. Currie may have been right after all in predicting that the "distinctive task of the conflict-of-laws technician . . . is one of diminishing importance."<sup>61</sup>

Worse yet, the freewheeling non-rule approach of interest analysis has provoked a backlash. Already, there are calls for a return to fundamentalism.<sup>62</sup> If such counsel is heeded, the American conflicts upheaval has been entirely in vain. Its true accomplishments, notably the improved protection of interstate accident victims,<sup>63</sup> would be sacrificed to the elusive goal of "conflicts justice."<sup>64</sup> The yearning for clarity and coherence, virtues interest analysis cannot offer, is understandable. But it would be deplorable if American conflicts law, rebounding from one orthodoxy to another, were to regress to "the sinkhole it once occupied."<sup>65</sup> Preoccupied with the chaotic state of current doctrine, those who favor the conventional wisdom of yore tend to overlook that the doctrinal foundations of the "classical" system are no less shaky than the ones on which Currie's edifice rests. Friedrich Carl Savigny, it will be recalled, hypothesized a "seat" of legal relationships<sup>66</sup> and Beale believed to have solved the conflicts puzzle by reducing it to the enforcement of vested rights.<sup>67</sup> But rights never vest without a choice-of-law rule that makes them vest, and those legal relationships that cause conflicts problems have no single seat; they straddle state boundaries.

Quite apart from their question-begging nature,<sup>68</sup> the old doctrines did not work well at all as applied in practice. Inevitably, the traditional choice-of-law rules mechanism imported substandard foreign rules of decision that offended the forum's sense of justice, and judicial discontent with the unfair results they produced explains the success of the conflicts revolution in American courts. How, for instance, can one expect California judges to apply a foreign guest act after the supreme court of that

60. Anderson, *Fellow Travellers Who Never Arrive*, The Times (London), Jan. 2, 1985, at 10, col. 6.

61. B. CURRIE, *supra* note 29, at 592.

62. See, e.g., Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171, 192-93 (1981) (resuscitating Savigny's seat dogma); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 214 (1981) (favoring Bealean rules).

63. See Juenger, *supra* note 5, at 47, 48.

64. See Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 632 (1979); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 959 (1983).

65. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 26 (Spring 1977).

66. See Juenger, *supra* note 11, at 450-51.

67. See 3 J. BEALE, *supra* note 22, at 1968-69, 1974.

68. See 1 A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 55 n.56 (1967).

state held the local version unconstitutional?<sup>69</sup> Whereas the forum bias of interest analysis checks the influx of odious foreign laws, the classical method can assure quality control only by recourse to evasatory tactics. To avoid injustice, during the First Restatement era courts invoked characterization and public policy,<sup>70</sup> escape devices that impugn the system's credibility and undercut its claim to forum-proof neutrality. But in spite of these deficiencies, judges may prefer the comfort of fixed rules to the discomfiture they experience when asked to apply non-rule approaches. As the New York experience shows, courts may become sufficiently disenchanted with free form analyses to revert, in desperation, to mechanical jurisprudence.<sup>71</sup>

#### IV

We now seem to face a dilemma: should we reintroduce hard and fast rules that work injustice and encourage evasion, or should we retain non-rule approaches that serve as a thinly disguised pretext for applying forum law? These are unpleasant alternatives. If there is truly no other choice, eight centuries of efforts by some of the finest legal minds have been wasted. As a Louisiana judge observed more than a century and a half ago, if "so many . . . men, of great talents and learning, are . . . found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles."<sup>72</sup> Should we, then, indulge in resignation, or could it be that something has gone wrong in the law of conflicts?

In my opinion, many of the problems that bedevil our discipline are rooted in our fascination with theories that blind us to realities. These theories, in turn, often rest on dubious assumptions. For instance, both interest analysts and rulists start from the proposition that it is the sole purpose of the conflict of laws to determine which state's law controls. Neither of the two opposing camps questions whether it makes sense to rely exclusively on domestic rules of decision to govern transactions that are interstate and international in nature, and whether all of such rules are equally fit for the purpose. These propositions, however, have never been free from doubt. It is hardly an accident that Joseph Story, the greatest American conflicts jurist, wrote the opinion in *Swift v. Tyson*,<sup>73</sup> which stressed the need for a universal mercantile law. Similarly, Judge Weinstein's opinion in the spectacular *Agent Orange* litigation<sup>74</sup> hypothesized the existence of a national consensus law to resolve problems for which neither the First Conflicts Restatement nor interest analysis holds forth the promise of a satisfactory solution. Other reported opinions as well evince a distinct uneasiness about the wisdom of applying local law to multistate realities.<sup>75</sup>

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69. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

70. See Weintraub, *supra* note 1, at 497.

71. See *Cousins v. Instrument Flyers*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978); *Towley v. King Arthur Rings*, 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976). *But cf.* *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

72. *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 595-96 (La. 1827).

73. 41 U.S. (16 Pet.) 1 (1842).

74. *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984).

75. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985); *In re Air Crash*



In contrast to judges, who must decide real-life disputes, theoreticians all too often forget that the conflict of laws raises fundamental questions about interstate and international justice. Thus, taking issue with the suggestion that choice-of-law issues may be resolved "in favor of the advancement or promotion of multistate activity,"<sup>76</sup> the authors of a conflicts casebook question the "dubious assumption that such activity is by and large a good thing."<sup>77</sup> Their comment suggests that some academicians countenance a conflict of laws system which would actively discourage transactions that cross state lines. Wrapped up in theoretical speculations, these writers are oblivious to the very purpose of the field of conflict of laws, although it has been reiterated many times in a rich literature ranging from Joseph Story<sup>78</sup> to the Second Restatement,<sup>79</sup> and they forget that the United States is, after all, a "common market."<sup>80</sup> Once theorizing reaches that level, it is not surprising that scholars are prone to losing sight of what is involved in conflicts cases. Story knew that they dealt with the "common business of private persons,"<sup>81</sup> and if reported opinions are any indication, sovereign rights are indeed rarely at stake. Rather, choice-of-law problems are engendered by such mundane occurrences as traffic accidents, exploding boilers, spousal kidnapping, breached contracts, and purloined cars. At issue are the rights of accident victims, children, consumers, manufacturers, insurers, and banks. Should we not ask how courts dealing with such multistate matters can best achieve the objective of reaching fair results?

It has been suggested that the conflict of laws is simply not up to this task. According to Arthur von Mehren, "one who expects to achieve results in multistate cases that are as satisfying in terms of standards of justice and of party acceptability as those reached in purely domestic cases is doomed to disappointment."<sup>82</sup> This is a startling admission. Surely, practitioners are entitled to expect more from conflicts teachers than the mere flexing of "jurisprudential muscles."<sup>83</sup> At the very least, scholars should ponder whether it may somehow be possible to "better the human condition through law."<sup>84</sup> I am heartened to see that Weintraub, for one, has not succumbed to facile pessimism. The alternative reference rules he has drafted<sup>85</sup> are designed to yield acceptable outcomes in multistate products cases,<sup>86</sup> and with this objective I fully agree. I am also pleased to note that unlike those interest analysts who manage to complicate the simplest matters, he has labored hard to draft manageable

Disaster Near Chicago, 644 F.2d 594, 632-33 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981); *Tooker v. Lopez*, 24 N.Y.2d 569, 591-92, 249 N.E.2d 394, 408, 301 N.Y.S.2d 519, 538-39 (1969) (Burke, J., concurring).

76. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 407 (1965).

77. R. CRAMTON, D. CURRIE & H. KAY, *supra* note 15, at 375.

78. See J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 7-9, 39, 320 (2d ed. 1841).

79. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6(2)(a) and comment d on § 6(2) (1971) [hereinafter cited as *SECOND RESTATEMENT*].

80. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (White, J.).

81. J. STORY, *supra* note 78, at 12.

82. Von Mehren, *Choice of Law and the Problem of Justice*, 41 *LAW & CONTEMP. PROBS.* 27, 42 (Spring 1977).

83. Rosenberg, *Comments on Reich v. Purcell*, 15 *U.C.L.A. L. REV.* 641, 644 (1968).

84. *Id.*

85. Weintraub, *supra* note 1, at 508.

86. See *id.* at 504.

rules to govern more complex situations. Still, I cannot endorse his proposed choice-of-law provisions.

## V

Regrettably, Weintraub's proposal is marred by design defects. First of all, he picked the wrong blueprint. The Hague Convention on the Law Applicable to Products Liability,<sup>87</sup> which served him as a source of inspiration,<sup>88</sup> has little to commend itself as a model. That convention has attracted few ratifications. It was elaborated by conflicts experts most of whom were steeped in the fundamentalist tradition<sup>89</sup> and hailed from countries whose products liability law is underdeveloped in comparison to ours.<sup>90</sup> Obviously, an American choice-of-law rule should go beyond such a reluctant compromise<sup>91</sup> negotiated with representatives from nations that lacked the practical experience in both the substantive and the conflicts aspects of products liability litigation, an experience that seems indispensable for an informed judgment about how to deal with multistate cases.

Weintraub, of course, realizes that the convention as it stands hardly deserves emulation, and he has attempted to improve on the original. A feature he likes is the plaintiff's option to select the applicable law, because "widely shared developments" call for a "plaintiff-favoring rule."<sup>92</sup> Indeed, abroad as well as in the United States there is considerable concern about the protection of consumers against the risks that mass-produced goods inevitably create.<sup>93</sup> The resulting trend to expand private remedies may well justify a conflicts rule favoring injured parties. Yet Weintraub goes on to say:

If such a rule is to be fair to the defendant, it must choose plaintiff-favoring law only if the law's compensation policy will be advanced by recovery and if the jurisdiction with that rule has sufficient nexus with defendant or defendant's course of conduct to make the use of its law reasonable.<sup>94</sup>

This passage is heavy going. Apparently, it seeks to accommodate two rather different considerations: (1) the "wishes" of sovereigns concerning the scope of their laws,<sup>95</sup> and (2) the asserted need to protect the "reasonable expectations of the defendant."<sup>96</sup>

Both of these considerations are open to challenge. The first has an aura of unreality given the fact that products liability law, at least in the United States, is largely judgemade. Whom, then, should one ask about the sovereign's wishes?

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87. III Acts and Documents of the 12th Session of the Hague Conference on Private International Law (1972), reprinted in 21 AM. J. COMP. L. 150 (1973).

88. See Weintraub, *supra* note 1, at 504.

89. Cf. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703, 723, 724 (1977).

90. See Voskuil, *Preface*, in H. DUINTIER TEBBENS, INTERNATIONAL PRODUCT LIABILITY (1979).

91. See Cavers, *supra* note 89, at 724, 725.

92. Weintraub, *supra* note 1, at 504.

93. See H. DUINTIER TEBBENS, *supra* note 90, at 119.

94. Weintraub, *supra* note 1, at 504.

95. *Id.* at 506.

96. *Id.* at 505.

Presumably the very court that laid down the pertinent rule of decision with obvious disregard for its spatial purport. When the conflicts issue arises later, that court would have to divine what it had in mind at a time when it gave no thought at all to the problem. The second consideration rubs with Weintraub's rejection of the deterrence argument,<sup>97</sup> for enterprises that manufacture and sell products without regard to liability can hardly claim reliance when it is imposed. And what are the expectations of those who pollute the stream of commerce with defective products? Even foreign entrepreneurs, less accustomed as they are than ours to being held accountable for defective wares, must realize—if they read the newspapers—that they may become defendants in an American lawsuit in the event that their products cause injuries here. Should they not insure themselves accordingly, unless they are able somehow to keep the merchandise out of the United States altogether? In short, the requirement of “availability through commercial channels”<sup>98</sup> seems ill-advised. There is no compelling reason to leave unsuspecting consumers without a remedy simply because the noxious product should not have been where it was.<sup>99</sup>

Inevitably, Weintraub's mixture of two debatable objectives, the apples of private reliance interests and the oranges of governmental interests, produces a set of rules that are open to challenge on several grounds. First of all, the mechanism of selecting the applicable law is deficient, for it seems wrong on principle to let one litigant dictate the law to the other. That expedient implies an abdication of the judge's role and smacks of favoritism. The only justification for giving a private party such an extraordinary power is the need to accord consumers more ample protection, and this consideration explains the pertinent provision of the Hague Convention.<sup>100</sup> In permitting manufacturers and sellers to choose a less favorable law prevailing at the plaintiff's residence, proposed rule (B) of Weintraub's draft<sup>101</sup> turns this idea on its head. In effect, that rule confers an unwarranted choice-of-law privilege, which enables enterprises to export with impunity shoddy merchandise that would expose them to certain liability if it were distributed at their principal place of business. If reliance interests matter at all, the law should protect a foreign victim who may have bought or used a dangerous product in the belief that it is safe because it has been manufactured in a place where stringent liability standards prevail. Moreover, it appears unsatisfactory, if not discriminatory, to apply to different parties dramatically different standards of recovery for the same loss in mass disaster cases like *In re Paris Air Crash of March 3, 1974*<sup>102</sup> and the *Agent Orange* suit.<sup>103</sup> Finally, it makes but little sense to offer plaintiffs a wider choice of punitive damages, as proposed rule (C)

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97. *Id.* at 506-07.

98. *Id.* at 508.

99. Even a products liability choice-of-law rule that omits the commercial availability requirement affords defendants a certain measure of protection against surprises. The lower the probability that products will turn up in unexpected places, the less likely it is that a manufacturer or distributor will be liable for accidents caused there. On the other hand, the more nimble a product happens to be, the more reasonable it is to require sellers to insure themselves adequately against the possibility that a particularly stringent law will be applied.

100. See Cavers, *supra* note 89, at 723 (quoting Reese).

101. Weintraub, *supra* note 1, at 508.

102. 399 F. Supp. 732 (C.D. Cal. 1975).

103. *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984).

does,<sup>104</sup> than that available for purposes of actual compensation. In general, a plaintiff-favoring choice-of-law rule may be acceptable because of the current trend to disregard those rules of decision that unreasonably curtail recovery. But there is no similar consensus on whether victims should be entitled to awards in excess of their actual damages.

Something, it seems, went wrong in drafting the proposed rules. Their defects reveal the pitfalls of an approach that relies on private initiative to vindicate governmental concerns. As is apparent from Weintraub's proposal, we would be better off without a conflicts dogma that attempts to defer to the wishes of sovereigns. If we left Leviathan to watch out for his own interests, and stopped worrying about the relative superiority of personal and territorial contacts,<sup>105</sup> we might find it easier to devise draft rules that promote interstate justice through the familiar choice-of-law mechanism. Drafting on a clean slate, we would be constrained only by pragmatic considerations and the limits of our legal imagination. Actually, not much original thinking is required if one keeps an open mind, for there are sources of inspiration close at hand. Why bother with the Hague Convention, if there are home-grown models, such as the Second Restatement of Conflict of Laws and the Uniform Commercial Code, that can be profitably canvassed for solutions? While my role as a participant in this symposium is that of a critic, it may be appropriate to add a constructive note by trying my hand at drafting an alternative to Weintraub's proposal.

## VI

Section 145 of the Second Restatement of Conflict of Laws lists various contacts to be taken into account in deciding tort choice-of-law cases. The second sentence of section 1-105(1) of the Uniform Commercial Code suggests that practically any personal and territorial link is a sufficiently strong connecting factor, since an "appropriate relation"<sup>106</sup> will do to justify the application of Code provisions to a multistate transaction. Whatever doubts may once have existed about the propriety of such an expansive claim to extraterritoriality have since been laid to rest by the United States Supreme Court.<sup>107</sup> It seems fair to assume that those minimum contacts that justify the application of the *lex fori* likewise warrant the application of foreign law, though interest analysts steeped in the Curriesque tradition may disagree. Accord-

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104. Weintraub, *supra* note 1, at 508.

105. The disadvantages of relying exclusively on personal connecting factors are equally apparent from Weintraub's proposed rule on contract choice of law. See Weintraub, *supra* note 1, at 498. That rule fails to incorporate the principle *locus regit actum*, which for centuries has been a regular feature of the conflict of laws. See Juenger, *supra* note 11, at 427. It has long been recognized that application of the law of the place of contracting serves the function of protecting contracts against formal invalidity. See 2 E. RABEL, *supra* note 12, at 489, 517-18; cf. B. CURRIE, *supra* note 29, at 99 n.32. Given the near universal consensus on the appropriateness of that connecting factor (as long as it upholds agreements) one is struck by its conspicuous absence in the provision of validation Weintraub has drafted. The addition of a territorial ingredient would have produced a much better choice-of-law rule.

106. U.C.C. § 1-105(1) (1978).

107. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). See generally, *Supreme Court Intervention in Jurisdiction and Choice of Law: From Shaffer to Allstate*, 14 U.C.D. L. REV. 837 (1981).

ingly, there is no need to combine connecting factors until some critical mass<sup>108</sup> is reached.

Now let us look again at the Uniform Commercial Code. At first blush, its choice-of-law rule appears patently ethnocentric, since it requires application of the forum's Code provisions to the exclusion of the laws of other states whenever a transaction has some appropriate relation to the forum. That impression, however, is misleading, as becomes apparent if one considers the reason for Section 1-105(1). Far from sanctioning an unthinking forum bias, the drafters meant to assure their work product the broadest possible scope because of the Code's intrinsic quality.<sup>109</sup> In this they could not be altogether wrong, if one considers the success story of the Code's nationwide adoption. Thus, that important statute enshrines the legislative policy that a superior law can properly claim a wide scope of application.

If one combines that idea with an appropriately modified version of Section 145 of the Second Restatement, the following alternative reference rule emerges:

In selecting the rule applicable to any issue presented by a multistate products liability claim, the court will take into account the laws of the following jurisdictions:

- (a) The place where the injury occurred,
- (b) The place where the conduct causing the injury occurred,
- (c) The place where the product was acquired, and
- (d) The home state (habitual residence, place of incorporation and principal place of business) of the parties.

As to each issue, the court shall select from the laws of these jurisdictions that rule of decision which most closely accords with modern standards of products liability.

No apology should be needed for drawing on the Second Restatement. Whatever may be wrong with it, we cannot simply disregard the intellectual effort it represents. The Uniform Commercial Code has an even stronger claim to our attention, for it is the positive law in all states but one. Moreover, its warranty provisions<sup>110</sup> were a first legislative attempt to deal with strict liability imposed for defective goods. Given the fact that the United States is a leader in the field of products liability, it also seems entirely appropriate to consult, first and foremost, American sources elaborated by such prestigious bodies as the Commissioners on Uniform State Laws and the American Law Institute. Anyone concerned about whether such a widely fanned alternative reference rule can also meet worldwide standards would do well to consult article 1, paragraph 1 of the Hague Convention on the Conflicts of Laws Relating to

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108. Compare *Cavers*, *supra* note 89, at 723, 725 with *Weintraub*, *supra* note 1, at 505.

109. To explain the Code's deviation from conflicts principles prevalent at the time of its adoption the draftsmen argued that broad application of its provisions "may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries." U.C.C. § 1-105 official comment 3 (1978). See also R. Leflar, *supra* note 32, at 202; Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *YALE L.J.* 1087, 1126 & n.134 (1956); Katzenbach, *Panel Discussion on the Uniform Commercial Code*, 12 *BUS. LAW.* 49, 72-74 (1956).

110. U.C.C. §§ 2-313 to 2-316 (1978).

the Form of Testamentary Dispositions.<sup>111</sup> If that provision is any indication, a multiplicity of alternative connecting factors should not be an obstacle to international acceptability.

Letting the choice of the applicable law hinge on the intrinsic merits of competing substantive rules seems preferable to relying on either the unilateral election by one party or the propensity of these rules to hurt or help a particular litigant. If widely adopted, the proposed alternative reference rule would promote the values of certainty, predictability and uniformity of result by creating, in effect, a national consensus law. *Dépeçage*, the process of deciding different issues in the same case according to different states' law, would lose its horror, for there is nothing wrong with applying to a multistate case a composite law that integrates rules of certified superiority. Courts would be able to adjudicate cases such as *Paris Air Crash*<sup>112</sup> and *Agent Orange*<sup>113</sup> with greater ease than any other known choice-of-law approach can possibly assure, and it is of course precisely in complex situations where a rule or theory must prove its worth. Finally, several states already apply the very choice-of-law rule principle on which my rule is based.<sup>114</sup>

One can, however, anticipate two objections: (1) The forum will invariably consider its law to be the most progressive, and (2) courts cannot make the value judgments the proposed rule requires. These objections are related: they proceed from the assumption that judges lack the ability to question the wisdom of established law. That this hypothesis is specious should be obvious to anyone who has ever studied products liability and noticed how it has evolved through the process of judicial lawmaking. By now, Cardozo's discussion of privity<sup>115</sup> and Traynor's espousal of strict liability for defective products<sup>116</sup> have become part of the repertory of every first year law student. The opinions of these two eminent jurists did not merely reform the laws of New York and California but those of the United States, because they persuaded other judges to scuttle outdated precepts. If courts would indeed uncritically accept the superiority of home-grown rules and were incapable of making value judgments, there would be no American law of products liability as we know it. Whatever arguments can be mustered against the better law principle in general, as applied to this particular choice-of-law problem, they sound hollow.

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111. II Acts and Documents of the 9th Session of the Hague Conference on Private International Law (1960), reprinted in 9 AM. J. COMP. L. 701, 705 (1960). Article 1, paragraph 1, of the Convention provides as follows:

A testamentary disposition shall be valid as regards form if it complies with the internal law:

- a) of the place where the testator made it, or
- b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
- c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
- d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- e) so far as immovables are concerned, of the place of their situation.

*Id.*

112. *In re Paris Air Crash* of March 3, 1974, 339 F. Supp. 732 (C.D. Cal. 1975).

113. *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984).

114. See Kay, *supra* note 26, at 565-72, 586.

115. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

116. See *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

There is a further possible objection to the proposed alternative reference provision, namely that it will not always be easy to determine which rule most closely accords with modern products liability standards. That is doubtless true, but hardly an argument against the underlying principle. The closer the question, the more helpful it is to obtain a judicial opinion that assesses the quality of different rules and principles. Surely, a thoughtful evaluation of competing policy considerations is of greater value to the bench and bar, not to mention law professors, than yet another flight of fancy into the Cloudcuckooland where *renvoi* and comparative impairment dwell. Moreover, when dealing with substantive rules, judges will find themselves on firmer ground than in wading through the conflicts quagmire. In fact, in most instances a glance at Prosser's treatise<sup>117</sup> is likely to resolve any doubt about the merits of a particular rule which may linger in the minds of judges, in spite of the judiciary's sophistication in the field of products liability. But even if neither their considerable experience nor diligent research furnishes a ready answer, the judges' efforts should at least yield a coherent argument that furnishes a starting point of reasoning for the next case to raise the same issue. In this fashion, hard cases can help make good law.

## VII

Let me now return to that modicum of conflicts consensus I touched upon at the outset. For all too long, conflicts scholars have engaged in jurisprudential cerebrations without much regard for the consequences of the rules and approaches they have advocated. There is a widespread belief that the conflicts of laws is different from all other legal disciplines in that practical results and workability do not matter. If what my colleagues Sedler and Weintraub say is any indication, this attitude is changing. At least some of those who would deduce the solution to multistate problems from the concerns of sovereigns do emphasize the need for sound substantive results in multistate cases. I welcome this change, for I have long maintained that the conflict of laws should provide decent and workable solutions to real-life problems. Instead of being a drag on the coattails of civilization,<sup>118</sup> our discipline can become an engine of law reform. Fifteen years ago, I suggested that "courts should cut short their dalliance with theories and methodologies and focus on the narrow, but important, question whether to accept or reject teleology in tort choice of law."<sup>119</sup>

Alas, that heartfelt call was misaddressed. Even before 1969,<sup>120</sup> and certainly since then,<sup>121</sup> courts have in fact been result-selective. Rarely do they non suit orphans and cripples;<sup>122</sup> in multistate personal injury cases the current conflicts rule seems to be that the plaintiff wins, unless counsel is inept. Yet, it may be too much

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117. W. PROSSER, *THE LAW OF TORTS* (5th ed. P. Keeton 1984).

118. The term was coined by Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952), to describe substantive rules that are outdated and disfavored in making choice-of-law decisions.

119. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 233 (1969).

120. *See id.* at 224, 231-32.

121. *See Juenger, supra* note 5, at 20-23.

122. *But see id.* at 48.

to expect courts to cut their dalliance with academic theories and methodologies. However questionable a particular approach may be, judges are bound to welcome it as long as it enables them to reach the results they desire. Interest analysis, for reasons I have stated elsewhere,<sup>123</sup> does the trick. It “works,” because it works with mirrors. It is a gigantic escape device, for judges are able to pull any number of policies and interests out of a hat if it suits their purposes, even to the point of contorting Currie’s approach so as to favor a foreign law the court considers better than its own.<sup>124</sup> Judicial honesty may be the best policy,<sup>125</sup> but perhaps it is not invariably the wisest. The proper addressees of my exhortation are therefore not the judges, but you, the scholars who manufacture the theories and methodologies on which courts rely to do multistate justice and, sometimes, multistate injustice.

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123. *See id.* at 47–48.

124. *See Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

125. Leflar, *supra* note 65, at 26.